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# Passions & prejudice : the constitution and same-sex marriage

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**PASSIONS & PREJUDICE:  
THE CONSTITUTION AND SAME-SEX MARRIAGE**

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By James Meyers

Submitted to the Committee on Undergraduate  
Honors at Baruch College of the City University of  
New York in partial fulfillment of the requirements  
for the degree of Bachelor of Arts in Political Science  
with Honors.

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## ABSTRACT

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Viscerally divisive sociopolitical issues with clear boundaries often raise questions of constitutional legality. Unfortunately, the Constitution does not offer guidance on a preferred method of interpretation, and so legal scholars and Supreme Court justices alike have yet to reach a consensus. Consequently, there is still debate over how a principled case can be made for the constitutional protection of rights not originally covered by constitutional amendments; the legal debate over same-sex marriage reflects this dilemma.

For same-sex marriage the question of interpretation is particularly concerned with the Equal Protection Clause of the Fourteenth Amendment and by extension the rational-basis test. This test asks whether a statute that classifies people is rationally related to a government interest. When lower courts have found a rational basis for laws prohibiting same-sex marriage it has historically been on moral or traditional grounds. Recently there have been several court cases that applied the Fourteenth Amendment and did not find a rational basis for the prohibition of same-sex marriage.

This paper analyzes current methods of constitutional exegesis from a practicable and historical perspective. It demonstrates how a right can shift under the Constitution from *unprotected* to *protected* without requiring a paradigmatic shift in the way the Constitution is read. It argues that, similar to previous civil-rights cases, same-sex marriage is now protected by the Constitution, and those courts that found no rational basis for its proscription got it right.

# PART ONE

## INTRODUCTION

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### Folk Devils and Moral History

*Societies appear to be subject, every now and then, to periods of moral panic. A condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right thinking people...*

- Stanley Cohen<sup>1</sup>

Few subjects have caused an uproar or caught the imagination of moral majorities more than sex. From St. Augustine of Hippo who came to see lust as “the most dangerous of all human drives,”<sup>2</sup> to the U.S. government’s “purge of the perverts” in the 1950s, which commenced with Deputy Undersecretary John Peurifoy “reveal[ing] that a number of persons considered to be security risks had been forced out [of government positions], and that among these were ninety-one homosexuals,”<sup>3</sup> the fear of sexual deviance has been a motivating force through much of history.

The most vociferous moral advocates over the last sixty years have often been concerned with the “homosexual agenda.”<sup>4</sup> Slowly, the LGBT community has been able

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<sup>1</sup> Stanley Cohen, *Folk Devils and Moral Panics*, 3<sup>rd</sup> ed. (New York: Routledge, 2002), 1. Stanley Cohen’s research into moral panics was concerned more with the impact of media-created moral panics in regards to “rebellious youth,” but his work has salience here, especially as it relates to the “moral barricades.”

<sup>2</sup> Faramerz Dabhoiwala, *The Origins of Sex*, (Oxford University Press, 2012), 8.

<sup>3</sup> David K. Johnson, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government*, (The University of Chicago Press, 2004), introduction, para. 3, kindle edition.

<sup>4</sup> See generally *Lawrence v. Texas*, 539 U.S. 558 (2003) (Scalia, dissenting.) (“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, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.”)

to pry civil liberties from the clenched fist of society, and most recently progress has been in the area of same-sex marriage. Opponents of same-sex marriage deliver ominous warnings of tragedies – a “parade of horrors”<sup>5</sup> – that may befall society if same-sex marriage is permitted, or in some cases permitted to continue.

Historically civil rights have not been granted easily, and this can often be attributed to this paper’s namesake. “Passions and prejudices,”<sup>6</sup> will often inform the obstinate will of majorities in place of reason, to the detriment of equality. To be sure, passions and prejudices were constantly referenced throughout founding era documents, including many of *The Federalist Papers*. It was a fear that where reason was absent, government would be guided by more emotive impulses.

Debate over the right for women to vote brought threats that it would lead to higher crime and higher rates of divorce;<sup>7</sup> debate over desegregation brought threats that “irreparable harm will be inflicted upon the students of both the Negro and white race,”<sup>8</sup> in the debates over interracial marriage the state argued that the very institution of marriage was at stake, and because the family is the building block of civilization it could lead to the disintegration of society;<sup>9</sup> debates over gay rights have brought similar fears despite evidence to the contrary.

This paper addresses the Constitution’s role in civil-rights cases, and in particular, why its Fourteenth Amendment now defends same-sex marriage, even if this has yet to

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<sup>5</sup> Brief for Appellees at 92, *Perry v. Schwarzenegger*, No. 10-16751, October 18, 2010.

<sup>6</sup> Alexander Hamilton, “Federalist Papers: No. 1,” The Avalon Project: Documents in Law, History, and Diplomacy, last modified 2008, [http://avalon.law.yale.edu/18th\\_century/fed01.asp](http://avalon.law.yale.edu/18th_century/fed01.asp)

<sup>7</sup> J.B. Sanford, “Reasons Why Senate Constitutional Amendment No. 8 Should Not be Adopted,” vol. 11 of *The California Outlook: A Progressive Weekly*,” (September 16, 1911), [www.books.google.com](http://www.books.google.com).

<sup>8</sup> “COOPER v. AARON,” The Oyez Project at IIT Chicago-Kent College of Law, accessed November 21, 2012, [http://www.oyez.org/cases/1950-1959/1958/1958\\_1](http://www.oyez.org/cases/1950-1959/1958/1958_1).

<sup>9</sup> “LOVING v. VIRGINIA,” The Oyez Project at IIT Chicago-Kent College of Law, accessed October 5, 2012, [http://www.oyez.org/cases/1960-1969/1966/1966\\_395](http://www.oyez.org/cases/1960-1969/1966/1966_395).

be recognized in all fifty states or the Supreme Court. This paper aims to show that while in some cases there may be legitimate criticism about the Supreme Court's fidelity to the Constitution, civil rights cases like *Brown v. Board of Education*, which desegregated schools; *Loving v. Virginia*, which struck down anti-miscegenation laws; *Reed v. Reed*, which said women are constitutionally equal to men; and now the case of same-sex marriage, do not violate the Constitution but rather are inevitable consequences of a static document being applied to a polity over a long period of time.

Segregation was permitted until 1954 when the Supreme Court ruled that it had become unconstitutional. States were permitted to prohibit interracial marriage until 1967, when it suddenly became unconstitutional. Until 1971 gender was not covered by the Equal Protection Clause – discriminating against women in state laws was constitutionally permissible. Then in *Reed v. Reed*, a state law that “provide[d] [] different treatment be accorded to the applicants on the basis of their sex” was struck down as the “very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment.”<sup>10</sup> More recently, laws that discriminate against homosexuals have been struck down in *Romer v. Evans* and *Lawrence v. Texas*.

Strong disagreement pervades the literature regarding the proper role of the judiciary. Much of it is spent analyzing whether or not civil-rights decisions, like *Brown v. Board of Education*, were correctly adjudicated. Regardless of whether a scholar agrees with the conclusion, some argue that it was inappropriate for the judiciary to step

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<sup>10</sup> *Reed v. Reed*, 404 U.S. 71 (1971).

in, and by doing so they usurped the power of the legislatures, i.e. the people. Some who take this view argue that a legitimate case can be made for *Brown*, but it just wasn't.<sup>11</sup>

This paper serves two purposes. It answers how something like segregation can go from being permitted to being prohibited when the same text is applied to the same situation, and further that like segregation, interracial marriage, and the equal treatment of women, same-sex marriage is a question of equal protection and is indeed covered by the Fourteenth Amendment of the Constitution.

As one of the more recent victims of being labeled *deviant* by a moral majority, the gay community has come under fire in a way that demonstrates the salience of sociologist Stanley Cohen's work. According to Cohen, those engaged in a moral panic will identify a group, called *folk devils*, as deviant:

The deviant is assigned to a role or social type, shared perspectives develop through which he and his behaviour are visualized and explained, motives are imputed, causal patterns are searched for and the behavior is grouped with other behaviour thought to be of the same order.<sup>12</sup>

*Of the same order* is dangerous territory. When panic ensues that order is often exaggerated or even utterly unrelated. In 1950, during the Red Scare, "three of President Harry Truman's top advisors wrote him a joint memorandum warning that 'the country is more concerned about the charges of homosexuals in Government than about Communists.'"<sup>13</sup> Civil-rights struggles are often difficult because they become politicized and politicians create a vicious cycle. Irrational fears are exacerbated by political rhetoric,

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<sup>11</sup> See McConnell, "Originalism and the Desegregation Decisions," (1995); see also Burt, "What Was Wrong with Dred Scott, What's Right about Brown," (1985).

<sup>12</sup> Cohen, *Folk Devils and Moral Panics*, 57.

<sup>13</sup> Johnson, *The Lavender Scare*, 2.



and political rhetoric is fueled by a desire to impress constituents about how tough they are on society's irrational fears.

Indeed, the gay community has had to deal with accusations of being deviant and therefore likely to commit a cadre of actions associated with deviance. Unlike skin color or gender, homosexuality has had the unique fight of whether it is a choice or not, and this has stifled its struggle for civil rights. Homosexuals have had to deal with their own identity in a civilization that stigmatizes and marginalizes them, while society's recent treatment has often ranged from abuse to perplexity. The discreet nature of homosexuality leads to the kind of misunderstanding that led columnist Robert C. Ruark to suggest, "it is possible to face the problem of homosexuality and perversion with the same honesty it took us so long to win the case of venereal disease."<sup>14</sup> Of course, unlike VD, homosexuality cannot be "cured," and certainly not with antibiotics.

Same-sex marriage has been deemed the "last civil rights battle," and while equal protection appears *prima facie* to treat same-sex couples in an equal manner to different-sex couples, this is not currently the case. Broadly speaking, the issue of same-sex marriage must contend with two arguments in the U.S. legal system: (1) it is not a constitutional matter and therefore should be left to the state legislatures to decide, and (2) it poses some threat to society. The first argument is contingent on how the Constitution is interpreted, whereas the second argument is contingent on the ability of opponents to articulate a hypothetical harm caused by the marriage of same-sex couples.

The larger portion of this paper focuses little on the specific issue of same-sex marriage, and more on the question of how something *becomes* constitutionally

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<sup>14</sup> Ibid., 6.

protected. The first argument concerns the theory behind constitutional law and interpretation and is inherently a more complex subject than defining harm. The second argument and same-sex marriage are therefore not specifically addressed until the last two chapters.

Importantly, this paper's approach is a minimal one. There are countless arguments, political, legal, and of course philosophical in regards to same-sex marriage and separately the Constitution. There are some salient points to be made in regards to constitutional interpretation, the justification for state coercion, and morality that this paper does not cover. Its thesis is one that does not need to go beyond a minimal level of analysis. That is, this paper concedes a great deal more than might be necessary to make the same point. It does so chiefly to maintain boundaries, but secondly because it can; as this paper intends to demonstrate, for the most conservative and restrained scholar of constitutional law to invoke a method of exegesis consistently would require the inclusion of sexual orientation and subsequently same-sex marriage under the Equal Protection Clause.

As with most civil-rights cases, hidebound majorities will often grasp at straws leaving defenders of civil rights debating what would otherwise be considered inane or irrelevant arguments. Because this paper addresses same-sex marriage, it is important to establish some facts about homosexuality and marriage lest a reader enter this discussion with less than accurate information.

## I. Choice

Some proponents of same-sex marriage will argue that whether sexual orientation is or is not a choice shouldn't have bearing on the issue, as people should be able to live their lives as they please. There are some very cogent arguments to this point, however, it ignores the reality of both the political implications and the rights being proscribed. The difference between acts and orientation is the difference between a behavior and an immutable characteristic completely inseparable from the individual. This will be addressed more specifically later, but for now consider this: the Equal Protection Clause – which is what this paper's argument turns on – forbids a state from denying equal protection to “person[s].” Any choice is not inextricably part and parcel of that person; orientation is a defining characteristic of a person. The question it seems is whether that trait exposes society to harm.

It is true that any person can engage in homosexual activity, but the activity does not imply orientation. In regards to sexual orientation, (i.e. erotic attractions and sexual arousal oriented to one sex or the other, or both),<sup>15</sup> this paper will strictly adhere to what the evidence shows: that it is in fact an immutable characteristic inseparable from the person. Whatever a person's orientation might be, and it does not always come in absolutes, it is defining and without the possibility of change. Attempts at change are continually denounced as harmful and the claims of supposed reparative therapies have been said to “mischaracterize homosexuality and promote the notion that sexual

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<sup>15</sup> B.S. Anton, “Proceedings of the American Psychological Association for the legislative year 2009: Minutes of the annual meeting of the Council of Representatives and minutes of the meetings of the Board of Directors,” *American Psychologist*, 65, 385–475, (2010) doi:10.1037/a0019553

orientation can be changed.”<sup>16</sup> The American Psychological Association observed some unfortunate effects of attempting to change orientation:

Distress and depression were exacerbated. Belief in the hope of sexual orientation change followed by the failure of the treatment was identified as a significant cause of distress and negative self-image.<sup>17</sup>

Although it is not the place of this paper to get involved in the essentialist versus social constructionist debate,<sup>18</sup> current research seems to favor the essentialist school of thought. A 2010 paper in *Pediatric Neuroendocrinology* stated:

The fetal brain develops during the intrauterine period in the male direction through a direct action of testosterone on the developing nerve cells, or in the female direction through the absence of this hormone surge. In this way, our gender identity (the conviction of belonging to the male or female gender) and sexual orientation are programmed or organized into our brain structures when we are still in the womb. However, since sexual differentiation of the genitals takes place in the first two months of pregnancy and sexual differentiation of the brain starts in the second half of pregnancy, these two processes can be influenced independently, which may result in extreme cases in transsexuality. This also means that in the event of ambiguous sex at birth, the degree of masculinization of the genitals may not reflect the degree of masculinization of the brain. There is no indication that social environment after birth has an effect on gender identity or sexual orientation.<sup>19</sup>

While this paper favors the essentialist view, it does not dismiss the importance of social construction. Indeed, it has been established that the delineation between heterosexual and homosexual was drawn around the early eighteenth century, when *the* heterosexual

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<sup>16</sup> Ibid., at 29.

<sup>17</sup> Ibid., at 30.

<sup>18</sup> The essentialist school of thought posits that sexual orientation is inborn, while the social constructionist school of thought posits that orientation is a construct of society and culture. For a more thorough discussion see Phillips, “Constructing Definitions of Sexual Orientation in Research Theory,” (2007).

<sup>19</sup> Alicia Garcia-Falgueras and Dick F. Swaab, “Sexual Hormones and the Brain: An Essential Alliance for Sexual Identity and Sexual Orientation,” ed. P.-E. Mullis, *Pediatric Neuroendocrinology* 17 (2010): 22-35.

and *the* homosexual emerged because of changing social constructs.<sup>20</sup> As philosopher and social constructionist Michael Foucault noted, “[t]he sodomite had been a temporary aberration; the homosexual was now a species.”<sup>21</sup> “The more clearly the line was drawn, [between acceptable and deviant behavior,] the more emphatically the homosexual or any other subculture [that] was labeled different and distinct, the more likely it was that such a subculture would develop a group consciousness, a sense of its own separateness and identity.”<sup>22</sup> Regardless of the school of thought to which a person subscribes, it should be noted that both acknowledge the immutable aspect of sexual orientation.<sup>23</sup>

If sexual orientation is indeed beyond modification, this would logically coalesce with a 1996 University of Georgia study that found “[h]omophobia is apparently associated with homosexual arousal that the homophobic individual is either unaware of or denies.”<sup>24</sup> It would seem that if orientation is beyond conscious control, that a person who strongly believes that their own orientation has been a choice might in fact be choosing heterosexual behavior in spite of a more homosexually inclined orientation. Again, this does not mean there are only absolutes in regards to sexual orientation, but that whatever an individual’s orientation is, it is immutable. This is the position from which this paper will work.

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<sup>20</sup> Randolph Trumbach, *Sex and the Gender Revolution Vol. 1: Heterosexuality and the Third Gender in Enlightenment London*, (Chicago and London: The University of Chicago Press, 1998), 4.

<sup>21</sup> Michel Foucault, *The History of Sexuality*, Vol 1: An Introduction, tr. Robert Hurley (New York: Vintage Books, 1980), 43.

<sup>22</sup> Nicholas C. Edsall, *Toward Stonewall: Homosexuality and Society in the Modern Western World*, (Charlottesville and London: University of Virginia Press, 2003), 69.

<sup>23</sup> JW Smitt, “Homosexuality in a new light,” *International Journal of Sexology* 6 (1952): 36–39.

<sup>24</sup> Henry E. Adams, Lester W. Wright, Jr., and Bethany A. Lohr, “Is Homophobia Associated With Homosexual Arousal?” *Journal of Abnormal Psychology* 105 (1996): 440.

## II. History

Throughout human history, from the most primitive humanoid societies to present day, homosexuality has been part of human existence.<sup>25</sup> Various cultures have historically treated it differently. Stories from the Zhou dynasty and Ming dynasty include many same-sex marriages and relationships.<sup>26</sup> The ancient Egyptians used to practice same-sex marriage,<sup>27</sup> and from the Babylonians<sup>28</sup> to the Greco-Roman era,<sup>29</sup> same-sex relationships flourished.

Marriage as an institution has undergone significant changes; it has not always concerned itself with the church or the state. Indeed, “[i]n considering whether marriage has a fixed essence or definition, the historical and cross-cultural diversity of marital practices cannot be overstated.”<sup>30</sup> For the Greek philosophers marriage was “a political and economic unit,”<sup>31</sup> and it was the Christian philosophers who introduced a “stern sexual morality,”<sup>32</sup> which stressed an “ascetic ideal of abstinence.”<sup>33</sup>

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<sup>25</sup> See Ryan and Jethá, *Sex at Dawn* (2010). See also Niell, *The Origins and Role of Same-Sex Relations in Human Societies* (2009). See also Boswell, *Christianity, Tolerance, and Homosexuality* (1981). See also Eskridge, Jr., “A History of Same-Sex Marriage” in *Vir. L. Rev.* (1993).

<sup>26</sup> James Neill, *The Origins and Role of Same-Sex Relations in Human Societies*, (Jefferson, NC: McFarland & Company, Inc., 2009), chapter 10, Kindle edition.

<sup>27</sup> William N. Eskridge, Jr., “A History of Same-Sex Marriage,” *Virginia Law Review* 79 (1993): 1419. (“The implication that same-sex intimacy was common in Egypt (and Canaan) is confirmed by the *Sifra*, an exegetic midrash interpreting the book of Leviticus.” The *Sifra* explains that one reason the Israelites were prohibited from acting as they do in Egypt is “A man would marry a man, and a woman would marry a woman, a man would marry a woman and her daughter, a woman would be married to two men.”)

<sup>28</sup> Neill, *The Origins and Role of Same-Sex Relations in Human Societies.*, chapter 4, Kindle edition.

<sup>29</sup> Elizabeth Brake, *Minimizing Marriage*, introduction.

<sup>30</sup> Elizabeth Brake, *Minimizing Marriage: Marriage, Morality, and the Law*, (New York: Oxford University Press, 2012), introduction, Kindle edition.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> Dabhoiwala, *The Origins of Sex*, 7.

The Christian tradition altered the view of sex, which had been more liberal under previous Jewish law,<sup>34</sup> into something corrupting as it “seduced one’s mind and body away from its highest purpose of communing with God.”<sup>35</sup> Sex became something that was to be avoided, but “if [people] cannot contain [their lusts], let them marry: for it is better to marry than to burn.”<sup>36</sup> One of the most influential philosophers on Christian ideals of sex was St. Augustine (354 - 430 AD) who propounded this ideal of chastity and “condemn[ed] [] sex outside of marriage and lust within it.”<sup>37</sup>

After Christianity became the official religion of the Roman empire, under emperor Theodosius, church officials became more intertwined with the state, taking on “more quasi-governmental functions.”<sup>38</sup> When Rome collapsed “the pope headed one of the few institutions able to raise money, administer law, preserve records,”<sup>39</sup> and so on. Eventually, “the church’s evolving political role and economic power were to embroil it deeply in the politics of marriage, divorce, and family life in the new kingdoms of Western Europe.”<sup>40</sup>

Until the twelfth century the church required sexual intercourse to seal a marriage. Then bishop Peter Lombard of Paris pointed out that if this were the case, “Mary and Joseph could not have been legally married.” The validity of marriage no longer required sex.<sup>41</sup> As the church’s influence spread, it was gathering a greater diversity of adherents, many of whom had entered into marriages informally. Initially the church recognized

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<sup>34</sup> Ibid., 6.

<sup>35</sup> Ibid., 7.

<sup>36</sup> Ibid., (quoting Paul the Apostle).

<sup>37</sup> Brake, *Minimizing Marriage*, introduction.

<sup>38</sup> Stephanie Coontz, *Marriage, a History*, (New York: Viking Penguin, 2005), chapter 5, iBook edition.

<sup>39</sup> Ibid., chapter 5.

<sup>40</sup> Ibid., chapter 5.

