A Deer in Headlights: The Supreme Court, LGBT Rights, and Equal Protection

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 COMMENTARY

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Nan D. Hunter*

ABSTRACT

In this Essay, I argue that the problems with how courts apply Equal Protection principles to classifications not already recognized as suspect reach beyond the most immediate example of sexual orientation. Three structural weaknesses drive the juridical reluctance to bring coherence to this body of law: two doctrinal and one theoretical. The first doctrinal problem is that the socio-political assumptions that the 1938 Supreme Court relied on in United States v. Carolene Products, Inc. to justify strict scrutiny for “discrete and insular minorities” have lost their validity. In part because of Roe v. Wade-induced PTSD, the courts have not generated a replacement paradigm for a society that is radically more diverse than the United States was at that time. The second doctrinal problem is that the discourse of Equal Protection law has become unnecessarily moralized, tending to infuse analysis of classifications with the question of whether a particular group of persons deserves judicial protection against majoritarian legislation. Finally, a theoretical issue has long plagued Equal Protection law: the role of ideology. Ostensibly irrelevant, it has nonetheless crept into the case law through references to, for example, “white supremacy,” but has never been fully and properly analyzed.

The role of ideology and its relationship to the original meaning argument advanced by Professor Eskridge generates my primary critique of his claim. While the dynamics of gender and sexuality

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can be separated in many instances, I argue that they are inextricably intertwined in the ideological foundations for discrimination based on sexual orientation (though not always in the manifestations of such discrimination). Recognizing this melded conceptualization would enrich equality principles more than reading a sexual orientation distinction alone into the scope of the original meaning of the Fourteenth Amendment. Given the Supreme Court’s antipathy to acknowledging the ideological dimensions of inequality, however, it should consider explicit adoption of the proportionality test that it has in fact been utilizing in sexual orientation cases.

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I. INTRODUCTION

The social movement for LGBT equality has led to a remarkable result. Public opinion on the topic once thought to be the most controversial—the right of same-sex couples to marry—has shifted dramatically to a position supportive of that claim.1 At the same time, when faced with LGBT equality arguments, the Supreme Court appears to have abandoned any attempt to develop or even explicate the law of Equal Protection. In three decisions since 1996, the Court has acted to protect LGBT

persons from discrimination without venturing beyond broad rhetorical gestures toward concepts of equality and liberty.  

Since modern Equal Protection doctrine began with the articulation of strict scrutiny for race-based classification, the Court has addressed the standard of review applicable to a classification multiple times during roughly a twenty-five-year period: for sex, parental marital status, noncitizenship, economic status, and disability. After an internal debate among the Justices in 1985 over whether to extend heightened scrutiny to “new” categories, the Court essentially concluded that further identification of suspect classifications was jurisprudentially unwise. Although the Court strengthened the intermediate standard for sex discrimination in United States v. Virginia, it has recognized no additional bases for heightened scrutiny for forty years. For sexual orientation cases, the Court has paired a refusal to invoke heightened scrutiny with an incongruous willingness to invalidate federal and state statutes and state constitutional amendments that disadvantage LGBT persons. It has not, however, produced the articulation of any standard of review applicable to sexual orientation-based classification.

At least in part, the Court’s hesitancy to extend the logic of prior decisions that were premised on the criteria for heightened scrutiny developed as a reaction to a reaction, that is, to the political movement mobilized in reaction to Roe v. Wade. Although not an Equal Protection decision, the social meaning of Roe is properly understood as an equality decision for women and the product of a social movement for women’s equality with men. The Court was hesitant to extend the logic of Roe’s holding when it came to cases involving the rights of women to marry other women or men.  

The backlash against *Roe* has frozen not only substantive due process law, the basis of the holding in *Roe*, but also may have contributed to the refusal to extend a higher level of review in Equal Protection law involving similarly contested “social issues.”

By now, the Court’s silence on Equal Protection standards of review has produced its own discourse. The Court’s willingness to act repeatedly, but without explanation, has perplexed scholars and left lower courts scrambling for interpretive guidance. In this Article, I enter the fray by taking the argument out of the LGBT rights field alone and analyzing a variety of ways that the Court could tackle a much-needed modernization of the principles underlying heightened scrutiny in Equal Protection law. Specifically, I argue that the current disarray has two distinct components: doctrinal and theoretical. In Parts III and V, respectively, I propose ways for the Court to address each.

In Part IV, I focus on the newest contribution to Equal Protection arguments about LGBT rights: Professor Eskridge’s assertion in the Frankel Lecture Address that, properly understood, the original meaning of the Fourteenth Amendment per se mandates invalidation of laws that discriminate based on sexual orientation. The Frankel Lecture Address asks, in effect, whether original meaning theory can put the Humpty Dumpty of current Equal Protection law together again. Professor Eskridge’s original meaning argument rests on two pillars: a historical analysis of the conceptual and linguistic components of the phrase “equal protection of the law” and the incorporation of the anti-caste principle as the primary signifier of legitimacy for stringent judicial review. The latter is, to me, the more interesting aspect of the claim, primarily because of its implications for the scope of the shelter provided by, and the role of ideology in, Equal Protection law. These are the dimensions of original meaning jurisprudence to which I will turn in Parts IV and V.

