

In or Out? Groups and the 14th Amendment after Lawrence v. Texas

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Several Supreme Court cases have struck down state laws using a rigorous form of rational basis scrutiny. The most recent example is *Lawrence v. Texas*,¹ in which the Supreme Court struck down Texas's law banning same sex sodomy. Other examples include *Romer v. Evans*,² which dealt with a Colorado constitutional amendment that precluded state and local governments from outlawing discrimination on the basis of sexual orientation; *City of Cleburne v. Cleburne Living Center*,³ which dealt with unconstitutional a city zoning regulation that required a special use permit before a group home for persons with mental disabilities could operate;⁴ *Plyler v. Doe*,⁵ which dealt with Texas's ban on school funding for illegal immigrant children; and *United States Department of Agriculture v. Moreno*,⁶ which dealt with the denial of food stamps to households containing unmarried adults.⁷ In every case in which it has been applied by the Court, this more rigorous form of rational basis scrutiny has been fatal for the law being scrutinized.

Rigorous rational basis scrutiny also served as one basis for the trial court decision in *In re Marriage Cases*, which held unconstitutional California's ban on same-sex marriage.⁸ As the court recognized in that case, all legislation creates classes of people, so the fact of classification is not itself suspicious. Some legislation classifies impermissibly, however, and the "nature of the classification" is therefore the key to analysis (a point that applies equally to the federal constitution).⁹ But what is the "nature" of a classification and when will a court deploy this more rigorous form of rational basis scrutiny? This article answers both questions.

The facts of these rigorous rational basis cases are diverse, but they share a common denominator: the Court has applied more rigorous rational basis scrutiny when a government has restricted the liberties of, or denied some state benefit, to a *group*. This heightened rational basis scrutiny has been fatal to government regulation whenever the

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¹ 123 S. Ct. 2472 (2003).

² 517 U.S. 620 (1996).

³ 473 U.S. 432 (1985).

⁴ *Id.*

⁵ 457 U.S. 202 (1982).

⁶ 413 U.S. 528 (1973).

⁷ *Id.* at 532–33.

⁸ *In re: Marriage Cases*, Judicial Council Coordination Proceeding No. 4635, (Ca. Sup. Ct., San Francisco Co. Mar. 14, 2005) (tent. decision), (*available at* <http://news.findlaw.com/nytimes/docs/qlrts/inremarriage31405opn.pdf>) (site last visited Mar. 15, 2005).

⁹ *Id.* at 4.

Court has chosen to apply it. As with strict and intermediate scrutiny, when the Court applies rigorous rational basis scrutiny, it does not simply presume that the statute is constitutional and then see if any rational basis could support it. Instead, in rigorous rational basis cases, the Court places the burden of establishing the constitutionality of the regulation or law on the state. Furthermore, the Court simply refuses to count some reasons as “rational” justifications. Moral objections to the group’s conduct or to the group itself, reasons based in stereotypes about the group, or over- or under inclusive justifications will not discharge the state’s burden.

Rigorous rational basis scrutiny has not wholly supplanted regular rational basis scrutiny. Courts still use regular rational basis scrutiny to review (and to uphold) state laws that prohibit some class of activities or deny benefits to some class of persons. When it has reviewed such laws, courts treat moral objections to the conduct and reasons that fit poorly with the law’s classifications as rational justifications. *Barnes v. Glen Theatre*,¹⁰ *City of Erie v. Pap’s A.M.*,¹¹ *McGowan v. Maryland*,¹² and *Fritz v. Railroad Retirement Board*¹³ are all examples of the Court countenancing legislation premised on essentially moral reasons or ill fitting ones.

As the next section will explain, the Court has deployed rigorous rational basis scrutiny because it worries about the exercise of majority power over gays, lesbians, persons with disabilities, illegal immigrant children, and hippies. This conclusion prompts an important question that the Court has never even ventured to answer: Why should we be particularly mistrustful of the majority’s exercise of power over persons with disabilities, illegal immigrant children, gays, lesbians and hippies count, but not over polygamists, users of sex toys, nude dancers, prostitutes, the patrons of either, or liquor store owners who would like to stay open on Sunday? The Court has been almost willfully obscure on this point—*Lawrence* holds that gay men and lesbians have liberty and autonomy interests in pursuing their relationships, including sexual expression within those relationships, but the Court explicitly denies that its principle extends beyond the particular case at hand.¹⁴ Why does the Court draw the line there?

I. THE HISTORY OF HEIGHTENED RATIONAL BASIS SCRUTINY.

It is obvious that groups matter to the Supreme Court. They have mattered in the past, and they will matter in the future. It is equally obvious that the Court is either

¹⁰ 501 U.S. 560 (1991).

¹¹ 529 U.S. 277 (2000).

¹² 366 U.S. 420 (1960) (accepting at face value state’s justification that store-closing laws on Sunday, the traditional Christian day of Sabbath provided citizens with a day of rest and recreation rather than arriving at the obvious conclusion, which is that such laws are based in sectarian, moral concerns).

¹³ 449 U.S. 166 (1980) (upholding Railroad Retirement Board’s decision to eliminate dual, “windfall” retirement benefits for only one class of railroad retirees—those who had worked fewer than twenty-five years for a railroad and who were not currently connected with any railroad).

¹⁴ See *Lawrence*, 123 S.Ct. at 2484 (stating that *Lawrence*’s principle would not extend to prostitution, sexual activities in public, or situations where freely given consent might be difficult to ascertain, perhaps referring to incest and polygamy).

unable or unwilling to say what groups are or why they are constitutionally significant. This article tries to provide such an explanation. Drawing on cases defining what is and is not a religion for purposes of the establishment and free exercise clauses, I argue that this Court recognizes as constitutionally salient, social groups formed around facts that constitute a significant parts of a person's identity, that affect much or all of the person's relations with the outside world, and that are recognized as constitutive by group members and outsiders alike.

A. *The Development of the Doctrine.*

United States Department of Agriculture v. Moreno,¹⁵ marks heightened rational basis scrutiny's first appearance in a Supreme Court opinion. In the late-1960s Congress made households that contained unmarried, unrelated adults ineligible for food stamps.¹⁶ The legislative history showed that Congress had crafted this limitation to make sure that hippies living in communes could not get food stamps.¹⁷ Applying rational basis scrutiny, the Court struck down the food stamp restriction. The Court held:

The challenged classification clearly cannot be sustained by reference to this congressional purpose. For if the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular *group* cannot constitute a *legitimate* governmental interest. As a result, "[a] purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify the 1971 amendment."¹⁸

The key language, "a bare . . . desire to harm a politically unpopular *group* cannot constitute a *legitimate* government interest," actually originated in the district court opinion in *Moreno*.¹⁹ The *Moreno* district court had drawn this idea from the California Supreme Court's opinion in *Parr v. Municipal Court*,²⁰ another hippie case.

In *Parr*, the California Supreme Court struck a 1968 Carmel by the-Sea ordinance that prohibited people from sitting or lying on the grass in Carmel's parks. Carmel had passed the ordinance to discourage hippies who might otherwise try to move the Summer of Love south to Carmel.²¹ As did *Moreno*, the California Supreme Court

¹⁵ 413 U.S. 528 (1973).

¹⁶ *Moreno*, 413 U.S. at 532–33.