<sup>41</sup> Ibid., chapter 7.

these informal marriages and required no more than “mutual intent or the blessing of a parent...to solemnize a marriage.”<sup>42</sup> Christianity did not require an official of the church to preside over marriage until 1215, when the church decided that it “did not like being put in the awkward position of defending young couples who, by privately exchanging their vows, married in defiance of their parents’ wishes.”<sup>43</sup> In response to this problem,

[T]he Fourth Lateran Council declared in 1215 that “we absolutely prohibit clandestine marriages.” For a marriage to be valid, the council stated, three things were necessary: The bride had to have a dowry, which effectively undercut the independence of a young woman from her parents; banns had to be published beforehand; and the wedding had to take place in a church.<sup>44</sup>

Clandestine marriages slowed but never ceased entirely and to further combat this, England passed the Marriage Act of 1753.<sup>45</sup> On the shores of the United States, the colonies did not always have the resources to deal with the idea of civil marriage, and so “although laws concerning marriage existed, informal or ‘self-marriage’ and self-divorce (without official authorization), sometimes followed by remarriage, were widespread.”<sup>46</sup>

What “traditionalists”<sup>47</sup> call marriage, and what they try to protect, is a relatively new institution. The more specific the description gets – e.g. with love, not for property, monogamous, consensual, and so on – the newer and more innovative the definition becomes. There were certainly exceptions, including those who fell in love, but regarding normative standards, the contemporary traditionalist’s conception is novel. Even in regards to monogamy the long-arc of history shows that “polygyny, not monogamy, has

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<sup>42</sup> Ibid., chapter 7.

<sup>43</sup> Ibid., chapter 7.

<sup>44</sup> Ibid., chapter 6.

<sup>45</sup> Ibid., chapter 7.

<sup>46</sup> Brake, *Minimizing Marriage*, introduction.

<sup>47</sup> See generally Wax, “Traditionalism, Pluralism, and Same-Sex Marriage,” (2007); See also Wax, “The Conservative’s Dilemma: Traditional Institutions, Social Change, and Same-Sex Marriage,” (2005).



been dominant—and has existed within the Judeo-Christian tradition, a fact for which both Augustine and Aquinas apologize.”<sup>48</sup>

Indeed, what many consider defining aspects of marriage are contingent on time and place. There are many examples of societies that flourished without heteronormative exclusivity in marriage, but the newness to culture in the United States produces something akin to moral panics. Considering marriage in the United States, it seems the conditions relevant to the state that must be satisfied to merit a legal recognition of marriage are minimal.

This work is divided into two parts. Part I consists of Chapters One – Three, which address constitutional theory. Part II consists of chapters Four – Six, which addresses the history and application of the provisions relevant to this matter. In addressing the exegetic process, Part I is imperative to understanding Part II, because it illuminates why changes in knowledge produce inevitable changes within the Constitution. This is not a matter of simply moral changes or changes in opinion, but rather how changes in knowledge produce changes in fact.

Chapter One answers the question of why in a democracy people would vest in “electorally unaccountable justices”<sup>49</sup> the power to overturn democratically adopted legislation. This chapter establishes a point that will be revisited throughout the paper: while our government derives its authority from the consent of the governed, the reason it is not a direct democracy is because of the fear that an irrational majority may tyrannize a

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<sup>48</sup> Brake, *Minimizing Marriage*, introduction.

<sup>49</sup> See infra note 86.

minority. It addresses what Alexander Bickel termed the *counter-majoritarian difficulty*,<sup>50</sup> which was not foreign to those who ratified the Constitution.

Chapter Two will address constitutional exegesis – both methods and problems inherent with those methods. Same-sex marriage must contend with methods lauded by more conservative justices and constitutional law scholars. These methods claim it never was covered by the Constitution and therefore it cannot legitimately be covered without the people’s consent on the specific issue. These methods contend that to do otherwise is to usurp the power of the people, placing it into the unaccountable hands of the judiciary. Because justices tend to use an amalgam of the methods discussed, the chapter will principally focus on the problem of reading the Constitution with a eighteenth or nineteenth century mindset.

Chapter Three will discuss *why* the provisions of any written document that is designed to remain relevant over a long period of time will necessarily incur change. It will consider how the provisions within a text can maintain fixed meanings while the objects they refer to change.

Chapter Four begins Part II, which looks at the construction and history of the Equal Protection Clause. This section is of particular importance because it also demonstrates the lack of rationale with which passionate majorities inimical to the rights of minorities will pursue their ends. When reason succumbs to passion and prejudice, opponents of civil rights will look for every loophole, make every claim that they can find, and even when faced with the most explicit pronouncements against their wishes, admittedly defy the Constitution, and compel the Supreme Court to act.

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<sup>50</sup> Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2<sup>nd</sup> ed. (New Haven, CT: Yale University Press, 1962).

Chapter Five sets the stage for the arguments explored in Chapter Six. The question of what conditions an argument must satisfy to warrant a rational basis for the unequal treatment of persons is answered here. Civil-rights cases are often subjected to a wide range of arguments, some of which have no conceivable footing in reality. Consequently, this chapter starts by establishing that, as a product of the Enlightenment, the United States was founded on the emphatic employment of reason in lieu of more impassioned impulses.

Chapter Six engages those arguments which opponents to same-sex marriage invoke. With a full understanding of the Equal Protection Clause and the rational-basis test, it should become clear that the arguments leveled at same-sex marriage do not create a rational basis rooted in either logic or history. This chapter uses the Proposition 8 same-sex marriage case from California, to build a framework of arguments and fleshes them out with those posited by Professor Amy Wax, the Robert Mundheim Professor of Law at University of Pennsylvania Law School. This work then concludes by combining all points hitherto discussed and considering the reality of civil rights in American jurisprudence.

## CHAPTER ONE

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### The Counter-Majoritarian Difficulty

*It may sound oddly to say that the majority is a faction; but it is, nevertheless, literally just. If the majority is partial in their own favor, if they refuse or deny a perfect equality to every member of the minority, they are a faction; and as a popular assembly, collective or representative, cannot act, or will, but by a vote, the first step they take, if they are not unanimous, occasions a division into majority and minority, that is, into two parties, and the moment the former is unjust it is a faction.*

-John Adams  
March 22, 1778<sup>51</sup>

*Democracy is two wolves and a lamb voting on what to have for dinner.*  
- Unknown<sup>52</sup>

“This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that ‘animosity’ toward homosexuality is evil. I vigorously dissent.”<sup>53</sup> Justice Antonin Scalia was once again castigating his fellow justices for purportedly usurping the power of the people to the detriment of the Constitution. In Colorado a statewide referendum had passed which “preclude[d] all legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons based on their ‘homosexual, lesbian or bisexual orientation, conduct, practices or relationships.’”<sup>54</sup> It was a unique law in that its purpose was to prevent other laws that might be passed to

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<sup>51</sup> John Adams and Charles Francis Adams, *The works of John Adams, Second President of the United States: with a life of the author, notes and illustrations*, Vol. VI. (Boston: Charles C. Little And James Brown, 1851), 60.

<sup>52</sup> Frequently misattributed to Benjamin Franklin. Also attributed to James Bovard of the Sacramento Bee.

<sup>53</sup> *Romer v. Evans*, 517 U.S. 620 (1996). (Scalia, dissenting.)

<sup>54</sup> *Romer v. Evans*, 517 U.S. 620 (1996).

protect the gay community. The Supreme Court found that such a law was remarkably at odds with the Constitution and struck it down. Scalia believed otherwise.

This interplay between the will of democratic majorities and the court's obligation, to uphold constitutionally protected individual rights, is emblematic of what Alexander Bickel termed the *counter-majoritarian difficulty*. It has become acutely part of our constitutional government. In western liberal democracies, what is considered *legitimate* power is derived from the consent of the governed; on the other hand, tyranny of the majority is a real problem of which the framers of the Constitution were well aware. It is a problem that has beleaguered our constitutional democracy since its inception and there is still an impassioned debate as to the best way to answer it.

Constitutional scholars who give the most deference to authority and individual states, will perceive the court's role as minimal and to some extent indifferent to individual rights. Some have argued that because the framers included "those rights a tyrannical government had traditionally moved against," and left out other rights, that "they don't care" about personal rights.<sup>55</sup> This view will often manifest itself in states'-rights arguments: if a majority within a state adopts legislation, it is up to that state to repeal it, and not the business of the federal judiciary to step in. This is the base-level argument that allows a person to believe that states infringing on personal rights do not raise constitutional questions.

Contrary to this are the scholars who give deference to the individual over government. They will point out that while states'-rights are important, to defer to the states at the expense of the individual, is to miss the reason that there was a debate over

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<sup>55</sup> Justice Antonin Scalia, interview by Calvin R. Massey, *Legally Speaking*, UCTV, March 21, 2011.

the relationship of the state and federal government in the first place; indeed, the Anti-Federalists argued that local, state control was a better guard of individual rights. The Federalists disagreed, and it was the Federalists' constitution that was adopted. One tool established to ensure those rights in the Constitution are protected from majorities acting through government was judicial review.

The act of judicial review is the “proper and peculiar province of the courts,”<sup>56</sup> but its nature has long been a cause of trepidation. In a letter to Thomas Jefferson, James Madison expressed his misgivings about “the Judiciary [being] paramount... to the Legislature.”<sup>57</sup> He stated that this was never meant to be and “can never be proper.”<sup>58</sup> It is a precarious device, because at once it theoretically allows protection of minority groups from the “tyranny of the legislatures,”<sup>59</sup> while at the same time giving the only unelected branch of government a power that is supposed to be retained by the people.

While Madison wrestled with the idea himself, he seemed to reconcile the issue just enough to publicly support it – at least around the time of ratification. He declared that the Constitution as fundamental law was antecedent to all other laws: “A law violating a constitution established by the people...would be considered by the Judges

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<sup>56</sup> Alexander Hamilton, “Federalist Papers: No. 78” (1788), *The Avalon Project: Documents in Law, History, and Diplomacy*, last modified 2008, [http://avalon.law.yale.edu/18th\\_century/fed78.asp](http://avalon.law.yale.edu/18th_century/fed78.asp).

<sup>57</sup> Philip B. Kurland and Ralph Lerner, eds., “James Madison, Observations on Jefferson's Draft of a Constitution for Virginia,” in Vol. 1 of *The Founders' Constitution*, (Chicago: The University of Chicago Press, 2000), 649.

<sup>58</sup> Ibid.

<sup>59</sup> Philip B. Kurland and Ralph Lerner, eds., “Thomas Jefferson to James Madison,” in Vol 1. of *The Founders' Constitution*, (Chicago: The University of Chicago Press, 2000), 479. (In a letter to James Madison, Thomas Jefferson warned that “The tyranny of the legislatures is the most formidable dread at present, and will be for long years.”).

null & void.”<sup>60</sup> On June 8, 1789 while arguing for a Bill of Rights, he referred to the courts as “independent tribunals of justice” and justices as the “guardians of...rights.”<sup>61</sup>

Any extant reservations gave way to practical necessity and congress passed the Judiciary Act of 1789, which explicitly demarcated the judicial supremacy of the Supreme Court. Hamilton seemed less conflicted as he had argued for its purpose in *Federalist Paper*, No. 78. “It is urged” he said, “that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void.”<sup>62</sup> It cannot be a “natural presumption” that the legislature is to police itself. “It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.”<sup>63</sup> He continued, casting aside any doubt as to who should determine the meaning of provisions in question, “...A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.”<sup>64</sup> Hamilton argued that of the three branches of government, the judiciary was the “least dangerous to the political rights of the Constitution.”<sup>65</sup>

Finally, it was codified within the American legal system in *Marbury v. Madison*, when

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<sup>60</sup> Philip B. Kurland and Ralph Lerner, eds., “Records of the Federal Convention,” in Vol. 3 of *The Founders’ Constitution*, (Chicago: The University of Chicago Press, 2000), 393.

<sup>61</sup> Philip B. Kurland and Ralph Lerner, eds., “James Madison, House of Representatives,” in Vol. 1 of *The Founders’ Constitution*, (Chicago: The University of Chicago Press, 2000), 484.

<sup>62</sup> Hamilton, “Federalist Papers: No. 78,” (1788).

<sup>63</sup> *Ibid*

<sup>64</sup> *ibid*

<sup>65</sup> *ibid*

Chief Justice Marshall wrote, "...It is emphatically the province and duty of the judicial department to say what the law is."<sup>66</sup>

Judicial review necessarily changes the relationship between the courts and the legislatures. In regards to where the line in the sand must be drawn between majority rule and individual rights, Alexander Bickel asked,

Which values...qualify as sufficiently important or fundamental or what have you to be vindicated by the Court against other values affirmed by legislative acts? And how is the Court to evolve and apply them?<sup>67</sup>

Whatever values may or may not warrant court intervention, the bottom line is that "From the beginning...the language of America has been the language of rights."<sup>68</sup> To what degree may be up for debate, but in recent decades something of a cynical backlash has emerged because of this almost uniquely American emphasis on rights. Indeed, "...So great has the preoccupation with rights become that it has given rise to a phenomenon that has itself become a topic of interest, *rights talk*."<sup>69</sup> Talk of rights has become a subject of reproach, prompting one critic to refer to it as "shrill, anti-social, irresponsible, and reductionist;"<sup>70</sup> subsequently, a plea for rights is often dismissed. Irrespective of any cynicism, the significance that the original ratifiers placed on individual rights led to an emphasis on protection from majority factions *within* states.<sup>71</sup>

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<sup>66</sup> *Marbury v. Madison*, 5 U.S. 137 (1803)

<sup>67</sup> Bickel, *The Least Dangerous Branch*, (1962), 55.

<sup>68</sup> Philip B. Kurland and Ralph Lerner, eds., "Chapter 14: Introduction," in Vol. 1 of *The Founders' Constitution*, (Chicago: The University of Chicago Press, 2000), 424.

<sup>69</sup> Thomas Halper, *Positive Rights in a Republic of Talk: A Survey and a Critique*, (Dordrecht: Kluwer Academic Publishers, 2003).

<sup>70</sup> *ibid.*

<sup>71</sup> Rakove, *Original Meanings*, 314.



This context directly affected the debates over ratification and the manner in which the Constitution was organized and realized. The implications were material and permanent.

This emphasis on personal rights came about in part due to a concern over property rights, and ironically in part as a reaction to the threat religion posed on individual rights.<sup>72</sup> If religion was able to touch any part of legislative acts, they knew from experience that oppression would soon follow. It was a fight over a religious assessment bill in Virginia that gave Madison and Jefferson a concerning insight into the greater threat of a republican government – the state legislatures. They knew the danger that religious passion could impose on private rights so that,

In the realm of religion... what Madison and Jefferson contested was the capacity of the state to act at all. And they did so not on behalf of the collective right of a people to be free from arbitrary rule, but rather to *protect autonomous individuals as the bearer of rights*.<sup>73</sup>

The threat of factions became a major focus. The experience Madison earned caused him to ponder “why, in a republic” a legislature might wield power arbitrarily and become more dangerous to personal rights than an executive.<sup>74</sup> He came to the conclusion that because legislators kowtow “to the passions and interest of their constituents” the biggest challenge would not be to protect individuals “*from* government,” but rather “to defend minorities and individuals against popular majorities acting *through* government.”<sup>75</sup>

Further, Madison realized that it was less likely (although not impossible) that these kinds of factions would hinder rights at the federal level. Instead, “the true problem

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<sup>72</sup> Ibid., 313.

<sup>73</sup> Ibid., 312.

<sup>74</sup> Ibid., 313.

<sup>75</sup> Ibid.

of protecting rights was to curb injustice *within* the individual states, where most laws affecting property and religion (and all other ordinary activities) would still originate.”<sup>76</sup>

In his pre-convention memorandum, he considers the problem of democratic majority rule:

If the multiplicity and mutability of laws prove want of wisdom, their injustice betrays a defect still more alarming: more alarming not merely because it is a *greater evil in itself*, but because it brings more into question the fundamental principle of republican Government, that the majority who rule in such governments are the safest Guardians both of public good and of private rights.<sup>77</sup>

That is, he sees it as a defect of republican government that majority rule should be considered the “safest guardian” of private rights.

It should be noted that while Madison was the architect of the Constitution, it was ultimately ratified by the states, some of whose signatures were contingent on the inclusion of a Bill of Rights. There were indeed Anti-Federalists who were wary of strong national control. This argument however, if followed to its conclusion, only serves to bolster the individual-rights point. The Anti-Federalists were largely concerned with the national government violating “personal rights.”<sup>78</sup>

Even the future disagreements that Jefferson and Madison came to have over the power of the judiciary were due to the encroachment on individual rights. As Charles Black writes,

It is true that Madison, with Jefferson, came to have deep disagreements with some actions of the federal judiciary, particularly in the case of the Circuit Judges who upheld the Alien and Sedition Acts but that disagreement was based on

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<sup>76</sup> Ibid., 316.

<sup>77</sup> Ibid., 314.

<sup>78</sup> Centinel, “Antifederalist: Centinel I,” TeachingAmericanHistory.org: A Project of the Ashbrook Center at Ashland University, <http://teachingamericanhistory.org/library/index.asp?document=1635>.

those judges' not being vigorous enough in protecting human rights by the judicial power. Jefferson was dissatisfied, in that controversy, with the federal judges' not having been sufficiently "activist," not "anti-majoritarian" enough. (The Alien and Sedition law was after all, an Act of Congress, the nearest thing to a national majority.)<sup>79</sup>

To be sure, liberty and the avoidance of arbitrary rule, and safety against those working through government were paramount concerns inculcated into the Constitution; it pervaded the entire political spectrum in revolutionary America, and was further amplified during reconstruction.

Shortly after the Civil War it became clear that passionate majorities working through government, at the state level, would not be quelled easily. As a result, the Civil Rights Act of 1866, and subsequent reconstruction amendments emphasized the Union over the individual states. Southern states relied on the states'-rights argument, which was a decidedly more compelling argument prior to the Civil War. Indeed, "...Opponents of the Civil Rights Act charged that it violated the Tenth Amendment, which 'reserved to the states' those powers not granted to Congress.... Even [the bill's] advocates recognized the bill's replacement of state with federal authority."<sup>80</sup> Senator Lot Morrill of Maine plainly stated,

No nation, from the foundation of government, has ever undertaken to make a legislative declaration so broad. Why? Because no nation hitherto has ever cherished a liberty so universal. The ancient republics were all exceptional in their liberty; they all had excepted classes, subjected classes, which were not the subject of government, and, therefore, they could not so legislate. That it is extraordinary and without a parallel in the history of this Government, or of any other, does not affect the character of the declaration itself. The Senator from Kentucky tells us that the proposition is revolutionary, and he thinks that is an objection. I freely concede that it is revolutionary. I admit, that this species of

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<sup>79</sup> Charles L. Black Jr., *A New Birth of Freedom: Human Rights, Named & Unnamed*, (New York: Penguin Putnam, 1997), 125.

<sup>80</sup> Peter Irons, *A People's History of the Supreme Court: The Men and Women Whose Cases and Decisions Have Shaped Our Constitution*, (New York: Penguin Books, 2000), chapter 16, para. 7, iBook edition.

legislation is absolutely revolutionary. But are we not in the midst of a revolution? Is the Senator from Kentucky utterly oblivious to the grand results of four years of war? Are we not in the midst of a civil and political revolution which has changed the fundamental principles of our Government in some respects?<sup>81</sup>

While an awareness of the counter-majoritarian difficulty helps to understand that the Constitution was made with an eye to autonomy, and why the judiciary might sometimes be called on, there is still a debate over at what level of detail provisions should be abstracted. With the power to declare acts of legislatures void, courts are wary of misappropriating constitutionally mandated powers. Theories range from a specific application, to an acute adherence to precedent, to a living interpretation rooted in a particular justice's moral inclinations. Although the text is static, the vague nature of the provisions allow for this wide range of methods. To solve the counter-majoritarian difficulty, the next chapter discusses the ambitious business of interpreting a written constitution.

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<sup>81</sup> William H. Barnes, A.M., *History of the Thirty-Ninth Congress of the United States*, (New York, NY: Harper & Brothers, Publishers, 1868), <http://books.google.com/ebooks>.

## CHAPTER TWO

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### In Pursuit of Judicial Restraint

*A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind.... Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.*

- Chief Justice John Marshall  
1819<sup>82</sup>

If the counter-majoritarian difficulty poses the question, *where is the line drawn between majority rule and individual rights?* Constitutional interpretation offers the answer. Unfortunately, the answer is not as cut-and-dried as one might hope. Peter Irons suggests that the Supreme Court is “a political institution, and constitutional litigation [is] a form of politics.”<sup>83</sup> He emphasizes this point with an observation made by Tocqueville: “...Scarcely any political question arises in the United States that is not resolved sooner or later, into a judicial question.”<sup>84</sup> The nature of the Constitution and its construction subject it fairly easily to the moral ideals that a justice may want to read into it, and this has caused some consternation for a few justices and scholars. Professor Gordon Wood notes,

There was not in 1787–1788—and today there is still not—one “correct” or “true” meaning of the Constitution. The Constitution means whatever we want it to mean. Of course, we cannot attribute any meaning we want and expect to get away with it. We have to convince others of our “true” interpretation, and if we

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<sup>82</sup> *McCulloch v. Maryland*, 17 U.S. 316 (1819)

<sup>83</sup> Peter Irons, *Brennan vs. Rehnquist: The Battle for the Constitution*, (New York: Knopf, 1994).

<sup>84</sup> *Ibid.*

can convince enough people that that is the “true” interpretation, then so it becomes. That is how the culture changes.<sup>85</sup>

It seems this almost-cynical view of the Constitution is not a rare one. In criticizing an interpretive method that he did not agree with, Justice Brennan made the point that “the political underpinnings of such a choice should not escape notice.”<sup>86</sup> After studying the subject for some time, Professor Mark Tushnet’s perspective went through a rather dramatic change: “I no longer believe that constitutional theory constrains, or is supposed to constrain judges. Rather...it serves primarily to provide a set of rhetorical devices that judges can deploy as they believe effective.”<sup>87</sup>

As a result, many justices and legal scholars fear that too many courts are replacing what the law *is* with their own moral idea of what the law *ought* to be.<sup>88</sup> The nature of “general propositions”<sup>89</sup> laid out in the Constitution make this a palpable risk. There is virtue in applying the law as it is known, as opposed to justices imbedding their own personal convictions. Often referred to as *judicial restraint*, it is argued that this most aptly occurs by the courts showing deference to the legislatures.<sup>90</sup> Contrary to this is *judicial activism*, which has taken on a pejorative tint; it implies that a justice has ignored

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<sup>85</sup> Gordon S. Wood, “Ideology and the Origins of Liberal America,” *William. and Mary Quarterly* 44 (Jul. 1987): 628.