Initially, however, one must situate this analysis in the context of Equal Protection law more broadly. In Part II, I address the first of the two components underlying the Court’s silence: the doctrinal gap. The Court has never broken from its Footnote 4 foundations for heightened judicial review, even

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15. Id. at 1073.
though they have been weakened by social and political change. The process-based protections for minority rights in a democracy may have functioned well in a demographically simple society, but the United States has grown far more complex. In addition, the rise of equality claims based on gender and sexuality-linked classifications has complicated the prejudice component of Footnote 4. The notion of prejudice has morphed into the concept of animus, which has tended to moralize judicial assessment of legislative classifications more than is necessary.

In Part III, I analyze what I believe are the strongest frameworks for future Equal Protection issues that do not involve the traditionally protected categories. First, I argue that the Court could choose to come out of its Equal Protection closet by explicitly adopting the metrics of proportionality, a philosophy that the Court has not owned but the one that most closely fits what it has actually done in sexual orientation and other cases. Second, I consider the anti-caste principle—the first of the two pillars of the original meaning argument. I argue that the anti-caste principle—standing on its own and distinct from original meaning—provides a strong alternative mode of analysis.

In Part IV, I turn to the original meaning argument in the Frankel Lecture. As a tactic for influencing jurists and others who have professed allegiance to original meaning philosophy but who are skeptical about a constitutional right of same-sex couples to marriage, the argument is appealing. I am doubtful, however, that it will suffice to unlock most such individuals from more traditionalist understandings of LGBT-related questions. My primary critique, however, is not tactical but conceptual. Even if an original meaning standard succeeds in a sexual orientation case, it may set the bar for meaningful Equal Protection review too high for other important claims because of the demanding criteria that are necessary to demonstrate the existence of a caste-like social structure.

Finally, in Part V, I address one aspect of the theoretical vacuum in Equal Protection law: the role of ideology. Although an assessment of all the major theoretical shortcomings of Equal Protection jurisprudence is beyond the scope of this Article, the incorporation of ideology has long been a missing piece. Identifying a hegemonic ideology behind structures of dominance is a required element for a caste-based analysis to succeed. An anti-caste or original meaning argument grounded solely on the history of discrimination based on sexual orientation, as Professor Eskridge proposes, misses the inextricable factor of gender. It is precisely in the realm of ideology that gender
functions most powerfully in constitutional analysis of anti-gay subordination.

This Article goes to press shortly before the Court’s next high impact LGBT rights decisions: the marriage equality issues raised in Obergefell v. Hodges and related cases.\textsuperscript{16} Whatever the outcome of that litigation, the decision on whether states must license or recognize same-sex marriages is unlikely to answer the deeper questions of Equal Protection jurisprudence. These questions will remain important for years to come.

\section*{II. THE DOCTRINAL GAP: FALLING Tiers}

The Supreme Court appears to have abandoned the project of identifying explicit standards of review in LGBT-related cases. In its three major decisions in this field, the majority of the Court has carefully avoided discussion of the traditional tiers of Equal Protection review. The gap created by this silence has flummoxed advocates and lower federal court judges, who lack the freedom to jettison doctrine, and thus have clung to the familiar structure of three-tiered analysis both before and after the Court’s most recent decision regarding sexual orientation and Equal Protection in United States v. Windsor. As the Second Circuit dryly noted in 2012, “[I]t is safe to say that there is some doctrinal instability in this area.”\textsuperscript{17}

Leading up to the Windsor decision, the briefs of the parties and their supporting amici divided with parade ground precision along the line of which standard of review should govern, as is typical in conventional Equal Protection analysis.\textsuperscript{18} At issue was the constitutionality of the Defense of Marriage Act, which prohibited the federal government from recognizing any marriage between same-sex spouses, regardless of the lawfulness of the marriage under state law.\textsuperscript{19} Both sides framed the case in such a way that the standard of review was outcome-determinative.\textsuperscript{20} In his opinion for the Court, Justice Kennedy chose to ignore the issue, prompting protests by

\begin{itemize}
\item\textsuperscript{17} Windsor v. United States, 699 F.3d 169, 181 (2d Cir. 2012), aff’d on other grounds, United States v. Windsor, 133 S. Ct. 2675 (2013).
\item\textsuperscript{18} Windsor, 133 S. Ct. at 2706 (Scalia, J., dissenting).
\item\textsuperscript{19} Id. at 2683 (majority opinion); Defense of Marriage Act of 1996, Pub. L. No. 104-199, § 3, 110 Stat. 2419, 2419 (codified at 1 U.S.C. § 7 (2012)).
\item\textsuperscript{20} See, e.g., Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 28–30, Windsor, 133 S. Ct. 2675 (No. 12-307), 2013 WL 267026; Brief for the United States on the Merits Question at 18–21, Windsor, 133 S. Ct. 2675 (No. 12-307), 2013 WL 683048.
\end{itemize}
dissenting Justices that the absence of an articulated standard rendered the Court’s logic incomprehensible.  

In the Courts of Appeals decisions since Windsor, judges have followed a variety of doctrinal paths, splitting on the level of review to be applied and on whether a liberty or an equality analysis should predominate. The Seventh Circuit held that the exclusion of gay couples from marriage violated the Equal Protection Clause under rational basis review. The Ninth Circuit reached the same conclusion relying on a prior Circuit decision finding that sexual orientation classifications must be subject to heightened scrutiny. The Fourth and Tenth Circuits utilized the equal liberty approach, suggesting that the fundamental right to marry formed the primary predicate for their decisions to strike down exclusionary laws, but ultimately grounding their conclusions on an interwoven and mutually reinforcing understanding of both liberty and equality.

