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The Shifting Doctrinal Face of Immutability

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ABSTRACT

This Article will examine the concept of immutability as it has been used in equal protection jurisprudence, particularly in the context of the gay rights movement. As a traditional matter, immutability was viewed as a doctrine that limited suspect and quasi-suspect classification status to those groups whose identities were fixed in some visible, often biological fashion. This narrow understanding of immutability served a purpose: it limited suspect or quasi-suspect status to those groups of individuals who were not at fault in some way for the subordinate condition in which they existed. Since the decisions in In re Marriage Cases, Kerrigan v. Commissioner of Public Health, *and* Varnum v. Brien, *the concept of immutability has undergone a significant change: immutable characteristics are no longer limited to those traits that a person cannot change, but also include characteristics that a person should not have to change. This new understanding of immutability expands the definition of the concept, but it also accomplishes two important goals: (1) it moves past a fault-based model of immutability that generally seeks to exclude from protection groups whose moral culpability or personal responsibility are the cause of their condition, and (2) it moves toward an autonomy-based model of immutability premised on a respect for human dignity that protects critical constitutive aspects of personhood, which allows courts to offer heightened-scrutiny protection to groups whose public identities are often not obvious.*

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INTRODUCTION

Over the course of the past several decades, gay[1] rights advocates have played an instrumental role in reshaping both state and federal constitutional doctrine by challenging discriminatory laws in the context of marriage,[2] parenting,[3] the military,[4] anti-sodomy laws,[5] speech and association,[6] and numerous other areas. These claims implicated, among

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[1] For convenience purposes, I will use the terms "gay" and "homosexual" in this paper interchangeably as overall categories that embrace lesbians, gay men, and bisexuals. I do not use it to embrace the transgendered community because that particular classification turns on gender identity, rather than sexual orientation.

[2] *See, e.g.*, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (holding that California Proposition 8 violated the California constitution, and stating in dicta that classifications on the basis of sexual orientation should be subject to strict scrutiny); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008) (holding that classifications on the basis of sexual orientation were subject to intermediate scrutiny, and that language limiting marriage to different-sex couples was unconstitutional); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) (holding that statutory language limiting marriage to different-sex couples violated the state guarantee of equal protection, and that classifications on the basis of sexual orientation were subject to intermediate scrutiny).

[3] *See, e.g.*, Fla. Dep't of Children & Families v. X.X.G, 45 So. 3d 79 (Fla. Dist. Ct. App. 2010) (affirming the Circuit Court's determination that the statute banning homosexual couples from adopting children served no rational purpose and violated the equal protection clause of the Florida State Constitution); *see also In re* Sebastian, 879 N.Y.S.2d 677 (N.Y. Sup. Ct. 2009) (granting second-parent adoption in a lesbian marriage); *In re* Cabalquinto, 669 P.2d 886, 888 (Wash. 1983) (ruling that "homosexuality in and of itself is not a bar to custody or to reasonable rights of visitation").

[4] *See, e.g.*, Log Cabin Republicans v. United States, Nos. 10-56634, 10-56813, 2011 WL 2683238 (9th Cir. July 11, 2011) (requiring the government to advise the court if it would timely file a report to Congress regarding its decision not to defend the constitutionality of the Don't Ask, Don't Tell Act, 10 U.S.C. § 358 (2006)).

[5] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986) and holding unconstitutional the Texas statute making it a crime for two consenting adult males to engage in intimate relations in the privacy of the home).

[6] *See, e.g.*, Gay Lib v. Univ. of Mo., 558 F.2d 848 (8th Cir. 1977) (holding that the University of Missouri violated both freedom of speech and freedom of association protections under the First Amendment by denying recognition of the Gay Lib student organization).

other constitutional provisions, state and federal free speech guarantees,[7] the Full Faith and Credit Clause of Article IV,[8] the Tenth Amendment,[9] and state and federal guarantees of due process.[10] Among all of the claims that gay rights advocates have raised, however, one of the most common arguments—if not *the* most common argument—is that a given restriction violates a state or federal guarantee of equal protection.[11] Generally speaking, equal protection arguments require the use of rational basis scrutiny to evaluate statutes or governmental actions that classify groups on a particular basis. Courts, however, will apply heightened scrutiny to classifications that fall into the categories of "suspect" or "quasi-suspect."[12] At the federal level, only a limited number of classifications receive heightened scrutiny: race, national origin, gender, illegitimacy, and alienage status.[13] Gay rights advocates

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[7] *See, e.g.*, Gay Lesbian Bisexual Alliance v. Sessions, 917 F. Supp. 1548 (M.D. Ala. 1996) (holding that a state statute prohibiting universities from spending public funds to sanction student organizations promoting action in violation of sexual misconduct and sodomy laws violated the First and Fourteenth Amendments); *see also* Irish Lesbian and Gay Org. v. Giuliani, 143 F.3d 638 (2d Cir. 1998) (reviewing constitutional challenge against a city's parade permit statute).

[8] *See* Finstuen v. Crutcher, 496 F.3d 1139 (10th Cir. 2007) (holding state law refusing to acknowledge adoptions by same-sex couples unconstitutional and in violation of the Full Faith and Credit Clause of Article IV); *Sebastian*, 879 N.Y.S.2d 677 (discussing the importance of granting an adoption petition in light of Full Faith and Credit Clause jurisprudence, which would not require other states to recognize parentage obtained through other legal avenues); Rhonda Wasserman, *Are You Still My Mother?: Interstate Recognition of Adoption by Gays and Lesbians*, 58 AM. U. L. REV. 1 (2008).

[9] *See, e.g.*, Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234 (D. Mass. 2010) (holding that Defense of Marriage Act ("DOMA") exceeded Congress's power under the Spending Clause and violated the Tenth Amendment).

[10] *See, e.g.*, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 412 (Conn. 2008); *see also* Bowers v. Hardwick, 478 U.S. 186 (1986) (refusing to expand its view of fundamental rights under the Due Process Clause when considering challenged anti-sodomy statutes), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

[11] *See* cases cited *infra* notes 14, 85, 92, and 95.

[12] *See, e.g.*, Mass. Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (Marshall, J., dissenting) (describing "women" and "illegitimates," both of which categories are subject to intermediate scrutiny, as "quasi-suspect" categories within equal protection analysis); *see also* Brown v. Montoya, 662 F.3d 1152, 1172 (10th Cir. 2011) ("Different types of equal protection claims call for different forms of review. A claim that a state actor discriminated on the basis of a suspect (e.g., race), quasi-suspect (e.g., gender), or a non-suspect classification calls for strict, intermediate, or rational basis scrutiny, respectively.").

[13] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440–43 (1985) (holding that mental retardation is not a quasi-suspect classification); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723–24 (1982) (gender a

have argued for years that classifications on the basis of sexual orientation should also be subject to some form of heightened scrutiny. Yet most courts that have heard this argument have ultimately rejected it, often on the basis of a conclusion that sexual orientation is not an immutable, or unchangeable, characteristic.[14]

This focus on immutability derives from the set of criteria that courts have used to determine whether a particular characteristic is, in fact, suspect or quasi-suspect. Those criteria have included a history of discrimination, lack of a relationship between the characteristic and the ability to perform, political powerlessness, and immutability.[15] The relative importance of each criterion has varied: courts do not uniformly cite all four factors when engaged in the suspect class analysis, and they have often excluded immutability altogether.[16] Nevertheless, a review of both state and federal case law reveals that concerns about immutability often rise to the surface during the course of gay rights litigation.[17]

Scholars have leveled a sustained critique against the use of immutability as a factor in the suspect class analysis, revealing numerous analytical difficulties that arise when courts employ this factor.[18] There is

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quasi-suspect classification); Lalli v. Lalli, 439 U.S. 259 (1978) (illegitimacy a quasi-suspect classification); *Murgia*, 427 U.S. 307 (age not a suspect classification); Graham v. Richardson, 403 U.S. 365, 372 (1971) (alienage a suspect classification); Loving v. Virginia, 388 U.S. 1 (1967) (race a suspect classification); Korematsu v. United States, 323 U.S. 214 (1944) (national origin a suspect classification).

[14] *See, e.g.*, High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990); *Woodward*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); Conaway v. Deane, 932 A.2d 571 (Md. 2007).

[15] *See infra* notes 54–57 and accompanying text.

[16] *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) ("[T]he class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.").

[17] *See* discussion *infra* Part II.

[18] *See, e.g.*, Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994) (critiquing immutability on numerous grounds, among them the degree to which it requires a false essentialism of identity and the sense that the conceptual work that it does in the suspect class inquiry is duplicative of a clearer, more precise factor); *see also* J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997) (arguing that possession of so-called immutable traits is actually irrelevant because the issue that matters is whether or not society has organized itself into a super- and subordinate structure on the basis of the traits); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 YALE L.J. 485 (1998) (critiquing the assimilationist bias inherent in the immutability factor).

a great deal of power in the arguments that these scholars have raised, and given the strength of their claims, many have suggested that courts should abandon this factor altogether in future analyses of suspect or quasi-suspect status.[19] Recent decisions from the supreme courts of California, Iowa, and Connecticut, however, have re-emphasized the significance of the immutability factor to lower courts across the country. In essence, these courts have claimed that while the traditional conception of an immutable trait as one that a person cannot change is irrelevant in the debate over gay rights, a different conception of immutability should be considered. They have suggested that immutable traits are those which form such a core, constitutive aspect of identity that individuals who possess those traits should not *have* to change them.[20] This idea is not new; Judge Norris of the Ninth Circuit famously articulated this understanding of immutability when he concurred in the *Watkins v. U.S. Army* decision, arguing that "'immutability' may describe those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically."[21] The California, Iowa, and Connecticut decisions, which all occurred in 2008 and 2009, represent the first time that courts of last resort have accepted this definition of immutability as a matter of law.