<sup>86</sup> Justice William J. Brennan, Jr., “Speech to the Text and Teaching Symposium,” (1985), in *Originalism: A Quarter Century of Debate*, ed. Steven G. Calabresi (Washington, DC: Regnery Publishing, inc., 2007), 59.

<sup>87</sup> Mark Tushnet, “Constitutional Interpretation, Character, and Experience,” *72 Boston University Law Review* 747, (1992): LexisNexis.

<sup>88</sup> See generally Scalia, *A Matter of Interpretation*, (1997), Kindle edition. “Judge-made law is ex post facto law, and therefore unjust.”

<sup>89</sup> *Lochner v. New York*, 198 U.S. 45 (1905), (Holmes Jr., dissenting). “general propositions do not decide concrete cases.”

<sup>90</sup> Irons, *Brennan vs. Rehnquist* (1994). Irons specifically uses the term ‘deference’ to describe Justice William Rehnquist’s position. Also see Scalia, *Originalism: The Lesser Evil*, (1989); also see Bork, *The Tempting of America*, (1990).

the dictates of the Constitution and predicated their judgment on no more than their own flighty discretion.

To be sure, restraint is important in maintaining a sense of legitimacy, but also important is the court's role in preventing a tyrannical majority from violating the constitutional rights of a minority. The Supreme Court has acknowledged this point on multiple occasions.<sup>91</sup> If legislation conflicts with the Constitution, it becomes a federal issue. In 1803 Chief Justice Marshall wrote that “[A] law repugnant to the Constitution is void, and [ ] courts, as well as other departments, are bound by that instrument.” He augmented the point, saying that if a state law which was repugnant to the Constitution were not held as such by the courts that “[the Constitution] is prescribing limits, and declaring that those limits may be passed at pleasure.”<sup>92</sup> Of course, in the interest of restraint, justices rightly remain cautious when reviewing legislation.

As it is relevant here, the question becomes, *why does state prohibition of same-sex marriage raise a constitutional question?* If a theorist believes that it is not a constitutional question they will maintain that the state legislatures should determine the issue, but on the other hand, if a theorist believes it does raise a constitutional question they will believe it is a federal issue and that the Supreme Court has the final word. The debate over what the Constitution has to say about specific rights begins with interpretation, and this is immediately problematic.

This seemingly benign act can be stifled by subjective interests, and often subconsciously. In 1651, Thomas Hobbes observed of written law that “considering there be very few, perhaps none, that in some cases are not blinded by self-love, or some other

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<sup>91</sup> See *infra* note 206.

<sup>92</sup> *Marbury v. Madison*, 5 U.S. 137 (1803).

passion, it is now become of all Laws the most obscure and has consequently the greatest need of able interpreters.”<sup>93</sup> The problem is further amplified by the manner in which the Constitution was crafted.

While the debates over the Constitution and its Bill of Rights were lengthy and enthusiastic, a desire to preserve the Union meant the focus was on “whether the Constitution would be adopted, not [on] formulat[ing] definitive interpretations of its individual clauses.”<sup>94</sup> As a result, the Constitution with its Bill of Rights is largely a mix of specific pragmatic rules and vague idealistic principles. Elucidating what exactly this implies for constitutional controversies more than 220 years later has proved challenging.

Of the varied methods to interpret the Constitution, it is generally accepted that they all more or less maintain one of two characteristics: what many call either a *living* interpretation or a *fixed* interpretation. This, however, is something of a false dichotomy. Not only is it too simplistic for a lucid analyzation, it is in many ways misleading, as methods that are frequently referenced as fixed are just as living as their deeply criticized counterparts.

The method that a justice uses seems to be allied with how they conceive their role vis-à-vis the Constitution. This perceived role is largely dependent on where they believe the authority of a constitution arises, which in turn establishes their perception of the Constitution’s role “in defining and limiting the authority and powers of government.”<sup>95</sup> There are essentially six models of how to interpret the Constitution,<sup>96</sup>

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<sup>93</sup> Thomas Hobbes, *Leviathan Or The Matter, Form, and Power of a Common-Wealth, Ecclesiastical and Civil*, (London: Andrew Crooke, 1651), 143, <http://books.google.com/ebooks>.

<sup>94</sup> Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution*, (New York: Vintage Books, 1997), 17.

<sup>95</sup> Robert C. Post, “Theories of Constitutional Interpretation,” *Faculty Scholarship Series*, 209 (1990): 19, [http://digitalcommons.law.yale.edu/fss\\_papers/209](http://digitalcommons.law.yale.edu/fss_papers/209).



but they can all more-or-less be distilled into three categories. For clarity, and what might be slightly more helpful to this analysis, Professor Robert Post's model will be used. He separates the possibilities into, "'Authority of Law,' governed by doctrine... 'Authority of Ethos,' governed by morality... [and] 'Authority of Consent,' governed by history."<sup>97</sup>

## **I. Authority of Ethos**

Those that believe the Constitution derives its authority from ideas of "dignity"<sup>98</sup> or "humanity," essentially words suffused with moral inclinations, might be said to subscribe to an "Authority of Ethos." They believe a constitution should be responsive to "current problems and current needs."<sup>99</sup> These interpretive methods "engage[] in an ongoing process of national self-definition."<sup>100</sup> This would be what people generally refer to as a living or evolving constitution. These theorists fear that using an interpretive method fixed too rigidly will needlessly submit the polity to detrimental, yet ostensibly avoidable outcomes; specifically, it is argued that politically vulnerable minorities will be at the mercy of a majority.

Society inevitably changes and, as the argument goes, adhering to anachronistic law can only serve to impede progress. Indeed, "[t]hose who would restrict claims of

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<sup>96</sup> Congressional Research Service, *The Constitution of the United States of America: Analysis and Interpretation*, ed. Johnny H. Killian, George A. Costello, and Kenneth R. Thomas, (Washington D.C.: U.S. Government Printing Office, 2004), 742. ("Scholarly writing has identified six forms of constitutional argument or construction that may be used by courts or others in deciding a constitutional issue. These are (1) historical, (2) textual, (3) structural, (4) doctrinal, (5) ethical, and (6) prudential.")

<sup>97</sup> Post, "Theories of Constitutional Interpretation," 20 – 21.

<sup>98</sup> See generally Brennan, "Speech given at the Text and Teaching Symposium," (1985). In his speech he uses the word 'dignity' twenty-nine times.

<sup>99</sup> Brennan, "Speech given at the Text and Teaching Symposium," (1985), 61.

<sup>100</sup> Post, "Theories of Constitutional Interpretation," 26.

right to the values of 1789... turn a blind eye to social progress and eschew adaption of overarching principles to changes of social circumstance.”<sup>101</sup>

Madison made the point that “in framing [the Constitution] which we wish to last for ages, we shd.[sic] not lose sight of the changes which ages will produce.”<sup>102</sup> Those changes, it is agreed, are generally effected most faithfully through the legislatures, but ultimately court rulings have consequences today, and according to the moral interpreter, those consequences should not be ignored. The change in society requires justices to ask, “what do the words of the text mean in our time?”<sup>103</sup> This evolving interpretive ethos can best be characterized by the majority opinion in 1958’s *Trop v. Dulles*: “the words of the [Eighth] Amendment are not precise, and [] their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>104</sup>

Those who claim to subscribe, (or are sometimes accused of subscribing), to an Authority of Ethos have often been on the liberal wing of the Supreme Court in recent decades. While some might enjoy the fruits of these rulings, the debate over those methods that allow for moral inclinations center on the idea that not everyone holds the same values. Justice Scalia, who emphatically claims *not* to be a moral reader, issues opinions that demonstrate quite the opposite. His conceptions of the Constitution’s establishment clause and the cruel and unusual punishment clause have been thoroughly dismantled, and exposed as moral “distortion[s] of the Constitution.”<sup>105</sup>

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<sup>101</sup> Brennan, “Speech given at the Text and Teaching Symposium,” (1985), 59.

<sup>102</sup> Rakove, *Original Meanings*, (1996), 35 – 36.

<sup>103</sup> Brennan, “Speech given at the Text and Teaching Symposium,” (1985), 61.

<sup>104</sup> *Trop v. Dulles*, 356 U.S. 86 (1958).

<sup>105</sup> Alan Dershowitz, “Scalia’s Catholic Betrayal,” *The Daily Beast*, August 18, 2009; *see also* Barnett, “Scalias Infidelity: A Critique of ‘Faint-Hearted’ Originalism,” (2006). (Barnett notes that Scalia uses his

The infamous *Dred Scott v. Sanford* case was decided by what the justices thought was best for society. The Supreme Court ruled that because the plaintiff was a slave, he did not have standing to sue in court. The declaration that the court did not have jurisdiction should have been the end of the case, but instead Chief Justice Taney went on to decide the second question of the case. He ruled that Congress did not have the power to prohibit slavery in territories and therefore Congress's provision in the Missouri Compromise declaring it a free territory was unconstitutional. As Robert Burt noted, the ruling was fraught with "the most explicit racist dogma that appears anywhere, before or since his opinion." Moral inclinations had infected the court's judgment. Consequently, "of all the repudiated decisions, *Dred Scott* carries the deepest stigma," and is the most "reviled."<sup>106</sup>

Moral decisions have of course come in a wide variety and are not always so disagreeable. The problem is that morals-based adjudication weakens any sense of legitimacy; it becomes a partisan tool for politics. Two similar cases might be decided differently based on no more than a justice's personal feelings. Expressed by John Adams in the Constitution for the Commonwealth of Massachusetts, stability and predictability in law allows a government to be one of "laws and not of men." That is, it allows laws to apply evenly to individuals, irrespective of personal traits.

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method of interpretation only where it "gives him the results he wants.") See also Nichol, "Justice Scalia and the Printz Case: the Trials of an Occasional Originalist," (1999); see also Koppelman, "Phony Originalism and the Establishment Clause," (2009); see also Chemerinsky, "The Jurisprudence of Justice Scalia: A Critical Appraisal," (2000); see also Silver and Kozlowski, "The First Amendment Originalism of Justices Brennan, Scalia and Thomas," (2012); see also Rosen, "Originalist Sins," (1997); see also Posner, "The Incoherence of Antonin Scalia," (2012).

<sup>106</sup> Robert Burt, "What Was Wrong with *Dred Scott*, What's Right about *Brown*," *Faculty Scholarship Series*, 799 (1985), [http://digitalcommons.law.yale.edu/fss\\_papers/799](http://digitalcommons.law.yale.edu/fss_papers/799).

## II. Authority of Law

Perhaps the most restrained a justice can be is by using the doctrine of precedent, or more formally, *stare decisis*. It is a vestige of the Common Law system whereby a law is expounded in one case and is forever a reference for future cases of similar circumstance. It gives the most deference to what has already been made law. Because it is self-referential, it has the unique characteristic of being imperative in avoiding arbitrary rule. Unlike adjudicating based on morals, it allows courts to apply the law in a predictable fashion establishing some sense of legitimacy. Citizens are able to reasonably plan their affairs and hence the legal framework maintains value.<sup>107</sup>

For this reason, questions of constitutional validity are usually decided by precedent rather than a scrutinizing look at the Constitution itself. After all, "...If the most powerful justification for the Constitution's authority is that it is law, and the most defensible justification for judicial review is that it is the peculiar province and duty of the courts to expound the law,"<sup>108</sup> then once that law has been developed, the courts are required to follow it. Courts, in this sense, are able to keep discretion to a minimum and act as "mere instruments of the law."<sup>109</sup> It is generally the more controversial issues that have a lack of precedent to fall back on and require a fresh look at the Constitution.

Even when the law has seemingly been decided in one case, precedent is not foolproof and in fact can be problematic. Justices are human and humans are fallible, yet in subsequent cases, "the determination of similarity or difference is the function of each

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<sup>107</sup> Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 2<sup>nd</sup> ed. (New York: Oxford University Press, 2009).

<sup>108</sup> Post, "Theories of Constitutional Interpretation," 20 – 21.

<sup>109</sup> *Osborn v. Bank of the United States*, 22 U.S. 738 (1824).

judge.”<sup>110</sup> That is, precedent is fundamentally analogical, rather than logical.<sup>111</sup> Mistakes can be made and determining when a mistake has been made is not absolute. It can very well be a matter of contention between justices; consequently, justices are known to never be acutely bound by precedent.

To be sure, precedent is important, but imperfect. It allows for what might be deemed a correction in a previously held case, and it provides a bouquet of decisions from which to quote. As Justice Scalia points out, “...In the narrowest sense...the holding of a case cannot go beyond the facts that were before the court,” and when they want to, “courts will squint narrowly when they wish to avoid an earlier decision.”<sup>112</sup> It can in this sense become just as flimsy as an interpretation based on a judge’s moral tendencies.

Of course, as with all human enterprises the legal system is developed through a continual process of learning through experience. Justice Brandeis observed the importance of precedent and its subservience to lessons learned in 1932:

Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right... This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error so fruitful in the physical sciences, is appropriate also in the judicial function.<sup>113</sup>

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<sup>110</sup> Edward H. Levi, *An Introduction to Legal Reasoning*, (Chicago: The University of Chicago Press, 1949), chapter 1, Kindle edition.

<sup>111</sup> Ibid.

<sup>112</sup> Scalia, *A Matter of Interpretation*, (1997).

<sup>113</sup> *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393 (1932).

While precedent might provide an out for justices wishing to avoid or overturn previous decisions, it is important not to confuse “experience and the force of better reasoning” with judicial activism. A justice doing what they want *in spite* of constitutional mandates is entirely distinct from learning that they were previously wrong about those mandates, and remedying the situation.

### **III. Authority of Consent**

Those methods that purport to derive their conclusions from consent do so by looking at the historical intention or understanding of provisions. It is believed by many that this is the best way to find legitimate authority. By looking at what the ratifiers intended a constitutional provision to do, or what the original public understanding would have yielded, the people’s consent that defines the law should be discernable, hence the name: Authority of Consent. Within the literature these methods often go by the name of Originalism. It comes in more than one flavor, but its purpose is to act as security from an overzealous judiciary usurping the power of the people and injecting their own moral ideals into a court decision. If the Constitution does not act as a restraint on judges then “[they] could govern areas not committed to them by specific clauses of the Constitution, there would be no law other than the will of the judge.”<sup>114</sup>

To be faithful to the Originalist doctrine a theorist must be able to demonstrate that their claim is based on “some textual or historical evidence.”<sup>115</sup> Originalism

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<sup>114</sup> Judge Robert H. Bork, “Speech at the University of San Diego Law School,” (1985), in *Originalism: A Quarter Century of Debate*, ed. Steven G. Calabresi (Washington, DC: Regnery Publishing, inc., 2007), 85.

<sup>115</sup> Antonin Scalia, “Originalism: The Lesser Evil,” *University of Cincinnati Law Review* 57 (1989): 849, LexisNexis.

recognizes the importance of consent of the governed, and because legislation might be subjected to judicial review, it “legitimizes” the process.<sup>116</sup> The Constitution might have evolving characteristics but the Originalist does not see a “basis for believing that supervision of the evolution would have been committed to the courts.”<sup>117</sup> Instead, it is believed that change is most legitimately effected through the legislatures:

[O]riginalism seems...more compatible with the nature and purpose of a Constitution in a democratic system. A democratic society does not, by and large, need constitutional guarantees to insure that its laws will reflect “current values.” Elections take care of that quite well.<sup>118</sup>

This is the essence of the originalist argument. If society wants change, they can elect new representatives that will pass legislation in line with that change. To ask the courts for moral guidance can very well result in decisions like *Dred Scott*. To argue that the Constitution is not law, or is not binding subjects society to the moral predilections of the courts. Justice Rehnquist made the point, “there is no conceivable way in which I can logically demonstrate to you that the judgments of my conscience are superior to the judgments of your conscience, and vice versa.”<sup>119</sup>

Scalia has further made the salient point that the “purpose of constitutional guarantees” is to inhibit undesirable change in those original values that those who adopted the amendment saw fit to instill in the Constitution. If society wants to change one of these fundamental values, it must “devote to the subject the long and hard consideration required for a constitutional amendment before those particular values can

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<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

<sup>119</sup> William H. Rehnquist, “The Notion of a Living Constitution,” 54 *Texas Law Review* (1976): 693.

be cast aside.”<sup>120</sup> The justice “has, after all, taken an oath to apply the laws and has been given no power to supplant them with rules of his own...if [a justice] feels strongly enough he can...[resign and] lead a political campaign...and if that fails, lead a revolution. But rewrite the laws he cannot do.”<sup>121</sup> For the government to reflect a change in society’s moral values, that change must occur through constitutional amendment, not the courts. Of course, it should also be noted that change should not occur through defiant states either.

Originalism makes some salient points, but the bigger argument arises in regards to how specific Originalism should get. Too specific and it would require a court to uphold a flogging statute and allow school segregation, (as the ratifiers of the Fourteenth Amendment continued to segregate school districts well after its adoption), however if provisions are read too broadly, progressive tax laws or even age requirements for driving wouldn’t stand up to the Equal Protection Clause.

Originalism has its merits; after all, completely ignoring the dictates of the Constitution would produce chaos. It is faithful, it is enduring, and it most likely has a manifestation that can produce something close to impartial results. The problem, however, is that the versions espoused by those of Scalia, Bork, and many others are not it. Enacted at too specific a level produces a version of Originalism that is wholly impracticable, and usually a euphemism for moral interpretation.

Professor Erwin Chemerinsky writes, “[w]hat disturbs me about Justice Scalia’s jurisprudence is that by denying that it is making value choices, it pretends that its

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<sup>120</sup> Scalia, “Originalism: The Lesser Evil,” (1989).

<sup>121</sup> Antonin Scalia, “God’s Justice and Ours,” *First Things*, (May 2002), <http://www.firstthings.com/article/2007/01/gods-justice-and-ours-32>.



decisions are a result of a neutral judicial methodology.”<sup>122</sup> As this paper refers to Originalism it will be of the kind that is of Bork and Scalia.

Originalism, whether it is based on original intent as Judge Bork would prefer or the original public understanding (sometimes called textualism)<sup>123</sup> as Justice Scalia would prefer, runs into several problems. Those covered here are: (1) there are instances where even the most conservative justices will not implement statutes that were perfectly constitutional at the time a law was adopted, making it no different than a moral interpretation; (2) originalists aim to find some kind of historical consensus at a very specific level beyond the explicit words adopted; and (3) although it will make a claim to the contrary, Originalism does not have the ability to cope with new phenomena, from changes in technology to changes in society. Two of these problems will be addressed here, and the third in Chapter Three.

To address the first point: Originalists congratulate themselves for belonging to a school of thought that is the pinnacle of judicial restraint and they chastise courts, and other justices, who do not subscribe to such a specific level of abstraction, as judicial activists. However, its impracticable nature requires just enough modification to nullify its existence: it becomes undergirded by moral relativism. Justice Scalia, one of Originalism’s most vociferous proponents, concedes that there is a problem with application if we know exactly what an originalist answer will provide, but find it morally repugnant:

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<sup>122</sup> Erwin Chemerinsky, “The Jurisprudence of Justice Scalia: A Critical Appraisal,” 22 *University of Hawai’i Law Review*, (2000): 385.

<sup>123</sup> Scalia, *A Matter of Interpretation*, (1997).

I hasten to confess that in a crunch I may prove a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging.<sup>124</sup>

This is fine for many justices, but if the sole justification for maintaining an eighteenth or nineteenth century mindset is legitimacy, then what excuse, aside from moral relativism, is there to not uphold a flogging statute? The statement annuls any sense of judicial restraint. For a restrained interpreter to pull even a single punch, such as not upholding a flogging statute based on a moral decision, makes *every other decision* a moral choice. Death penalty? Scalia does not morally deem it worthy of pulling a punch. Sodomy laws? Scalia does not morally deem it worthy of pulling a punch, (and he offers scathing dissents despite his own admission of being a moral interpreter).<sup>125</sup>

In some cases, such as flogging, the originalist interpreter would no doubt look to precedent to justify why they will not uphold the statute. However, making that decision –when to use and when not to use precedent, or when to squint narrowly – is a moral one. As Professor Lawrence Tribe has written,

Justice Scalia asserts that his assumption of the power to invoke *stare decisis* or not to do so does not leave him open to the charge of importing his own views and values into his method of interpretation, because he follows “rules” as to when the disregard of *stare decisis* is appropriate. But even if we assume that Justice Scalia has such “rules” for the selective invocation of *stare decisis*, and for whether to uphold some but not all erroneous decisions of the Supreme Court, what is the origin of those rules? They certainly are not derived from the

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<sup>124</sup> Scalia, “Originalism: The Lesser Evil,” (1989).

<sup>125</sup> Nadine Zylberberg, “Justice Scalia Dissents,” *The New Yorker*, June 25, 2012. (This particular article compiles some of his better dissents, including such hyperbole as: “Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members,” and “If securing its territory in this fashion is not within the power of Arizona, we should cease referring to it as a sovereign State,” and “I find it a sufficient embarrassment that our Establishment Clause jurisprudence regarding holiday displays has come to ‘requir[e] scrutiny more commonly associated with interior decorators than with the judiciary.’ But interior decorating is a rock hard science compared to psychology practiced by amateurs.”)