¹⁷ *Id.* at 534 (citing H.R. Conf. Rep. No. 91-1793, at 8 (1970), and 116 Cong. Rec. 44,439 (1970) (statement of Sen. Holland)).

¹⁸ *Id.* at 534–35 (alterations in original) (quoting the district court opinion, *Moreno v. United States Dep't of Agric.*, 345 F. Supp. 310, 314 n.11 (D.D.C. 1972) (first emphasis supplied)).

¹⁹ *See Moreno*, 345 F. Supp. at 314 n.11 ("In order to qualify as 'legitimate' under the Equal Protection Clause, a legislative purpose must arguably be related to the improvement of the general welfare. . . . The mere intent to harm a politically unpopular group will not suffice." (citation omitted) (emphasis supplied)).

²⁰ *Id.*

²¹ Carmel's brief to the Court had urged the California Supreme Court to examine the historical context and the conditions existing prior to enactment of the ordinance:

purported to strike the statute on equal protection grounds under rational basis scrutiny. The California Supreme Court held that Carmel’s “discriminatory antagonism [was] unmistakable” in its “description of the problem” that purportedly required it “to prohibit sitting or lying in the park.”²² Carmel violated the Equal Protection Clause because it “use[d] official Municipal Code language to single out a *social group* and stigmatize its members as ‘undesirable’ and ‘unsanitary.’”²³ At the same time it also stigmatized “the *entire class* of youthful Carmel visitors whose mode of dress and life style differ from and irritate the majority of the residents and tourists in the city.”²⁴ Perhaps somewhat hyperbolically, Justice Mosk inveighed, “[W]e cannot be oblivious to the . . . avowed [] purpose . . . of the ordinance in question: to discriminate against an ill-defined *social caste* whose members are deemed pariahs by the city fathers.”²⁵ In short, the ordinance could not stand because it was, as Professors Tussman and tenBroek had said, an “expression[] of hostility or antagonism to certain groups of individuals.”²⁶

Heightened rational basis scrutiny next appeared in *Plyler v. Doe*. *Plyler* struck a Texas law that prohibited school districts from using state funds to educate undocumented alien children and required school districts to refuse them admission.²⁷ The Court held these restrictions violated the Equal Protection Clause—despite the fact that alienage is not a suspect class and education is not a fundamental right.²⁸ The state argued that its restrictions husbanded scarce educational resources, enhanced education for its citizens and legal aliens, and discouraged illegal aliens from migrating to Texas.²⁹ The Court deemed these “insubstantial” reasons to deny public education to undocumented alien children, largely because Texas’s cost savings were low, and Texas could not explain how excluding undocumented children improved education or how it discouraged migrants from coming to Texas.³⁰ The restrictions would, however, ensure

We hope the court will not shut its eyes to matters of public notoriety and general cognizance. We hope the court has seen the instant slum created in the Haight-Ashbury. We hope the court has seen the deterioration if not destruction of the Telegraph-campus in Berkeley; we hope the court has seen the squalor and filth of the communes in Big Sur, and the damage caused by the sheer numbers of this transient phenomenon. The court may be aware that Carmel had become a meeting place—a mecca—for the hippies who had become disenchanted with the Haight-Ashbury and Berkeley. Regarding this ordinance we hope that the court observed the conditions existing prior to its enactment. The mass of humanity that occupied the park smothered the grass by their very numbers. The grass competed with and struggled against the overwhelming effect of heavy usage—cigarettes, bottles, knives, and just plain people.

Parr v. Mun. Court, 479 P.2d 353, 357–58 (Cal. 1971) (quotations omitted) (citing the brief for the city of Carmel, Brief for Respondent and Real Party in Interest at 11–12, *Parr* (No. 26-594)).

²² *Id.* at 358.

²³ *Id.* (emphasis supplied).

²⁴ *Id.* (noting that the “Carmel City Council made no effort to define the term ‘hippie’ so as to limit the application of its hostile rhetoric to persons who are engaged in illegal conduct”) (emphasis supplied).

²⁵ *Id.* at 360 (emphasis supplied).

²⁶ *Id.* at 355 (citing Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 358 (1949)).

²⁷ *Plyler v. Doe*, 457 U.S. 202, 205 (1982).

²⁸ *Id.* at 230.

²⁹ *Id.* at 228–30.

³⁰ *Id.* at 230.

that undocumented alien children would inhabit a permanent, illiterate subclass in the United States.³¹ In other words, the Texas law unconstitutionally cemented illegal aliens' status as outsiders.

Heightened rational basis scrutiny reared up again in *City of Cleburne v. Cleburne Living Center*. The *Cleburne* Court held that a city zoning regulation violated the Equal Protection Clause because it required a group home for persons with mental disabilities to get a special use permit.³² The Court concluded that the city imposed this regulation because of prejudice against persons with disabilities.³³ If the residents not had mental disabilities, the group home could have opened without a special use permit.³⁴ The Court held that disabled persons were not a suspect category.³⁵ Nevertheless, the city had no rational basis for requiring group homes for persons with mental disabilities, but not fraternities, nursing homes, hospitals, or boarding houses, to get special use permits.³⁶ The city had worried about the “negative attitude” of nearby property owners and of students at a nearby junior high school³⁷ and worried that the home’s residents would be injured in a flood.³⁸ These concerns, the Court found, “rest[ed] on an irrational prejudice against the mentally retarded”³⁹ and were indistinguishable from “a bare desire . . . to harm a politically unpopular group.”⁴⁰

One year after *Cleburne*, the Court found that Georgia’s ban on sodomy satisfied rational basis scrutiny.⁴¹ The Court declined to apply anything but the minimal level of scrutiny to Mr. Hardwick’s claim that his arrest violated his liberty and privacy rights under the Fourteenth Amendment. The Court characterized Mr. Hardwick’s claim that he had a *fundamental* right to engage in “homosexual sodomy” as “facetious.”⁴² Laws prohibiting sodomy had “ancient roots.” The common law had criminalized it, and when the Bill of Rights was ratified, all of the original thirteen states forbade it. Moreover, “until 1961, all 50 states outlawed sodomy.”⁴³ Against this historical background, the idea that the right to engage in sodomy was a fundamental right implicit in the concept of ordered liberty or rooted in our history and tradition was to the *Bowers* majority utterly incomprehensible.⁴⁴ Though nothing justified Georgia’s ban “other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable,” the Court had no problem upholding the law. “The law” the Court held, “is constantly based on notions of morality, and if all laws representing essentially moral

³¹ *Id.* at 223.

³² 473 U.S. 432 (1985).

³³ *Id.* at 450.

³⁴ *Id.* at 437.

³⁵ *Id.* at 442–43.

³⁶ *Id.* at 446–48.

³⁷ *Id.* at 448–49.

³⁸ The home was situated on a 500-year flood plain. *Id.* at 449.

³⁹ *Id.* at 450.

⁴⁰ *Id.* at 447 (ellipses in original) (quoting *United States Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

⁴¹ *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), *overruled by Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

⁴² *Id.* at 193.