This alternative understanding of immutability expands the concept for equal protection purposes, while also accomplishing two important goals: (1) it moves past a fault-based model of immutability that generally seeks to exclude from protection groups whose moral culpability or personal responsibility are the cause of their condition, and (2) it moves toward an autonomy-based model of immutability that is premised on a respect for human dignity, which protects critical constitutive aspects of personhood, and which allows courts to offer heightened scrutiny protection to groups whose public identities are often not obvious. In Part I of this paper, I will discuss the development of what I call "traditional immutability" by reflecting on the origins of suspect class doctrine, and the role that immutability doctrine plays

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[19] *See* Halley, *supra* note 18; Diana S. Meier, Note, *Gender Trouble in the Law: Arguments Against the Use of Status/Conduct Binaries in Sexual Orientation Law*, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 147, 187 (2008) ("Ultimately, classifying conduct under either side of the immutable/mutable binary creates unpleasant outcomes.").

[20] Varnum v. Brien, 763 N.W.2d 862, 893 (Iowa 2009) (quoting Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 438 (Conn. 2008)) ("[W]e agree with those courts that have held the immutability 'prong of the suspectness inquiry surely is satisfied when . . . the identifying trait is 'so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change [it].'").

[21] Watkins v. U.S. Army, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring in the judgment).

within it. Part I will end with a brief discussion of the manner in which traditional immutability is premised on a conception of fault. Part II will discuss the manner in which the fault-based notion of immutability undermined the ability of gay rights advocates to argue successfully in favor of treating sexual orientation as a suspect status. Part III will then turn to the California, Connecticut, and Iowa decisions—*In re Marriage Cases*, *Kerrigan v. Commissioner of Public Health*, and *Varnum v. Brien*, respectively—and discuss the manner in which they have shifted immutability from a fault-based model to an autonomy-based model. Part III will conclude with a brief sketch of how this new model fits comfortably within a modern jurisprudence that is increasingly focused on individuals' dignitary claims against the state.[22]

I. CONCEPTUAL UNDERPINNINGS OF TRADITIONAL IMMUTABILITY

One cannot discuss the roots of immutability doctrine without first understanding suspect class doctrine, which has its origin in *United States v. Carolene Products*.[23] Justice Stone, who authored the opinion, applied the deferential standard of rational basis review to uphold a congressional ban on shipping filled milk in interstate commerce. However, he also famously suggested in footnote four that deference may not always be appropriate. Specifically, he noted in the first paragraph of the footnote that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution . . . ."[24] The second and third paragraphs expanded on Justice Stone's account of the circumstances under which stricter review might be necessary, namely, when evaluating laws that "restrict[] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," or when evaluating laws that target "discrete and insular minorities."[25] This approach to judicial review offered a justification for Supreme Court decisions that invalidated procedurally deficient political frameworks, protected minorities, and extended many of the criminal procedure protections of the Bill of Rights to defendants who were proceeding in the state courts.[26]

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[22] *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748–50 (2011) (arguing that pluralism anxiety has inspired the Supreme Court to re-envision group-based equality claims as dignitary claims that are premised on the Due Process Clauses of the Fifth and Fourteenth Amendments).

[23] 304 U.S. 144 (1938).

[24] *Id.* at 152 n.4.

[25] *Id.*

[26] Scholars have debated for years the role that footnote four played in the development of a jurisprudence that ultimately addressed the very concerns that the footnote raised, precisely in the manner that it prescribed. The received account sees a clear link between the footnote and (in particular) the Warren

Over the course of the twentieth century, matters relating to so-called "discrete and insular minorities" were increasingly subject to challenge, both politically and through litigation.[27] In the realm of constitutional law, these claims often manifested as race-based equal protection claims.[28] The Supreme Court took several decades to develop the current

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Court's efforts to address the problems it raised; Professor John Hart Ely has received most of the credit for articulating this view. In truth, Ely only modestly claimed that the footnote "foreshadowed" the approach of the Warren Court; it was subsequent commentators who were responsible for expanding on that claim. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 75 (1980); *see also* Bruce Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713 (1985) (analyzing the operative terms of *Carolene Products*' footnote four and finding that, as America evolves and minorities participate in the political process in large numbers, courts can no longer rely solely on "discrete insular minorities" to define groups deprived of access to the political process or constitutional safeguards); Oona Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001). Other scholars, however, have suggested that Ackerman and his followers overstate the importance of the footnote in the development of the Court's equal protection jurisprudence. *See, e.g.*, Edward J. Erler, *Equal Protection and Personal Rights: The Regime of the "Discrete and Insular Minority,"* 16 GA. L. REV. 407 (1982); Felix Gilman, *The Famous Footnote Four: A History of the* Carolene Products *Footnote*, 46 S. TEX. L. REV. 163, 166–67 (2004) (arguing that the footnote did not gain traction until the 1970s or even 1980s, and that judges and academics used the footnote to justify the Court's role as a defender of minorities and civil liberties after the Court had already assumed the role).

[27] This is particularly true in the context of race, especially regarding the experiences of African-Americans. As Professor Michael Klarman has noted, between 1914 and 1917, civil rights advocates achieved some victories in the following matters: cases challenging peonage laws that largely affected Black workers; cases challenging grandfather clauses under the Fifteenth Amendment; and a case which challenged a local statute using race to segregate neighborhood blocks. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 61–62 (2004). Civil rights advocates also achieved victories in lawsuits that pressed for, among other things, the equalization of Black and White teacher salaries and the integration of graduate and professional education programs. *See* MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950, at 34, 58–65, 70–76 (1987). Moreover, prior to the explosion of activity generated by the Civil Rights Movement, the Black community saw gradual shifts in the accrual and exercise of political power due to a variety of forces, including the migration of Blacks to Northern cities (where they were able to vote far more freely than their Southern counterparts), and the development of a Black middle class in Southern cities that was not dependent on White employers. *See* KLARMAN, *supra*, at 100–03.

[28] Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 227 (1991) (noting that equal protection claims in the pre-*Brown* era tended to manifest as racial classification claims, which applied to

framework for reviewing equal protection claims, but the process for doing so began shortly after the decision in *Carolene Products*. In *Korematsu v. United States*, the Court upheld a military exclusion order directed at people of Japanese descent,[29] despite its holding that classifications based on race were both "immediately suspect" and subject to "the most rigid scrutiny."[30] Soon thereafter, the Court implicitly found that classifications based on national origin were equally pernicious.[31] The Court, however, did not take seriously the full implications of *Korematsu* for almost two decades. Professor Michael Klarman notes that during this period, the Court did not apply strict scrutiny to racial classifications; instead, it applied the *Plessy v. Ferguson* "separate but equal" principle to presumptively neutral Jim Crow statutes, and rational basis review to statutes that explicitly discriminated on the basis of race, such as race-based voting restrictions.[32] The Court did not apply the *Korematsu* standard until its decision in *McLaughlin v. Florida*, which invalidated a state law that prohibited interracial couples from cohabiting.[33]

After the 1964 *McLaughlin* decision, the modern framework for equal protection analysis began to take shape. In little more than a decade, the general outlines of the doctrine were complete. The Court developed a three-tiered structure which identified rational basis, intermediate scrutiny, and strict scrutiny as the relevant standards of review. In addition, the Court found that three classifications other than race and national origin—alienage, gender, and illegitimacy—were either suspect or quasi-suspect classifications, and therefore subject to one of the higher standards of review.[34] Typically, laws that were subject

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everyone and ostensibly harmed no one, and racial discrimination claims, which disadvantaged specific groups of people on the basis of race).

[29] Korematsu v. United States, 323 U.S. 214, 219–24 (1944).

[30] *Id.* at 216.

[31] Oyama v. California, 332 U.S. 633, 646–47 (1948). Even though the Court did not specifically identify national origin as a suspect class, subsequent decisions cited *Oyama* in support of this principle. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 372 (1971) (citing *Oyama*, among other cases, as establishing the principle that classifications based on national origin are inherently suspect and subject to close judicial scrutiny).

[32] Klarman, *supra* note 28, at 227–28 (noting that the Court applied the principle of "separate but equal" to this category of cases).

[33] 379 U.S. 184 (1964).

[34] Trimble v. Gordon, 430 U.S. 762 (1977) (illegitimacy); Matthews v. Lucas, 427 U.S. 495 (1976) (illegitimacy); Craig v. Boren, 429 U.S. 190 (1976) (gender); Frontiero v. Richardson, 411 U.S. 677 (1973) (sex); *Graham*, 403 U.S. 365 (alienage). The Court has not identified a new suspect or quasi-suspect class since its decision in *Lucas*. In fact, this reluctance to identify new protected classes has convinced at least one prominent scholar that the Court, more likely than not, does not intend to identify any new protected classes. *See* Yoshino, *supra* note 22, at 748, 755–76.

to an equal protection challenge received the benefit of the presumption of constitutionality, and were therefore subject only to rational basis review.[35] But if the law in question doled out benefits or burdens on the basis of a suspect classification, the Court would apply strict scrutiny; if the classification was quasi-suspect, the law would receive intermediate scrutiny.[36]

The decision to link specific classifications to increasingly rigorous standards of review was rooted in an effort to identify precisely the laws that violated the norm of equality. As the Court has noted, most laws will survive an equal protection challenge for two primary reasons: (1) it is in the nature of laws to classify, and as a result, they inevitably establish frameworks of comparative advantage, which does not necessarily undermine the principle of constitutional equality; and (2) the Court has concluded that, in most instances, disagreements over the allocation of advantage are best mediated through the political process.[37] By contrast, claims that will *not* survive an equal protection challenge are those that undermine the very purpose of the Equal Protection Clause. In *McLaughlin*, the Court stated that its central purpose was the "eliminat[ion] [of] racial discrimination emanating from official sources in the States."[38] The Court, however, later described its purpose in broader terms, arguing that the Clause serves as a shield against arbitrary forms of official discrimination that have the "'purpose or effect [of] creat[ing] discrete and objectively identifiable classes.'"[39] These different expressions of purpose notwithstanding, the Court has

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[35] *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.").