“original meaning” of the text of the Constitution, as Justice Scalia’s interpretive methodology would require.<sup>126</sup>

Scalia’s concession about being a faint-hearted originalist also shows the irony in this account of the Constitution. Flogging is brutal, as is ear clipping, but to hold that they are not constitutional under any circumstances while simultaneously holding that capital punishment is easily constitutional,<sup>127</sup> would likely be deemed morally incongruous by many people.

This of course is only in application, and there is still the question of theory. Some will inquire as to the practicability of Originalism if a good-faith effort is engaged; that is, if a person were to hold a flogging statute as constitutional, as well as ear-clipping, segregation, and so on, would Originalism be practicable, and therefore the most legitimate interpretation of our Constitution? This, however, is an impossibility, as there was no originally agreed-upon understanding. This leads to the second point that Chief Justice Marshall articulated, “historians can never forget that it is a debate they are interpreting.”<sup>128</sup>

Advocates of a specific level of Originalism concede that finding the original meaning is a challenge, and will offer their insights as to what the enterprise entails. Unfortunately, the challenge masks the incoherent nature of supposedly determinate

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<sup>126</sup> Laurence Tribe, “Comment,” (1997), in *A Matter of Interpretation*, ed. Amy Gutmann (Princeton, NJ: Princeton University Press, 1997).

<sup>127</sup> See Antonin Scalia (dissenting), In Re Troy Anthony Davis on Petition for Writ of Habeas Corpus, 557 U. S. \_\_\_\_ (2009), 2. (Scalia says if a person is convicted and placed on death row that he does not believe it is “constitutionally cognizable” to rehear the case if it is later discovered that they are “actual[ly] innocen[t]” as long as they have received a “fair trial.”) Also see Scalia, “God’s Justice and Ours,” *First Things*, (2002). (“[I]t seems to me that the more Christian a country is the less likely it is to regard the death penalty as immoral. Abolition has taken its firmest hold in post-Christian Europe, and has least support in the church-going United States. I attribute that to the fact that, for the believing Christian, death is no big deal.”)

<sup>128</sup> Rakove, *Original Meanings*, 10.

answers. Judge Robert Bork, a proponent of intent Originalism, offered a laundry list of places to uncover the original meaning:

records of the Philadelphia convention, records of ratifying conventions, the newspaper accounts of the day, the Federalist Papers, the Anti-Federalist Papers, the constructions put upon the Constitution by early Congresses...executive branch officials...and...courts, as well as treatises by men who, like Joseph Story, were thoroughly familiar with the thought of the time.<sup>129</sup>

Beyond that, Justice Scalia concluded that to properly ascertain an original meaning,

[I]s often exceedingly difficult.... Properly done, the task requires the consideration of an enormous mass of material – in the case of the Constitution and its Amendments, for example, to mention only one element, the records of the ratifying debates in all the states. Even beyond that, it requires an evaluation of the reliability of that material—many of the reports of the ratifying debates, for example, are thought to be quite unreliable. And further still, it requires immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day. *It is, in short, a task sometimes better suited to the historian than the lawyer.*<sup>130</sup>

Ironically, it is the historians that point to the futility of Originalism. Gordon Wood has observed, “it may be a necessary fiction for lawyers and jurists to believe in a ‘correct’ or ‘true’ interpretation of the Constitution, in order to carry on their business.”<sup>131</sup> Jack Rakove continued this line of thought and added that the most important task for historians “is to explain *why* ‘contrasting meanings’ were attached to the Constitution from its inception.”<sup>132</sup> The dean of American constitutional historians, Leonard Levy made it very clear,

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<sup>129</sup> Robert Bork, *The Tempting of America: The Political Seduction of the Law*, (New York, NY: Touchstone, 1990), chapter 8, para. 12, Kindle edition.

<sup>130</sup> Scalia, “Common-Law Courts in a Civil-Law System,” (1997), (emphasis mine).

<sup>131</sup> Wood, “Ideology and the Origins of Liberal America,” (1987).

<sup>132</sup> Rakove, *Original Meanings*, 9.

[T]he Supreme Court’s use of originalist evidence is best described as a mix of “law office history” and justificatory rhetoric which offers little reason to think that this method of interpretation can provide the faithful and accurate application of the original constitutional understandings its advocates promise.<sup>133</sup>

The burden of discovering the original meaning of the provision in question is claimed to be “largely [a] factual matter requiring none of the moral and political reasoning appropriately undertaken by the creators of the constitution.”<sup>134</sup> This, however, does not align with the facts. Looking for specific conclusions can produce numerous results from numerous individuals, but to claim that there was a consensus at such a specific level that can be reliably drawn from is intellectually dishonest. Having numerous individuals from which to pull allows a person to search legislative history and selectively pick the parts that support their point, or as Judge Harold Leventhal put it, it is like “looking over the crowd and picking your friends.”<sup>135</sup> As will be established later, Judge Bork’s interpretation of the Fourteenth Amendment is depictive of this problem.

In the Annals of Congress, Madison is noted as advising the framers “not to inquire into the details behind ‘abstract propositions, of which judgment may not be convinced.... [I]f we confine ourselves to an enumeration of simple, acknowledged principles, the ratification will meet with but little difficulty.”<sup>136</sup> Without a consensus, what becomes constitutionally valid is contingent upon who is being quoted. In that sense, it is no more stable than a moral interpretation.

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<sup>133</sup> Ibid., 11.

<sup>134</sup> Wil Waluchow, “Constitutionalism,” *The Stanford Encyclopedia of Philosophy* (Winter 2004 Edition), ed. Edward N. Zalta, <http://plato.stanford.edu/archives/win2004/entries/constitutionalism>.

<sup>135</sup> This quotation is from Patricia M. Wald, “Some Observations on the Use of Legislative History in the 1981 Supreme Court Term,” 68 *Iowa Law Review*, (1983). “It sometimes seems that citing legislative history is still, as my late colleague Harold Leventhal once observed, akin to ‘looking over a crowd and picking out your friends’.”

<sup>136</sup> United States Congress, *Annals of the Congress of the United States*, (Washington, D.C.: Gales and Seaton, 1834), 766, <http://books.google.com/ebooks>.

As an example we can look at what is often considered one of the most concretely understood amendments: the First Amendment. The First Amendment prohibits the “abridge[ment] [of] the freedom of speech” among other things. It would be remarkably difficult to argue that there was a concrete consensus on the understanding or intention of the First Amendment when it was first adopted. Only eight years later there was significant debate by its ratifiers as to its meaning. The dominant Federalist Party enacted the Sedition Act in 1798 and argued “that the freedom of speech meant only freedom from prior restraint—in effect, freedom from an advance prohibition—and did not include any protection at all from punishment *after* publication.”<sup>137</sup> Precedent may inform us as to exactly what the provision entails today, but that is certainly not an originalist approach, and invoking precedent here, but not elsewhere, is a patently moral decision.

Further, Justice Scalia uses the Eighth Amendment’s cruel and unusual punishment clause as a kind of acid test for fitness of character to even be a judge. He believes any judge who is prepared to strike down capital punishment under any scenario – even in the case of “actual innocence”<sup>138</sup> – should resign instead of “sabotage[] death penalty cases.”<sup>139</sup> The history of the debate over the Eighth Amendment – the original understanding – shows that they were well aware that the Supreme Court might use its own discretion in such matters, and could even deem capital punishment, flogging, whipping, and ear clipping as cruel and unusual.<sup>140</sup>

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<sup>137</sup> Ronald Dworkin, “Comment,” (1997), in *A Matter of Interpretation: Federal Courts and the Law*, ed. Amy Gutmann (Princeton, NJ: Princeton University Press, 1997).

<sup>138</sup> Antonin Scalia (dissenting), *In Re Troy Anthony Davis on Petition for Writ of Habeas Corpus*, 557 U.S. \_\_\_\_ (2009), 2.

<sup>139</sup> Antonin Scalia, “God’s Justice and Ours,” *First Things*, (May 2002), <http://www.firstthings.com/article/2007/01/gods-justice-and-ours-32>.

<sup>140</sup> See generally Kurland and Lerner, “House of Representatives, Amendments to the Constitution,” in Vol. 5 of *The Founders’ Constitution*, (2000), 377. (During the debates, Mr. Livermore criticizes the

Indeed, finding an original consensus is not always easy, but worse is when an originalist believes they have found a consensus at a specific level and apply the provision in a manner antithetical to its purpose. One of the hardest arguments for Originalists to reconcile is the decision in *Brown v. Board of Education*. As the facts are that the Fourteenth Amendment was passed and that same Congress segregated the Washington D.C. school district, there is a general consensus amongst constitutional law scholars that at least one reason Originalism in the specific sense is problematic is that it cannot explain the *Brown* decision.<sup>141</sup> In defense of intent-Originalism Judge Bork explained why it does in fact work with his version. To do this, however, he abandons his own method and views the Fourteenth Amendment at a broader view. In his book *The Tempting of America*, he writes:

By 1954, when *Brown* came up for decision, it had been apparent for some time that segregation rarely if ever produced equality ... the physical facilities provided for blacks were not as good as those provided for whites. That had been demonstrated in a long series of cases ... The Court's realistic choice, therefore, was either to abandon the quest for equality by allowing segregation or to forbid segregation in order to achieve equality. There was no third choice. Either choice would violate one aspect of the original understanding, but there was no possibility of avoiding that. Since equality and segregation were mutually inconsistent, *though the ratifiers did not understand that*, both could not be honored. When that is seen, it is obvious the Court must choose equality and prohibit state-imposed segregation. *The purpose that brought the fourteenth amendment into being was equality before the law, and equality, not separation, was written into the law.*<sup>142</sup>

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proposed Eighth Amendment because the details that define *cruel and unusual*, including the prohibition of acts such as whipping, ear-clipping, and hanging, would be left “with the court to determine.” Knowing this, it still passed by a “considerable majority.”)

<sup>141</sup> See McConnell, “Originalism and the Desegregation Decisions,” (1995). (“In the fractured discipline of constitutional law, there is something very close to a consensus that *Brown* was inconsistent with the original understanding of the Fourteenth Amendment.”)

<sup>142</sup> Bork, *The Tempting of America*, (1990), 82.

Judge Bork is correct. To choose segregation, just because the ratifiers thought it was permissible, and because it was within the moral perceptions of the time is to ignore the purpose of the Fourteenth Amendment. The new knowledge that separate but equal did not produce equality meant that segregation was inarguably violating the Fourteenth Amendment. The state legislatures and the justices in *Plessy v. Ferguson*<sup>143</sup> did not know this, but as Chapter Three will explore, that is the nature of facts – there is a distinction between what we know and what we believe we know.

Judicial restraint is important, and some form of Originalism might have it. But considering at a specific level (a) there is a lack of consensus imbedded in constitutional provisions, and considering (b) the ability to choose when to use precedent, and particularly detrimental to its case is (c) the fact that it can lead to implementing statutes which are explicitly antipodal to the purpose of an amendment, any argument for adhering to the specifics of an eighteenth or nineteenth century mindset seems considerably weakened.

Interpretation is not black and white. The Constitution cannot be read as literal and absolute, like radio instructions. If it were then laws against perjury would be unconstitutional under the First Amendment, and individuals would be permitted to acquire nuclear weapons under the Second Amendment. The process of elucidating what the Constitution holds often seems to succumb to Tushnet's assessment that justices use it more as a rhetorical device to find their preferred conclusions. This, however, might be somewhat hyperbolic. It seems that if justices can find a level of abstraction – even a version of Originalism – that allows them to stay consistent over time, they might be able

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<sup>143</sup> *Plessy v. Ferguson* (1896) was a landmark decision that affirmed the doctrine of *separate but equal*.



to show the restraint that they are after. That is, if a justice subscribes to Originalism and in one case uses an exacting specification to hold up something like flogging, but in another instance allows the text to adapt and strikes down segregation laws, then they are not being consistent and not showing restraint. They are essentially hiding behind Originalism to invoke their moral decisions. Professor Herbert Wechsler articulated this point when he asked:

To be sure, the courts decide, or should decide, only the case they have before them. But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply? Is it not the very essence of judicial method to insist upon attending to such other cases, preferably those involving an opposing interest, in evaluating any principle avowed?<sup>144</sup>

More recently the point was articulated by Gene R. Nichol, “constitutional theories are meant to be applied to cases in which we like the results and to cases in which we dislike the results.”<sup>145</sup>

The debate over interpretation is unlikely to be solved any time soon. What can be asserted is that for any method of interpretation to claim fidelity to the Constitution, it requires some level of analysis that allows for the specifics to change, but not the purpose of the amendment. Chapter Three will address why change is inevitable and Chapter Four will discuss the Equal Protection Clause in light of its original construction.

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<sup>144</sup> Herbert Wechsler, “Toward Neutral Principles of Constitutional Law,” *Harvard Law Review* 73, No. 1 (Nov. 1959): 15.

<sup>145</sup> Gene R. Nichol, “Justice Scalia and the Printz Case: The Trials of an Occasional Originalist,” *University of Colorado Law Review* 70, (Summer 1999): 953.

## CHAPTER THREE

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### Inevitable Evolution & Epistemology

*[W]e may add that, when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.... The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.... We must consider what this country has become in deciding what that amendment has reserved.*

– Oliver Wendell Holmes, Jr.  
1920<sup>146</sup>

The debate over whether a change to the Constitution is more faithfully executed in the courts or the legislatures usually begins with a discussion of the counter-majoritarian difficulty and ends with the idea that since the government derives its power from the people, change should most often occur in the legislatures. What this point misses is that sometimes there is no change, only a mistake about the facts.

In Judge Bork's *Brown* example, segregation never did produce equality. That was the fact regardless of what the ratifiers believed the facts to be. Once that became obvious the legislatures had an obligation to bring their legislation in line with the Constitution and if it ended up in court, the court had an obligation to overturn it.

The facts did not change, only what the legislatures and courts knew about the facts. In this case, it would certainly be preferable for the legislatures to remove legislation that is repugnant to the Constitution, but if the courts should find themselves with a case in front of them where state legislation is inarguably repugnant to the

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<sup>146</sup> *Missouri v. Holland*, 252 U.S. 416 (1920)

Constitution, they don't have a choice but to strike it down. As it was stated in Chapter Two, there is a cogent difference between judicial activism, and learning that a mistake was made and remedying the situation.

The point that Bork made, that although “equality and segregation were mutually inconsistent...*the ratifiers did not understand that*,” is the epistemological point. New facts change the reference but not the meaning of Constitutional provisions. The meaning of the Fourteenth Amendment never changed, but once it was discovered that segregation did not in fact produce equality, the reference of the Fourteenth Amendment changed. As Bork concludes, “...The purpose that brought the fourteenth amendment into being was equality before the law, and equality, not separation, was written into the law.”<sup>147</sup>

Arguing a similar point, British economist and political philosopher Friedrich Hayek argued in 1960 that the treatment of homosexuality was “[t]he most conspicuous instance of” illegitimate state coercion.<sup>148</sup> He then approvingly quotes Bertrand Russell, and adds his own point,

...“if it were still believed, as it once was, that the toleration of such behavior would expose the community to the fate of Sodom and Gomorrah, the community would have every right to intervene.” But where such factual beliefs do not prevail, private practice among adults, however abhorrent it may be to the majority, is not a proper subject for coercive action for a state whose object is to minimize coercion.<sup>149</sup>

Hayek's point, that learning new facts necessarily changes the implications of proper state coercion is not a small one. This leads to a point that is the meat of why constitutional provisions will change their reference without changing their meaning, and

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<sup>147</sup> See supra note 142.

<sup>148</sup> F.A. Hayek, *The Constitution of Liberty: The Definitive Edition*, ed. Ronald Hamowy, (Chicago: The University of Chicago Press, 1960), iBook edition.

<sup>149</sup> Ibid.

happens regardless of whether society or the legal system acknowledges it. Change in reference is a consequence of gaining knowledge, and is no more preventable than the progression of time. Without allowing room to expand, the Constitution would become brittle, ineffectual and irrelevant. This point might be deemed living by some, but interestingly, even the most professedly restrained and often conservative justices concede this point.

Scalia refers to a trajectory he looks for when a case involves “new phenomena:”

How, for example, does the First Amendment guarantee of “the freedom of speech” apply to new technologies that did not exist when the guarantee was created—to sound trucks, or to government-licensed over-the-air television? In such new fields the Court must follow the trajectory of the First Amendment, so to speak, to determine what it requires—and assuredly that enterprise is not entirely cut-and-dried by requires the exercise of judgment.<sup>150</sup>

He clarifies this trajectory idea later in his book,

I...believe that the Eighth Amendment is no mere “concrete and dated rule” but rather an abstract principle. If I did not hold this belief, I would not be able to apply the Eighth Amendment (as I assuredly do) to all sorts of tortures quite unknown at the time the Eighth Amendment was adopted.<sup>151</sup>

Judge Bork says,

[C]ourts must not hesitate to apply old values to new circumstances. A judge who refuses to deal with unforeseen threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair, and reasonable meaning, fails his judicial duty.<sup>152</sup>

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<sup>150</sup> Scalia, “Common-Law Courts in a Civil-Law System,” (1997)

<sup>151</sup> Ibid.

<sup>152</sup> Judge Robert H. Bork, “Speech at the University of San Diego Law School,” (1985), in *Originalism: A Quarter Century of Debate*, ed. Steven G. Calabresi (Washington, DC: Regnery Publishing, inc., 2007), 88.

Of course, he goes on to warn that “[i]n stating the value that is to be protected, the judge must not state it with so much generality that he transforms it.”<sup>153</sup>

He says the idea of applying old values to new circumstances is why “electronic media” is covered by the First Amendment, electronic surveillance is prohibited in certain cases by the Fourth Amendment’s protection from unreasonable searches and seizures, and even why the Commerce Clause is applied to state regulation of interstate trucking;<sup>154</sup> it is because the reference of the Constitution expands. Former Attorney General and originalist, Edwin Meese’s assessment was simple and to the point:

Where the language of the Constitution is specific, it must be obeyed. Where there is a demonstrable consensus among the Framers and ratifiers as to a principle stated or implied by the Constitution, it should be followed. Where there is ambiguity as to the precise meaning or reach of a constitutional provision, it should be interpreted and applied in a manner so as to at least not contradict the Constitution itself.<sup>155</sup>

This concept might open up the Constitution to imputing moral standards, but ultimately the idea is the inevitable consequence of a static document being applied to a society that incurs change independent of the government. While there is usually no single original consensus in a specific sense, it seems that moral inclinations can be minimized by at least understanding the original purpose at a broad level. This way the virtue of restraint can be realized through consistent application over time.

A document that is meant to remain applicable over a long period will necessarily have its reference broadened, and the Fourteenth Amendment is no different than the

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<sup>153</sup> Ibid.

<sup>154</sup> Ibid., 87.

<sup>155</sup> Edwin Meese, “Speech Before the D.C. Chapter of the Federalist Society Lawyers Division,” (1985), in *Originalism: A Quarter Century of Debate*, ed. Steven G. Calabresi (Washington, DC: Regnery Publishing, inc., 2007), 76.

First or Eighth Amendments. The reference of the “freedom of speech,” or “cruel and unusual punishment,” is extended to “new phenomena” such as radio, television, or “tortures quite unknown.” The reference of the Amendments are expanded because of new technological facts, and as Judge Bork’s point demonstrated, if there are similarly social facts that emerge as a result of gaining knowledge, there would be a change to the reference of the Fourteenth Amendment. As Professor Adele Mercier points out, “[s]ocial facts may have a different aetiology than natural and technological facts...but they are ontologically on par as facts.”<sup>156</sup>

If the courts were ever convinced that separate-but-equal actually resulted in equality, by 1954 it had become known as a matter-of-fact that it did not. Any “anticipation that it would...was simply a mistake about the facts.”<sup>157</sup> In the choice between adhering to the purpose of the amendment with the consideration of new facts or upholding a statute that would require disregarding new facts, Bork concludes that the court must choose the former. This explains why *Brown*, *Loving*, and *Reed* cannot be deemed judicial activism, but rather exactly in line with the purpose of the amendment. Similar to segregation, new social facts have emerged about interracial marriage, women and now sexual orientation.

Importantly there is a distinction to make between an object, and knowledge as it pertains to that object. Using Scalia’s trajectory metaphor, segregation is an institution with which the framers of the Fourteenth Amendment were familiar, but it was the knowledge that it did not produce equality that changed the institution as it related to the amendment. The trajectory of the amendment did not change, but the knowledge that

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<sup>156</sup> Adele Mercier, “Re: question from a student,” email message to professor, September 27, 2012.

<sup>157</sup> Ibid.

*separate but equal* did not produce equality moved segregation into the trajectory of the amendment. That is, the meaning of the amendment did not change, but its reference did. To elucidate the difference, Mercier gives an example, “If I live on an island where there are only maples and pines, and so I have only applied the word ‘tree’ to maples and pines, that nowise means that when I visit the mainland and bump into a beech, I cannot, or even ought not, call it a tree.”<sup>158</sup> The new knowledge expands the reference of the word “tree.”

The same can be said for the *Reed* decision, which in 1971 said women were constitutionally equal to men. Women – the object – were of course not new, but the knowledge that they were equally as capable as men was new information, assuming the honesty of the assessments contemporary men gave of women. Note that this says nothing about the open mindedness of people, as it could have certainly been figured out before 1971 that women were equal to men, but it was not until then that the Court recognized the fact.

In 1869 Mill criticized the argument that women were naturally inferior to men and should be dissuaded from participating in certain activities. He rightly argued that “...Until conditions of equality exist, no one can possibly assess the natural differences between women and men, distorted as they have been.”<sup>159</sup> In his view, such a confident declaration cannot be made without evidence. Mill made this point four years before the U.S. Supreme Court was writing, “...The natural and proper timidity and delicacy which

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<sup>158</sup> Adele Mercier, 2001, Affidavit to the Ontario Superior Court of Justice regarding Halpern et al. v. Canada, Kingston, ON: Queens University Philosophy Department and Linguistics Program.