The Sixth Circuit, by contrast, rejected each of the possible bases for a finding of unconstitutionality and upheld bans on same-sex marriage in four states. In analyzing the correct standard for Equal Protection review, the court invoked the most deferential form of rational basis: “Our task...is to decide whether the law has some conceivable basis, not to gauge how that rationale stacks up against the arguments on the other side,” and cited Windsor as authority for recognizing the traditional role of states in defining marriage. Rather than a motivation based on animus, the court identified “fear that the courts would seize control over an issue that people of good faith care deeply about” as the driving force behind bans on same-sex marriage.

It is no wonder that there is a cacophony in the lower federal courts, when the Supreme Court itself appears to have reached a doctrinal dead end. In this situation, it is understandable that lower courts and advocates would continue to structure their Equal Protection reasoning around the standard of review. That focus, however, misses two structural factors that converge in the

21. Windsor, 133 S. Ct. at 2706–07 (Scalia, J., dissenting); id. at 2716 (Alito, J., dissenting) (stating that the decision “seems to rest on [Equal Protection]”).
22. Baskin v. Bogan, 766 F.3d 648, 656 (7th Cir. 2014).
23. Latta v. Otter, 771 F.3d 456, 464–65 (9th Cir. 2014) (citing SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471 (9th Cir. 2014)).
26. Id. at 408 (citing Windsor, 133 S. Ct. at 2689).
27. Id.
Supreme Court’s silence: the broken foundation for stringent judicial review of legislative classifications and the moralized social meaning of strict scrutiny.

A. The Obsolescence of Footnote 4

The status quo of Equal Protection analysis, under which the tiers of review developed, emerged from the Court’s famous Footnote 4 in *United States v. Carolene Products*, later elaborated by John Hart Ely’s concept of representation reinforcement. Although that argument initially garnered wide support among scholars and judges, it no longer holds the same position of preeminence. The persuasiveness of the representation reinforcement principle has weakened steadily since Bruce Ackerman’s deconstruction of the concept of “discrete and insular minority,” arguing that it is the wrong beginning point for application of heightened scrutiny.

For Ackerman, the Footnote 4 representation reinforcement argument failed the test of late twentieth century politics because it gave too little weight to the potential impact of social movement mobilization that could be deployed by distinctive minorities and because it overlooked members of anonymous or diffuse groups “who, in the future, will have the greatest cause to complain that pluralist bargaining exposes them to systematic—and undemocratic—disadvantage.” The deepest harm from discrimination, he argued, was its impact on pariah groups, those whose interests failed to garner even respectful engagement and consideration in the legislative process. Ackerman used gay people to illustrate his argument that “[l]ong after discrete and insular minorities have gained strong representation at the pluralist bargaining table, there will remain many other groups who fail to achieve influence remotely proportionate to their numbers.”

28. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (suggesting that “prejudice against discrete and insular minorities may be a special condition [justifying judicial intervention], which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities”).


31. *Id. at* 723–28.

32. *Id. at* 729–33.

33. *Id. at* 737.

34. *Id. at* 732, 38.

35. *Id. at* 742.
The paradox of political power in the United States—that minoritarian civil rights protections are achieved only when there is majoritarian support—has grown more complex since Ackerman wrote his article. The United States no longer contains only the relatively simple categories of race, national origin, and religion that constituted minority groups as the 1938 Court understood them in Footnote 4. Today a messy mix of hundreds of social groups occupies the demographic landscape. Patterns of assimilation and intermarriage blur the borders of each group, further complicating the premises underlying the representation reinforcement principle.

The same-sex marriage debate, with the adoption of equal marriage rights by democratic legislative or electoral majorities in twelve states plus the District of Columbia, illustrates how far the social reality has come since Ackerman used the example of gay men and lesbians to demonstrate the pariah principle. To put it colloquially, this is not your grandfather's discrete and insular minority.

The complexity of contemporary U.S. society has made the old criterion of zero-sum political powerlessness largely irrelevant. The white majority has decreased from 90% of the population in 1940 to 75% in 2010. The Census Bureau predicts that whites will become a population minority by 2043. The largest single ethnic minority today is Hispanics, a group that was not even counted in 1940.

See infra notes 40–44 and accompanying text.

Marriage across racial and ethnic lines is increasing in the United States. In 1960, less than 1% of married couples were interracial. Table 1. Race of Wife by Race of Husband: 1960, 1970, 1980, 1991, and 1992, U.S. CENSUS BUREAU (June 10, 1998), http://www.census.gov/population/socdemo/race/interractab1.txt. In 1980, 6.7% of new marriages involved spouses of different races or ethnicities; in 2010, the rate had more than doubled to 15.1%. Paul Taylor et al., Pew Research Ctr., The Rise of Intermarriage: Rates, Characteristics Vary by Race and Gender 5 (2012). A telephone survey in 2009 found that 35% of adults say that they have a close relative who is married to someone of a different race. Id. at 37 & n.17.


the Statistical Abstract did not report numbers for any religions other than Christian or Jewish faiths. Today, the Pew Research Center includes Hindus, Native American religions, New Age faiths, and three subcategories each of Buddhists and Muslims in its reports on religion in the United States.

As LGBT political progress has demonstrated, even a minority that is quite small can achieve meaningful political power. Urban areas have long been a stronghold for LGBT political power, and effective coalition building within, and allegiance to, a political party can extend that power beyond the urban context. Yet despite strong LGBT representation at the pluralist bargaining table, there also remain enormous geographic disparities. If the Court wishes to articulate a coherent doctrinal approach in sexual orientation discrimination cases, it must acknowledge the possibility of profound unevenness in political representation and jettison a zero-sum metric of powerlessness.