[36] *See supra* note 12.

[37] *See* Personnel Adm'r v. Feeney, 442 U.S. 256, 271–72 (1979) ("The equal protection guarantee of the Fourteenth Amendment does not take from the States all power of classification. Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law. When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern. The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility." (citations omitted)).

[38] *McLaughlin*, 379 U.S. at 192.

[39] *See* Engquist v. Or. Dep't of Agric., 553 U.S. 591, 601 (2008) (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 60 (1973) (Stewart, J., concurring)); *see also* Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) ("[W]e have explained that [t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." (citations and internal quotation marks omitted)).

consistently defended the same general view of equality for approximately forty years: the notion that the Equal Protection Clause embraces an anti-caste principle that frowns on official efforts to distinguish unfairly between otherwise similarly-situated people.[40] Suspect class doctrine reflects an effort to identify and protect the low-caste groups that society has targeted for the most egregious forms of invidious treatment.[41]

The Court, however, has not been altogether clear about which markers identify the groups that require the most protection. Over the

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[40] *See* Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994). Professor Sunstein defines the anti-caste principle as follows:

> [T]he anticaste principle forbids social and legal practices from translating highly visible and morally irrelevant differences into systemic social disadvantage, unless there is a very good reason for society to do so. On this view, a special problem of inequality arises when members of a group suffer from a range of disadvantages because of a group-based characteristic that is both visible for all to see and irrelevant from a moral point of view. This form of inequality is likely to be unusually persistent and to extend into multiple social spheres, indeed into the interstices of everyday life.

Id. at 2411–12.

[41] *See* Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982) (offering several justifications for suspect class treatment: (1) classifications that likely reflect prejudice rather than reason are suspect because they undermine the principle that people are legally entitled to equal justice; (2) classifications that are unrelated to "any proper legislative goal" are suspect; and (3) classifications that reflect a historical tendency to render members of the group politically powerless are suspect, and people within that classification need protection from the vagaries of the political process). The Court in *Plyler* ended this discussion by noting that the decision to place burdens on people on the basis of traits over which they have no control may result in suspect treatment because this imposition "suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish." *Id.; see also* Schweiker v. Wilson, 450 U.S. 221, 230 (1981) ("Unless a statute employs a classification that is inherently invidious or that impinges on fundamental rights, areas in which the judiciary then has a duty to intervene in the democratic process, this Court properly exercises only a limited review power over Congress . . . ."); *Feeney*, 442 U.S. at 271–73 (describing equal protection doctrine as typically deferential to legislative judgments, but far less so when the classification at issue gives rise to an inference of presumptively invalid antipathy toward the class); Johnson v. Robison, 415 U.S. 361, 375 n.14 (1974) (approving the district court analysis that the underlying purpose of suspect class theory is to attack laws which target "discrete and insular minorities" on the assumption that those laws have lost the "presumption of constitutionality . . . because traditional political processes may have broken down" (quoting Robison v. Johnson, 352 F. Supp. 848, 855 (D. Mass. 1973))).

course of time, it has considered such factors as a history of discrimination, political powerlessness, the degree to which a group has been "saddle[d] with . . . disabilities" based on stereotypical beliefs and assumptions about the group, the lack of a connection between the trait in question and individual ability, and possession of an obvious and immutable characteristic.[42] Among these factors, immutability is the one that the Court has most readily abandoned, and that scholars have most persistently criticized.[43] In fact, many scholars have argued that the courts should refrain from relying on immutability altogether.[44] Nevertheless, immutability remains an important part of the equal protection conversation, especially in the context of gay rights claims, because some lower courts still take seriously the possibility that homosexuality is an immutable characteristic.[45]

The Supreme Court's decision in *Weber v. Aetna Casualty and Surety Company* reflects the earliest instance in which the concept of immutability was linked to an equal protection challenge.[46] In it, the Court held that a statutory scheme which deprived dependent, illegitimate, and unacknowledged children of equal death benefit recovery rights violated the Equal Protection Clause.[47] The Court

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[42] *See, e.g.*, Lyng v. Castillo, 477 U.S. 635, 638 (1986) (noting that quasi-suspect and suspect classes are comprised of individuals who have been subject to a history of discrimination, possess immutable or distinguishing characteristics, and are politically powerless); Frontiero v. Richardson, 411 U.S. 677, 686–87 (1973) (relying on a history of discrimination, immutability, political powerlessness, and the lack of a connection between the singled-out trait and ability); *Rodriguez*, 411 U.S. at 28 (identifying as relevant characteristics a history of discrimination, political powerlessness, and the possession of disabilities that warrant extraordinary protection from the political process).

[43] *See* Yoshino, *supra* note 18, at 518–19; *see also* Samuel A. Marcosson, *Constructive Immutability*, 3 U. PA. J. CONST. L. 646, 647 (2001) ("For many years, the concept of immutability in equal protection law has been in decline in the eyes of constitutional scholars and apparently the Supreme Court, to the point where there is now a strong consensus among legal scholars that immutability is not relevant to analysis of claims brought under the Equal Protection Clause of the Fourteenth Amendment.")

[44] *See, e.g.*, Halley, *supra* note 18.

[45] *See, e.g.*, Kerrigan v. Comm'r of Pub. Health, 957 A.2d at 436–39 (Conn. 2008) (relying on an analysis of immutability in the course of striking down restrictions on same-sex marriage); Varnum v. Brien, 763 N.W.2d 862, 892–93 (Iowa 2009) (same); *cf.* Conaway v. Deane, 932 A.2d 571, 614–16 (Md. 2007) (considering and then rejecting the argument that homosexuality is an immutable trait in the absence of any generally accepted scientific findings supporting this conclusion); Andersen v. King Co., 138 P.3d 963, 974–76 (Wash. 2006) (en banc) (discussing, and then rejecting, the claim that homosexuality was an immutable characteristic).

[46] Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972).

[47] *Id.* at 165.

specifically critiqued the state for premising rights on a trait over which these children had no control.[48] Doing so was "contrary to [a] basic concept of our system[:] that legal burdens should bear some relationship to individual responsibility or wrongdoing."[49] The immutable characteristic was a condition of birth that the child in question could neither change nor escape, and therefore, the law should refrain from punishment on the basis of that characteristic. One year later, the Court picked up on this theme in *Frontiero v. Richardson*, when a plurality of the Court found for the first time that classifications based on sex should be deemed suspect.[50] The Court defended its position by arguing that sex was "an immutable characteristic determined solely by the accident of birth,"[51] and relying on the principle from *Weber*, noted that such accidents should have no bearing on the imposition of legal disabilities.[52]

During the 1970s and early 1980s, members of the Court regularly cited immutability as a relevant factor in the suspect class analysis.[53] Each factor, including immutability, played an important gatekeeping role, enabling the Court to distinguish between those classifications that did and did not require extra judicial protection. Proof of a long-standing history of discrimination, as well as pervasive and ongoing discrimination, offered a factual basis for demonstrating the

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[48] *Id.* at 175.

[49] *Id.*

[50] *See* Frontiero v. Richardson, 411 U.S. 677, 686–88 (1973).

[51] *Id.* at 686.

[52] *Id.*

[53] *See, e.g.*, Johnson v. Robison, 415 U.S. 361, 375 n.14 (1974) (describing immutability as one of "the traditional indicia of suspectedness" (citing *Frontiero*, 411 U.S. at 686)); *see also* Schweiker v. Wilson, 450 U.S. 221, 229 n.11 (1981) (approving the lower court's description of immutability as one of the factors that denote suspect status); Mathews v. Lucas, 427 U.S. 495, 505 (1976) (describing illegitimacy as a characteristic that the individual in question cannot control in a case that impliedly accepts illegitimacy as a quasi-suspect classification subject to intermediate scrutiny); Kahn v. Shevin, 416 U.S. 351, 357 (1974) (Brennan, J., dissenting) (listing immutability as one of the factors that are relevant to finding a suspect classification); *cf.* Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982) (obliquely suggesting that immutability is a part of the suspect class analysis by including it in the discussion of suspect status, but declining to list it as a key analytical factor). *But see* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (excluding immutability from the list of the traditional indicia of suspect status, which identifies those groups that are "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process"); *see also* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (citing *Rodriguez* for the same proposition). It is particularly noteworthy that the *Rodriguez* Court failed to list immutability as a factor in the suspect class analysis.

perniciousness of the classification.[54] Evaluating the relative political powerlessness of the group in question mattered for gatekeeping purposes as well, since groups that could plausibly use the political process for self-defense did not need the assistance rendered by a suspect designation.[55] The focus on the relationship between the trait itself and individual capacity also allowed the Court to better identify worthwhile claims of suspect status. If the singled-out trait diminished the bearer's ability to perform in some relevant manner, it furnished a legitimate reason for subjecting the bearer to differential treatment.[56] The absence of such a connection rendered the distinction irrelevant to appropriate ends, resulting in higher scrutiny of the law or policy in question.[57]

Factual evidence of long-standing and current harm, lack of access to the political process, and questions about relevance were not the only factors the Court considered when identifying suspect classes. The immutability inquiry allowed the Court to consider an important and related issue: the moral dimension attached to the decision to offer a selected group extraordinary judicial protection. Moral questions were not explicit within the immutability analysis; rather, this factor created room for courts to consider implicitly the possibility of fault. As the Court suggested in both *Weber* and *Frontiero*, the prospect of using accidents of birth to impose group liabilities ran afoul of baseline notions of fairness linking public burdens to private accountability.[58] Immutability, then, allowed courts to explore the equitable basis of

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[54] *See, e.g.*, *Frontiero*, 411 U.S. at 686–88 (deeming sex a suspect classification in part because "women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena"); *see also* Note, *Developments in the Law - Equal Protection*, 82 HARV. L. REV. 1076, 1107–08 (1969) ("Racial classifications are generally thought to be 'suspect' because throughout the country's history they have generally been used to discriminate officially against groups which are politically subordinate and subject to private prejudice and discrimination.").