<sup>159</sup> John Stuart Mill, *The Subjection of Women*, (London, UK: Longmans, Green, Reader, and Dyer, 1869), Project Gutenberg, October 2008.

belongs to the female sex evidently unfits it for many of the occupations of civil life,”<sup>160</sup> and forty-two years before it was argued that “Woman is woman. She can not unsex herself or change her sphere. Let her be content with her lot and perform those high duties intended for her by the Great Creator, and she will accomplish far more in governmental affairs than she can ever accomplish by mixing up in the dirty pool of politics.”<sup>161</sup>

Segregation did not produce equality, “though the ratifiers did not understand that.” Women are as capable as men, “though the ratifiers did not understand that.” Sexual orientation is an immutable characteristic and same-sex marriage will not harm society, “though the ratifiers did not understand that.” These are all social facts and as Mercier points out, “the facts were the facts regardless of what we believed them to be.”<sup>162</sup>

In the nineteenth century the facts about sexual orientation and same-sex marriage were wrong or non-existent. Arguing against the pillory in 1816, Michael Taylor noted that “no punishment, however severe, appeared to deter persons addicted to this atrocious offense.”<sup>163</sup> While “homosexual subcultures[] certainly existed, even thrived” in the mid to late nineteenth century, they “existed in isolation and near invisibility.” This did not

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<sup>160</sup> *Bradwell v. State of Illinois*, 83 U.S. 130 (1873).

<sup>161</sup> J.B. Sanford, “Reasons Why Senate Constitutional Amendment No. 8 Should Not be Adopted,” vol. 11 of *The California Outlook: A Progressive Weekly*, (September 16, 1911), [www.books.google.com](http://www.books.google.com). For a more thorough discussion on women and the Equal Protection Clause see Calabresi, “Originalism and Sex Discrimination,” (2011). (Calabresi demonstrates that women were given equal civil rights under the Fourteenth Amendment, and when the Nineteenth Amendment was adopted they were finally given equal political rights.)

<sup>162</sup> Mercier, “Re: question from a student,” (2012)

<sup>163</sup> Nicholas C. Edsall, *Toward Stonewall: Homosexuality and Society in the Modern Western World*, (Charlottesville and London: University of Virginia Press, 2003), 63.



change in the United States until the end of the nineteenth century,<sup>164</sup> but certainly not before the reconstruction amendments were adopted. Even as late as the 1890s educated contemporaries were unaware of the distinction between a sexual act and a sexual orientation. The trial of Oscar Wilde for “gross indecency” demonstrates this. The judge’s condemnation reverberates with this unawareness:

The crime of which you have been convicted is so bad that one has to put stern restraint upon one’s self to prevent one’s self from describing... the sentiments which must rise to the breast of every man of honor who has heard the details of these two terrible trials.... It is of no use for me to address you. People who can do these things must be dead to all sense of shame, and one cannot hope to produce any effect upon them. It is the worst case I have ever tried.... I shall, under the circumstances, be expected to pass the severest sentence that the law allows. In my judgment it is totally inadequate for such a case as this.<sup>165</sup>

That sexual orientation cannot only be different in different people, but that it is an immutable characteristic would have been a surprise to many. This fact though, has always been the case. Where it implicates the Constitution is where that fact is unearthed and sexual orientation becomes part of a descriptive trait of a person, the way hair color, race, or height are.

This leads to two points: (1) if same-sex marriage had been discussed during the debates over the Fourteenth Amendment, it would have been deemed negative and would not have been included under the Equal Protection Clause. However, just like segregation, the ascertainment of new knowledge changes constitutional implications. To ask what ratifiers of the Fourteenth Amendment would have thought about same-sex marriage and to do this by projecting backwards the sole idea of same-sex marriage without the accompanying facts that have been well established over the last half-century

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<sup>164</sup> Ibid., 69.

<sup>165</sup> Ibid., 110.

is specious reasoning. It would be similar to asking what the 39<sup>th</sup> Congress might have thought about internet legislation without assuming proper knowledge of a computer; assuming their position on a question without assuming knowledge of facts that define it produces a nonsensical and irrelevant result. And (2) same-sex marriage was *not* considered. Bearing in mind the utter lack of knowledge about sexual orientation, same-sex marriage would be more akin to a new phenomena for which the trajectory would have to be ascertained.

When the ratifiers of the Fourteenth Amendment pronounced that all persons would be treated equally under the law, they certainly did not conceive of every difference between individuals, nor could they have rationally been expected to do so. The argument that because sexual orientation was not considered during the debates over the Equal Protection Clause and therefore it has not been decided by the people that it should be protected, is incorrect. It *has* been decided. There are an infinite amount of personal qualities that can be said to have not gone through the minds of those ratifiers. All a person need do is ponder what the argument would be if it were over a trait considered benign, such as hair color.

In a hypothetical thought experiment, if red hair had been completely unknown to the ratifiers and one day in the twentieth century a red-haired child were born, would that child not deserve equal protection of the laws? The question is bizarre. Just because they did not consider a trait is not sufficient to remove it from equal protection. It seems the reason that sexual orientation is on the chopping block is three-fold: (1) sexual orientation implies behavior, (2) that behavior concerns sex, and (3) that sexual behavior was illegal at the time of ratification.

The fact that it implies behavior is moot, unless that behavior creates a rational basis for not applying the amendment. For example, psychosis may be immutable, but the behavior it implies provides a rational basis for proscribing action based on that characteristic. On the other hand if the thought experiment concerned obesity – certainly something that implies behavior (and usually has some aspect of choice) – it is doubtful that there would there be a weight limit for equal protection. Perhaps an even closer analogy would be something similar to ADHD. ADHD implies behavior and might be an immutable characteristic, which the ratifiers would not have considered but those with ADHD are not suddenly uncovered nor is their behavior – as long as there is no rational basis for its proscription. A person may argue that the difference is that the actions implicit with ADHD – perhaps talking quickly, or losing train of thought – were not illegal in 1868, whereas sodomy was. This ignores the implication of new knowledge, (and the effect of new knowledge on static provisions as demonstrated by the segregation example). When it became evident that sexual orientation is immutable and part of the person, the Supreme Court was forced to change its reading of the Equal Protection Clause. Whereas the sodomite was seen as *person + s*, where *s* is a crime like any other, the homosexual is seen as just *person*, and certainly *person* is what the Equal Protection Clause was meant to cover.

As familiarity with sexual orientation grew, states overturned their discriminatory legislation, which “brand[ed] all homosexuals as criminals”<sup>166</sup> and in those states that failed to do so, the Supreme Court appropriately stepped in and did its job of defending

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<sup>166</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003) (O’Conner, concurring).

the Constitution.<sup>167</sup> The Supreme Court has readily acknowledged this in the language of *Romer v. Evans* when Justice Kennedy wrote that the Equal Protection Clause is “a commitment to the law's neutrality where the rights of *persons* are at stake,”<sup>168</sup> and subsequently struck down a provision in Colorado’s state constitution because it violated the rights of persons with a non-heterosexual sexual orientation. In *Lawrence v. Texas* the wording similarly expresses this sentiment: “[t]hose harmed by this law are *people* who have a same-sex sexual orientation and thus are more likely to engage in behavior prohibited.”<sup>169</sup> The new knowledge added sexual orientation to the definition of person and changed the reference of the amendment in the same way new knowledge about segregation or new knowledge about technology expands the reference of those respective amendments. It was then affirmed in 2010, that the Supreme Court’s “decisions have declined to distinguish between status and conduct in [the context of sexual orientation.]”<sup>170</sup>

The unique fight that sexual orientation has had of whether it is immutable, it seems, is what opposition to gay rights turns on. Considering that orientation is an immutable trait inseparable from the person, whether it was known at the time or not, the gay population is necessarily covered by the Equal Protection Clause, and the case of same-sex marriage, then, does in fact at least raise a question that belongs in the Supreme

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<sup>167</sup> *Romer v. Evans*, 517 U.S. 620 (1996); see also *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>168</sup> *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>169</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>170</sup> *Christian Legal Society v. Martinez*, 561 U.S. \_\_\_\_ (2010), 23. (For reference the court cited “*Lawrence v. Texas*, 539 U. S. 558, 575 (2003) (“When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination.” (emphasis added)); *id.*, at 583 (O’Connor, J., concurring in judgment) (“While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class.”))

Court. In the Supreme Court the question will be in regards to whether same-sex and different-sex marriages are equivalent in the relevant areas as it pertains to the state. This will be answered in Chapter Six.

If state laws that implement segregation or prohibit same-sex marriage are discovered to violate equal protection the only way they would be able to surmount the Fourteenth Amendment would be to further amend the Constitution. After all, segregation, or the prohibition of same-sex marriage, were not what was debated, thoughtfully considered, and added as an amendment – equal protection was. In that vein President George W. Bush gave a speech in favor of a constitutional amendment saying that marriage would only be recognized between one man and one woman; this would in fact overcome the Equal Protection Clause. Opponents to same-sex marriage have the government at their disposal, but in the words of Justice Scalia, “rewrite the laws they cannot do.”<sup>171</sup>

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<sup>171</sup> Antonin Scalia, “God’s Justice and Ours,” *First Things*, (May 2002), <http://www.firstthings.com/article/2007/01/gods-justice-and-ours-32>.

## PART TWO

### CHAPTER FOUR

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#### Passions and Prejudice

*If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.*

- Oliver Wendell Holmes, Jr.  
1922<sup>172</sup>

*I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.*

- Oliver Wendell Holmes, Jr.  
1913<sup>173</sup>

Regardless of the interpretive method used, all theorists acknowledge that there must be some room for change in reference to accommodate new phenomena. The knowledge of sexual orientation and the concept of same-sex marriage are new in the U.S., and although new social facts are no different than technological facts, ontologically speaking, some will ignore the dictates that they have set for new phenomena and plainly argue that because homosexuality in some form was around, and because it was not considered during the debates over the Fourteenth Amendment that an expansion of the amendment cannot support sexual orientation.

When addressing how general a provision can be read, according to intent-Originalism, Judge Bork gives the following hypothetical:

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<sup>172</sup> *Jackman v. Rosenbaum Co.*, 260 U.S. 22 (1922).

<sup>173</sup> Oliver Wendell Holmes, *Speeches by Oliver Wendell Holmes*, (Clark, NJ: The Lawbook Exchange, 2006), 102.

Assume for the sake of the argument that a judge's study of the evidence shows that both black and general racial equality were clearly intended, but that equality on matters such as sexual orientation was not under discussion.

The [intent originalist] may conclude that he can enforce black and racial equality but that he had no guidance at all about any higher level of generality. He has, therefore, no warrant to displace a legislative choice that prohibits certain forms of sexual behavior.<sup>174</sup>

To be sure, the conception that the Fourteenth Amendment makes particular distinctions in its allotment for equal protection is a conception that Bork, Scalia, and others have propounded for decades. As this chapter discusses, it is incorrect. The ratifiers of the Fourteenth Amendment had the opportunity to make the amendment specific to race, but they struck it down for an amendment that would cover all persons. They didn't parse equal protection into categories, make a mistake, or carelessly leave it too broad. It is meant to assure that all laws apply to all persons equally.

Some will argue that the term *equality* is too vague to elicit anything concrete. While there are different conceptions and scopes of equality, that which is laid down in the Fourteenth Amendment has a specific meaning, and like all laws described with words, there are boundaries which do not require a treatise on the word to discern.

Kurt Vonnegut's opening to "Harrison Bergeron" begins,

The year was 2081, and everybody was finally equal. They weren't only equal before God and the law. They were equal every which way. Nobody was smarter than anybody else. Nobody was better looking than anybody else. Nobody was stronger or quicker than anybody else. All this equality was due to the 211th, 212th, and 213th Amendments to the Constitution, and to the unceasing vigilance of agents of the United States Handicapper General.<sup>175</sup>

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<sup>174</sup> Bork, "Speech at the University of San Diego Law School," (1985), 89.

<sup>175</sup> Kurt Vonnegut, Jr., "Harrison Bergeron," in *Welcome to the Monkey House*, (1950), 7. Robert Post references the same work, making a similar point about a California ordinance in his article "Prejudicial Appearances: The Logic of American Antidiscrimination Law," (2000), 4.

This, it should be obvious, is not the conception that the ratifiers had in mind. Some will throw their hands up as if to say the pursuit for equality is a fruitless one. Simply put, the equality provision in the Fourteenth Amendment is similar to that of Hayek's equality requirement in his conception of the rule of law: "equality prohibit[s] the enactment of laws that ma[ke] arbitrary distinctions among people."<sup>176</sup> Just like the First Amendment that guarantees freedom of speech – there are exceptions. In the case of the First Amendment it might be perjury laws, in the case of the Fourteenth Amendment it might be age restrictions on driving, or taxation laws. But these exceptions are not arbitrary and therefore do not confuse the word – it is not a nebulous concept; although some will become distracted with such semantic debates.<sup>177</sup>

The Equal Protection Clause was "in every draft of the Fourteenth Amendment."<sup>178</sup> It's construction was volatile to be sure, but it is clear that it was never meant to be restricted to race legislation alone. Judge Bork disagrees with this, and to find his evidence in history he quotes the infamous *Slaughter-House Cases*. In 1873 Justice Miller wrote,

We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of [the Equal Protection Clause.]<sup>179</sup>

Judge Bork concludes from this, that "[t]he fourteenth amendment ... had little reach beyond the protection of those who had been slaves.... In a word, the history of the

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<sup>176</sup> Brian Tamanaha, *On the Rule of Law: History, Politics, Theory*, (Cambridge: Cambridge University Press, 2004).

<sup>177</sup> Ibid.

<sup>178</sup> Irons, *The People's History of the Supreme Court*, (2000)

<sup>179</sup> Bork, *The Tempting of America*, (1990), 37. See also *Slaughter-House Cases*, 83 U.S. 36 (1873).



fourteenth amendment gave judges no guidance on any subject other than the protection of blacks. Beyond that the justices had nothing more to apply than their personal views.”<sup>180</sup>

Of course, as it has been established precedent is imperfect. Dealing with any of the reconstruction amendments takes special care, as there are multiple examples of legislatures and courts invoking their own moral ideas at the expense of the Constitution,<sup>181</sup> and few amendments have brought forth the infighting and misperception as the Fourteenth Amendment. Still, it is awkward that Bork would use a court opinion so reviled that “[v]irtually no serious modern scholar—left, right, and center—thinks that [the *Slaughter-House* interpretation] is a plausible reading of the Amendment.”<sup>182</sup>

First, it deserves mention that Bork is not being completely forthright with the quote he is using. It is accurate, and it was put forward in the *Slaughter-House* opinion, but in the following sentence the court says even though they do not think the Equal Protection Clause is relevant in this case, they feel that the question of whether it relates to persons other than blacks is not a matter that concerns them at the present moment and that until “some case of State oppression, by denial of equal justice. . . shall have claimed a decision at our hands” the court “may safely leave the matter alone.”<sup>183</sup> Several years

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<sup>180</sup> Ibid.

<sup>181</sup> See supra note 143.

<sup>182</sup> As quoted in *Mv. CHICAGO* 567 F. 3d 856. (“Today, many legal scholars dispute the correctness of the narrow *Slaughter-House* interpretation. See, e.g. , *Saenz v. Roe* , 526 U. S. 489 , n. 1, 527 (1999) ( Thomas , J., dissenting) (scholars of the Fourteenth Amendment agree “that the Clause does not mean what the Court said it meant in 1873”); Amar, *Substance and Method in the Year 2000*, 28 *Pepperdine L. Rev.* 601, 631, n. 178 (2001) (“Virtually no serious modern scholar—left, right, and center—thinks that this [interpretation] is a plausible reading of the Amendment”); Brief for Constitutional Law Professors as Amici Curiae 33 (claiming an “overwhelming consensus among leading constitutional scholars” that the opinion is “egregiously wrong”); C. Black, *A New Birth of Freedom* 74–75 (1997).”)

<sup>183</sup> *Slaughter-House Cases*, 83 U.S. 36 (1873).

later when the question was answered by the court the same justice Miller joined the majority opinions that affirmed the Equal Protection Clause applied to all persons.<sup>184</sup>

Second, the history of the Fourteenth Amendment does not support Bork's reading. While legislative history will allow a person to "pick their friends," there is no logical way a person familiar with the history of the Fourteenth Amendment can come to his conclusion. The first draft of the Fourteenth Amendment did limit the Equal Protection Clause to racial inequality; it was struck down. As passed, it was specifically designed to do two things: (1) "alter the relationship between the states and the federal government," and (2) guarantee that legislation be applied equally to all persons.<sup>185</sup> To be sure, there were those who spoke in favor of classes, who were against a broader application, and who only wanted it to apply to race; they were defeated.

In early April 1866, the first draft of the Fourteenth Amendment was submitted. It read:

Section 1. No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude.

Sec. 2. From and after the fourth day of July, in the year one thousand eight hundred and seventy-six, no discrimination shall be made by any state, nor by the United States, as to the enjoyment by classes of persons of the right of suffrage, because of race, color, or previous condition of servitude.

Sec. 3. Until the fourth day of July, one thousand eight hundred and seventy-six, no class of persons, as to the right of any of whom to suffrage discrimination shall be made by any state, because of race, color, or previous condition of servitude, shall be included in the basis of representation.<sup>186</sup>

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<sup>184</sup> See infra notes 191-192.

<sup>185</sup> Steven Calabresi, "Originalism and Sex Discrimination," *Texas Law Review* 90, No. 1 (2011): 31

<sup>186</sup> Ibid.

This version was rejected and by April 30, another version was submitted that dropped any allusion to race. The Amendment's broader text was explained by Senator Howard: it "disable[s] a State...from denying to [any person] the equal protection of the laws of the States. This abolishes all class legislation in the States and does away with *the injustice of subjecting one caste of persons to a code not applicable to another.*"<sup>187</sup>

Further, it was known that broad rights can be interpreted broadly by the courts. For that reason, it was stressed that the Amendment should be as specific as they believed necessary. From the minority report from the Joint Committee of the Indiana General Assembly:

We have seen so many instances of stretching the powers of government in the last few years, by resorting to new and startling constructions of what seemed to be plain provisions, plainly written, that we feel the time has come when proposed amendments should be freed from all ambiguity; and therefore we are unwilling to sanction any new proposal to confer power upon the Federal Government, by amending the Constitution, until we know its precise scope and meaning.<sup>188</sup>

The Equal Protection Clause is often mistaken as vague. It seems that in light of the country's age and experience with the Supreme Court they were well aware of how specific they were going to have to make the amendment, and they chose specifically to make it broad. That is, it isn't an inconclusive or unsettled statement of equality; it is a statement of equality settled on the notion that it is without exception.

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<sup>187</sup> Jacob Howard, "Speech introducing the Fourteenth Amendment," (May 23, 1866), in *Supplemental Materials for Brest, Levinson, Balkin, Amar, and Siegel, Processes of Constitutional Decisionmaking* (5<sup>th</sup> ed. 2006),

<http://www.yale.edu/lawweb/jbalkin/conlaw/senatorhowardspeechonthefourteenthamendment.pdf>

<sup>188</sup> H.R. JOURNAL, 45th Gen. Assemb., Reg. Sess. 104 (Ind. 1867), <http://books.google.com/ebooks>.

In June of 1866 the final text was formally presented to the states. The National Republican Party published an account of the 39<sup>th</sup> Congress, congratulating themselves for abolishing any sense of caste:

The Republicans in Congress sought by legislation and by constitutional amendment to *guarantee to every citizen of the republic the equality of civil rights before the law*. How much did the Democrats do toward that object?

The Republicans in Congress sought to break up the foundations of secession and rebellion by making citizenship national and not sectional. How much did the Democrats do toward that object? The Republicans in Congress tried to the extent of their powers to abolish throughout the bounds of the republic the evils of caste, as second only to those of slavery. How much did the Democrats do toward that object?<sup>189</sup>

As Calabresi notes, “the Framers of the Fourteenth Amendment gave state legislators ample notice that they understood the Amendment to prohibit caste or systems of special-interest and class-based lawmaking.”<sup>190</sup> The original intent was to use a universal quantifier in place of a particular quantifier.

Unfortunately, the nature of passions and prejudice lends itself to improper application of the Constitution. The manifestation of defiance in court cases is one of the reasons that while precedent is important, it is imperfect. In 1885, the same justice who wrote the *Slaughter-House* opinion was part of the majority in two cases, *Barbier v. Connolly*, and *Yick Wo v. Hopkins*, that stated the purpose of the Equal Protection Clause quite differently. In *Barbier v. Connolly* it was said that,

The Fourteenth Amendment... undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and ... that no impediment should be

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<sup>189</sup> Steven Calabresi, “Originalism and Sex Discrimination,” *Texas Law Review* 90, No. 1 (2011).

<sup>190</sup> *Ibid.*

interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and ...Class legislation, discriminating against some and favoring others, is prohibited...<sup>191</sup>

A year after *Barbier*, the Supreme Court said in *Yick Wo v. Hopkins*, that “just and equal laws” were necessary “so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth ‘may be a government of laws, and not of men.’” They went on to express their abhorrence of the idea that “one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life *at the mere will of another*.” This, they said, is “the essence of slavery itself.”<sup>192</sup>

The court continued to elucidate exactly what they believed the purpose of the Fourteenth Amendment was which included a prohibition even of laws which appeared *prima facie* equal, but whose effects in operation were decidedly unequal:

[T]he facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied...with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.<sup>193</sup>

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<sup>191</sup> *Barbier v. Connolly*, 113 U.S. 27 (1885)

<sup>192</sup> All quotes from *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (emphasis added.)