⁴³ *Id.*

⁴⁴ *Id.* at 192–93.

choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.”⁴⁵ *Q.E.D.*

But *Bowers* was not the last word on gay men, lesbians, and the Constitution. Ten years later, the Court struck down a 1992 Colorado constitutional amendment that forbade the state and local governments from outlawing discrimination on the basis of sexual orientation.⁴⁶ Amendment 2 meant that if gays and lesbians wanted legal protection from sexual orientation discrimination, they would have to amend the state constitution.⁴⁷

As in *Cleburne*, the Court appeared to use a kind of heightened rational basis scrutiny to strike Amendment 2. The Court closely scrutinized Amendment 2’s purposes. According to the state, Amendment 2 just “put[] gays and lesbians in the same [legal] position as all other persons,” as people may freely discriminate against one another except on the basis of special, prohibited categories, such as race, sex, national origin, religion, and color.⁴⁸ The Court flatly rejected that characterization of the amendment.

Instead, the Court held that Amendment 2 was “a denial of equal protection of the laws in the most literal sense” because it made it “more difficult for one *group* of citizens than for all others to seek aid from the government.”⁴⁹ Amendment 2’s denial of equal treatment was unconstitutional because it bore no “rational relationship to legitimate state interests.”⁵⁰ Amendment 2 “had the peculiar property of imposing a broad and undifferentiated disability on a single named *group*, an exceptional and . . . invalid form of legislation.”⁵¹ The breadth of the disability the amendment imposed on gays, lesbians, and bisexuals also was completely “discontinuous with the reasons offered for the amendment.”⁵² So discontinuous, the Court found, that only “animosity” toward gays, lesbians, and bisexuals could explain it.⁵³ Animus towards a group is never a “legitimate” reason for state regulation: “If the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular *group* cannot constitute a *legitimate* governmental interest.”⁵⁴

B. *The Journey from Bowers to Lawrence.*

⁴⁵ *Id.* at 196.

⁴⁶ *Romer v. Evans*, 517 U.S. 620, 623 (1996).

⁴⁷ *Id.* at 626–27.

⁴⁸ *Id.* at 626 (noting also that “the State says[] the measure does no more than deny homosexuals special rights”).

⁴⁹ *Id.* at 633 (emphasis added).

⁵⁰ *Id.* at 632.

⁵¹ *Id.* (emphasis added).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 634 (emphasis added) (quoting *United States Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

After *Romer*, was *Bowers v. Hardwick*⁵⁵ still good law? *Lawrence v. Texas* answered “no.”⁵⁶ Since 1973, Texas had made same-sex sodomy between consenting adults a crime.⁵⁷ John Lawrence and Tyron Gardner were charged and convicted under this law after police discovered them having consensual sex in Mr. Lawrence’s bedroom.⁵⁸ The Court held that earlier sexual privacy cases—*Griswold v. Connecticut*,⁵⁹ *Eisenstadt v. Baird*,⁶⁰ *Roe v. Wade*,⁶¹ and *Planned Parenthood v. Casey*⁶²—required the conclusion that individuals have the right to have private sexual relationships with partners of the same sex:

[A]dults may choose to enter [into sexual relationships] in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.⁶³

As in *Romer*, the Court appeared to be applying heightened rational basis scrutiny in *Lawrence*. Texas argued that it was permitted to prohibit immoral acts.⁶⁴ In the Court’s eyes this was not a legitimate reason for the criminal sodomy statute. “[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”⁶⁵

Indeed, Texas’s moral justification compounded, not ameliorated, the equal protection violation—prohibiting an activity because the state deems it immoral and deviant inevitably stigmatizes and demeans the people who engage in it. The same-sex sodomy ban stigmatized those gays and lesbians convicted under the statute in yet a more palpable way.⁶⁶ Were their convictions sustained, the Court observed that John Lawrence and Tyron Garner would “bear on their record the history of their criminal convictions.”⁶⁷ Were they to move from Texas, at least four states would require them to register as sex

⁵⁵ 478 U.S. 186 (1986) (holding that the constitutional right to privacy did not encompass the right to engage in same-sex sodomy), *overruled by* *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

⁵⁶ 123 S. Ct. 2472, 2483–84 (2003).

⁵⁷ *Id.* at 2479–80 (citing 1973 Tex. Gen. Laws ch. 399, codified as TEX. PENAL CODE ANN. § 21.06 (Vernon 2003)).

⁵⁸ *Id.* at 2475–76.

⁵⁹ 381 U.S. 479 (1965).

⁶⁰ 405 U.S. 438 (1972).

⁶¹ 410 U.S. 113 (1973).

⁶² 505 U.S. 833 (1992).

⁶³ *Lawrence*, 123 S. Ct. at 2478.

⁶⁴ Respondent’s Brief at 41, *Lawrence*, (No. 02-102) (arguing that Texas’s law against same-sex sodomy “rationally furthers other legitimate state interests, namely, the continued expression of the State’s long-standing moral disapproval of homosexual conduct, and the deterrence of such immoral sexual activity, particularly with regard to the contemplated conduct of heterosexuals and bisexuals”), *available at* http://supreme.usatoday.findlaw.com/supreme_court/briefs/02-102/02-102.resp.pdf.

⁶⁵ *Lawrence*, 123 S. Ct. at 2483 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

⁶⁶ *Lawrence v. Texas*, 123 S. Ct. 2472, 2482 (2003).

⁶⁷ *Id.*

offenders.⁶⁸ Texas’s criminalization of same-sex sodomy threatened to impose palpable injuries and legal disabilities on gay men and lesbians that extended far beyond moral condemnation of their acts. This aspect of the *Lawrence* Court’s opinion closely parallels the Court’s reasoning in *Cleburne* and *Plyler*—gays have the right not to be marked as outsiders or strangers to the law.

How did the Court get from *Bowers* to *Lawrence* in fewer than twenty years? The Court’s view of sodomy, on the one hand, and of gay men and lesbians, on the other, changed radically during the eighteen years that separated these cases. The cases’ characterization of gay men and lesbians and of sodomy could hardly be more different. *Bowers* saw sodomy laws as proscribing an *act*. *Lawrence* saw those same laws as denying members of a group the right to equal dignity.

Bowers characterized the right claimed by Mr. Hardwick as that of “homosexuals to engage in sodomy.”⁶⁹ Posing the question that way guaranteed the Court’s answer. The substantive due process cases *Meyer v. Nebraska*, *Griswold*, *Eisenstadt*, and *Roe* could not have created such a right because those cases were about “family, marriage, [and] procreation.”⁷⁰ There was “[n]o” demonstrated “connection between family, marriage, or procreation on the one hand and homosexual activity on the other.” “[N]one of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy.”⁷¹

The idea that sex between gay men or between lesbians could be part of “a personal bond that is more enduring”⁷² apparently did not occur to the Court or seemed too implausible or too distasteful to entertain. That much is implicit in the Court’s description of Mr. Hardwick’s claim: “the claimed constitutional right of homosexuals to engage in *acts* of sodomy.”⁷³ “*Acts of sodomy*” connote discrete encounters divorced from an intimate relationship with another person—base and animalistic sex acts devoid of affection. It does not connote the physical expression of love or attraction in a relationship between two people. Described thusly, it is not so far fetched for the Court to conclude that “liberty” and “justice would [still] exist” if this one particular sex act were proscribed⁷⁴ (as indeed they would if many sex acts engaged in by straight couples were criminalized.)

That “acts of homosexual sodomy” occurred in the privacy of the home made absolutely no difference—“otherwise illegal conduct is not always immunized whenever

⁶⁸ *Id.* (citing statutes in Louisiana, Mississippi, South Carolina, and Idaho).

⁶⁹ *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986).

⁷⁰ A dizzyingly circular proposition, if you think about it.

⁷¹ *Bowers*, 478 U.S. at 190-91.