[55] Ely argues that there is no single, well-defined majority but instead that politics is made up of a myriad of groups, each bargaining with one another for support, thereby criticizing the Court's contention that insular minorities are completely devoid of political safeguards. ELY, *supra* note 26, at 84 (comparing *Carolene Products*' famous footnote concerning politically ineffective minorities being subject to the will of the majority with the theory of pluralism). Some scholars are skeptical of this theory of political bargaining. *See, e.g.*, Ackerman, *supra* note 26, at 720.

[56] *See Frontiero*, 411 U.S. at 686; ELY, *supra* note 26, at 150; Halley, *supra* note 18, at 508.

[57] *Cf.* ELY, *supra* note 26, at 250 n.64 (stating that while irrelevancy alone does not account for higher scrutiny, it may be combined with a history of discrimination to produce that result).

[58] Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972); *Frontiero*, 411 U.S. at 686.

challenged classifications by distinguishing between the groups who were and were not answerable for their own condition.[59]

The immutability inquiry adopted a fault model by implicitly asking the following questions: is the group in question morally culpable for possession of the challenged trait because the group is, in some way, *to blame* for the classification? If not, is there a causal relationship between action and classification, so that the group in question is *responsible* for the challenged trait? The answers to these implicit questions offered an additional basis for deciding whether the classification in question was appropriately deemed suspect.[60] A "no" answer to both questions strengthened the request for suspect status because it bolstered the claim that the challenged classification presumptively created invalid laws. A "yes" answer to both questions would strengthen the claim that official forms of discrimination were reasonable. By way of example, people who are discriminated against on the basis of gender are neither to blame for their gender status, nor responsible for it. Mere status as a man or woman carries with it no moral weight, and since human beings are generally born as male or female, they are not accountable for being a man or a woman. These conclusions allowed the Court to find that gender was a quasi-suspect classification in *Craig v. Boren*.[61] By contrast, discrimination on the basis of undocumented alienage reaches a group of people who are both blameworthy, because they have broken the law in order to enter the country, and responsible for their treatment, because they chose to enter the country illegally.[62] While this conclusion does not justify invidious discrimination, it renders the group ineligible for suspect status and justifies official sanctions based on undocumented alienage.

The answers to these questions do not, however, produce consistent results for the overall suspect class inquiry. The class of children of undocumented aliens, for instance, would require a "no" answer to the above questions: they are neither to blame for their undocumented status, nor are they responsible for it, because their parents made the decision to enter the country illegally on their behalf. This status, then, is comparable to gender. Nonetheless, in *Plyler v. Doe*, the Court refused to

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[59] *See* Harris M. Miller II, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 812–13 (1984); Yoshino, *supra* note 18, at 504 (citing Halley, *supra* note 18, at 507–09).

[60] *Cf.* Marcosson, *supra* note 43, at 673 (2001) (arguing that a failure to find that the trait bearers themselves are morally culpable suggests the possible immorality of a policy that discriminates against them).

[61] 429 U.S. 190, 204 (1993).

[62] *See* Plyler v. Doe, 457 U.S. 202, 219 (1982).

find that the children of undocumented aliens were members of a suspect or a quasi-suspect class.[63]

Similarly, a "no" answer to the blameworthiness inquiry, and a "yes" answer to the responsibility inquiry, can produce contradictory results. For example, there is no moral culpability that attaches when a company decides to operate as a sole proprietorship rather than a single member corporation or a limited liability corporation; the owners, however, are responsible for making that choice. As such, when a company in this position tried to argue that it was a suspect class, the trial court rejected the claim in part on immutability grounds, reasoning that distinguishing between companies on this basis did not trigger a suspicion that the state was acting on a constitutionally questionable basis.[64] On the other hand, applying the immutability inquiry to a religious discrimination claim[65] yields a different result. Membership in a religious group is not something for which society would typically assign blame, but one is certainly responsible for choosing to become a member of a religious group. Even though the analysis produces the same set of "no"/"yes" responses as in the sole proprietor example, courts have nonetheless found that religious classifications *are* suspect.[66]

Ultimately, these questions about blame and responsibility point to an overriding concern about an actor's ability to control his experience of discrimination, and the obligation of the state to refrain from particular kinds of discrimination. As others have noted, immutability, standing on its own, is "neither a necessary nor a sufficient basis for

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[63] *See id.* at 230 (striking down a law denying public education to children of illegal aliens because it did not survive rational basis scrutiny).

[64] *See In re* Watson, 332 B.R. 740, 746 (Bankr. E.D. Va. 2005).

[65] Although religious discrimination claims are typically reviewed under the First Amendment, at least one scholar has argued that such claims might properly be evaluated under the Equal Protection Clause. *See* Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 90–91, 102–112 (1990).

[66] When the Court has asserted that religious classifications are suspect, it has done so in a highly conclusory fashion. *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976); Patel v. U.S. Bureau of Prisons, 515 F.3d 807, 815–16 (8th Cir. 2008). In fact, a review of the case law does not reveal an instance in which the Supreme Court justified its decision to confer suspect status on religious classifications. Professor Brownstein, however, has persuasively argued that religious minorities meet the criteria for suspect status, including the immutability factor. *See* Brownstein, *supra* note 65, at 102-112. Insofar as the application of the immutability inquiry is concerned, there is no need to seek examples producing a "yes" answer to the blameworthiness question and a "no" answer to the responsibility question. Such a result is logically impossible – if a group is to blame for the challenged classification (e.g., status as ex-felons), it is *necessarily* responsible for it, too.

treatment as a 'suspect class.'"[67] For instance, a person who was born with only one leg, who has chosen not to acquire a prosthesis, should probably not receive a basketball scholarship to the local state university. Rather, immutability works in tandem with the other suspect classification factors in order to ensure that societal burdens are not distributed inequitably, and that courts do not inappropriately absolve claimants of their obligation to be held individually accountable for the consequences of their actions. This theoretical model, which attempts to balance the desire to eliminate invidious discrimination on the basis of immutable characteristics with the need to ensure individual accountability, is deeply attractive on initial consideration. However, when litigators in the early gay rights struggle applied this model to their cases, they quickly learned the flaws of the approach.

II. THE FAULT MODEL OF IMMUTABILITY AS APPLIED IN EARLY GAY RIGHTS CASES

Over the course of time, the Supreme Court expressed clear discomfort with the use of immutability in the suspect class analysis, largely because it found scholarly critique of the factor persuasive.[68] The lower federal and state courts noted this skepticism, but continued to apply the factor sporadically, especially in the context of gay rights cases.[69] Throughout the latter portion of the twentieth century, plaintiffs challenged anti-gay restrictions in many areas, frequently raising the equal protection argument that classifications on the basis of sexual orientation should be deemed suspect. In each of these cases, litigants asked the courts to consider the possibility that homosexuality was not a chosen identity. If a court agreed with this proposition, then two conclusions would naturally follow: homosexuals were not *morally culpable* for being gay, and they were also not *responsible* for being gay. As such, restrictions based on homosexuality might violate the *Weber/Frontiero* notion of fair play. Multiple federal courts of appeal and state supreme courts heard these arguments, but they were not prepared to reach the suggested conclusion. Early decisions from the 1980s and onward disagreed with the proposition that homosexuals were a suspect class, often on the ground that the immutability factor could not be established.[70]

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[67] Cass Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 9 (1994).

[68] *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442 n.10 (1985) (citing John Hart Ely for the proposition that the relevancy factor largely obviates the need for the immutability factor). *But cf.* Bowen v. Gilliard, 483 U.S. 587, 602 (1987) (continuing to list immutability as one of the factors that apply to a suspect class analysis two years after the decision in *City of Cleburne*).

[69] *See infra* notes 74–101 and accompanying text.

[70] *See id.*

A review of the early cases shows that immutability claims were uniformly viewed through the prism of fault. There were three primary arguments upon which these courts based their decisions: (1) the lack of scientific evidence showing that homosexuality had a basis in genetics;[71] (2) the idea that gay identity became visible to the world only as a matter of choice;[72] and (3) the notion that sexuality, or more precisely, sexual conduct, was a choice.[73] Each argument is examined in turn below.

A. SCIENTIFIC EVIDENCE FAILED TO OFFER A BASIS FOR A FINDING OF IMMUTABILITY

One of the more prominent reasons that courts gave for rejecting immutability arguments was the idea that science had not yet determined whether sexual orientation was a function of biology.[74] To the degree that courts believed that immutable characteristics should be "obvious" and "distinguishing," and should allow trait possessors to be defined as members of a "discrete group,"[75] a failure of the biological inquiry could serve as a useful limitation on the number of successful claimants. Race and gender were the classic examples of biologically determined characteristics, despite a growing acknowledgement that neither trait was firmly rooted in a person's genetic code.[76] This fact notwithstanding,

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[71] *See infra* notes 74–88 and accompanying text.

[72] *See infra* notes 89–102 and accompanying text.

[73] *See infra* notes 103–11 and accompanying text.

[74] *See, e.g.*, Conaway v. Deane, 932 A.2d 571, 614–15 (Md. 2007) (finding that there is not yet a "generally accepted scientific conclusion" that sexual orientation is biologically based). *But see* Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417, 437 (S.D. Ohio 1994) (stating that sexual orientation is "beyond the control of the individual"); Jantz v. Muci, 759 F. Supp. 1543, 1547 (D. Kan. 1991) (stating that scientific evidence supports the conclusion that sexual orientation cannot change).

[75] Lyng v. Castillo, 477 U.S. 635, 638 (1986).