Although too long overlooked, the *Carolene Products* decision itself supports such flexibility. It envisions enhanced scrutiny of classifications penalizing characteristics that were disfavored in a particular time and place, in addition to characteristics such as race that have been enduring subjects of disfavor. The cases cited in Footnote 4 allude to discrimination against persons who were geographic outsiders in a particular state, even though not members of an otherwise stigmatized group, and Americans of German descent during a particular time period. Although

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45. Schacter, supra note 1, at 1170–71.
46. S.C. State Highway Dep’t v. Barnwell Bros., 303 U.S. 177, 184 n.2 (1938). In *Barnwell*, the Court found that even in an ordinary commercial regulation, an invidious distinction disadvantaging geographic and political outsiders could be invalid. As the Court explained, in conjunction with citing other cases as support, “[W]hen the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.” *Id.* at 185 n.2.
47. Pierce v. So’y of Sisters, 268 U.S. 510, 529–30 (1925); Bartels v. Iowa, 262 U.S. 404, 409–10 (1923); Meyer v. Nebraska, 262 U.S. 390, 396–97 (1923). The statutes at issue in all three of these cases barred the teaching of German in public schools and were enacted in the wake of World War I. Cf. Farrington v. Tokushige, 273 U.S. 284, 298 (1927).
“differences in race and color” have historically served as markers of discrimination, the Court also has a record of understanding that “community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection.” 48 It is this more contingent understanding of political power that the Court will need to reconsider in the future.

B. The Moralization of Strict Scrutiny

The Court’s reluctance to be more clear about its Equal Protection standards does not signal an unwillingness to develop new doctrine (there are plenty of examples of new doctrine in other fields), but rather an inability to escape being caught in the gears of normative change in the broader society. The majority of Justices have sought to eliminate egregious forms of discrimination based on sexual orientation, without endorsing the proposition that sexual orientation is a neutral characteristic and that agents of the state may not assign moral weight to an individual’s sexual orientation. Fear of a backlash against such a position by social conservatives, and memory of the backlash against Roe v. Wade, has produced a jurisprudence of minimalist incrementalism.

This fear, and the resulting intentional obfuscation of the interpretive principles normally embedded in precedent, is exacerbated by the right and wrong morality associated with the anti-discrimination command. Too often, the mandate of equal protection of the law bleeds into a moral assessment of the affected group, rather than the propriety of a classification. The shorthand question for strict scrutiny can too easily become whether the group deserves protection rather than whether the classification can be justified.

In Equal Protection law, this moralization has come to a head in the Court’s use of animus as a marker of illicit legislative motive. The Court relied heavily on an inference of animus to invalidate a state constitutional amendment in Romer v. Evans, 49 and Justice O’Connor made the articulation of an animus-based standard the grounding for her concurring opinion in Lawrence v. Texas. 50 In Windsor, the Court once again alluded to prejudice as a central rationale for striking down DOMA. 51

Using morality-inflected language to promote equality norms may seem appealing, but that discourse has not served women and sexual minorities well. Discomfort with venturing into the terrain of moral questions related to sexuality may partially explain why the Court has not more clearly formulated its doctrinal approach to LGBT cases. This category of cases will not disappear with the Court’s resolution of nationwide marriage rights, however. A more secular and sedate invocation of civic norms may seem less inspirational, but could be more productive in the long run in changing social practices.

C. Summary

These two structural cracks in the underpinnings of the Footnote 4 paradigm create the demand and opportunity for the Court to explore new approaches to Equal Protection law. Sexual orientation cases provide an excellent context for that re-examination. This category of cases has signaled that the old engines for heightened judicial review—whether the presence of a discrete and insular minority or the absence of political power—are obsolete in today’s complex political and social culture. Moreover, a rhetoric or structure of reasoning that loads too much moral weight onto the concept of animus might contribute to, rather than discourage, an incitement of backlash against current and future generations of civil rights law. If the Court wishes to salvage the basic insight of Footnote 4—that legislative classifications must meet certain criteria for prejudice-driven failures of the democratic process before judicial invalidation can be justified—it must adapt representation reinforcement principles to contemporary society.

III. DIVERGING PATHS

In the pending marriage cases, probably the smartest bet would be that the Court will continue its minimalist jurisprudence regardless of the possibility that the decision could change marriage laws across the country. Especially if Justice Kennedy writes the opinion of the Court and follows his own precedents, the Court may simply pave over the conceptual problems in the doctrine, and produce results rather than reasoning.

The Court also has two other options that would delay a moment of reckoning with the problem of how to assess

classifications that reinforce disadvantage and stigma, but which do not fall within the traditional categories of heightened scrutiny. First, the Court may elect to ground a marriage decision in the Liberty—rather than the Equal Protection—Clause of the Fourteenth Amendment.53 In that way, the Court could sidestep equality doctrine completely, as it did in its invalidation of a state sodomy law.54 Second, the Court may prefer to conceptualize sexual orientation discrimination as sex discrimination, recognizing that the same gender stereotypes that drive discrimination against women also stigmatize anyone who does not conform to gender norms, including in their sexual practices and choice of partners.55 The questions that I address in this Article are those that will remain after such a decision on the marriage issue.