⁷² See *Lawrence v. Texas*, 123 S.Ct. 2472, 2478 (2003).

⁷³ *Bowers*, 478 U.S. at 190-91.

⁷⁴ *Id.* at 191-92. This conclusion appears still more reasonable in light of the Court’s belief that sodomy had been criminalized under the common law for centuries and was prohibited by all states at the time the Constitution was ratified. For quite a long time it seemed, liberty and justice got along fine without the right to engage in acts of homosexual sodomy.

it occurs in the home,”⁷⁵ and sodomy, unlike dirty pictures, had nothing to do with the First Amendment. Sodomy was more like the other “victimless crimes,” such as “the possession⁷⁶ and use of illegal drugs” or like “the possession in the home of drugs, firearms, or stolen goods.” The Constitution plainly offered no refuge from prosecution for such acts. Nor did it matter that Mr. Hardwick’s claimed right “is limited to the voluntary sexual conduct between consenting adults.” “Except by fiat” the Court could not limit a declaration that sodomy was constitutionally protected “while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home.”⁷⁷ “We are,” the Court wrote, “unwilling to start down that road.”⁷⁸ In the Court’s view, homosexuals engaged in “acts of homosexual sodomy,” but straight people had sex to create families.

The very first lines of the opinion in *Lawrence* revealed that the *Lawrence* Court saw the right claimed by John Lawrence and Tyron Garner very differently. The right these men claimed was part of the “autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct” and involved “liberty of the person in its . . . more transcendent dimensions.”⁷⁹ Where the *Bowers* Court saw discrete and criminal acts of sodomy, the *Lawrence* Court saw gay men and lesbians in intimate relationships. By framing the right in terms of the act of sodomy, *Bowers* “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.*”⁸⁰ Sex between gay men and between lesbians can contribute to the creation of intimate, loving relationships: “When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”⁸¹ Those relationships, to the *Lawrence* Court, can be as central to a gay or lesbian person’s identity as is marriage. The *Lawrence* Court therefore did not care that the law before it criminalized the same acts as the laws in *Bowers*.⁸² The *Lawrence* Court was concerned with the *effect* of the laws, not the acts proscribed. The laws, it said, had

far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.⁸³

As the *Lawrence* Court saw it, gay and lesbian relationships deserve as much Constitutional protection from state interference as straight relationships: “Persons in a

⁷⁵ *Bowers*, 478 U.S. at 195.

⁷⁶ *Id.*

⁷⁷ *Id.* at 195-96.

⁷⁸ *Id.* at 196.

⁷⁹ *Lawrence v. Texas*, 123 S.Ct. 2472, 2475 (2003).

⁸⁰ *Id.* at 2478 (emphasis supplied).

⁸¹ *Id.*

⁸² *Id.* at 2478 (“The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act”).

⁸³ *Id.*

homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”⁸⁴ Permitting states to deprive gays and lesbians of this autonomy would denigrate their relationships as deviant and undesirable. *Lawrence* declares that gay men and lesbians have a right not to be demeaned or stigmatized.

Lawrence also viewed the history of criminal sodomy laws very differently than had *Bowers*. *Bowers* was correct that *sodomy* had been illegal at common law and at the founding. But those laws had nothing to do with gay men and lesbians—homosexuality did not exist as a “distinct category of person until the late 19th century.”⁸⁵ Instead, “early American sodomy laws . . . sought to prohibit nonprocreative sexual activity more generally.”⁸⁶ America thus had no long-standing tradition that distinguished “homosexual conduct” “from like conduct between heterosexual persons.”⁸⁷ To the extent that such laws were ever enforced, they were rarely enforced against consensual, private conduct.⁸⁸ Laws “targeting same-sex *couples* did not develop until the last third of the 20th century”⁸⁹—hardly the “ancient roots” described in *Bowers*.⁹⁰ The Court’s reference to “same-sex *couples*” rather than acts of sodomy reflects an entirely different view of the world than the one that lies behind *Bowers*. Furthermore, no state “singled out same-sex relations for criminal prosecution” until the 1970s.⁹¹ Their timing suggests that they were passed as a reaction to the early gay rights movement.⁹²

In dissent, Justice Scalia objects,

[I]t is (as *Bowers* recognized) entirely irrelevant whether the laws in our long national tradition criminalizing homosexual sodomy were “directed at homosexual conduct as a distinct matter.” Whether homosexual sodomy was prohibited by a law targeted at same-sex sexual relations or by a more general law prohibiting both homosexual and heterosexual sodomy, the only relevant point is that it *was* criminalized—which suffices to establish that homosexual sodomy is not a right “deeply rooted in our Nation’s history and tradition.”⁹³

Justice Scalia’s objection would be entirely cogent if *Lawrence* were declaring the right to engage in sodomy to be a *fundamental* right. It did not. Because *Lawrence* does not, Justice Scalia’s objection misses the point of the legal history of sodomy laws for the *Lawrence* majority. States had traditionally prohibited *all* forms of sodomy and non-

⁸⁴ *Id.* at 2482.

⁸⁵ *Id.* at 2478-79.

⁸⁶ *Id.* at 2479.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* (emphasis added).

⁹⁰ *Id.* (“Far from possessing ‘ancient roots,’ American laws targeting same-sex couples did not develop until the last third of the 20th century.”) (quoting *Bowers*, 478 U.S. at 192) (citation omitted).

⁹¹ *Id.*

⁹² *Cf.* *Lofton v. Florida*, 2004 WL 1627022 * 27-28 (11th Cir.(Fla.)) (Anderson, J., dissenting from order denying petition to rehear *en banc*) (explaining that Florida’s ban on same-sex adoptions was in reaction to the gay rights movement.)

⁹³ *Lawrence*, 123 S.Ct. at 2494 (Scalia, J., dissenting).

procreative sex acts, and only later rewrote their laws to target just sodomy by gay men and lesbians or chose to enforce their laws only against gay men and lesbians. This history demonstrated to the Court that these laws were intended to not to express moral disapproval of non-procreative sex acts, but to express disapproval of an identifiable group of people—gay men and lesbians.

The Court therefore concluded that the traditional moral objections to homosexuality as embodied by Texas law, and reflected in *Bowers* demeaned the lives of gay men and lesbians and stigmatized them as criminal. That the Constitution did not permit: “The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.”⁹⁴

C. *Why Alternative Explanations of Lawrence are Incomplete.*

The difference between *Lawrence* and *Bowers* is central to my thesis that rigorous rational basis scrutiny applies when laws aim at particular social groups. Before proceeding to my discussion of the distinctions between groups and classifications, therefore, I would like to explain why my reading of *Lawrence* is better than the main alternative interpretations of that case. There have been at least two major alternative readings offered: one by Professor Dale Carpenter, which argues that *Lawrence* is best explained as an extension of fundamental rights jurisprudence; and one by Professor Randy Barnett, which argues that *Lawrence* is a sign of a libertarian revolution that constitutionalizes the harm principle.

Both readings have their merits. They also have their weaknesses, and their weaknesses reveal why it is important and necessary to have a cogent understanding of what a group is. Simply put, Professor Carpenter’s reading does not explain the Court’s journey from *Bowers* to *Lawrence*; Professor Barnett’s does not explain why the Court has said that it will not declare laws against prostitution and incest between adults unconstitutional and why it is quite likely to let stand laws like Sunday closing laws and laws criminalizing polygamy and adulterous cohabitation.