[76] Modern sociological understandings of gender and race reject the notion that these characteristics are firm and unchanging, and rooted in the body. *See, e.g.*, JUDITH LORBER, *"Night to His Day": The Social Construction of Gender*, *in* PARADOXES OF GENDER 13, 13–15, 17 (1994) (discussing the difference between sex and gender, and evaluating the manner in which behavioral norms, expectations, and social practices are layered onto sex categories to create the concept of gender); David R. Harris & Jeremiah Joseph Sim, *Who is Multiracial? Assessing the Complexity of Lived Race*, 67 AM. SOC. REV. 614, 615 (2002) (discussing the transformation of the conception of race from a belief in its biological determinism to the modern view that racial identity is constructed along multiple social dimensions that are fluid and context-specific). In fact, insofar as race is concerned, the Supreme Court has long acknowledged that racial identity is socially, historically, and culturally determined in many respects. *See, e.g.*, United States v. Bhagat Singh Thind, 261 U.S. 204, 208–09 (1923) (denying a claim to legal "whiteness" raised by a South Asian Indian who was technically deemed Caucasian, based on a common, socially-constructed understanding of the meaning of "whiteness");

casual assumptions of race and gender fixedness were the analogical benchmarks against which arguments regarding the science of homosexuality were measured.

The possibility of a biological explanation for homosexuality made its first significant breakthrough in 1991, when neurobiologist Simon LeVay published a study that found that the hypothalamus—which, among other things, regulates the sex drive[77]—was smaller for gay men than for heterosexual men, and was comparable in size to the hypothalamus in female brains.[78] As a result of this finding, LeVay concluded that "gay men differ from non-gay men 'in the central neuronal mechanisms that regulate male sexual behavior.'"[79] Several years later, a researcher named Dean Hamer at the National Cancer Institute found that there was a link between male homosexuality and markers on the X chromosome.[80] This finding offered even more support for arguments in favor of a biological explanation for homosexuality. As Professor Janet Halley noted, these studies raised the stakes in constitutional litigation:

> Bolstered by citations to recent scientific experiments claiming to show that human sexual orientation rests on a biological substrate, the argument

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see also Saint Francis College v. Al-Khazraji, 481 U.S. 604, 609–13 (1987) (acknowledging the degree to which definitions of race are both fluid and historically-contingent in a case where a plaintiff of Arab descent challenged official assertions that he was legally White). *But see, e.g.*, Robin O. Andreasen, *The Meaning of 'Race': Folk Conceptions and the New Biology of Race*, 102 J. PHIL. 94, 95–96 (2005) (arguing that race can be defined by looking at genealogy, and in the course of doing so, identifying groups of people who are descended from a common ancestor and who were "reproductively isolated over a significant portion of evolutionary history").

[77] *Hypothalamus*, MEDLINEPLUS, http://www.nlm.nih.gov/medlineplus/ency/article/002380.htm (last updated Oct. 14, 2009).

[78] *See* E. Gary Spitko, *A Biologic Argument for Gay Essentialism-Determinism: Implications for Equal Protection and Substantive Due Process*, 18 U. HAW. L. REV. 571, 576–79 (1996) (summarizing LeVay's findings on "hypothalamic dimorphism" (citing SIMON LEVAY, THE SEXUAL BRAIN (1994))). LeVay's findings were later challenged on multiple grounds, including the following: (1) almost no evidence supported his claim that particular cadavers were of heterosexual men; (2) the presumptively gay men in the study had all died of AIDS; and (3) the study does not account for the possibility that the disease altered the size of the hypothalamus for those men. *Brief on Sexual Orientation and Genetic Determinism*, COUNCIL FOR RESPONSIBLE GENETICS (May 2006), http://www.councilforresponsiblegenetics.org/ViewPage.aspx?pageId=66.

[79] Spitko, *supra* note 78, at 577 (quoting SIMON LEVAY, THE SEXUAL BRAIN 121 (1994)).

[80] *Id.* at 579 (citing D.H. Hamer et al., *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 SCIENCE 321–27 (1993)).

> from immutability [became] the platform on which many gay-rights advocates prefer[red] to contest post-*Hardwick* courts' equation of homosexual identity with criminalizable sodomy.[81]

The Supreme Court's 1986 ruling in *Bowers v. Hardwick* was a key stumbling block for litigants who wanted to assert that sexual orientation was immutable, and that classifications on this basis should be deemed suspect. In *Bowers*, the Court held that states could criminalize sodomy without running afoul of constitutional due process guarantees.[82] Assuming that gay individuals did, in fact, engage in acts of sodomy, or were inclined to do so by virtue of their sexual orientation, *Bowers* turned homosexuals into a class of presumptive criminal actors. Lower courts were thus able to rely on *Bowers* when upholding discriminatory statutes, since homosexuals could be deemed morally blameworthy as a class of presumptive criminals.[83] This conclusion deprived homosexuals of substantial judicial assistance and left them vulnerable to the workings of the political process. The jurisprudential landscape made the researchers' discoveries potentially invaluable; if science could prove that homosexuality was innate and fixed at birth, not only were the anti-gay statutes unjust, but homosexuals as a group might be eligible for suspect class status.

Several lower courts, however, still refused to find that sexual orientation was a product of biology.[84] These courts reviewed the evidence that existed within the scientific community and found that there was no consensus around the root causes of homosexuality.[85] This failure was key. Even though the courts acknowledged that suspect class jurisprudence did not consistently rely on the immutability factor, they also recognized that proof of a biological origin for sexual orientation would strengthen the viability of the claim to suspect status:

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[81] Halley, *supra* note 18, at 513.

[82] 478 U.S. 186 (1986).

[83] *See, e.g.*, Steffan v. Perry, 41 F.3d 677, 685 n.3 (D.C. Cir. 1994) (en banc) ("[I]f the government can criminalize homosexual conduct, a group that is defined by reference to that conduct cannot constitute a 'suspect class.'"); High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) ("After *Hardwick* it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm.").

[84] *See, e.g.*, Dean v. District of Columbia, 653 A.2d 307, 346 (D.C. 1995) (noting the lack of a consensus within the scientific community over the origin of sexual orientation); Conaway v. Deane, 932 A.2d 571, 615–16 (Md. 2007) (same); *cf.* Able v. United States, 968 F. Supp. 850, 863 (E.D.N.Y. 1997) (finding that homosexuals are entitled to heightened protection, even though "the causes of sexual orientation are still in dispute").

[85] *Id.*

> The degree to which an individual controls, or cannot avoid, the acquisition of the defining trait, and the relative ease or difficulty with which a trait can be changed, are relevant to whether a classification is "suspect" or "quasi-suspect" because this inquiry is one way of asking whether someone, rather than being victimized, has voluntarily joined a persecuted group and thereby invited the discrimination. . . . If homosexuality has a genetic origin . . . [then] any court—aware of the history of purposeful discrimination against homosexuals—would have to be sympathetic to arguments that any statute [classifying on the basis of sexual orientation] should be subject to "strict," or at least "intermediate," scrutiny . . . . Presumably, the same would hold true if sexual orientation were substantially determined by prenatal hormonal influences. If sexual orientation, however, were entirely a learned, and thus psychological, phenomenon—and were subject to change through a program of predictably successful, and safe, therapy—then the statute limiting marriage to heterosexual couples, reflecting traditional values, arguably would be reviewable under the "rational basis" test . . . .[86]

A biological explanation for a particular trait would eliminate most conversations about choice, and would obviate the need to evaluate fault. The practical value of a biological explanation aside, Professor Halley has resisted the idea that gay identity can be reduced to the level of DNA by offering an unsparing critique of the argument.[87] Even she, however, has recognized the value of the rhetorical strategy employed by the defenders of this position, particularly as it relates to the claim of immutability:

> The argument from immutability responds to a particularly contemptuous and dismissive form of anti-gay animus with elegant simplicity and plangent appeal. It also works. Indeed, it often is the *only* effective resource available to gay men, lesbians, and bisexuals seeking to persuade their parents, coworkers, and neighbors that they can love someone of the same sex and remain fully human. Moreover, for most of the gay children, workers, and neighbors who use the argument

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[86] *Dean*, 653 A.2d at 346 (internal citations omitted).

[87] *See, e.g.*, Halley, *supra* note 18, at 529–46 (critiquing three studies purporting to show that homosexuality is genetic).

> from immutability in these settings, it is absolutely true: They can't change their sexual orientation.[88]

Professor Halley is not speaking here to the value of immutability within a legal framework; rather, she is looking at it from a common-sense perspective that seeks to promote basic fairness between different groups of people. The courts that rejected the biological explanations for gay identity were engaged in the same project, but the lack of scientific consensus doomed the effort from the start.

B. IMMUTABILITY AND THE PROBLEM OF VISIBILITY

Courts raised a second objection to the possibility of finding that sexual orientation deserved suspect class status: the notion that protected traits should be distinctive and *visible*, much like popular conceptions of race and gender. Professor Kenji Yoshino calls this "the visibility presumption."[89] The visibility presumption is not regularly mentioned in connection with immutability; the two ideas, though linked, are conceptually distinct.[90] In fact, there are times when courts treat visibility and immutability as two independent prongs in the suspect classification analysis, and analyze each prong accordingly.[91] Nonetheless, I consider the two factors together because the role that visibility plays in the overall analysis is tied to the immutability concerns regarding blame and responsibility: as in the immutability inquiry, the visibility presumption also asks if the members of the group in question possess distinguishing characteristics over which they have no control, and as a result, are not responsible for the subordinate treatment that they receive.

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[88] *Id.* at 567.

[89] Yoshino, *supra* note 18, at 508.

[90] *See id.* at 494–95. In his discussion of these two factors, Yoshino describes immutable characteristics as follows: "If a trait is perceived to be defined by nature rather than by culture, then the courts will be more likely to call it immutable. Race and sex, for example, are clearly viewed as biologically determined." *Id.* at 495. By contrast, he defines visibility by distinguishing between corporeal and social visibility:

> By corporeal visibility, I mean the perceptibility of traits such as skin color that manifest themselves on the physical body in a relatively permanent and recognizable way. Social visibility, on the other hand, designates the perceptibility of nonphysical traits. By visibility, the courts mean corporeal visibility rather than social visibility.