<sup>193</sup> *Ibid*. This quote goes on to say, (“[t]his principle of interpretation has been sanctioned by this court in *Henderson v. Mayor of New York*, 92 U. S. 259; *Chy Lung v. Freeman*, 92 U. S. 275; *Ex parte Virginia*, 100 U. S. 339; *Neal v. Delaware*, 103 U. S. 370, and *Soon Hing v. Crowley*, 113 U. S. 703”)

The implication of the Equal Protection Clause of the Fourteenth Amendment as adopted was simple. As stated by the justices in *Yick Wo*, it only required that laws be applied equally so that we may be a country of laws and not of men.

It should not go unnoticed that the decision in *Yick Wo* concerned Chinese immigrants, a minority with which the court had little familiarity. As such, it was likely able to remain more impartial than it did in *Plessy v. Ferguson*, which did not overturn *Yick Wo* so much as simply ignore it. Peter Irons suggests this is one reason *Yick Wo* fell to relative obscurity,

Unlike blacks, who numbered some five million at the time, fewer than 100,000 Chinese lived in the United States, the vast majority in California. The institution of slavery had provoked a bloody Civil War, while the Chinese...were ignored by most people outside the West Coast. And the Supreme Court disposed of the case without dissent...<sup>194</sup>

If there was ever an argument for the importance of a court being disinterested in its ruling, the difference between *Yick Wo* and *Plessy* demonstrate that need.

Despite losing the Civil War, or perhaps because of losing the Civil War, many Southerners made it clear that they “had no intention of treating the [black] freemen as political equals, or even as fellow humans.”<sup>195</sup> This became obvious with devices like the Black Codes which were an attempt to return blacks to a condition similar to that of slavery. Among other things, it restricted their movement, often forced them into labor contracts, and prevented them from owning firearms, suing, or testifying in court.<sup>196</sup> The will of a zealous majority is not quelled easily.

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<sup>194</sup> Irons, *A People's History of the Supreme Court*, chapter 17, iBook edition.

<sup>195</sup> *Ibid.*, chapter 16.

<sup>196</sup> NV Community College, “Mississippi Black Code,” <http://chnm.gmu.edu/courses/122/recon/code.html>.

Before the former Confederate states were readmitted to the Union, they were required to adopt new state constitutions and ratify the Fourteenth Amendment. As many would freely admit, there was little intention of following the Constitution. In 1873, *The Birmingham News* wrote, “The rights guaranteed by the State and Federal constitutions do not frighten us in the least. We do not expect to repeal any of the recent enactments. [The reconstruction amendments] may stand forever—but we intend...to make them dead-letters on the statute-book.”<sup>197</sup> Indeed, even after the amendments to the Constitution were added, a defiant south fought every expression of those amendments.

Through the end of the Nineteenth Century and beginning of the Twentieth Century, violence escalated towards blacks who challenged “the established usages, customs, and traditions” of white southerners. It was these traditions that would later be cited in *Plessy v. Ferguson* to uphold the unconstitutional Jim Crow laws.<sup>198</sup> By 1938 violence towards minorities both here and abroad had taken its toll on one justice who made the moral decision that he would take action; it was morals fighting morals. Justice Stone expressed his concerns in a letter to a New York Judge regarding the gruesome stories being reported of lynch mobs torturing and killing blacks in the south<sup>199</sup> and the abuse of the Jewish population in Austria at the hands of Nazis. Spurred by violence that “seem[ed] to bedevil the world”<sup>200</sup> he composed a footnote for a seemingly arbitrary case,

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<sup>197</sup> Committee on Privileges and Elections, *In the Senate of the United States*, 44<sup>th</sup> Congress., 2<sup>nd</sup> Sess., Report No. 704, at 675 (March 3, 1877), <http://books.google.com/ebooks>.

<sup>198</sup> Irons, *A Peoples History of the Supreme Court*, (2000).

<sup>199</sup> For a more in depth telling of the story of Footnote 4 see Irons, *The People’s History of the Supreme Court*, (2000) and specifically the multiple Duck Hill lynchings: “Roosevelt Townes, accused of murder in Duck Hill Mississippi, was tied to a tree, his ‘eyes were gouged out with an ice pick,’ and he was ‘tortured slowly to death with flames from a blow torch.’”

<sup>200</sup> Irons, *A Peoples History of the Supreme Court*, (2000).

his *Carolene Products* opinion,<sup>201</sup> that would go on to establish a tiered judicial review system.

The footnote was important for the distinction it made between economic legislation and civil rights legislation. The case was concerned with the Filled Milk Act of 1923, and the court held that they would “presume the constitutionality of regulatory laws ‘affecting ordinary commercial transactions’,” but if legislation reflects “prejudice against discrete and insular minorities” it might be necessary to use a “more searching judicial inquiry,”<sup>202</sup> which came to be known as Strict Scrutiny.

Footnote 4 and Strict Scrutiny became powerful weapons for minorities. Between 1938 and 1955, the NAACP took thirty-two cases to court and won twenty-nine of them.<sup>203</sup> But as powerful as they became, they never should have been needed. If it had not been for vehement prejudice engulfing and crippling reason that was leading to such violence, the Fourteenth Amendment, as it was originally adopted and even applied in *Barbier v. Connolly* and *Yick Wo v. Hopkins*, would have covered the same cases.

It was later clarified that because laws by their nature do often classify individuals, “[t]he mere fact of classification will not void legislation.”<sup>204</sup> To reconcile this practical reality with the Equal Protection Clause it was clarified that it is only ‘invidious discrimination’ which offends the Constitution.”<sup>205</sup>

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<sup>201</sup> Ibid.

<sup>202</sup> *United States v. Carolene Products Company*, 304 U.S. 144 (1938)

<sup>203</sup> Irons, *A Peoples History of the Supreme Court*, (2000).

<sup>204</sup> Congressional Research Service, *The Constitution of the United States of America: Analysis and Interpretation*, ed. Johnny H. Killian, George A. Costello, and Kenneth R. Thomas, (Washington D.C.: U.S. Government Printing Office, 2004), 1906.

<sup>205</sup> *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963). See also *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955)



It is true that legislatures are charged with the arduous task of fitting imperfect legislation onto a diverse polity for the sake of social order. The important point is that these laws cannot violate the Constitution. In 1917, before Footnote 4 had been created, it was said that

It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.<sup>206</sup>

More recently the dissenting opinion in *Plessy* was quoted in the gay-rights case *Romer v. Evans*, suggesting that the law may not create “classes”:

One century ago, the first Justice Harlan admonished this Court that the Constitution "neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U. S. 537, 559 (1896) (dissenting opinion). Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake.<sup>207</sup>

This ruling is not only directly in line with the Fourteenth Amendment’s actual precedent, it corresponds with Calabresi’s point: the grounds to prohibit discrimination are more easily answered when Section One of the Fourteenth Amendment is “understood in the way that it was understood originally: as enacting a rule against class legislation and systems of caste.” This was further clarified in 1869 by Senator Charles Sumner in his lecture *The Question of Caste*.<sup>208</sup>

Judge Bork has given very reasonable standards to adhere to intent-Originalism in the face of unforeseen circumstances:

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<sup>206</sup> *Buchanan v. Warley*, 245 U.S. 60 (1917).

<sup>207</sup> *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>208</sup> Calabresi, “Originalism and Sex Discrimination,” (2011).

[A]ll an intentionalist requires is that the text, structure, and history of the Constitution provide him not with a conclusion but with a premise. That premise states a core value that the framers intended to protect. The intentionalist judge must then supply the minor premise in order to protect the constitutional freedom in circumstances the Framers could not foresee.<sup>209</sup>

If Originalism allows for the references of provisions to expand in the face of unforeseen circumstances, and if equal protection encompasses all people, it is unlikely that Bork or Scalia would like what history would produce. When Judge Bork gives his reasoning for how broadly an amendment can be read, he is not just saying that they must be read in the sense of exactly what was discussed. He makes this clear, as does Scalia, by offering a trajectory for new phenomena. The level of generality Bork believes is in the Equal Protection Clause is race. It is with this reading he is able to explain that as new social facts emerged, they affected the constitutionality of segregation. As the case is that the Equal Protection Clause encompasses all persons, the only implicit exceptions are those for which there is a rational basis. As discussed in the following two chapters there is no such basis.

It should be noted that Judge Bork has not been discreet about his feelings towards the gay community. In *Slouching Towards Gomorrah*, he warns of the “homosexual movement,” and how this threat of modern liberalism is “assault[ing]” “American’s culture... from within.”<sup>210</sup> It seems for all the merits that Originalism – at least at a broad level – might have, those who invoke it the most fervently often use it as a guise to promote their own partisan ideals. It also shows the problem of any interpretive method. If used impartially and consistently it might have restraint, but in the wrong

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<sup>209</sup> Bork, “Speech at the University of San Diego Law School,” (1985)

<sup>210</sup> Robert H. Bork, *Slouching Towards Gomorrah: Modern Liberalism and American Decline*, (New York: HarperCollins e-books, 2010).

hands, any method can become a warped husk of its former self. After all, even the infamous *Dred Scott* decision started out with an appeal to Originalism.<sup>211</sup>

It seems that the inclusion of all persons under the Equal Protection Clause, and whether by trajectory, or the change that social facts have on old provisions, sexual orientation can be securely placed under the Equal Protection Clause.

In the Supreme Court, the question becomes how do we determine where the line should be drawn between acceptable classification and “invidious discrimination?” The Supreme Court has noted that “[c]lassifications which are purposefully discriminatory fall before the Equal Protection Clause,”<sup>212</sup> and that the key requirement “[e]xplicit in all the formulations is that a legislature must have had a permissible purpose.”<sup>213</sup> This requirement is a small enough hurdle that state legislation almost always passes it: “[s]o deferential is the classification that it denies the challenging party any right to offer evidence to seek to prove that the legislature is wrong in its conclusion that its classification will serve the purpose it has in mind, so long as the question is at least debatable and the legislature ‘*could rationally have decided*’ that its classification would

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<sup>211</sup> *Dred Scott v. Sandford*, 60 U.S. 393 (1857). (“No one, we presume, supposes that any change in public opinion or feeling ... should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning ... and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers and was voted on and adopted by the people of the United States.”)

<sup>212</sup> Congressional Research Service, *The Constitution of the United States of America: Analysis and Interpretation*, (2004).

<sup>213</sup> *Ibid.*

foster its goal.”<sup>214</sup> The next chapter will examine how to determine if there is a rational basis.

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<sup>214</sup> *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (emphasis by court).

## CHAPTER FIVE

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### The Geometry of Law

*As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves.*

- James Madison  
1787<sup>215</sup>

*Certitude is not the test of certainty. We have been cocksure of many things that were not so.*

- Justice Oliver Wendell Holmes Jr.  
1918<sup>216</sup>

It was said in Chapter Four that the term *equal*, as it is used here, means that state laws cannot make arbitrary distinctions among people. This, it seems, is the basic idea of the rational-basis test. Determining what qualifies as arbitrary will be done here in two ways: (1) reason and (2) precedent. Because this chapter sets the filters through which the arguments in Chapter Six will be sifted, it is important to establish that because precedent is imperfect, the emphasis placed on reason and empiricism imbedded in the Constitution can act as a secondary filter and yield similar answers as current precedent.

Without an appreciation for the emphasis that was put on reason, some are led to believe that modern society warrants a Burkian view, suggesting that the prejudices of

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<sup>215</sup> James Madison, "Federalist Papers: No. 10," The Avalon Project: Documents in Law, History, and Diplomacy, last modified 2008, [http://avalon.law.yale.edu/18th\\_century/fed10.asp](http://avalon.law.yale.edu/18th_century/fed10.asp)

<sup>216</sup> Oliver Wendell Holmes, "Natural Law," 32 *Harvard Law Review* (1918), 41.

tradition are necessary for social order.<sup>217</sup> Amy Wax is critical of what she deems “rationalists,” who “are skeptical of the notion, associated with conservative thinkers like Hayek<sup>218</sup> and Burke, that customary norms that emerge organically over time are likely to be more beneficial than arrangements that are individually or bureaucratically devised through a process of reason.”<sup>219</sup> This point may have some cogence in regards to areas outside of unalterable traits, but it misses the idea that same-sex relationships are not arrived at via reason. With the exception of arranged relationships they are developed no differently than different-sex relationships.

In another paper regarding same-sex marriage, she eschews the use of reason for tradition and quotes Michael Oakeshott: “the rationalist project founders on the fundamentally fallacious assumption that ‘what is made is better than what merely grows.’”<sup>220</sup> Oakeshott, she says,

...opposes the modernist tendency to bring ‘the political, legal, and institutional inheritance’ before ‘the tribunal of intellect,’ and to make reason the ultimate arbiter of policy and practice. Relying too much on reason does violence to the nature of customary practice, which resists the demands of perfect coherence.<sup>221</sup>

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<sup>217</sup> See generally Wax, “Traditionalism, Pluralism, and Same-Sex Marriage,” (2007). See also Wax, “The Conservative’s Dilemma,” (2005).

<sup>218</sup> Although Hayek was fearful of too much emphasis being put on what he called “scientism,” and even abrupt change, it is odd that Wax includes Hayek in this train of thought. She seemingly did not read either the postscript or the notes in Hayek’s *The Constitution of Liberty* (1960). In the postscript he includes an essay entitled, “Why I am Not a Conservative,” where he clarifies his passion for liberty as what drives him and while he has a love of “grown institutions,” he criticizes conservatives because “the admiration of the conservatives for free growth generally applies only to the past. They typically lack the courage to welcome...undesigned change from which new tools of human endeavors will emerge.” Further, in note #19 he condemns the unequal treatment of homosexuals. Still further his understanding of an equality requirement in regards to the rule of law demands that all (including homosexuals) be treated equally under the law: “that the argument for liberty demands that government treat [people] equally.” Also see Tamanaha, *On the Rule of Law* (2004) “Hayek held that equality prohibited the enactment of laws that made arbitrary distinctions among people.”

<sup>219</sup> Amy Wax, “Traditionalism, Pluralism, and Same-Sex Marriage,” *Rutgers Law Review* 59, (Winter 2007): 377.

<sup>220</sup> Ibid.

<sup>221</sup> Ibid.

This assessment mischaracterizes the same-sex marriage debate. First, Oakeshott makes the same mistake as Wax in terms of “what grows.” Same-sex relationships grow where there are no prejudiced majorities to persecute them. Marriage has not always and everywhere been exclusively heteronormative. More importantly, same-sex couples who wish to wed are often in favor of tradition, *which is why they want to get married*.

There are only two things that require the use of reason in this debate: (1) to determine if there are *relevant* differences in marriage as it relates to the state, and (2) to determine if those differences will bring harm. If there are empirical answers, then reason will extract them, and moreover, to not use reason is to go against the spirit of the Constitution. According to Madison, innovation by reason for the benefit of personal rights in the face of tradition is characteristically part of the American experiment:

But why is the experiment of an extended republic to be rejected, merely because it may comprise what is new? Is it not the glory of the people of America, that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience? To this manly spirit, posterity will be indebted for the possession, and the world for the example, of the numerous innovations displayed on the American theatre, in favor of private rights and public happiness.<sup>222</sup>

The United States was borne out of the Enlightenment, and it is well known that reason was held in high esteem while passions and prejudice were considered quintessentially antithetical to the American experiment. The founding fathers referenced social contract theorists such as Thomas Hobbes and John Locke in their writings. Hobbes’s emphasis on science and reason in the area of morals pervades *The Federalist*

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<sup>222</sup> James Madison, “Federalist Papers: No. 14,” The Avalon Project: Documents in Law, History, and Diplomacy, last modified 2008, [http://avalon.law.yale.edu/18th\\_century/fed14.asp](http://avalon.law.yale.edu/18th_century/fed14.asp).

*Papers*. He believed moral philosophers could deduce empirical conclusions about “the nature of human actions,” the same way geometricians had revealed the distinct “nature of Quantity in Geometricall figures.” The tragedy, he said, was that they hadn’t.<sup>223</sup>

Hobbes used the reference to geometry in multiple writings, and it is no doubt what influenced Hamilton to employ the same analogy. They both believed that where reason failed, emotive impulses may lead to irrational majorities. “[T]he strength of avarice and ambition,” Hobbes said, led to “the vulgar” believing that their opinions are related to what is morally right or morally wrong.<sup>224</sup>

Hamilton similarly wrote that in a dispute one can never be sure if one side is working on “purer principles than their antagonists.” It must be assumed that “ambition, avarice, personal animosity, party opposition...are apt to operate” on both sides.<sup>225</sup>

Because of this, reason must remain paramount. When Hamilton wrote *Federalist Paper*, No. 31, he discussed the importance of reason being paramount to passions, or prejudice:

IN DISQUISITIONS of every kind, there are certain primary truths, or first principles, upon which all subsequent reasonings must depend. These contain an internal evidence which, antecedent to all reflection or combination, commands the assent of the mind. Where it produces not this effect, it must proceed either from some defect or disorder in the organs of perception, or from the influence of some strong interest, or passion, or prejudice. Of this nature are the maxims in geometry, that "the whole is greater than its part; things equal to the same are equal to one another; two straight lines cannot enclose a space; and all right angles are equal to each other." Of the same nature are these other maxims in ethics and politics, that there cannot be an effect without a cause; that the means ought to be proportioned to the end; that every power ought to be commensurate with its object...<sup>226</sup>

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<sup>223</sup> Thomas Hobbes, *De Cive: Containing the Elements of Civill...Subjection*, (1647; London: R. Royston, 1651), University of Oxford Text Archive, iBook edition.

<sup>224</sup> Ibid.

<sup>225</sup> Alexander Hamilton, “Federalist Papers: No. 1,” The Avalon Project: Documents in Law, History, and Diplomacy, last modified 2008, [http://avalon.law.yale.edu/18th\\_century/fed01.asp](http://avalon.law.yale.edu/18th_century/fed01.asp).

<sup>226</sup> Alexander Hamilton, “Federalist Papers: No. 31,” The Avalon Project: Documents in Law, History, and Diplomacy, last modified 2008, [http://avalon.law.yale.edu/18th\\_century/fed31.asp](http://avalon.law.yale.edu/18th_century/fed31.asp).



While human action has yet to be reduced to quantifiable bits, the emphasis on reason and using tools of inquiry as opposed to other systems that beget knowledge, such as divine revelation, was a central tenet in the construction of the United States. There are legal scholars in the new natural law<sup>227</sup> field who clamorously argue that any homosexual conduct should be illegal because it contradicts natural human goods.<sup>228</sup> Generally informed by Thomas Aquinas, they make egregious errors in their reasoning, such as conflating nature and nurture.<sup>229</sup> Bertrand Russell summed up the problem with Aquinas relative to those who use tools of inquiry:

[Aquinas] does not, like the Platonic Socrates, set out to follow wherever the argument may lead. He is not engaged in an inquiry, the result of which it is impossible to know in advance. Before he begins to philosophize, he already knows the truth; it is declared in the Catholic faith. If he can find apparently rational arguments for some parts of the faith, so much the better; if he cannot, he need only fall back on revelation. The finding of arguments for a conclusion given in advance is not philosophy, but special pleading. I cannot, therefore, feel that he deserves to be put on a level with the best philosophers either of Greece or of modern times.<sup>230</sup>

Because precedent can quickly be dismissed as judicial activism, it deserves mention that the conditions required for justification of differential treatment outside of precedent, if derived by reason, might yield something in the spirit of John Stuart Mill's

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<sup>227</sup> New natural law is a sect of natural law theorists. To be sure, the founding fathers subscribed to a natural law, but it was not of this conception.

<sup>228</sup> See generally John Finnis or Germain Grisez.

<sup>229</sup> For an in-depth discussion see Pope, *Evolution and Christian Ethics*, (2007). ("A critical weakness of the position is its attempt to interpret natural law without giving any account of human nature itself.... This theory reasons *a priori* from principles to what must in fact be the empirical case, but not in the reverse direction. It presents moral law but no account of nature.... The 'new natural-law theory' attends to a certain kind of human experience – an experiential grasp of 'self-evident' basic goods – but isolates itself from the data and insights about human goods coming from knowledge of human evolution. It avoids committing the 'naturalistic fallacy,' but does so in such a way that nothing of normative significance can be learned about human behavior from science. It is thus an abstract theory imposed on human nature rather than an account of the human good informed by current scientific knowledge of human behavior.")

<sup>230</sup> Bertrand Russell, *The History of Western Philosophy*, (New York, NY: Simon & Schuster, Inc., 1945), 463.

*harm principle*. In legal philosophy this seems to be the starting point for most western liberal democratic theorists.<sup>231</sup> Without an empirical claim the legislation is based on the circular argument that homosexuality is immoral because homosexuality is immoral. In a democracy concerned with the counter-majoritarian difficulty, this is problematic. A majority could claim any trait or idea to be immoral or offensive, and ultimately castrate the Fourteenth Amendment. In *On Liberty*, John Stuart Mill writes,

[T]he sole end for which mankind is warranted, individually or collectively in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.<sup>232</sup>

He then extended this same point to offense.

There are many who consider as an injury to themselves any conduct which they have a distaste for, and resent it as an outrage to their feelings; as a religious bigot, when charged with disregarding the religious feelings of others, has been known to retort that they disregard his feelings, by persisting in their abominable worship or creed. But there is no parity between the feeling of a person for his own opinion, and the feeling of another who is offended at his holding it; no more than between the desire of a thief to take a purse, and the desire of the right owner to keep it. And a person's taste is as much his own peculiar concern as his opinion or his purse.<sup>233</sup>

Indeed, considering the subjective values of liberty and equality before the law that have been imbued into the Constitution, the moral whims of a majority do not create

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<sup>231</sup> See Mill, *On Liberty* (1859); Raz, *The Authority of Law* (2009); Feinberg, *The Moral Limits of the Criminal Law* (1985) (specifically volume II: *Offense to Others*); Hart, *Social Solidarity and the Enforcement of Morality* (1967).