If and when the Court does elect to mark a trail out of its self-created predicament, two possible paths suggest themselves. The Court could venture down the path utilized by virtually every major common law constitutional court in the world except the United States: the analysis of discriminatory classifications under the principle of proportionality. Alternatively, it could return to first principles and recuperate the anti-caste mandate that animated the Reconstruction era framers. I shall evaluate each possibility in turn as it applies to sexual orientation discrimination.

A. Proportionality

Other than the United States, all three of the major judicial systems that have decided multiple LGBT rights claims—Canada, the European Court of Human Rights, and South Africa—utilize a proportionality approach when adjudicating constitutional equality issues.56 The core inquiry underlying a proportionality analysis is whether the burdens imposed on a politically vulnerable minority are discontinuous with, and

54. Lawrence, 539 U.S. at 578–79.
disproportional to, whatever neutral public goals are asserted as the purpose of the challenged provision.

Proportionality analysis turns on a multi-step standard. Courts ask first “whether a prima facie case has been made to the effect that a government act burdens the exercise of a right.” This is the threshold point at which courts determine which classifications trigger equality jurisprudence and thereby merit any scrutiny at all. At the next stage, these other systems have developed a method for determining when government may treat groups of individuals differently by asking a series of three questions, known as the limitations analysis:

1. Whether the burden on the asserted right is rationally related to a sufficiently legitimate government objective;
2. Whether there is a less restrictive means by which the government could achieve the same goal without burdening the right; and
3. Whether the burden on the right outweighs the benefits to the government of its infringement.

The similarities and differences compared to Equal Protection analysis in the United States are fairly self-evident. If a claimant succeeds at the prima facie stage, the analysis inverts what traditionally had been the logical order in American case law. In earlier U.S. discrimination cases, courts first asked whether a classification met the criteria for heightened scrutiny; if so, courts proceeded to the probing questions that comprise the second and third queries of the limitations analysis. U.S. courts reached a rational basis standard only if it had found that the classification did not entail heightened scrutiny.

Under a proportionality analysis, the initial threshold is much lower. When courts assess whether to pursue any equality review, there is no initial channeling of classifications into tiers, as has developed in U.S. law. Instead, if there are any indicia of invidious or systemic discrimination, constitutional courts first ask whether there is a rational basis. Even if a rational basis exists, the inquiry nonetheless goes on to the second and third queries, thus pursuing the elements of stricter scrutiny.

The proportionality model of analysis precisely describes what the Supreme Court has actually done in its three major LGBT rights cases. After reviewing the animus or prejudice underlying an anti-gay law, the Court—without articulating a specific tier of review—has concluded that the law in question

58. Id. at 802–03.
effectively lacks a rational basis. At that point, as in a disproportionality analysis, the Court has reached its judgment.

This conceptual overlap between proportionality and the LGBT case results has gone unnoticed. Only one Justice of the Supreme Court has explicitly alluded to disproportionality analysis and then not in the context of LGBT rights issues. None of the post-Windsor lower federal courts have utilized this method in the flood of marriage law challenges that followed that decision.

The controversy associated with importation of non-U.S. law—even from our closest jurisprudential kin—suggests why advocates might hesitate to press such an approach too strongly. The foreign law canard is a red herring, however. There is a significant history of proportionality concepts in the Court’s constitutional precedents. The proportionality principle also explains a number of nonsexual orientation cases in which the Court has struck down legislation imposing burdens based on nonsuspect classifications and burdens on nonfundamental liberties.

In Plyler v. Doe, for example, the Court struck down a law barring undocumented resident children from public schools, noting that their immigration status was a legitimate basis for classification, yet their exclusion from public schools would produce “a lifetime [of] hardship” with the “stigma of illiteracy [that] will mark them for the rest of their lives.” The Court has also struck down laws imposing especially serious burdens on low-income persons even though poverty is not a suspect classification. “[I]n criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color.” Although there is no absolute constitutional right to initiate litigation or appeal, the Court has struck down economic barriers in civil cases implicating important liberty interests.

59. I described the Romer opinion as grounded in the concept of proportionality but did not elaborate on the doctrine as developed outside the United States. Hunter, supra note 9, at 908.


The overarching principle that greater burdens require more persuasive justifications is the conceptual key to the Court’s constitutional jurisprudence in sexual orientation cases. What is most striking is not what the Justices have said or not said, but what they have done. In each of its three most significant decisions, the Court has essentially concluded that laws barring normal amendment of civil rights statutes, criminalizing intimate sexual conduct, and disqualifying one group of lawful marriages from recognition under federal law are grossly excessive measures in relation to the purported goals of the legislation. This is proportionality analysis if it is anything, and one option for the Court to end its doctrinal muddle would be for it to name it for what it is.

B. Caste

A second conceptual option for the Supreme Court in approaching LGBT rights issues is to invoke the anti-caste principle animating the Fourteenth Amendment. Professor Eskridge’s Article provides a powerful description of this principle’s historical importance. Although he does so as part of an argument for application of an original meaning understanding, I discuss the two ideas separately in this Article because the Court could choose to utilize either or both branches of the conjoined theory in its same-sex marriage analysis. In other words, a caste analysis does not necessarily require adoption of original meaning jurisprudence, which I will treat in more detail in the next section.

Similarly to proportionality, one could argue that the Court has already begun using caste analysis in LGBT rights cases. The origins of the anti-caste argument in this category of cases lie in the amicus brief on behalf of constitutional law professors filed by Professor Laurence Tribe in Romer v. Evans. Tribe’s brief eschewed discussion of the tiers of Equal Protection review and instead painted equality under law in the broad strokes adopted by Justice Kennedy in his opinion for the Court.