Id. at 497–98.

[91] *See, e.g.*, Steffan v. Cheney, 780 F. Supp. 1, 5–6 (D.D.C. 1991) (treating the assessment of distinguishing characteristics as an aspect of the suspectness inquiry that is separate and apart from the immutability inquiry).

The courts that have considered visibility in the context of homosexuality have answered this question in the negative. In *Steffan v. Cheney,* for instance, the trial court found that the plaintiff, a former midshipman at the Naval Academy who was denied the opportunity to graduate and take his commission shortly after "coming out," possessed no distinguishing characteristics that marked him as gay.[92] Indeed, the fact that he had deliberately chosen to keep that information secret indicated that the characteristic was not outside of his control.[93] Therefore, he was unable to claim suspect status.

Similarly, in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, the Sixth Circuit overruled a trial court finding that homosexuals *did* constitute a suspect class.[94] The trial court held invalid a local law that discriminated against gay men and women, and which failed to survive the court's heightened scrutiny review.[95] According to the trial court, sexuality was a "characteristic beyond the control of the individual," and since the statute was not targeting conduct, it was targeting "an innate and involuntary state of being and set of drives."[96] As such, this was nothing more than an attack on status, which could not survive constitutional review.[97] The Court of Appeals disagreed with this analysis, however, basing its objection on the invisibility of homosexuality:

> Assuming *arguendo* the truth of the scientific theory that sexual orientation is a "characteristic beyond the control of the individual," . . . the reality remains that no law can successfully be drafted that is calculated to burden or penalize, or to benefit or protect, an unidentifiable group or class of individuals whose identity is defined by subjective and unapparent characteristics such as innate desires, drives, and thoughts. Those persons having a homosexual "orientation" simply do not, as such, comprise an identifiable class. Many homosexuals successfully conceal their orientation. Because homosexuals

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[92] *Id.*

[93] *See id.* at 6.

[94] 54 F.3d 261, 267 (6th Cir. 1995) (discussing the trial court ruling which found that homosexuals were a suspect class, and accordingly struck down an amendment to the city charter which prevented the city from enacting policies that protected homosexuals on the basis of their sexual orientation or offered them any preferential treatment).

[95] Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417 (S.D. Ohio 1994), *rev'd*, 54 F.3d 261 (6th Cir. 1995), *vacated*, 518 U.S. 1001 (1996), *aff'd*, 128 F.2d 289 (6th Cir. 1997).

[96] 54 F.3d at 267 (internal quotation marks omitted).

[97] *Id.* (citing 860 F. Supp. at 436–37).

> generally are not identifiable "on sight" unless they elect to be so identifiable by conduct (such as public displays of homosexual affection or self-proclamation of homosexual tendencies), they cannot constitute a suspect class or a quasi-suspect class because "they do not [necessarily] exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group."[98]

Both the trial court and the Court of Appeals distinguished between homosexuality as a private, internal orientation and homosexuality as a fully comprehensible course of public conduct. Unlike the trial court, however, the Court of Appeals was unwilling to offer heightened protection to a group that was only intermittently visible, and also subject to immediate designation as criminal, per *Bowers v. Hardwick*.[99]

Both *Steffan* and *Equality Foundation* demonstrate the difficulties that arise when courts apply the visibility presumption to gay men and women. In both cases, the courts penalized the plaintiffs for maintaining their hidden selves: the midshipman was penalized for keeping his secret and remaining in the closet, and the *Equality Foundation* plaintiffs were deprived of quasi-suspect status because their most personal experiences of identity were not readily apparent to the outside world. Neither court was prepared to consider seriously the plaintiffs' need for heightened protection until some of the most private aspects of their lives had been exposed for public view.

This approach is deeply problematic, however, because of the depth of its coerciveness. In the case of the midshipman, for instance, the court's requirement would have forced him to "out" himself in a military that was not only unfriendly to gays, but would remove him from the service upon proof of being gay.[100] The court would either force him out of the closet in order to face virulent discrimination, or else punish him with indifference if, instead of exposing himself to such treatment, he chose to keep secret his identity as a gay man. The court never considered the possibility that some aspects of identity are so personal and significant that it *should* protect them without conditioning its assistance on public revelation. Instead, in the absence of a physical

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[98] *Id.* (citations omitted).

[99] *Id.* at 267–68.

[100] The military did, in fact, discharge the midshipman after his homosexuality was made public. *See* Steffan v. Cheney, 780 F. Supp. 1, 3 (D.D.C. 1991). The Navy gave him two options: he could submit a qualified resignation, which allowed the Navy to record an honorable discharge, or he could receive an involuntary discharge. The midshipman chose the qualified resignation, but eighteen months later, he sought reinstatement in the military. He filed suit after the Secretary of the Navy denied his request. *Id.*

marker, the court demanded that the plaintiff meet a performative requirement.[101] By insisting on visibility, the court was bargaining—offering the chance of freedom from oppressive discrimination in exchange for a coerced "outing."

The court's actions, however, are perfectly legitimate within the constructs of the fault model of immutability and the visibility presumption. If the purpose of the inquiry is to smoke out individuals who either merit social opprobrium or have the power to change their circumstances, it is clear that the closet is a tool that gives its occupant a chance at both social control and personal alteration. For instance, it allows the person who occupies it the freedom to decide the timing and the circumstances of the revelation of her sexuality. Beyond that, though, the closet gives gay people the opportunity for concealment. In a world where anti-gay discrimination continues to exist, it is a space where occupants may seek protection. The difficulty with this, though, lies in the lived experience of the closet, which has been described as "the defining structure for gay oppression in this country."[102] The closet gives its occupant control over the timing of the decision to come out, but it also offers the insidious comfort of hiding in shame. The closet may offer opportunities for concealment, but it also creates the illusion of self-help: if a gay person can simply avoid discrimination by concealing her identity, courts have an excuse to deny her additional protection. As it is currently constructed, the fault model of immutability and the visibility presumption leave very little room for a gay person to maneuver. A court might, in good faith, use the model to declare that a gay person who has the ability to conceal herself has no need for more judicial protection than the average citizen receives. Taken to its farthest extreme, a court might also suggest that one who leaves the closet at inopportune moments is at least partially responsible, though not morally culpable, for *any* discrimination that person might experience.

C. THE VOLUNTARY NATURE OF SEXUAL CONDUCT

Finally, the most prominent argument that lower courts used when rejecting gay plaintiffs' immutability claims was the idea that sexual conduct was the product of a free and autonomous choice. The fault model of immutability is clearly on display here; even if a gay person's *desire* for intimacy with a person of the same sex was purely innate, the *decision* to act on that desire was voluntary, deliberate, and unworthy of special judicial protection. Judicial decisions reflected this belief. The immutability claim was rejected in many instances because "[h]omosexuality . . . is [a] behavioral [characteristic] and hence is

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[101] *See id.* at 6 (noting that the plaintiff never "overtly 'exhibited' [homosexual tendencies]").

[102] EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 71 (1990).

fundamentally different from traits such as race, gender, or alienage . . . ."[103] The trial court in *Steffan v. Cheney*, however, was a bit more flexible in its approach when it refused to find that sexual orientation was immutable, stating that "[t]he [c]ourt is . . . convinced that homosexual orientation is neither conclusively mutable nor immutable since the scientific community is still quite at sea on the causes of homosexuality, its permanence, its prevalence, and its definition."[104] The trial court reached this conclusion after noting that the scientific literature suggested that many people, including bisexuals, exist "in between" strict heterosexuality and strict homosexuality, implying that even if a bisexual person does not choose her orientation as such, she has the functional capacity to choose between men and women when selecting her sexual partners.[105] The court's approach here does not reduce sexuality to purely a product of volition, but it recognizes the important role that choice plays when engaging in sexual conduct.

The most damaging argument that courts raised, however, was the *Bowers* argument. As noted above, litigators were eager to use advances in science to combat the harm that *Bowers*—despite its status as a substantive due process decision—wrought in equal protection cases. More often than not, though, their efforts failed. Courts would disregard efforts to find that homosexuals were members of a suspect class by resting on (1) a conduct-based rationale, and (2) a conclusion *about* that conduct that was permissible under the logic of *Bowers*. Specifically, more than one court found that "[i]t would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the [E]qual [P]rotection [C]lause."[106] This argument went right to the core of the immutability factor's gatekeeping purpose, namely, excising from suspect class consideration those groups of litigants who contributed to their own

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[103] High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990); *see also* Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) ("Members of recognized suspect classes, e.g., blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in nature."); Rich v. Sec'y of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984) (dismissing a claim that homosexuality is an immutable characteristic by noting that "[a] classification based on one's choice of sexual partners is not suspect"); *accord* Thomasson v. Perry, 80 F.3d 915, 928 (4th Cir. 1996) (finding that homosexuals are not a suspect class).

[104] 780 F. Supp. at 6.

[105] *Id.* at 6 n.12.

[106] Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987); *see also* Ben-Shalom v. Marsh, 881 F.2d 454, 464–65 (7th Cir. 1989) ("If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes. The Constitution, in light of *Hardwick*, cannot otherwise be rationally applied, lest an unjustified and indefensible inconsistency result.").

subordinate status. Not only were members of the gay community knowingly engaging in conduct that society largely despised at that time, but even worse, it was conduct for which one might constitutionally go to jail.