1. Fundamental rights

Professor Dale Carpenter has argued that the best reading of *Lawrence* is that the Court struck Texas’s ban on sodomy because the ban infringed the fundamental right of “adults to engage in a noncommercial, consensual, sexual relationship in private, where their activity involves no injury to a person or harm to an institution (like marriage).” Professor Carpenter draws our attention to the Court’s description (or *re*-description) of *Griswold*, *Eisenstadt*, *Roe*, and *Casey*.⁹⁵ *Griswold*, the Court said, “declared the right to privacy” and shielded “the marriage relation and the protected space of the marital

⁹⁴ *Id.* at 2482.

⁹⁵ The following description of the cases is Dale Carpenter’s. See Dale Carpenter, *Is Lawrence Libertarian?*, 88 MINN. L. REV. 1140, 1155 (2003).

bedroom” from state control.⁹⁶ *Eisenstadt* struck down a state law that infringed “fundamental human rights” by prohibiting the sale of contraceptives to unmarried persons. *Roe* protected the “right of a woman to make certain fundamental decisions affecting her destiny.”⁹⁷ These cases, according to *Lawrence*, “were, broadly speaking, about [protecting] a form of sexual autonomy.”⁹⁸ The Court’s description “places the claimed right in *Lawrence* squarely within the context of the prior cases involving a fundamental liberty to engage in private sexual conduct.” “Like *Eisenstadt* and *Carey*, *Lawrence* involves ‘sexual conduct’ outside the ‘marital relation.’”⁹⁹

Furthermore, Professor Carpenter is not persuaded that the Court is applying rational basis scrutiny. The Court, Professor Carpenter argues, does not hold that “the promotion of morality is not a legitimate state interest”;¹⁰⁰ rather the Court says more obliquely that Texas’s law “furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual”¹⁰¹ and that there had been “no showing that the state interest ‘is somehow more legitimate or urgent’” than it had been in other countries that had rejected sodomy laws.¹⁰²

The *Lawrence* Court’s citation of Justice Stevens’s dissent in *Bowers* provides the final element in Professor Carpenter’s argument that *Lawrence* is a fundamental rights case. In dissent in *Bowers*, Justice Stevens protested,

[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.¹⁰³

To Professor Carpenter, “it is clear that Stevens was arguing that a morality justification is an insufficient state interest where a *fundamental right* is concerned. In adopting Stevens’s argument, the [*Lawrence*] Court is saying no more than that.”¹⁰⁴

Professor Carpenter’s reading is suspect for four reasons. First, Justice Stevens is far more ambiguous than Professor Carpenter allows. Second, Professor Carpenter’s explanation does not account for either Justice Stevens’s worries about the stigma imposed on gay men and lesbians by Georgia’s law or the *Lawrence* Court’s identical concerns. Justice Stevens also bases his argument that traditional moral objections to some practice will not justify prohibiting it partly on principles of equality. He cites anti-miscegenation laws, one of the cornerstones of white supremacy, as his example, and he

⁹⁶ *Lawrence v. Texas*, 123 S.Ct. 2472, 2477 (2003).

⁹⁷ *Id.*

⁹⁸ Carpenter, *supra* note ___ at 1156.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1157.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J. dissenting).

¹⁰⁴ Carpenter, *supra* note ___ at 1158 (emphasis supplied).

cites *Loving v. Virginia*, which struck down those laws.¹⁰⁵ Importantly, *Loving* struck anti-miscegenation laws on equal protection grounds as well as on fundamental rights grounds.¹⁰⁶ Consistent with this reasoning, Justice Stevens argued, and Georgia conceded, that the Constitution provided straight couples with a right of private sexual intimacy that included their choice of sex acts. Gay men and lesbians were no different than other individuals, Justice Stevens argued, as they had exactly the same interests that gave rise to that right of private sexual intimacy. Therefore, Georgia could not constitutionally prohibit same-sex sodomy unless it had some neutral reason to treat same sex sodomy differently than it treated sodomy between members of the opposite sex. “[H]abitual dislike for, or ignorance about, the *disfavored group*”¹⁰⁷ was not a neutral or legitimate reason.

Nor can Professor Carpenter’s reading tell us why the *Lawrence* Court was worried about the stigma Texas’s law created, a point that would be unnecessary to a fundamental rights holding. The Court said that Texas stigmatized and demeaned gays and lesbians by singling out same sex sodomy for criminal punishment.¹⁰⁸ The Court articulates this problem explicitly: “[The] continuance [of *Hardwick*] as precedent demeans the lives of homosexual persons. The stigma this criminal statute imposes . . . is not trivial.”¹⁰⁹ Were the Court to uphold Texas’s ban on same-sex sodomy, it would be complicit in stigmatizing and demeaning gays.

Lawrence, in short, was as much about equality as it was about liberty. The Court adopts the rationale of liberty as kind of a belt and suspenders approach – were it to decide *Lawrence* purely on grounds of equality, some might continue to question whether laws criminalizing all types of sodomy were unconstitutional. But *liberty* was not what was denied to gays and lesbians—fear of prosecution did not keep people from having sex in their homes. Laws banning sodomy—both same-sex prohibitions and across the-board prohibitions—gave states power to brand gays and lesbians as felons, however. That power, in turn, empowered states to brand gays and lesbians as deviants and as outlaws.¹¹⁰

Third, Professor Carpenter’s account does not tell us why the *Lawrence* Court rejected *Bowers*’s articulation of the right at issue. Why did *Lawrence* refuse to describe it as the right to engage in acts of sodomy and insist on framing it in terms the right to develop intimate relationships? The fundamental rights reading cannot explain the

¹⁰⁵ 388 U.S. 1 (1967).

¹⁰⁶ *Id.* at 10-12 (equal protection); *id.* at 12 (fundamental liberties).

¹⁰⁷ *Bowers*, 476 U.S. at 219 (emphasis added).

¹⁰⁸ *Id.* at 2482.

¹⁰⁹ *Id.* at 2482. Indeed, according to the Court, state laws that prohibit all forms of sodomy would stigmatize gays and lesbians just the same as bans on same-sex sodomy: “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.” All laws against sodomy are therefore unconstitutional. *Id.* at 2482.

¹¹⁰ See Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 115 (2000) (explaining that even unenforced sodomy laws were used by states to “define a specific class of Americans as inferior and ... remove them from view”).

Court's tectonic shift in perspective. As far as the Constitution is concerned, *Lawrence* holds that gay and lesbian relationships deserve as much protection from state interference as straight relationships.¹¹¹ Permitting states to deprive gays and lesbians of this autonomy would denigrate their relationships as deviant and undesirable. As states had no reason for doing so besides their moral objections to same sex sodomy, the state's exercise of power violated the constitution. As the Court holds: "The State cannot demean [gays' and lesbians'] existence or control their destiny by making their private sexual conduct a crime"¹¹² because the "petitioners are entitled to respect for their private lives."¹¹³ States, in other words, may not use law to heap disrespect on gays, to demean their existence, or to control their destinies.¹¹⁴ States, in other words, may not use law to deny gays and lesbians equal status as citizens.