66. Compare id. at 3–4 (“To decree that some identifying feature or characteristic of a person or group may not be invoked as the basis of any claim of discrimination under any law or regulation enacted, previously or in the future, by the state, its agencies, or its localities—when persons and groups not sharing this characteristic are not similarly handicapped—is, by definition, to deny the ‘equal protection of the laws’ to persons having that characteristic.” (emphasis in original)), with Romer, 517 U.S. at 633 (“A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”).
The greatest appeal of the caste analogy as an analytic tool for courts is that it is simultaneously broad and narrow. Its origins in Equal Protection jurisprudence lay in the radical egalitarianism (for that time) of the Reconstruction framers and their intense antipathy to laws that “entrench social groups as inferior castes.” Its built-in limiting principle is that caste surely signals a systemic structure that is far more damaging and malicious than mere discrimination. Minimally, one could say that the caste analogy requires at least five independent criteria:

1. A pattern of legal and social adverse treatment that is pervasive;
2. That the pattern is continuous over a long period of time, even if diminishing during some periods;
3. That its enforceability is strengthened by the targeting of a single characteristic;
4. That the cumulative effect suppresses open and robust political contestation by those who are disadvantaged; and
5. That no strong public or governmental interest justifies its existence.

To this formidable list, the original meaning claim articulated by Professor Eskridge adds an additional requirement: that a caste-like system is one driven by an ideology of invidiousness. I agree that such an ideology should trigger searching review. The separate-but-equal apartheid of southern segregation, for example, was doomed never to produce equality, even had southern whites invested resources in ways that led to equal test scores or teacher salaries in the black-only schools, because the propagation of the ideology of white supremacy was embedded at every level of public education. And I welcome the explicit addition of ideology to an understanding of the anti-caste principle that various scholars have argued properly belongs at the center of Equal Protection jurisprudence.

Securing that understanding, however, like an acknowledgment of the role of proportionality, likely will have to await a future Court with a different political stripe. In its race jurisprudence, the current Court seems to have slammed this particular analytic door shut. As Justice Stevens noted in an affirmative action case, “There is no moral or constitutional

68.  This distillation is drawn from the cases cited in Eskridge, supra note 14, passim.
equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination."\(^{69}\) Since that time, the racism-blind use of a heightened standard of review regardless of whether whites or racial minorities claim discriminatory treatment has remained in place. It is difficult to imagine that the Court will see the anti-gay history that Professor Eskridge has so carefully documented as comparable to caste when it apparently cannot see the treatment of nonwhite persons as such.

C. Summary

The foregoing options represent different jurisprudential approaches to interpretation. The adoption of the proportionality principle speaks to a mindset of pragmatic governance. It seeks balance and fairness rather than modifications to the weight of this or that interest or the suspectness of each new classification. The anti-caste principle turns to a more directly historical approach, focusing on the dynamics of subordination that have affected each group. Either could become the basis for a more fully reasoned articulation of Equal Protection law. At stake is the future of classifications based not only on sexual orientation, but also on other grounds that will emerge in the future as similarly contested.

IV. ORIGINALISM’S LIVING MEANING

Justice Scalia: ... I'm curious ... when did it become unconstitutional to exclude homosexual couples from marriage? 1791? 1868, when the Fourteenth Amendment was adopted? ...

Mr. Olson: ... [M]ay I answer this in the form of a rhetorical question? When did it become unconstitutional to prohibit interracial marriages? When did it become unconstitutional to assign children to separate schools[?]

Justice Scalia: It’s an easy question, I think, for that one. At ... the time that the Equal Protection Clause was adopted. That’s absolutely true. But don’t give me a question to my question. ... When do you think it became unconstitutional? Has it always been unconstitutional?

Mr. Olson: When the ... California Supreme Court faced the decision, which it had never faced before, [of: D]oes excluding gay and lesbian citizens, who are a class based upon their status as homosexuals ... .

Justice Scalia: [T]hat’s . . . not when it became unconstitutional. . . . When did it become unconstitutional to prohibit gays from marrying?

Mr. Olson: . . . [T]hey did not assign a date to it, Justice Scalia, as you know. . . .

Justice Scalia: I’m not talking about the California Supreme Court. . . . You say it is now unconstitutional.

Mr. Olson: Yes.

Justice Scalia: Was it always unconstitutional?

Mr. Olson: It was constitutional [sic] when we— as a culture determined that sexual orientation is a characteristic of individuals that they cannot control . . . .

Justice Scalia: I see. When did that happen? When did that happen?

Mr. Olson: There’s no specific date in time. This is an evolutionary cycle.

Justice Scalia: Well, how am I supposed to know how to decide a case . . . if you can’t give me a date when the Constitution changes?

. . . .

Justice Scalia: 50 years ago, it was okay?

Mr. Olson: . . . I can’t answer that question . . . .

Justice Scalia: I can’t either. That’s the problem. That’s exactly the problem.70

The Scalia-Olson exchange pointedly framed an enduring puzzle embedded in constitutionalism: How can judicial interpretation of unamended text legitimately accommodate various forms of change, especially changes in the social meanings and moral valence of certain behaviors. There is no more contentious example of this problem than the unstable cultural consensus regarding expressions of gender and sexuality that has emerged in the last decade. Reconciling this rocky past to the principle of fidelity to original meaning is no easy task.