The cases from the 1980s and 1990s that rejected immutability arguments on the basis of conduct raise several interesting points about the interaction between sexual orientation and a model of immutability based on fault. First of all, gay members of society did not receive nearly as much support in those decades as they do in the contemporary world. According to a 2011 Pew Research study, 58% of Americans have concluded that homosexuality should be accepted by society rather than discouraged.[107] This represents a significant change in attitude over a relatively brief period of time. In 1977, approximately 13% of Americans believed that a person was born gay, while 56% of Americans believed that homosexuality was caused by a person's upbringing and environment.[108] Today, those numbers have converged, with 36% of Americans believing that individuals are born gay, and 37% believing that upbringing and environment cause homosexuality.[109] In 1973, 70% of Americans believed that sexual intimacy between gay couples was always wrong, but by 2010, only 43.5% felt this way.[110]

These numbers offer a sense of the degree to which the gay community was an object of contempt in the 1980s and into the 1990s, when many gay rights advocates were losing the battle to have sexual orientation deemed a suspect class. As noted in the cases above, a number of courts refused to find that homosexuality was a suspect classification, because the victims of the discriminatory policies *chose* to engage in gay sexual conduct. Even though some courts recognized the difference between homosexual status and homosexual conduct, the emphasis on conduct—socially despised conduct—was ultimately overwhelming. The reduction of homosexuality to gay sex, combined with a fault-based model of immutability, undermined the civil rights interests of gay plaintiffs because, with the exception of rape, sex is always a choice. Therefore, gay plaintiffs had to persuade a court that the conduct which defined the class was either beneficial or benign, in order

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[107] PEW RESEARCH CTR., MOST SAY HOMOSEXUALITY SHOULD BE ACCEPTED BY SOCIETY (2011), *available at* http://pewresearch.org/pubs/1994/poll-support-for-acceptance-of-homosexuality-gay-parenting-marriage.

[108] Lydia Saad, *Americans' Acceptance of Gay Relations Crosses the 50% Threshold*, GALLUP (May 25, 2010), http://www.gallup.com/poll/135764/americans-acceptance-gay-relations-crosses-threshold.aspx.

[109] *Id.*

[110] William Harms, *Americans Move Dramatically Toward Acceptance of Homosexuality*, UCHICAGO NEWS, Sept. 28, 2011, *available at* http://news.uchicago.edu/article/2011/09/28/americans-move-dramatically-toward-acceptance-homosexuality-survey-finds.

to overcome the view that they were responsible for their own poor treatment. The impact of *Bowers*, however, made that an impossible task. The conduct that defined the class could never be beneficial or benign because the law was perfectly free to stigmatize it.[111] In the course of stigmatizing the act, the law effectively stigmatized homosexuals as well. Under the fault model, a group that is appropriately stigmatized will not receive the extraordinary assistance that comes from suspect status. This line of reasoning effectively foreclosed homosexuals from achieving this goal.

The unsuccessful argument from science, the problem of visibility, and the functional conflation of stigmatized act and identity show how the fault model produced a singular failure for gay claimants. That failure continued until 2008, when the Supreme Court of California became the first court of last resort in the nation to hold that classifications on the basis of sexual orientation would be accorded suspect status.[112]

III. SHIFTING TO AN AUTONOMY-BASED MODEL FOR IMMUTABILITY

A. THE CORE OF A DOCTRINAL REVOLUTION: IN RE MARRIAGE CASES, KERRIGAN V. COMMISSIONER OF PUBLIC HEALTH, *AND* VARNUM V. BRIEN

The gay rights movement saw a series of victories in 2008 and 2009 that fundamentally shifted the doctrinal landscape on which so many earlier battles had been fought and lost. After many years of disappointment and frustration, the Supreme Court of California legalized same-sex marriage in the spring of 2008 with *In re Marriage Cases*. The substantive civil rights victory was the most important

[111] The language and tenor of the Court's opinion made it clear that they were linking the act of sodomy to homosexuals, as homosexuals. The Court achieved this end simply by virtue of the way it framed the relevant question: whether or not there was a fundamental right to engage in homosexual sodomy. *See* Bowers v. Hardwick, 478 U.S. 186, 190 (1986). The Court did not inquire whether homosexuals had a fundamental right to privacy while engaged in intimate activity in their own homes; rather, the Court inquired whether or not homosexuals had a fundamental right, *particular to them*, to have a very particular kind of sex. *Id. Bowers* surely was not the first instance of outsiders constructing gay identity around the act of sex. It was, however, an instance where the Supreme Court placed its imprimatur on that attitude. By treating homosexual status as indistinguishable from the homosexual act, and upholding a law which made the act criminal, the Court effectively sanctioned the criminalization of the status, as well. At the time of the decision, twenty-six states had already eliminated their anti-sodomy statutes, but this fact was irrelevant. *Id.* at 193. After *Bowers*, the figure who embodied the conduct in the Court's imagination was, at all times, a presumptive criminal.

[112] *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008).

outcome of the case from both a social and an historical perspective, but the decision to treat classifications on the basis of sexual orientation as both suspect and subject to strict scrutiny may have a more widespread impact in the future.[113] In order to reach its conclusion, the court evaluated three factors for achieving suspect status in California: (1) the classification was based on an immutable trait; (2) a lack of a relationship between the characteristic and an ability to contribute to society; and (3) the characteristic was associated with a significant social stigma based on a long-standing history of discrimination.[114]

The analysis of the final two categories was relatively straightforward, but the key analytical move was the court's holding on immutability. Consistently with most other courts around the country, the California Court of Appeal had previously found that sexual orientation

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[113] Professor Dale Carpenter has noted the following:

> For the first time in the nation's history, an appeals court of last resort . . . held that discrimination on the basis of sexual orientation, like discrimination based on race, should be subjected to strict judicial scrutiny under equal protection principles. Under this scrutiny, the discrimination is almost always unconstitutional, requiring the government to show that its classification is necessarily related (or narrowly tailored) to a compelling interest. While this part of the California Supreme Court holding may have little practical effect in a state like California, where it seems almost all public and much private discrimination has already been eliminated by the state legislature, the court's reasoning may influence other courts at the state and federal levels that have been very reluctant to go down this road.

Dale Carpenter, *Sexual Orientation and Heightened Scrutiny in the California Marriage Decision*, THE VOLOKH CONSPIRACY (May 22, 2008, 11:02 AM), http://volokh.com/2008/05/22/sexual-orientation-and-heightened-scrutiny-in-the-california-marriage-decision/. The voters in California passed an amendment to the state constitution subsequent to the *In re Marriage Cases* decision that invalidated same-sex marriage in California, thus obviating this aspect of the State Supreme Court decision. *See generally* CALIFORNIA GENERAL ELECTION: OFFICIAL VOTER INFORMATION GUIDE 54 (2008), http://voterguide.sos.ca.gov/past/2008/general/pdf-guide/vig-nov-2008-principal.pdf. The California Supreme Court upheld the amendment to the state constitution in *Strauss v. Horton*, 207 P.3d 48 (2009). Even though this holding confirmed the popular result which overruled much of *In re Marriage Cases*, the court noted that the new amendment did not undermine the finding that classifications on the basis of sexual orientation would be subject to strict scrutiny. *See id.* at 78.

[114] *In re Marriage Cases*, 183 P.3d at 442.

was not a suspect classification precisely because the characteristic was not immutable.[115] The Supreme Court of California, however, rejected that position, finding that "a person's sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment."[116] It is true that the court also noted that immutability was not a *necessary* finding for purposes of the suspect class analysis.[117] Nonetheless, the court's decision ensured that *if* future courts included immutability in their analysis, then they would have to consider whether the characteristic in question reflected deeply-held commitments to personhood and identity.

The Supreme Court of California reached its decision in the spring of 2008, and later that year, the Supreme Court of Connecticut also legalized same-sex marriage.[118] Connecticut had a civil union statute at the time that was essentially identical to California's domestic partnership statute, in that it offered gay couples the same rights under state law as married heterosexual couples.[119] The availability of the alternative regime notwithstanding, plaintiffs filed suit when they were unable to acquire marriage licenses, arguing that the denial violated their equal protection rights under the state constitution.[120]

In this case, the plaintiffs asked the court to consider whether or not sexual orientation might qualify as a quasi-suspect classification under state law. The court determined that immutability would be a relevant factor in that analysis, and held the following:

> In view of the central role that sexual orientation plays in a person's fundamental right to self-determination, we fully agree with the plaintiffs that their sexual orientation represents the kind of distinguishing characteristic that defines them as a discrete group for purposes of determining whether that group should be afforded heightened protection under the equal protection provisions of the state constitution.[121]

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[115] *Id.*
[116] *Id.*
[117] *Id.* at 442. The Court's assertion that religion—a highly mutable fact of existence—was treated as a suspect classification in California made it clear that immutability was a factor that courts might regard as significant, or else completely ignore. *See id.*
[118] Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008).
[119] *Id.* at 411–12.
[120] *Id.* at 412–13.
[121] *Id.* at 438.

As noted above, the effort to convince courts that sexual orientation was an immutable characteristic often foundered on the comparison to the ostensibly fixed identities of race, gender, and national origin.[122] The Supreme Court of Connecticut, however, rejected that approach, stating that "[a]lthough we do not doubt that sexual orientation—heterosexual or homosexual—is highly resistant to change, it is not necessary for us to decide whether sexual orientation is immutable in the same way and to the same extent that race, national origin and gender are immutable . . . ."[123] Instead, the court explicitly grounded its approach in the sentiments of cases like *Lawrence v. Texas*, which held that gay and lesbian individuals have a protected liberty interest in conducting intimate encounters with other consenting adults without interference from the state.[124] Describing sexual intimacy as a "'sensitive, key relationship of human existence,'"[125] and choices regarding that intimacy as "'an integral part of human freedom,'"[126] the court concluded that sexual orientation was "'a significant part of a person's identity.'"[127] The court, however, did not end its analysis with a reflection on the hardiness of sexual orientation and its relationship to personal autonomy. Relying on the language of the California decision, it also found that this aspect of identity was so important that government did not even have the *power* "to require a person to repudiate or change his or her sexual orientation"[128] as the price for ensuring equal treatment. The Supreme Court of Connecticut, then, pushed harder than the Supreme Court of California to explain *why* the ability to express one's sexual orientation publicly was not only important, but also worthy of heightened protection: given that choices about sexual intimacy flow from the deepest commitments of our humanity, policies which protect only those who publicly pass as heterosexual amount to a form of tyranny that undermines the constitutional commitment to personal autonomy.[129]

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[122] *See supra* Part II.