Fourth, the simplest explanation is usually correct, as Occam's Razor holds. The Court probably omitted the words "fundamental" (as in rights)¹¹⁵ and "suspect" (as in class) in *Lawrence* intentionally. If so, the simplest reason for these omissions is that the Court did not hold (and did not intend to hold) in *Lawrence* that gays were a suspect class or that Americans have a *fundamental* right to engage in consensual sexual activities in their homes. Furthermore, the Court said that Texas lacked a "legitimate"¹¹⁶ state interest for banning sodomy; the simplest explanation for why the Court used the language of "legitimate" state interests is that the Court was applying rational basis scrutiny. I'll admit it: Some things are true even though Justice Scalia says they are true.¹¹⁷

The simplest explanation could also be the scariest one, for it is consistent with the radical libertarian account of *Lawrence*. If *Lawrence* held that Texas could not restrict the non-fundamental liberties of gays and lesbians because Texas's moral objections to gay sodomy were not rational reasons for the ban, then *Lawrence*'s holding is indeed a radical one. Additionally, this construction of *Lawrence* leaves most of the questions I posed above unanswered. Those who fear that Earl Warren's soul was transplanted into Justice Kennedy's body will find much in *Lawrence* to keep them

¹¹¹ *Lawrence*, 123 S.Ct. at 2482.

¹¹² *Id.* at 2484.

¹¹³ *Id.* at 2484.

¹¹⁴ *Id.* at 2484.

¹¹⁵ The phrase the Court does use is "liberty"—unadorned by adjectives. See *Lawrence v. Texas*, at 2478. ("The *liberty* protected by the Constitution allows homosexual persons the right" to enter into personal relationships in the privacy of their own homes) (emphasis supplied); *id.* at 2484. ("Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.")

¹¹⁶ See *id.* at 2484. ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.") and at 2483 ("There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.")

¹¹⁷ *Id.* at 2492 (Scalia, J., dissenting) ("[T]he Court concludes that the application of Texas's statute to petitioners' conduct fails the rational-basis test, and overrules *Bowers*' holding to the contrary.")

awake at night.¹¹⁸ Does *Lawrence* signify that the Court will in the future act as super-legislature, scrutinizing the sufficiency of legislatures' justifications for myriad laws?¹¹⁹

2. *Lawrence* as the harm principle unbound

Both critics and proponents of *Lawrence* see it as evidence of the Court's libertarian leanings.¹²⁰ On this account, *Lawrence* stands for the proposition that the Court will strike state restrictions on liberty if a state cannot show that the restriction protects third parties from physical or economic injuries. The Court will presume that restrictions on liberty are unconstitutional until proved otherwise. Without some evidence that economic or physical harm will result, moral disapproval for an activity will not justify restrictions on individual liberties.

Some language in the opinion supports this reading, as Justice Kennedy's opinion invokes language reminiscent of the harm principle. He speaks broadly of "liberty," not of "*fundamental*" rights or liberties.¹²¹ The Court, Randy Barnett notes, uses the word liberty at least twenty-five times¹²² but never uses the phrase "fundamental right" or "fundamental liberty."¹²³ Perhaps most strikingly, he stresses the fact that the Texas ban "seek[s] to control a personal relationship [that] is within the liberty of persons to choose without being punished as criminals."¹²⁴ "This," Justice Kennedy continues, "as a general rule, should counsel against attempts by the State to . . . define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects."¹²⁵ In a case involving only consenting adults, there is no such harm. This caution sounds like the harm principle: The state should not curtail personal freedom absent harm to non-consenting parties.

¹¹⁸ See e.g., Nelson Lund & John O. McGinnis, *Lawrence v. Texas* and Judicial Hubris, Mich. L. Rev. (forthcoming) at 24-29 (2004) (available at: <http://ssrn.com/abstract=534343>).

¹¹⁹ See *id.* at 55-61 (criticizing *Lawrence* as evidencing the Court's willingness to act as a super-legislature).

¹²⁰ For example, Professor Barnett praises the Court for embracing the libertarian harm principle, see Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas*, in 2002-2003 CATO SUPREME COURT REVIEW 21, 21 (James L. Swanson ed., 2003), while the Web site CitizenSoldier.org decries *Lawrence* as throwing out "the last remaining tie in American law to the Judeo-Christian moral principles our nation was founded upon" in favor of libertarian principles, see *Lawrence v. Texas—America Dies*, Citizen Soldier, at www.citizensoldier.org/deathofamerica.html (last visited Mar. 13, 2004). See also *Lawrence*, 123 S. Ct. at 2595 (Scalia, J., dissenting) (criticizing the Court for putting an end to "all morals legislation"); Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1282-84, (claiming the Court's "consistent disinclination" to allow morals rationales to justify lawmaking indicates that "mere reference" to morality will not justify government action, and arguing that "the Court's avoidance of morals rationales as the exclusive justifications for government action is not only reasonable" but also inevitable.)

¹²¹ See, for example, the first sentence of Justice Kennedy's analysis, stating that "[w]e conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their *liberty* under the Due Process Clause of the Fourteenth Amendment to the Constitution." *Id.* at 2477 (emphasis added).

¹²² Barnett at 34.

¹²³ *Id.* at 35.

¹²⁴ *Lawrence*, at 2478.

¹²⁵ *Id.*

Lawrence also subtly alters the substantive due process “history and tradition” analysis—more grist for the libertarian mill. According to the majority, the question is not whether the right to engage in sodomy is grounded in the history and tradition of our nation.¹²⁶ Rather, the question is whether there has been a long-standing tradition of treating sex between same-sex partners differently under the law than sex between members of the opposite sex.¹²⁷ The Court brushes aside the fact that state and common law had long prohibited sodomy, as these laws were rarely enforced against private sexual acts.¹²⁸ Furthermore, the Court uses the word “privacy” only sparingly, and it does not try hard to ground the opinion in that right.¹²⁹ Though the Court does not invoke the vocabulary of fundamental rights, Justice Kennedy never indicates that the Court will presume that the Texas law is constitutional—the traditional stance when laws invade ordinary, not fundamental, liberties.¹³⁰ The Court also appears to hold that morality does not satisfy even minimal rational basis scrutiny (though the opinion does not actually specify the level of scrutiny).¹³¹

The Court’s opinion in *Lawrence* also takes seriously Texas’s concerns about the moral effects of permitting same sex sodomy. The Court acknowledges that many people seriously and sincerely condemn sodomy and homosexuality as immoral: “For many persons [objections to homosexual sex] are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives.”¹³² But the Court strikes down the ban anyway—however deeply and sincerely held, these moral beliefs do not count as rational justifications to restrict the liberty of gays and lesbians. *Lawrence*’s alteration of history and tradition analysis can be read to suggest that the Court no longer presumes the validity of state restrictions of liberties, regardless whether a liberty has traditionally been considered fundamental. The history and tradition inquiry now asks whether traditionally a specific activity has been actively regulated by the states. What the state has not traditionally and actively regulated seems to fall into the realm of “liberty,” and states will need to justify their incursions into that realm.

Yet, the libertarian construction of *Lawrence* creates a principle with no logical stopping point. If the libertarian construction of *Lawrence* is correct, it would predict that the Court will overturn *Barnes v. Glen Theatre*, strike laws against prostitution, restrictions on the sale of sex toys, legal benefits to married people, polygamy, Sunday closing laws, and laws against possession and use of small amounts of marijuana. The

¹²⁶ See *id.* at 2478–79.

¹²⁷ See *id.*

¹²⁸ *Id.* at 2479 (“Laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private.”).

¹²⁹ Barnett, *supra* note ___, at 33.

¹³⁰ *Id.* at 35.