The Frankel Lecture contributes to the emergence of what one might describe as a truce in one corner of jurisprudential politics. Scholars loosely associated with right, left, and center have endorsed the idea that the starting point for constitutional interpretation should be the original public meaning of constitutional text, even if the full reach of this meaning was not endorsed or expected by the framers. Professor Steven Calabresi

has used this interpretive method to argue that several of the Court’s decisions in pro-equality cases, including *Loving v. Virginia*,\(^71\) can be justified as implementations of original meaning,\(^72\) and he has recently posted an essay on SSRN in which he argues that original meaning also mandates the invalidation of exclusionary marriage laws.\(^73\) Professor Jack Balkin has proffered a theory of “framework originalism” that would produce essentially the same results.\(^74\) Professor Eskridge’s Frankel Lecture Address provides by far the most extensive articulation of the link between original meaning and the issues raised in the same-sex marriage cases.

My first hesitation about this original meaning argument is tactical and retrospective. Simply put, given the retrenchment of the Court’s Equal Protection jurisprudence in the context of race, I am skeptical that judges and others who promote originalist interpretative strategies would adopt the method as proffered for the same-sex marriage cases.\(^75\) Even traditional originalists have accepted *Brown v. Board of Education* and *Loving v. Virginia* as legitimate exercises of Equal Protection review. Yet, as Justice Scalia’s comments in the foregoing colloquy illustrate, those views can coexist with a willingness to apply different standards for race than for other forms of discrimination and to stress literal differentiation over effective subordination in the interpretive process. I doubt that the originalist methodology associated, for example, with Justice Scalia is likely to produce recognition that laws excluding gay and lesbian couples from marriage fall into the same category as those invalidated in *Loving*.

My second concern is conceptual and prospective. An original meaning approach potentially narrows the scope of Equal Protection. The linguistic lynchpin in the *Loving* decision that supports an analysis based on caste is the Court’s explicit

\(^75\) See, e.g., DeBoer v. Snyder, 772 F.3d 388, 403 (6th Cir. 2014) ("Nobody in this case . . . argues that the people who adopted the Fourteenth Amendment understood it to require the States to change the definition of marriage.").
reference to “White Supremacy.”76 Without either that reference or the history of southern white extremism, however, the Court surely should have reached the same result.

Consider the example of disability. The Court rejected heightened scrutiny for classifications based on disability in City of Cleburne v. Cleburne Living Center, but nonetheless invalidated a restriction on group homes for mentally disabled persons, in one of its first uses of heightened rational basis review.77 Few constitutional cases have raised disability discrimination issues since Cleburne because of a series of subsequent legislative actions by Congress that provided protection in federally funded programs, employment, public accommodations, transportation, and housing.78 As a result, the practical need for anti-discrimination litigation based on the Constitution has been all but erased in this field.

The major constitutional development since Cleburne has been to weaken anti-discrimination statutes for having gone too far in holding states liable for discrimination. A state government entity challenged the Americans with Disabilities Act successfully on the ground that Congress lacked sufficient proof of a history of widespread and persistent discrimination by the states to justify the waiver of state sovereign immunity.79 If the record that Congress had established, which was significant, could not survive the congruence and proportionality standard, it seems quite unlikely that the Court would find it to be a proper basis for a finding of caste-like subordination.80 This ruling suggests, then, that an original meaning approach would offer little support for classifications such as disability that have elicited a mix of positive as well as negative regulatory responses by the government, were not thought of as a social minority until relatively recently, and comprise a huge range of conditions from the most stigmatized and vulnerable to the largely invisible.

For a second example of classifications for which there is little recourse for irrational discrimination, one could analyze those based on immigration or citizenship status. Congress has long been accorded plenary power to regulate immigration, in cases that date back to roughly the same post-Reconstruction era

76. Loving, 388 U.S. at 7.
80. Id. at 374.
in which the Court endorsed Jim Crow laws. The text of the Equal Protection Clause references “persons,” not “citizens.” Yet noncitizens are routinely treated unequally. Unlike Bowers v. Hardwick, Korematsu has never been reversed.

I would argue that resident noncitizens satisfy the indicia of caste. A variety of laws envelop them in a system of disfavored status, with compounding results. This system of subordination also satisfies the requirement of an underlying ideology: that of nationalism. Stated alternatively, the law demands that the individual profess loyalty to a set of ideas thought to constitute Americanism, with no requirement that the absence of such loyalty would result in harm to valid interests of the nation.

In sum, my primary concern regarding an original meaning argument is whether it is too self-limiting to provide relief to persons who have suffered from systems of social hierarchy in the United States, and who are today’s pariahs. Although Professor Eskridge’s proposal is intended as an expansion of equality principles, the Court’s adoption of an original meaning basis for a ruling that bans on same-sex marriage violate the Constitution risks having the ultimate effect of narrowing the scope of the Equal Protection Clause.

V. THE THEORETICAL VACUUM: THE ROLE OF IDEOLOGY

If original meaning prohibits castes, and castes require an underlying ideology of invidiousness to qualify as such, then in making an anti-caste argument against the subordination of LGBT persons, one must identify the ideology driving the discrimination. Professor Eskridge argues that compulsory heterosexuality is that ideology, fueled by stereotypes of “gay” as anti-family and of LGBT persons as sex-obsessed predators on children.