[123] *Kerrigan*, 957 A.2d at 437.

[124] *See* Lawrence v. Texas, 539 U.S. 558, 576–77 (2003).

[125] *Kerrigan*, 957 A.2d at 437 (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973)).

[126] *Id.* at 438 (quoting *Lawrence*, 539 U.S. at 576–77).

[127] *Id.* (quoting Able v. United States, 968 F. Supp. 850, 863 (E.D.N.Y. 1997), *rev'd on other grounds*, 155 F.3d 628 (2d Cir. 1998)).

[128] *Id.* (quoting *In re* Marriage Cases, 183 P.3d 384, 384 (Cal. 2008)).

[129] Professor Jed Rubenfeld talked about the powerful, normalizing effect of the law on those areas of life deemed subject to protection under the rubric of privacy:

> Consider . . . three principal areas in which the right to privacy has been applied: child-bearing (abortion and contraception), marriage (miscegenation laws, divorce restrictions, and so on), and education of children (*Meyer* and *Pierce*). According to the prevailing method of privacy analysis, certain decisions concerning these matters cannot be

Thus, the court's analysis sent an important signal: it not only said that the new approach to immutability would be deeply respectful of those choices which organized key components of existence, but also that this respect would take doctrinal form in a liberty-based conception of

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> proscribed because they are "fundamental." But what is fundamental about these decisions? Are they fundamental in themselves? If, for example, the right to decide whom to marry is inherently fundamental, how is it, for example, that the proscriptions against incestuous and bigamous marriage do not offend it? . . . . There *is* something fundamental at stake in the privacy decisions, but it is not the proscribed conduct, nor even the freedom of decision—it is not what is being taken away.
>
> The distinctive and singular characteristic of the laws against which the right to privacy has been applied lies in their *productive* or *affirmative* consequences. There are perhaps no legal proscriptions with more profound, more extensive, or more persistent affirmative effects on individual lives than the laws struck down as violations of the right to privacy. Anti-abortion laws, anti-miscegenation laws, and compulsory education laws all *involve the forcing of lives into well-defined and highly confined institutional layers. At the simplest, most quotidian level, such laws tend to* take over *the lives of the persons involved: they occupy and preoccupy. They affirmatively and very substantially shape a person's life; they direct a life's development along a particular avenue. These laws do not simply proscribe one act or remove one liberty; they inform the totality of a person's life.*

Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 783–84 (1989) (final emphasis added). Though Rubenfeld is not discussing homosexuality or the pressure to conform in this passage, the sentiment he expressed is perfectly applicable in that context. Courts that rely on immutability when denying suspect or quasi-suspect status to classifications on the basis of sexual orientation impermissibly steer the direction of gay people's lives by granting them protection under two primary circumstances: (1) when they seek the shelter of the closet, or (2) when they actively embrace compulsory heterosexuality and actively reject open homosexuality. A gay man need not face employment discrimination if he simply declines to come out at work; a lesbian can get married if she simply chooses to marry a man; a gay man need not experience housing discrimination if he pretends to be straight when he seeks an apartment; a lesbian can maintain custody of her children if she refuses to cohabit with her life partner. Laws that fail to protect homosexuals *as such* can have the consequence of altering the most fundamental aspects of a person's life. The ability to avoid those consequences lies squarely in a gay person's willingness to pretend that sexual orientation is nothing more than a temporary barrier to a desirable outcome that is easily removed, when in fact it is as powerful a shaping force as racial affiliation, gender, or national origin.

equality, locating concerns about autonomy within the framework of equal protection analysis.

The Supreme Court of Iowa continued in the same vein when it issued its decision legalizing same-sex marriage in *Varnum v. Brien*.[130] Again, much like the supreme courts of California and Connecticut, the court considered whether or not classifications on the basis of sexual orientation would be subject to a higher form of scrutiny. Immutability was key to the analysis again, and here, the court held that immutability is satisfied "when . . . the identifying trait is 'so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change it.'"[131] Identity formation was not something that happened solely on an individual level; it also happened in a context. The court reasoned that "[s]exual orientation influences the formation of personal relationships between all people—heterosexual, gay, or lesbian—to fulfill each person's fundamental needs for love and attachment."[132] Those relationships reflect and reinforce aspects of the self, and the fact that "the barrier is temporary or susceptible to self-help"[133] is not a proper justification for judicial inattention. The Iowa court—following the California and Connecticut courts—implied that the right to insist on judicial protection of such core components of the self was actually a right of citizenship, and courts had an obligation to affirm that right by shielding it from untenable forms of governmental intrusion. This focus on autonomy was not, however, expressed in the familiar terms established by the Due Process Clauses of the Fifth and Fourteenth Amendments; rather, these courts understood the role that autonomy played in shaping a *group* identity, and infused that understanding into equal protection doctrine through the mechanism of the immutability factor. As such, these courts shifted the emphasis in immutability from the traditional fault-based model to a new autonomy-based model, which may in the future become the dominant method of analyzing suspect class claims.

B. DIGNITARY CLAIMS AND THE AUTONOMY-BASED MODEL OF IMMUTABILITY

Even though the California, Connecticut, and Iowa courts have provided a viable model that other courts—including the U.S. Supreme Court—might follow, there is some speculation that equal protection no longer provides a path for future protection against group-based harms. Professor Yoshino, for instance, has argued that pluralism anxiety has

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[130] 763 N.W.2d 862 (Iowa 2009).

[131] *Id.* at 893 (quoting *Kerrigan*, 957 A.2d at 438 (quoting Watkins v. U.S. Army, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring in the judgment))).

[132] *Id.*

[133] *Id.*

persuaded the Supreme Court to deny equal protection to new subordinated groups.[134] He argues that, instead of embracing the project of deciding which groups will receive heightened protection and which groups will not, modern jurisprudence suggests that the Court is far more open to evaluating their claims of discrimination through the lens of liberty: "[t]he liberty-based dignity claim has been the Court's way of splitting the difference between a direct extension of equality analysis and its absolute foreclosure."[135] In other words, Professor Yoshino believes that the Due Process Clauses, rather than the Equal Protection Clause, will be the primary guarantors of protection against group-based discrimination.

Professor Yoshino makes a compelling argument regarding the future direction of the U.S. Supreme Court. It is less clear, however, that the state courts will necessarily follow a similar path. An extraordinary amount of gay rights litigation takes place in the state courts, and this trend is very likely to continue. Moreover, even if these courts rely on immutability as a factor only sporadically, it has not disappeared from consideration. Therefore, these courts might be open to a new understanding of the factor. If Connecticut and Iowa are any indication, then the concern for autonomy and the tone of respect that animated the Supreme Court's decision in *Lawrence v. Texas* might play an instrumental role in persuading other courts to adopt the autonomy-based model of immutability that those courts chose to adopt.

Lawrence represents the high-water mark in what Professor Laurence Tribe describes as a jurisprudence within which "due process and equal protection . . . are profoundly interlocked in a legal double helix[,] [and tell] a single, unfolding tale of equal liberty and increasingly universal dignity."[136] In *Lawrence*, the Supreme Court held that anti-sodomy statutes violated the liberty and privacy rights protected by the Due Process Clause of the Fourteenth Amendment.[137] Protecting the right to engage in sodomy, however, was not the Court's ultimate point; rather, the point of the decision was to protect the right of consenting adults to engage in intimate, sexual relationships without undue interference by the state.[138] This was particularly important for the gay claimants whose interests were primarily at stake in the case; unlike the Court in *Bowers*, the *Lawrence* majority recognized that the central claim spoke to the protection of a relationship, rather than the demeaning reduction of a relationship to a sexual act.[139] This concern for the dignity

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[134] Yoshino, *supra* note 22, at 748.
[135] *Id.* at 776.
[136] Laurence Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004).
[137] 539 U.S. 558, 578 (2003).
[138] *Id.* at 567.
[139] *Id.*

of both the individuals who made the choice and the relationship—even if fleeting—that flowed from that choice was not, however, simply a liberty claim:

> Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.[140]

Even though the Court rested its decision on the Due Process Clause of the Fourteenth Amendment, it understood the implications for equality that arose from the decision. Protecting the right of consenting adults to engage in intimate sexual conduct eliminated the ability of the state to turn gay people, as a class, into presumptive criminals. Homosexuals were no longer naturally appropriate targets for discrimination. Rather, they were people whose intimate relationships were worthy of respect. "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, *just as it would demean a married couple* were it to be said marriage is simply about the right to have sexual intercourse."[141] Thus, treating the conduct as a function of a relationship, and elevating the relationship by comparing it to heterosexual marriage, validated the activity and served as a gesture of equal respect to gay people as a group. Rejecting the demeaning approach of *Bowers* restored dignity to the class.

The autonomy model of immutability is in line with this reasoning. The approach conveys a message of respect to individuals by evaluating the claims of personhood that they present to courts. Especially in the context of gay rights, the autonomy model acknowledges the link between act and identity, offers respect for individuals whose identities have been the source of persecution, and protects those same individuals against unwarranted intrusion from the state.

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[140] *Id.* at 575.

[141] *Id.* at 567 (emphasis added).

CONCLUSION

Three state supreme courts, in California, Connecticut, and Iowa, have altered their vision of what "counts" for purposes of the immutability analysis. Immutability is no longer a characteristic that is inscribed, if only figuratively, in the genetic code or in blood; it now embraces an increasingly fleshed-out conception of the elements that contribute to who we are as persons. Now that three courts have taken this step, it remains to be seen whether other courts will follow their lead. At a minimum, doing so would open the doors to ensuring that gay individuals receive the protections under law that they have so long deserved.