¹³¹ See *Lawrence*, at 2495 (Scalia, J., dissenting) (contending that the majority applied rational basis scrutiny to strike Texas’s ban on same-sex sodomy). The fact that *Lawrence* overrules *Hardwick*, which upheld Georgia’s sodomy ban on the ground that moral disapproval of sodomy and of gays was a rational justification for the statute, suggests that *Lawrence* itself applies rational basis scrutiny. See *id.* at 2483–84.

¹³² *Id.* at 2480.

Court will do none of these things.¹³³ The libertarian reading therefore cannot explain why the Court explicitly distanced itself from the implications of even a moderately robust libertarian agenda.

3. The central role of groups to rigorous rational basis scrutiny.

My own view (advanced above and more fully in *From Outlaws to Ingroup*¹³⁴) is that the majority did not believe that it was reviving robust substantive due process jurisprudence (if it can be characterized as a “jurisprudence”). Rather, *Lawrence* extends the Court’s analysis in *Romer*, *Moreno*, *Cleburne*, and *Plyler*, that a bare desire to harm a group or moral objections to a group cannot rationally sustain state action against that group. The Court, therefore, appears to think that it will only apply more stringent rational basis analysis when majorities have denied liberties or state services to groups that the majority permits itself to enjoy.

The *Lawrence* Court’s concern centers on the social status of gay men and lesbians. The Court’s point was that gay men and lesbians have a right not to be demeaned in their lives, a right not to be marked as or rendered pariahs. To be sure, gays and lesbians did object that sodomy laws restricted their liberties. Practically, however, such laws probably did not deter many gays and lesbians from having sex in their homes. These laws were so infrequently enforced against private conduct in the home that gay-rights attorneys saw *Lawrence* as a rare opportunity to ask the Court to overturn *Bowers* and to declare anti-sodomy laws unconstitutional. (The vast majority of arrests under the law were for sex with children, solicitation, prostitution, or sex in parks and other public places.)¹³⁵ But sodomy laws did deny gays and lesbians “dignity as free persons” and it assigned criminal status to their intimate, sexual relationships. Such injuries are unconstitutional, the *Lawrence* Court holds, when based on bare moral objections to gays and lesbians.¹³⁶

This conclusion has some intuitive appeal: hatred of a group of people hardly qualifies as a ‘rational’ reason, and laws that target groups seem more suspicious than laws that target conduct because that conduct is deemed objectionable. The intuition that animosity toward a group is not rational and is therefore inherently suspicious undergirds all of the rigorous rational basis cases. Fashioning a principle for these cases might be as

¹³³ Cf. *Id.* at 2484 (“The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. . . . The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.”) *But cf. id.* at 2490 (Scalia, J., dissenting) (questioning whether there is a principled distinction between laws against sodomy and laws prohibiting bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity, none of which involve harm to third parties and are only “sustainable as laws based on moral choices”).

¹³⁴ Miranda Oshige McGowan, *From Outlaws to Ingroup: Romer, Lawrence, and the Inevitable Normativity of Group Recognition*, 88 MINN. L. REV. 1312 (2003).

¹³⁵ See Brief of Amicus Curie, The American Civil Liberties Union, 2003 WL 164132 *13-14 (reporting that “sodomy laws have almost always been applied in cases involving children, the use of force, public sex, or prostitution”).

¹³⁶ *Lawrence*, 123 S. Ct. at 2478.f

simple as distinguishing between laws that target groups and laws that merely target conduct.

If only it were it so simple. The problem is that there is no discernable difference between laws that are motivated by animus toward a *group* and laws that are motivated by disapproval of some conduct engaged in by a *class* of people. All criminal laws stigmatize the prohibited conduct and, by extension, stigmatize the class of people who do the prohibited act.¹³⁷ Laws against public nudity, for example, stigmatize nude dancers and men who go to see them. Laws that ban the sale of sex toys stigmatize the people who want to use them and the people who want to sell them.

Laws that treat one class of persons differently than another class of persons for moral reasons also valorize one class but not the other. Married couples with one income pay income taxes at a lower rate than single people do, because marriage is a morally worthy activity (at least when one woman marries one man). States that do not restore civil rights, including the right to vote, to felons upon completion of their sentences do so to declare and render them strangers to the community. Each of these *classes* of people can also be referred to as *groups* of people—“the group of nude dancers,” “the group of married couples,” “the group of ex-cons,” or “the group of people who use sex toys.”

If you agree that the Court is not likely to strike down bans on sex toys,¹³⁸ bans on public nudity, or distinctions between married and unmarried couples in the tax code, then we have to conclude that when the Court speaks of the illegitimacy of laws based on moral objections to a group or a bare desire to harm a group it means only *some* groups. In other words, laws that restrict the liberties of *some* groups will trigger rigorous rational basis scrutiny but others will not. But which groups? The Court has never said. A close look at *Williams v. Alabama*, the Eleventh Circuit decision that upheld a ban on the sale and distribution of sex toys, may help us to limn a distinction between groups that trigger rigorous rational basis scrutiny and those that do not.

The Court appears to believe that the stigma of same-sex sodomy laws is notable because it is directed toward gays and only gays. Unfortunately, this objection does not really distinguish same-sex sodomy laws from other laws. The public indecency statute in *Barnes* at least tried to stigmatize the set of men who visited totally nude clubs and stigmatized nude exotic dancers. The public indecency statute and the prosecution of the Kitty Kat Lounge reflected the state’s moral distaste for the kinds of people who would like to appear nude in public and who frequent totally nude clubs; Indiana offered no other justification for its statute.

¹³⁷ See *Lawrence v. Texas*, 123 S.Ct. at 2495–96 (Scalia, J., dissenting) (arguing that laws that regulate sexual behavior reflect society’s belief “that certain forms of sexual behavior are immoral and unacceptable”); *cf.* *Romer v. Evans*, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting) (“I had thought that one could consider certain conduct reprehensible—murder[,] . . . or polygamy, or cruelty to animals—and could exhibit even ‘animus’ toward such conduct.”).

¹³⁸ The Court recently declined to review an appellate court decision upholding a state ban on their distribution and sale. *Williams v. King*, 2005 U.S. LEXIS 1540 (U.S., Feb. 22, 2005).

The state of Alabama prohibits the commercial distribution of “any obscene material or any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value.”¹³⁹ Alabama citizens can give each other sex toys, and both have and use sex toys that they bought on weekend pleasure trips to New Orleans or Miami. Walgreen’s can also sell hand-held massagers, which even the profoundly unimaginative could adapt for good sexy fun. Good Vibrations, however, cannot open a store in the state of Alabama, and the good citizens of Alabama cannot order dildos, anatomically correct vibrators, or strap-ons (and why don’t we just leave the list at that?) from the Good Vibrations Internet site.