<sup>232</sup> John Stuart Mill, *On Liberty and Other Essays*, (1859; Digireads.com, 2011), chapter 1, para. 6, iBook edition.

<sup>233</sup> *Ibid.*, chapter 4, para. 12.

a logical justification, i.e. a rational basis, for the differential treatment of a minority.<sup>234</sup>

While this is important to keep in mind, lest a court ruling be deemed judicial activism, the rational-basis test is a product of the court and the reality is that “[t]he life of the law has not been logic; it has been experience.”<sup>235</sup> Consequently, how the rational-basis test has been used historically will now be explored.

The root of rational basis review was a simple means-ends test. Only a few years after establishing judicial review in *Marbury v. Madison*, Chief Justice John Marshall elucidated the standard for overturning state legislation in *McCulloch v. Maryland*:

If the end be legitimate, and within the scope of the Constitution, all the means which are appropriate, which are plainly adapted to that end, and which are not prohibited, may constitutionally be employed to carry it into effect.<sup>236</sup>

This standard might have lasted had vicious majorities indifferent to reason not obliged the court to establish a level of review that was more challenging for state legislation to pass. After Footnote 4 was added and a tiered system of judicial review was established, the rational-basis test took the place of the means-ends test.

Unfortunately in modern cases there is a discrepancy in the way that courts have determined whether a rational basis exists. Currently there are two methods which can be used to determine whether something passes the rational-basis test. One, which was established in *Lindsley v. Natural Carbonic Gas Co.* in 1911 says,

1. The Equal Protection Clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done

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<sup>234</sup> For a more in depth discussion see Hart, *Social Solidarity and the Enforcement of Morality* (1967); also see, Williams, Bernard, *Morality: An Introduction to Ethics* (1993).

<sup>235</sup> Oliver Wendell Holmes, Jr., *The Common Law*, (Boston: Little, Brown & Co., 1881), Kindle edition.

<sup>236</sup> *McCulloch v. Maryland*, 17 U.S. 316 (1819).

only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.<sup>237</sup>

Around the same time that the *Lindsley* standard was adopted, there was an adoption of a slightly more lenient standard that allowed justices more room for judgment, but still under the title of Rational Basis. In *Royster Guano v. Virginia* it was held that,

[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.<sup>238</sup>

The *Lindsley* standard has a greater emphasis on “complete arbitrariness” and “irrationality” that makes it harder to fail,<sup>239</sup> that is, there is a greater chance that state legislation will not be overturned. The *Royster* standard allows the court more room to consider the goal and how “fair and substantial” the purported legislation is at achieving the goal it has set out to accomplish. Regardless of certain standards, “. . . In recent years, the Court has been remarkably inconsistent in setting forth the standard which it is using, and the results have reflected this. . . [and] [a]ttempts to develop a consistent principle have so far been unsuccessful.”<sup>240</sup> The Supreme Court has conceded that even “the most arrogant legal scholar would not claim that all of these cases cited applied a uniform or

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<sup>237</sup> *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911).

<sup>238</sup> *F. S. Royster Guano v. Virginia*, 253 U.S. 412 (1920).

<sup>239</sup> Congressional Research Service, *The Constitution of the United States of America: Analysis and Interpretation*, (2004).

<sup>240</sup> *Ibid.*

consistent test under equal protection principles,”<sup>241</sup> and has yet to identify a single, practicable method that would provide consistency. In a two year period the court used the *Lindsley* method, the *Royster* method, and in between those cases it used an amalgamation of the two methods. “In short, it is uncertain which formulation of the rational basis standard the Court will adhere to [in any given case].”<sup>242</sup>

Whether the original means-ends test is applied, or a newer conception of the rational-basis test, it is obvious that the standard at its most restrained will only uphold legislation that a state legislature could have reasonably believed would be the means to a legitimate end. The rational-basis test in modern adjudication seems to have given more deference to the state legislatures than the original means-ends test, but it has also become more protective of liberty and equal protection.

In 1996 “a jury in rural Wisconsin concluded that school officials violated the constitutional rights of a gay teenager”<sup>243</sup> by denying him equal protection when they permitted other students to bully him in ways that were explicitly stopped for other students.<sup>244</sup> Also in 1996, *Romer v. Evans*, was decided. The court wrote that “so long as the legislative classification bears a rational relation to some independent and legitimate legislative end” the court will uphold a state law, however the Colorado statute “indeed defies, even this conventional inquiry.”<sup>245</sup> They continued,

[T]he amendment raises the inevitable inference that it is born of animosity toward the class that it affects... It is a status-based classification of persons

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<sup>241</sup> Ibid.

<sup>242</sup> Ibid.

<sup>243</sup> Ibid.

<sup>244</sup> See Ball, *From the Closet to the Courtroom*, (2010). (“[The bullies] urinated on him, pretended to rape him during class and when they found him alone kicked him so many times in the stomach that he required surgery.”)

<sup>245</sup> *Romer v. Evans*, 517 U.S. 620 (1996).

undertaken for its own sake, something the Equal Protection Clause does not permit.<sup>246</sup>

In *Lawrence v. Texas* (2003) the Supreme Court found that an anti-sodomy law in Texas “furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.” It was held that “the provision was ‘born of animosity toward the class of persons affected’ and further that it had no rational relation to a legitimate governmental purpose.”<sup>247</sup> Interestingly, *Lawrence* acknowledges the differences in simple rational basis review and forgoes strict scrutiny:

Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster, since “the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.” We have consistently held, however, that some objectives, such as “a bare ... desire to harm a politically unpopular group,” are not legitimate state interests. When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause. We have been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships.<sup>248</sup>

Because rational basis review is the most lenient standard of review, the burden “is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.”<sup>249</sup> In *Heller v. Doe* Justice Kennedy articulated the interplay of the court’s deference to state legislation and reality:

A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. “[A] legislative choice is not subject to courtroom fact-finding and may be based on *rational* speculation unsupported by evidence or empirical data.” [...] [The] courts are compelled under rational basis

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<sup>246</sup> Ibid.

<sup>247</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>248</sup> Ibid.

<sup>249</sup> *Heller v. Doe*, 509 U.S. 312 (1993).

review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational basis review because it “is not made with mathematical nicety or because in practice it results in some inequality.”<sup>250</sup>

Significantly he qualifies this statement by setting a boundary:

True, even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation.<sup>251</sup>

Given the minimal requirements for a rational basis, we can assess the main arguments against same-sex marriage and determine whether there is even a hypothetical government interest that could be “reasonably conceived” and is more than a “bare desire to harm” a minority group, and at least “find[s] some footing in the realities of the subject addressed by the legislation.” The following chapter will distill arguments against same-sex marriage to establish whether they provide a rational basis for proscription.

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<sup>250</sup> Ibid.

<sup>251</sup> Ibid.

## CHAPTER SIX

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### Arguments

*I believe that marriage is between a man and woman. It has been for all of recorded history and I think this is a temporary aberration that will dissipate. I think that it is just fundamentally goes against everything we know.*

- Newt Gingrich  
2011<sup>252</sup>

*[M]arriage has always been considered as the union of a man and a woman and we have been presented with no authority to the contrary... It appears to us that appellants are prevented from marrying, not by the statutes of Kentucky ... but rather by their own incapability of entering into a marriage as that term is defined.*

- Court of Appeals of Kentucky  
1973<sup>253</sup>

*Marriage is ingrained on the human conscience as existing solely between a man and a woman. That is why this is the only commonly accepted arrangement found across all spectrums of religion, race, and culture.*

- Ron Crews: President, Massachusetts Family Institute  
2003<sup>254</sup>

If same-sex marriage can appropriately be decided in the Supreme Court, and if the Equal Protection Clause can appropriately be applied, then the question concomitant with the Equal Protection Clause is whether a rational basis for its prohibition can at least be thought of as having footing grounded in reality. The purpose of this section is to show that the arguments leveled against same-sex marriage do not have such footing.

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<sup>252</sup> Arlette Saenz, "Gingrich Calls Same-Sex Marriage a 'Temporary Aberration'," September 30, 2011, interview, <http://abcnews.go.com/blogs/politics/2011/09/gingrich-calls-same-sex-marriage-a-temporary-aberration/>

<sup>253</sup> *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973).

<sup>254</sup> Ron Crews, "No Court Ruling can Change the Fact that Marriage is About One Man and One Woman," (2003), in *Same-Sex Marriage: The Moral and Legal Debate*, 2<sup>nd</sup> ed., ed. Robert M. Baird and Stuart E. Rosenbaum (Amherst: Prometheus Books, 2004), 99-100.



At the rational basis level of review, the onus is on those who challenge a statute to explain why there is no rational basis – even in theory – for its existence. To determine whether there is a rational basis for denying equal protection of the laws, we are tasked with examining those theoretical arguments to see if “any state of facts reasonably” could have been “conceived that would [have] sustain[ed]”<sup>255</sup> them.

The arguments against same-sex marriage seem to revolve around a few central points. This section will distill and consolidate those points. They will be framed in terms of the arguments from the California Proposition 8 case and those from Professor Amy Wax.

**I. Prohibition of same-sex marriage advances the vital state interest in proceeding with caution when considering fundamental changes to a vitally important social institution.**

One point that gets some traction is that same-sex marriage might have a negative effect on different-sex marriage, and because marriage is a “vitally important social institution,” that negative effect might implicate the rest of society. Wax acknowledges that same-sex marriage could very well help the institution as a whole, but, “[t]he alternative is that marriage (and, by extension, society) will suffer if gays are permitted to enter into the state of matrimony.”<sup>256</sup>

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<sup>255</sup> *Heller v. Doe*, 509 U.S. 312 (1993).

<sup>256</sup> Amy Wax, “Traditionalism, Pluralism, and Same-Sex Marriage,” *Rutgers Law Review* 59, (Winter 2007): 377.

She asserts a kind of broken windows thesis<sup>257</sup> in regards to sexual “devian[ce],”<sup>258</sup> noting that same-sex marriage could threaten different-sex marriage because “conduct is mediated by social meanings and understandings.”<sup>259</sup> In her view,

[C]onservatives are attuned to the crucial role of conventions—including the customary forms surrounding established institutions—in promoting moral conduct and maintaining the proper functioning of social life.... That social norms often serve to restrain self-regarding, irresponsible behavior renders them fragile and vulnerable even to remote or obscure effects. Because cultural practices are maintained through group consent, conformity is crucial to their vitality, and deviant conduct poses a potential threat to their very integrity.<sup>260</sup>

This reasoning rests on a circular assumption and it ignores a very crucial point. If the fear is that “deviant conduct” might lead to more “deviant conduct,” or to a breakdown of marriage, there is a built-in assumption that homosexuality or same-sex marriage is deviant. If homosexuality or same-sex marriage were not considered deviant, then per her theory, they would not beget forms of sexual deviance, and subsequently would not weaken the institution of different-sex marriage. It is *precisely* the suggestion that either are deviant that would allow any person to believe they live in a society that condones sexual deviance if same-sex marriage were legal. This argument is predicated on the assumption that same-sex marriage is deviant because same-sex marriage is deviant. Further, the idea *if society consents to X then X is maintained*, does not imply *if*

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<sup>257</sup> See Wilson and Kelling, “Broken Windows: The police and neighborhood safety,” (1982). (“At the community level, disorder and crime are usually inextricably linked, in a kind of developmental sequence. Social psychologists and police officers tend to agree that if a window in a building is broken and is left unrepaired, all the rest of the windows will soon be broken. This is as true in nice neighborhoods as in run-down ones.”) That is, it suggests that because of established norms and signaling, if some disorder (or deviant behavior) is allowed to persist, it will signal others to engage in similar behavior. By limiting such disorder, a society can limit the amount of subsequent deviant behavior.

<sup>258</sup> Wax, “Traditionalism, Pluralism, and Same-Sex Marriage,” (2007).

<sup>259</sup> Ibid.

<sup>260</sup> Amy Wax, “The Conservative’s Dilemma: Traditional Institutions, Social Change, and Same-Sex Marriage,” *San Diego Law Review* 42, (Summer 2005): 1059.

*society consents to X and Y then X will not be maintained.* Y would have to have some negative effect on X, and her point is that deviant behavior has that effect, but as we have established it is the assumption of deviance and that assumption's manifestation, such as in laws that prohibit same-sex marriage, which stigmatize same-sex marriage and give it the label, deviant.

Of course, if it is only the idea of non-conformance that defines deviance then two separate points should be made: (1) no two marriages are alike, so why stop at sex? In 1967 it was argued before the Supreme Court that interracial marriage does not conform to normative expectations and is therefore deviant.<sup>261</sup> When Wax is concerned that if “conventions” and “customary forms” are not held up that this will lead to the demise of marriage, she is omitting all of the relevant aspects of marriage that do perpetuate its existence outside of genitalia alone. There are many different-sex couples that cannot conceive, so the only consistent difference between same-sex relationships and different-sex relationships is the genitalia. The history of marriage shows that relationships have been based on everything from property,<sup>262</sup> to punishment,<sup>263</sup> to love, to companionship, to attraction and so on. Whatever the basis was, and whatever perpetuated its existence in society, it has at least been more than the simple matter of genitalia.

And (2) it should not be forgotten that sexual orientation is an unalterable trait. Whatever the person's orientation, it does not help the institution of straight-marriage to

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<sup>261</sup> “LOVING v. VIRGINIA,” The Oyez Project at IIT Chicago-Kent College of Law, accessed October 5, 2012, [http://www.oyez.org/cases/1960-1969/1966/1966\\_395](http://www.oyez.org/cases/1960-1969/1966/1966_395).

<sup>262</sup> Elizabeth Brake, *Minimizing Marriage: Marriage, Morality, and the Law*, (New York: Oxford University Press, 2012).

<sup>263</sup> Deut. 22:28-29 (New International Version). “<sup>28</sup> If a man happens to meet a virgin who is not pledged to be married and rapes her and they are discovered, <sup>29</sup> he shall pay her father fifty shekels of silver. He must marry the young woman, for he has violated her. He can never divorce her as long as he lives.”

prevent gay-marriage. It only means that there are less happily (and to be fair, unhappily) married couples.

We can also appeal to lessons of experience. It seems that just because a minority is capable of doing something there is no logical implication that a person in the majority will stop doing it. The fact that gays can adopt does not seem to have stopped straight people from wanting to adopt. When the Voting Rights Act of 1965 was passed, it didn't appear to cause fewer whites to vote. Proposition 8 in California, which banned same-sex marriage, was passed after same-sex marriage had been legal for some time in California and it did not repeal legislation that acknowledged same-sex married couples betrothed in other states. The counsel defending Prop 8, did not "submit[] one affidavit – not one unverified allegation – that a single resident of California either was less likely to get married or viewed his or her marriage as less valuable or less stable because California had [previously] extended some measure of marriage equality to same-sex couples."<sup>264</sup>

Theodore Olson argues that "against the background of California's short, but entirely uneventful, experience with providing marriage rights to same-sex couples," that the district court's finding that same-sex marriage has no discernable negative impact on opposite-sex marriage, is unassailable. Without any "reasonable" theory the proponents of Prop 8 are asserting that an "unsubstantiated fear of negative externalities of *equality* is sufficient to justify *inequality*," which then makes "discrimination self-justifying."<sup>265</sup> The Supreme Court has held that in matters of civil rights, even the most deferential interpretation of the rational-basis test which assumes the constitutional validity of

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<sup>264</sup> Brief for Appellees, *Perry v. Schwarzenegger*, No. 10-16751, October 18, 2010.

<sup>265</sup> *Ibid.*

legislation, must be “rationally related to a legitimate governmental interest,”<sup>266</sup> without which it is simply “invidious discrimination which offends the Constitution.”<sup>267</sup>

Further, it should be noted that in regards to any such harm that may befall society Olson writes in his brief that,

[W]hen the district court asked [the proponents of Prop 8’s] council point blank what harm would come to opposite-sex married couples if gay and lesbian couples could marry, Proponents’ counsel mustered only, “I don’t know. I don’t know.” . . . Proponents’ “deinstitutionalization” expert, David Blankenhorn, had not seen a seminal 2009 study that empirically tested his theory of deinstitutionalization and that concluded that “laws permitting same-sex marriage or civil unions have no adverse effect on marriage, divorce, and abortion rates, the percent of children born out of wedlock, or the percent of households with children under 18 headed by women.”<sup>268</sup>

Often the point that opponents of same-sex marriage, including Professor Wax, miss is that same-sex couples are not asking for a new institution, or an amendment to the current institution of marriage. They are asking for the same legal recognition that different-sex couples get. Marriage as it is relevant to the law, does not have any conditions to satisfy which require two different sexes. For the purpose of conversation a person might differentiate between the parties involved – straight-marriage, gay-marriage, interracial-marriage – but as far as what is relevant to the state, there need not be a distinction between marriage, gay marriage, or interracial marriage.

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<sup>266</sup> *United States Dept. of Agriculture v. Moreno* (1973)

<sup>267</sup> *Ferguson v. Skrupa* 372 U.S. 726 (1963)

<sup>268</sup> Brief for Appellees at *Perry v. Schwarzenegger*, No. 10-16751, October 18, 2010.

## II. Prohibiting same-sex marriage advances the vital state interests of responsible procreation and childrearing.

Wax states that if same-sex couples are recognized as married, “then behavior surrounding all marital relations may change in response.... For example...procreation might become less central to marriage. This might foster a model of marriage that views children as optional or even unimportant.”<sup>269</sup> In the fight over Proposition 8 in California similar fears were raised. The proponents of Prop 8 cited “the possibility of long-term adverse societal consequences.” The proffered reason was that marriage equality might “sever[] civil marriage from its traditional procreative purposes, resulting in a corrosion of marital norms, including that fathers should take responsibility for the children they beget and sexual fidelity...and ultimately social devaluation of marriage as an institution.”<sup>270</sup>

Responsible procreation and childrearing has long been an argument of opponents of same-sex marriage. As Theodore Olson points out, this concept “encompasses two distinct, but related, concepts: First, it addresses the State’s desire to channel those heterosexual couples who might beget children ‘by accident’ into marital family units. But it also entails a purported interest in raising children in what Proponents [of Prop 8] have deemed to be the ‘optimal social structure’ for child development—a man and a woman, bound together in marriage, raising children *genetically related to both parents*.”<sup>271</sup> In fact, in *Traditionalism, Pluralism, and Same-Sex Marriage*, Wax points to

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<sup>269</sup> Wax, “Traditionalism, Pluralism, and Same-Sex Marriage,” (2007).

<sup>270</sup> Brief for Appellees at *Perry v. Schwarzenegger*, No. 10-16751, October 18, 2010. (Internal quotations omitted.)

<sup>271</sup> *Ibid*.

the importance of a biological connection between parents and children. The problem is that the studies she cites in favor of this are *not* analogous to same-sex couples.

She says that “[m]ost relevant to the same-sex marriage debate is the data on different types of blended families. In particular, evidence has emerged that stepparent families are significantly less beneficial for children than intact nuclear families.”<sup>272</sup> It doesn’t take much thought to realize that stepparent families might include significant differences than families that manage to stay together: potential conflict between parents, or the change of authority figures for children for example. She even lauds the fact that they controlled for “factors such as ‘parental education, number of siblings, race and religion.”<sup>273</sup> But did they control for conflict and success of a relationship? She cites the study:

[L]ate adolescents and young adults who had grown up with both biological parents performed better on school achievement tests, had fewer children as teenagers, finished high school more often, attended college more often, and were more likely to be employed in early adulthood than those who had grown up with a single parent or a stepparent. Furthermore, although “[c]hildren living with a stepparent . . . were almost as well off economically as children living with two biological parents,” they nonetheless were “at least as likely as children who had lived with a single parent to drop out of high school or to have a baby before they turned twenty.” The authors concluded that “[f]or adolescents, the economic advantages of having a stepparent seemed to be offset by psychological disadvantages.” In sum, parental matrimony measurably benefits children, but welfare is most enhanced when both parents are biologically related to the child.<sup>274</sup>

Equating this study to same-sex marriage is patently dishonest. Single parents have their own set of problems with which to contend (the possibility of lacking a model for close adult interaction for example), but even comparing same-sex couples to a

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<sup>272</sup> Wax, “Traditionalism, Pluralism, and Same-Sex Marriage,” (2007).

<sup>273</sup> Ibid.

<sup>274</sup> Ibid.

stepparent model is disingenuous, and confuses correlation and causation. The American Psychological Association has written, “[i]f a stepparent is frequently battling his former spouse, research shows that his children suffer. But if he is close with his ex-partner, his new spouse may feel anxious and insecure. On top of this, say experts, many children don't view their step-parents as ‘real parents’ for the first few years—if ever.”<sup>275</sup> No rational conclusion can be drawn from Wax’s analogy because the implied premise, “same-sex couples are equivalent to stepparent couples,” is absurd.

There is a substantial amount of research that goes into the best ways for stepfamilies to succeed because of the amount of conflict that often develops. Wax is correct with her assessment of the children of stepfamilies; after all, it is “the children, who often suffer the most through divorce, remarriage and stepfamily situations. They are particularly at-risk if their biological parents are in conflict, the divorce situation is protracted, they receive less parenting after the divorce or they lose important relationships as a result of the divorce...”<sup>276</sup> Subsequently, there are many reasons that stepfamilies require special attention, but this point only serves to undermine her argument. Remarriage is not illegal. Same-sex couples who are in a loving, committed relationship and together from a child’s infancy do not exhibit any of the same risks as stepfamilies. This point, that marriages which are not positive environments for children should be minimized, is not practicable in any sense. If followed to its conclusion, it would disallow remarriages, and possibly divorce. But an abusive unhappy first marriage is likely worse for the children than a happy second marriage, so that doesn’t work either. It is understandable that a state would want to only “reward” families that produce a

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<sup>275</sup> Tori DeAngelis, “Stepfamily Success Depends on Ingredients,” 36 *APA Monitor* 11, (2005): 58.