The regime of compulsory heterosexuality that emerged as various disciplinary structures, including law, began penalizing same-sex desire, operated in tandem with profound gender normativity. Effeminate men and masculine women became the public face of sodomy and the core of gender deviant

81. See Mark S. Kende, Justice Clarence Thomas’s Korematsu Problem, 30 Harvard J. on Racial & Ethnic Just. 293, 293 & n.3 (2014) (noting efforts to get the U.S. Supreme Court to repudiate the decision).
subcultures.85 To use Professor Eskridge’s terminology and periodization, the “anti-gay terror” of 1921 to 1969 began not only with the prosecutions of gays, but also with the era of “the new woman” who claimed for herself sexual and reproductive autonomy.86 Although not perfectly in sync, the evolution of gender norms into somewhat less strictly binary codes in the latter part of the twentieth and the first part of the twenty-first century coincided with the growing toleration of gender deviance and lesbian and gay sexual culture.

The central role of gender normativity carries over into the specific realm of marriage law. First recognized during Phyllis Schlafly’s campaign against the Equal Rights Amendment on the ground that its adoption would lead to same-sex marriage,87 the argument that “genderless marriage” threatens social stability and particularly the welfare of children has fueled the crusade against legalization of gay marriage.88 As is often true of social panics, it is impossible to distill which of several tropes most reliably produce a level of anxiety that can be mobilized for political contests. Indeed, the relative force of particular arguments may shift over time. Certainly today, however, the discomfort over unconventional gender roles is as fundamental to anti-gay campaigns as disgust over specific sexual acts.89

In her concurring opinion in the challenge to same-sex marriage bans in Nevada and Idaho, Judge Marsha Berzon described the history of legal restrictions on women’s choices in the arenas of work, marriage, parenting, and other life activities, and tied them to the same stereotyping underlying arguments that the law should prohibit “genderless” marriage by same-sex couples.90 The gender stereotyping behind bans on same-sex marriage, she concluded, “affect[s] men and women in basically the same way as, not in a fundamentally different manner from,

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86. Id. at 233–34.
88. See, for example, repeated references to how the defendants in one recent same-sex marriage case framed their arguments as objections to allowing “genderless marriage” because equal marriage laws lack “gender complementarity” and fail to reinforcer “[t]he man-woman meaning at the core of the marriage institution [that] has always recognized, valorized, and made normative the roles of ‘mother’ and ‘father’. . . .” Latta v. Otter, 771 F.3d 456, 486, 490–91 (9th Cir. 2014) (Berzon, J., concurring).
89. Id. at 473 (majority opinion).
90. Id. at 486–87 (Berzon, J., concurring).
a wide range of laws and policies that have been viewed consistently as discrimination based on sex.\textsuperscript{91}

This foundation of gender in the debates over LGBT rights broadly and same-sex marriage specifically complicates the argument that an anti-gay caste system underlies the laws that are currently under challenge. Applying a caste analysis based on sexual orientation alone misses the inextricable melding of sexuality with gender. Although the two themes overlap and reinforce one another in multiple ways, they are distinguishable. Professor Eskridge’s Article correctly points to a series of state actions directed specifically at homosexual persons, regardless of gender.\textsuperscript{92} The problem is that while the historical narrative may support the claim of a caste-like regime based on repressive anti-gay actions by the state, it is considerably weaker in demonstrating that the regime’s ideology centered so clearly on sexuality as distinct from gender.

My argument is not that gender simply trumps sexual orientation in the analytic calculus. It is also true that an element related to sexuality has almost always been present in the ideology and legal structure of gender subordination. Just as one finds gender normativity at the heart of repressive laws directed at gay men and lesbians, one finds sexuality and specifically sexual restriction at the heart of laws that have limited women’s liberty. Looked at through a broader lens than homosexuality, sexual regulation has always been gendered. Whether one examines laws addressing pregnancy, reproductive decision-making, sexual violence, workplace norms, or military service, “burdens on women’s sexual expression . . . enforce[] traditional gender roles by binding women to the reproductive consequences of heterosexual activity”\textsuperscript{93} and by enforcing gender normativity within families.

The two discourses of sexuality and gender are most merged in the realm of ideology, one comparable to the white supremacy identified by the Court as underlying the anti-miscegenation laws struck down in \textit{Loving v. Virginia}. Gender performance and sexual dissent constitute the expressive dimension of the equal liberty claims at issue both in LGBT rights litigation and in women’s rights cases.\textsuperscript{94} The struggle on the ground for the

\textsuperscript{91} Id.

\textsuperscript{92} Eskridge, \textit{supra} note 14, at 1094–98.

\textsuperscript{93} Kim Shayo Buchanan, \textit{Lawrence v. Geduldig: Regulating Women’s Sexuality}, \textit{56 Emory L.J.} 1235, 1238 (2007).

freedom to breathe life into new gender and sexual norms is very much a battle of ideas. The power of the closet is and has always been its capacity to police discursive space.

The best mechanism for incorporating an original meaning jurisprudence into this line of cases would take us back even further than the origins of the Fourteenth Amendment. Fundamentally, nonnormative forms of sexuality and gender constitute performances of dissent. Thus, the correct answer to Justice Scalia’s question to Ted Olson about when bans on gay marriage became unconstitutional is 1791. That is the year when the framers adopted the First Amendment’s guarantee of protection against state-enforced orthodoxy.

VI. CONCLUSION

The Supreme Court is at a crossroads in its Equal Protection jurisprudence. Cases involving LGBT rights issues have identified the need for the Court to craft a new generation of Equal Protection law, if only to serve its traditional function of providing meaningful guidance in future cases. Deficiencies in current law go beyond mere lack of clarity, however. How the Court addresses the current doctrinal and theoretical shortcomings in this corner of constitutional law will help shape new social meanings of equality.