<sup>276</sup> *Ibid.*



positive environment for children, but this is not feasible without looking at each individual family.

In the Prop 8 case opponents of same-sex marriage stated their belief that the “‘special recognition and encouragement’ of marriage may be withheld from same-sex couples...because they ... cannot in any circumstance, create an ‘optimal’ childrearing environment.”<sup>277</sup> This claim, however, is not supported by the facts, and subsequently cannot substantiate even remote belief, let alone debate.

It is indicative of passions or prejudice when biased studies which should fail peer review are published making such claims. Sociologist Mark Regnerus recently released a study, “New Family Structures Study,”<sup>278</sup> that conflicts with thirty years of research. It questioned the parenting of LGBT parents and made a number of negative claims. After the study was published in a reputable journal, *Social Science Research (SSR)*, some eyebrows were raised at the methodology used and possible conflicts of interest in the review process. Consequently, an internal audit was conducted by SSR’s editorial board, and found that the “peer-review system failed because of ‘both ideology and inattention’ on the part of the reviewers.”<sup>279</sup>

They found that there were “significant, disqualifying problems” with the methodology and “scholars who should have known better failed to recuse themselves from the review process.”<sup>280</sup> The study’s author later admitted, “I said ‘lesbian mothers’

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<sup>277</sup> Brief for Appellees at *Perry v. Schwarzenegger*, No. 10-16751, October 18, 2010.

<sup>278</sup> Mark Regnerus, “How different are the adult children of parents who have same-sex relationships? Findings from the New Family Structures Study,” *Social Science Research* 41, No. 4 (July 2012): 752-770.

<sup>279</sup> Tom Bartlett, “Controversial Gay-Parenting Study Is Severely Flawed, Journal’s Audit Finds,” *The Chronicle for Higher Education*, July 26, 2012, <http://chronicle.com/blogs/percolator/controversial-gay-parenting-study-is-severely-flawed-journals-audit-finds/30255>.

<sup>280</sup> *Ibid.*

and ‘gay fathers,’ when in fact, I don’t know about their sexual orientation.”<sup>281</sup> The American Psychological Association issued a scathing assessment of the study and further noted that,

On the basis of a remarkably consistent body of research on lesbian and gay parents and their children, the American Psychological Association and other health, professional, and scientific organizations have concluded that there is no scientific evidence that parenting effectiveness is related to parental sexual orientation... That is, lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children. This body of research has shown that the adjustment, development, and psychological well-being of children are unrelated to parental sexual orientation and that the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish.<sup>282</sup>

Moreover in November 2011 when a gay-rights issue was before the First Circuit Court of Appeals in Massachusetts, an Amici Curiae brief was submitted on behalf of The American Medical Association, The American Psychological Association, The American Academy of Pediatrics, The Massachusetts Psychological Association, The American Psychiatric Association, and The National Association of Social Workers and its Massachusetts Chapter. It addressed, sexual orientation, and sexual orientation as it relates to relationships and childrearing. It came to the same conclusion stated above and added that they wanted to “emphasize that the abilities of gay and lesbian persons as parents and the positive outcomes for their children are *not areas where credible scientific researchers disagree*.”<sup>283</sup>

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<sup>281</sup> Mark Regnerus, “Interview by Citizen Link: A Focus on the Family Affiliate,” *Friday 5: Mark Regnerus*, www.Citizenlink.com, October 26, 2012.

<sup>282</sup> “APA on Children Raised by Gay and Lesbian Parents,” APA press release, June 11, 2012, on APA website, <http://www.apa.org/news/press/response/gay-parents.aspx>.

<sup>283</sup> Brief Amici Curiae, *Commonwealth of Massachusetts, v. United States Department of Health and Human Services et al.*, November 3, 2011. (emphasis mine).

In fact, the expert witness which the opponents of same-sex marriage relied on in the Proposition 8 case, “Paul Nathanson testified in his deposition that peer-reviewed studies of the effect of permitting gay men and lesbians to marry on the rearing of children ‘don’t detect problems and they don’t predict problems.’”<sup>284</sup>

As for the possibility that the prohibition of same-sex marriage will “‘increase[e] the likelihood’ that heterosexual couples with the capacity to procreate accidentally will marry,”<sup>285</sup> there is no rational reason a person can come to this conclusion. In fact there is such a lack of reality to this premise that the proponents of Prop 8, merely stated that this would be the case, but made “no argument at all” to support the premise “that prohibiting same-sex couples from entering relationships designated marriage will make it more likely that heterosexual couples in California will marry.”<sup>286</sup>

If laws prohibiting same-sex marriage were really geared toward rewarding procreation they would not legally be able to leave out the numerous other groups that cannot procreate.<sup>287</sup> Omitting other groups makes this argument “so woefully underinclusive as to render belief in [its purported end] a challenge to the credulous.”<sup>288</sup> Further, while these groups are different, that

difference is “irrelevant unless [same-sex couples] would threaten [Proponents’ interest] in a way that other [infertile heterosexual couples] would not.” Same-sex couples pose no such *unique* threat to Proponents’ efforts to channel instances of accidental procreation into marriage, and thus the same-sex nature of the union is not a “rational[] justif[ication]” for singling them out for disfavored treatment.<sup>289</sup>

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<sup>284</sup> Brief for Appellees at *Perry v. Schwarzenegger*, No. 10-16751, October 18, 2010.

<sup>285</sup> *Ibid.*

<sup>286</sup> *Ibid.*

<sup>287</sup> *Ibid.*

<sup>288</sup> *Ibid.*

<sup>289</sup> *Ibid.*

If the prohibition of same-sex marriage “is intended to reserve ‘special recognition’ of marriage for couples that can procreate ‘by accident,’ it ‘ma[k]e[s] no sense in light of how [it] treat[s] other groups similarly situated in relevant respects.’”<sup>290</sup>

*Responsible procreation and childrearing* might be a vital state interest, but it is decidedly separate from same-sex marriage. It does not provide justification beyond “invidious discrimination,” considering the various other groups that can marry, remarry, and raise children.

**III. Slippery slope argument: If same-sex marriage is allowed, then bigamy, adult incest, prostitution, masturbation, adultery, fornication, bestiality, obscenity and/or pedophilia might become legal.**

Slippery slope arguments are generally problematic because they use extreme hypotheticals to leverage fear about the issue at hand. In the case of same-sex marriage, slippery slope arguments are invoked to make one of two conclusions: (1) it will lead to society slowly accepting the extreme scenario’s (which they find unpleasant), or (2) if a state cannot engage in legal moralism, the Supreme Court will be able to strike down laws against these extreme hypotheticals, which would implicate all victimless crimes.

The first issue is one of social mores and less concerned with the court. As the argument goes, if social mores change then laws may be passed which allow things like bestiality or prostitution. A person may service a goat, or take money in exchange for sex, but the impetus to do either of those things is not a trait completely inseparable from their

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<sup>290</sup> Ibid.

person. Money is an artifact of society, so it cannot be argued to be inseparable from the individual. Considering the development of sexual orientation occurs internally it is necessarily separate from the external world, including other animals. As it was stated in the introduction, there may be social constructs which lead to situational sexual behavior, and that may very well be what leads to bestiality, but the drive to have sex with animals, is at the very least something that occurs external to the individual.

Perhaps more importantly, the fear that society will learn to accept bestiality if they accept homosexuality, misses something else entirely. It can only be claimed that there is any parity between the two, if sexual activity is looked at in such a narrow sense as to have a single isolated end: orgasm. In that case, it would necessarily implicate heterosexual acts as well. Indeed, those who fear that an approval of homosexuality may lead to an approval of bestiality, do so because in their mind there is nothing more to homosexuality than the sexual act itself – nothing more than the absolute end of orgasm:

Those who propound “gay” ideology or theories of same-sex marriage or “sexual activity” have no principled moral case to offer against (prudent and moderate) promiscuity, indeed the getting of orgasmic sexual pleasure in whatever friendly touch or welcoming orifice (human or otherwise) one may opportunely find it in.<sup>291</sup>

Of course, just as in different-sex relationships – even the casual one-night stand – there is usually more than the single end of orgasm. As soon as a concept slightly more abstract, like intimacy, is added it would separate *both* heterosexual human relationships and homosexual human relationships from bestiality. There is nothing inherent about homosexuality that makes it any closer to bestiality than heterosexuality, so there is no

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<sup>291</sup> John Finnis, “Law, Morality, and ‘Sexual Orientation’,” in *Debating the Ethics, Science, and Culture of Homosexuality*, (New York, NY: Rowman and Littlefield, 1997), 31 – 43.

logical justification to prohibit one and not the other. But with all that said, regarding purely what society does and does not accept is not the concern of the court. What is the concern of the court is the second argument.

All of the examples which opponents of gay rights or same-sex marriage offer can be prohibited by the state without the legalization of same-sex marriage affecting them because prostitution, bigamy, incest, and so on are all defined and driven by external as opposed to internal factors and therefore do not engage the Equal Protection Clause. Bigamy for example is often thrown around as if the court would not be able to discern a difference. Consider the argument. Bigamy is not rooted on anything fundamentally inseparable from the person. It is *only* a condition of *want* grounded in external factors; as in a person might change their mind and not want it later. People cannot change their mind about their sexual orientation, and while some of them certainly want to get married, that want is not isolated. If the Equal Protection Clause were used in situations composed purely of want, it would become utterly meaningless. Segregationists want segregation, “traditionalists” want only their version of marriage recognized by the state, and just like Mill pointed out, thieves want the victim’s purse.

If sexual orientation occurs internally, and is an immutable part of that person then same-sex marriage is only the manifestation of that inseparable quality, and that manifestation produces no harm. All of the hypothetical victimless crimes result from no such internal trait that is inseparable from the individual, and therefore the state may engage in all the moral legislation that it like without the court interfering. It only becomes repugnant to the Constitution when morals legislation arbitrarily treats groups of

*persons* unequally.<sup>292</sup> The Supreme Court has said that in the case of equal protection, “mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable...are not permissible bases for” differential treatment.<sup>293</sup>

#### IV. Semantics

One argument that is often used is that of semantics: that the definition of marriage will not support same-sex marriage. To these people, saying same-sex marriage is akin to saying round square. The very meaning of marriage just cannot support the concept of a same-sex couple. Of course, as Adele Mercier, has pointed out, this confuses meaning and reference.

The *meanings* of all words of all languages, with the exception of proper names (which refer all and only to well-defined *single* objects, i.e. to a person), *always* stretch beyond their current *reference*. The word ‘Canadians’ currently applies to a different group of people than it applied to a hundred years ago, and than it will apply to a hundred years hence.... Words can undergo reference changes without a change in meaning.... before Emancipation, the word ‘citizen’ had never been applied to Blacks in the US, it would follow from [the semantic argument] that, as a matter of necessity, Blacks cannot be citizens.<sup>294</sup>

Note that she does not mean that according to the semantic argument they *shouldn't be* citizens, as was debated during the reconstruction amendments, but rather that despite any amendments, if the semantic argument is to hold, they *couldn't be* citizens.

Importantly, she goes on to say that those who make this argument are committed to the

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<sup>292</sup> While this paper takes a more conservative approach, it should be noted that the Supreme Court has actually gone further than this and in 2010 said that they have refused to distinguish between conduct and status when it comes to sexual orientation, which underlies a case for equal protection even if sexual orientation were a choice. *See supra* note 170.

<sup>293</sup> *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985).

<sup>294</sup> Adele Mercier, 2001, Affidavit to the Ontario Superior Court of Justice regarding Halpern et al. v. Canada, Kingston, ON: Queens University Philosophy Department and Linguistics Program.

view “that Emancipation, by extending its reference, *changed the very meaning of the word ‘citizen’*.”<sup>295</sup> That is, they are “committed to the view that, after Emancipation, even Whites were no longer citizens according to the usual meaning of that term in the language.”<sup>296</sup> In this same vein, if the semantic argument against same-sex marriage were to be sustained, it would follow that when Massachusetts declared that same-sex couples could legally be recognized as married, all married heterosexual couples in the Commonwealth of Massachusetts were no longer married “according to the usual meaning of that term.”

As far as the legal conditions require, the term marriage fully supports same-sex couples. While some religions may not approve, per the First Amendment, the state has no interest in respecting any one religion. It seems that it is the distinct difference between the meaning of the word marriage in civic and religious circles that leads to the semantic argument.

In her affidavit submitted to the Canadian court system in 2001, she made the point that in Canada there are two distinct concepts of marriage, and this, it seems, is similar to the case in the United States.

[Religious marriages and civil marriages] are properly distinct, not only in contemporary consciousness but in the religious and legal institutions that are commonly understood to underlie such concepts. That is demonstrated by the fact that a religious marriage is not recognized by Canadian law as a legal marriage unless it is authorized by the state to *be* a legal marriage, and that not all legal marriages are recognized as religious marriages.

Various grounds suffice for a religious marriage to be annulled in some religions; but an annulment even by the Pope does not constitute in and of itself the dissolution of a legal marriage.

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<sup>295</sup> Ibid.

<sup>296</sup> Ibid.



The Anglican Church did not recognize as a religious marriage the Duke of Windsor's civil marriage to Mrs. Simpson because she had previously divorced. Many religions do not recognize as religious marriage the legal (or religious) marriages of one of their members with someone of a different religion.

It is one of the foundational principles of logic (known as Leibniz's law from the philosopher of the same name) that two things are identical if and only if they have all and only the same relevant properties. Religious marriages and civil marriages have some but not all of their relevant properties in common. Hence they are distinct.<sup>297</sup>

Mercier notes that "[i]t is an *empirical* issue, not one of norms, whether gays and lesbians have the capacities required for marriage."<sup>298</sup> The conditions that have defined marriage across time and culture have changed. The state's purpose for involving itself in marriage in the first place, to limit clandestine marriages, is not affected by the sex of the two people getting married.

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<sup>297</sup> Ibid.

<sup>298</sup> Ibid.

## CONCLUSION

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### The Subjection of Gays and Lesbians

*[O]ne feels that among all the lessons which men require for carrying on the struggle against the inevitable imperfections of their lot on earth, there is no lesson which they more need, than not to add to the evils which nature inflicts, by their jealous and prejudiced restrictions on one another. Their vain fears only substitute other and worse evils for those which they are idly apprehensive of: while every restraint on the freedom of conduct of any of their human fellow-creatures...dries up pro tanto the principal fountain of human happiness, and leaves the species less rich, to an inappreciable degree, in all that makes life valuable to the individual human being.*

- John Stuart Mill  
1869<sup>299</sup>

The principle agent of change in a republic is social attitude. A change in attitudes will foster change in legislation and in extreme cases a constitutional amendment. If the amendment provokes emotive responses there are often predictable attempts to subvert every manifestation of that amendment. In these cases, it requires a “guardians of rights,” to stop states from violating what has already been adopted in the Constitution. It is an unfortunate truth that just because something is constitutionally protected does not mean that in practice it will be. Sometimes it is because the legislatures and the Supreme Court are mistaken about the facts, and sometimes it is because those legislatures are motivated by the “influence of some strong interest, or passion, or prejudice.”<sup>300</sup> Whether it’s *The Birmingham News*’s declaration that it would explicitly contravene the Constitution or the century discrepancy between the passage of the Fifteenth Amendment (1870), and the

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<sup>299</sup> John Stuart Mill, *The Subjection of Women*, 4<sup>th</sup> ed. (London: Longmans, Green, Reader, and Dyer, 1878), 194, <http://books.google.com/ebooks>.

<sup>300</sup> Alexander Hamilton, “Federalist Papers: No. 31,” The Avalon Project: Documents in Law, History, and Diplomacy, last modified 2008, [http://avalon.law.yale.edu/18th\\_century/fed31.asp](http://avalon.law.yale.edu/18th_century/fed31.asp).

passage of the Voting Rights Act of 1965 which allowed the Fifteenth Amendment to become a reality, sometimes emotive impulses disregard reason and flout the Constitution. That the Constitution protects same-sex marriage will probably not be recognized by the states for some time, and if the Supreme Court should figure it out before the states, and act, those states will predictably claim judicial activism, just as they did in 1954.

Fortunately, for the LGBT community, the court has acknowledged the facts and sexual orientation has been recognized over the last two decades as being covered by the Fourteenth Amendment. First in *Romer v. Evans*, and then further in *Lawrence v. Texas*. In her concurring opinion of *Lawrence*, Justice O’Conner eloquently explained why laws aimed at same-sex couples but not opposite-sex couples do not pass the rational-basis test:

The statute at issue here makes sodomy a crime only if a person “engages in deviate sexual intercourse with another individual of the same sex.” Tex. Penal Code Ann. § 21.06(a) (2003). Sodomy between opposite-sex partners, however, is not a crime in Texas. That is, Texas treats the same conduct differently based solely on the participants. Those harmed by this law are people who have a same-sex sexual orientation and thus are more likely to engage in behavior prohibited by § 21.06. Texas’ sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else. Indeed, Texas itself has previously acknowledged the collateral effects of the law, stipulating in a prior challenge to this action that the law “legally sanctions discrimination against [homosexuals] in a variety of ways unrelated to the criminal law,” including in the areas of “employment, family issues, and housing.”

This case raises a different issue than *Bowers*: whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy. It is not. Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. See, e. g., *Department of Agriculture v. Moreno*, 413 U. S., at 534; *Romer v. Evans*, 517 U. S., at 634-635. Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient

rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.

Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be “drawn for the purpose of disadvantaging the group burdened by the law.” *Id.*, at 633. Texas’ invocation of moral disapproval as a legitimate state interest proves nothing more than Texas’ desire to criminalize homosexual sodomy. But the Equal Protection Clause prevents a State from creating “a classification of persons undertaken for its own sake.” *Id.*, at 635. And because Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior. The Texas sodomy law “raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”<sup>301</sup>

Some will see decisions like *Romer* and *Lawrence* and they will argue that morals changed, and so the Supreme Court is “imposing upon all Americans the resolution favored by the elite class from which the Members of [the court] are selected, pronouncing that ‘animosity’ toward homosexuality is evil.”<sup>302</sup> But this misunderstands the nature of a written constitution. The court doesn’t need to believe that animosity towards homosexuality is evil to see that a person and all that is concomitant with that term is protected by the Equal Protection Clause, unless there is a rational basis for not allowing it. It is an unfortunate bout of adjudicating by morals when a justice understands that a provision’s reference necessarily broadens in the context of new facts, but not when they personally disagree with it. This, however, has been the history of civil-rights struggles.

While majority rules in a democracy, Justice Brennan once observed, “faith in democracy is one thing, blind faith quite another.”<sup>303</sup> The problem of passions and

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<sup>301</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003) (O’Conner, concurring.)

<sup>302</sup> See supra note 53.

<sup>303</sup> Justice Willaim J. Brennan, Jr., “Speech to the Text and Teaching Symposium,” (1985), in *Originalism: A Quarter Century of Debate*, ed. Steven G. Calabresi (Washington, DC: Regnery Publishing, inc., 2007).

prejudice tyrannizing a minority in spite of the Constitution is why in a democracy people would vest in “electorally unaccountable justices” the power to overturn democratically adopted legislation. It is part of the counter-majoritarian difficulty to ask “...Which values...qualify as sufficiently important or fundamental...to be vindicated by the Court against other values affirmed by legislative acts?”<sup>304</sup>

In the Fourteenth Amendment the value of equal protection was explicitly demarcated, and if the court acts accordingly, it can only strike down state legislation that conflicts with it. It has been said that for a constitutional democracy to maintain legitimacy justices must adhere to the provisions in a constitution as they were originally understood – they ought to value judicial restraint. Those who have put forward ideas of Originalism in a specific sense, are emphatic about how restrained their methods are, and believe themselves resilient for being able to administer such “strong medicine.”<sup>305</sup> But under scrutiny, the problem with their methods are not just that they are too specific, it is that they are often only specific in areas that they don’t want to see rights expanded. Looking for an original understanding of a provision at a specific level is problematic when an original consensus did not exist, but even more problematic is when a justice adheres tightly to original moral perceptions and upholds a statute specifically antithetical to the purpose of the amendment.

It has often been put forward that sexual orientation is not covered by the Equal Protection Clause because it was not considered during the adoption of the Fourteenth Amendment and therefore not part of its meaning. This, however, confuses meaning and reference.

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<sup>304</sup> See supra note 67.

<sup>305</sup> Scalia, “Originalism: The Lesser Evil,” (1989).

The 39<sup>th</sup> Congress had the opportunity to make the Equal Protection Clause specific; they declined. They opted instead for an amendment that meant laws must be applied equally to all persons without exception. Of course, exceptions do occur, as they do with all amendments, but as the court later clarified the exceptions must have some justification, and those justifications must have some footing in reality.

Two points float to the top in regards to the Fourteenth Amendment's application to sexual orientation: (1) Homosexuality was around, but the facts surrounding it – orientation not being a choice, it being immutable, and it not being harmful to society – were unknown. This is analogous to Bork's segregation point: when the facts (social or otherwise) that define something are discovered to be different than previously thought and this discovery establishes that an amendment is plainly being broken, "it is obvious the Court must choose equality and prohibit state-imposed"<sup>306</sup> laws that defy the Constitution. (2) As evidenced by the quotes that open up Chapter Six, the concept of same-sex marriage, in the U.S. at least, is a new phenomenon. It therefore requires some kind of assessment of trajectory. Considering the absolute character the phrase "equal protection of the laws" was given, that trajectory should easily cover sexual orientation, and subsequently same-sex marriage.

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<sup>306</sup> See supra note 142.

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