It is hard to imagine what purpose this law serves—ever since the automobile came into wide use, this law has hardly limited Alabamians’ access to the full panoply of stock at the Florida, Georgia, Tennessee, and Mississippi branches of Sex Toys ‘R Us. The only possible purpose of this law is to express the moral opinion that the “commerce of sexual stimulation and auto-eroticism, for its own sake, unrelated to marriage, procreation or familial relationships” is “an evil, an obscenity” and “detrimental to the health and morality of the state.”¹⁴⁰

Several plaintiffs, whom the ACLU represented, challenged this law’s constitutionality, and the Eleventh Circuit upheld it earlier this year.¹⁴¹ The Eleventh Circuit rejected the ACLU’s claim that *Lawrence* created a fundamental right to sexual privacy that included the right to purchase sex toys. Under regular rational basis scrutiny, this was an easy case. As the Eleventh Circuit observed, “Rational basis scrutiny is a highly deferential standard that proscribes only the very outer limits of a legislature’s power. A statute is constitutional under rational basis scrutiny so long as ‘there is *any reasonably conceivable state of facts* that could provide a rational basis for the’ statute.”¹⁴²

Alabama’s interest in “crafting and safeguarding . . . public morality [is] indisputably . . . a legitimate government interest under rational basis scrutiny,” and the statute certainly served that interest. The ban on the sale of sex toys “rationally” furthers the state’s interest “in discouraging prurient interests in autonomous sex.” It does so by discouraging “commerce in the devices” and by making it “more difficult” to get these devices.¹⁴³ Alabama’s failure to criminalize the use or possession of *all* devices that could be used as sex toys did not undermine this conclusion as Alabama could take

¹³⁹ Ala. Code §13A-12-200.2 (2003).

¹⁴⁰ *Williams v. Alabama*, 41 F. Supp. 2d 1257, 1286 (N.D. Ala. 1999), *rev’d & remanded*, 240 F.3d 944, 948 (11th Cir. 2001).

¹⁴¹ *Williams v. Alabama*, 2004 WL 1681149 (11th Cir.) Actually, this was the second time that the 11th Circuit upheld this law. They first upheld it in *Williams v. Alabama*, 240 F.3d 944, 948 (11th Cir. 2001), reversing the district court’s conclusion that the statute lacked a rational basis and remanding it to the district court for further proceedings. On remand, the district court struck the statute, 220 F.Supp.2d 1257 (2002), finding that the fundamental right to privacy barred the state from restricting the access of adults to sex toys.

¹⁴² *Williams v. Alabama*, 240 F.3d 944, 948 (11th Cir. 2001).

¹⁴³ *Williams*, at 949-50.

“incremental steps” towards the state interest, so long those steps were not “irrational.”¹⁴⁴ Alabama’s ban of the sale but not possession or use was not irrational—the possession or use of sex toys might be so difficult as to be impracticable or require enforcement methods that would intrude on and interfere with private relationships.¹⁴⁵

As a heightened rational basis case, however, this statute could be vulnerable, as the district court had originally held.¹⁴⁶ The law could be impugned as quite under-inclusive because it prohibited only those devices “designed or marketed as useful primarily for the stimulation of human genital organs.” Devices like hand-held massagers could still be sold freely, leading one expert to observe that “the primary effect of the statute was to benefit one set of retailers (drug stores, health food stores, and discount houses such as Walmart [sic], GNC and Target) at the expense of another (marital aids vendors).”¹⁴⁷ Furthermore, Alabama did not prohibit the sale of items used by kinkier Alabamians—fur suits, 5-inch stiletto heels, leather vests, chaps, thigh-high boots, straightjackets, or nurses’ uniforms—or by more organically inclined Alabamians.

The statute also prohibited far more conduct than necessary to meet its purported purposes. The Attorney-General of Alabama argued that the law “ban[ned] the commerce of sexual stimulation and auto-eroticism, for its own sake.” That is, it banned sexual stimulation and auto-eroticism that did not relate “to marriage, procreation[,] or familial relationships.”¹⁴⁸ The statute banned the sale of sex toys to *all* potential customers, however, without exception for those who would use them in conjunction with marriage or procreation.¹⁴⁹

The district court found these problems of fit fatal to the statute, and cited *Romer* and *Cleburne*.¹⁵⁰ The Eleventh Circuit chastised the district court for relying on those cases and distinguished them. The lack of fit in *Romer*, the circuit court held, suggested that Colorado pursued no legitimate end, not that it pursued legitimate ends imperfectly, as did Alabama.

Both Amendment 2 and Alabama’s sex toy ban, however, expressed moral disapproval. Amendment 2 expressed disapproval of *homosexuality*. That disapproval was manifested in an amendment that stripped cities of the ability to pass pro-gay rights legislation. The Amendment’s object was to express opposition to gay rights: it stripped localities of jurisdiction because those localities had passed pro-gay rights measures. Similarly, Alabama’s law expressed disapproval of certain sex practices. Its means were more usual and straightforward—criminal prohibition of the sale of items that facilitated those practices—but both laws had moral disapproval of some practice as their ends. The Eleventh Circuit’s distinction between *Romer* and the ban on sex toys cannot be the reason why these cases are different.

¹⁴⁴ *Id.* 950.

¹⁴⁵ *Cf.* *Poe v. Ulmann*, (Harlan, J., dissenting)

¹⁴⁶ 41 F.Supp.2d 1257 (N.D. Ala. 1999).

¹⁴⁷ *See Williams*, 2004 WL 1681149 at *14 (11th Cir.).

¹⁴⁸ 41 F.Supp.2d at 1288 (alteration in original).

¹⁴⁹ *Id.* at 1289.

¹⁵⁰ *Id.*

Justice Scalia's reference to the conflict in Colorado that gave rise to Amendment 2 as a "Kulturkampf,"¹⁵¹ however, provides a clue to why these cases are indeed different. Justice Scalia references the struggle between Bismarck and the Catholic Church for power over Germany in order to frame the conflict in Colorado as a struggle between two different *groups* to define Colorado's moral code: on the one hand, gays and lesbians who wanted to define anti-gay bias as irrational discrimination; on the other, Coloradoans who morally disapproved of homosexuality.¹⁵² Justice Scalia repeats this theme of group struggle in *Lawrence* when he accuses the majority of having signed onto the "homosexual agenda."¹⁵³ For Justice Scalia's analogy to "Kulturkampf" to succeed, and for there to be such a thing as a "homosexual agenda," gays and lesbians must be characterized as a *group* and their struggle characterized as a *group* struggle. The *Romer* majority reveals that this is precisely how it sees Amendment 2 when it calls it "a status-based enactment . . . [and] a classification of persons undertaken for its own sake[, which] the Equal Protection Clause does not permit."¹⁵⁴ The "class of persons" is obviously not the localities that had passed the pro-gay rights laws, but gays and lesbians toward whom unconstitutional "animus" was directed.

It would sound odd to characterize Alabama's sex toy ban as a "status-based enactment" or a "classification of *persons* undertaken for its own sake" because people who use sex toys and people who sell them are a looser kind of group than gays and lesbians are. They are persons who do or sell a certain thing, which is how *Bowers* saw gays.¹⁵⁵ Most individuals in the group of people who use sex toys do not derive a significant portion of their identity from the fact that they use vibrators or dildos. The fact someone else shares the affinity for such things does not necessarily provide a point of shared identity among sex toy users, either.¹⁵⁶ In contrast, gays and lesbians are a

¹⁵¹ *Romer*, 517 U.S. at 636 (Scalia, J., dissenting).

¹⁵² Significantly, Bismarck and the Church fought for the power to define marriage, which is the current locus of the debate over gay rights. It's possible to read the "Kulturkampf" reference as a struggle between different jurisdictions – between majorities at the local government level on the one hand and majorities at the state level on the other. Whether you think this reading of Scalia's reference is more plausible than the one offered above is ultimately irrelevant to my point. What's important is that the *Romer* majority saw this case as affecting the rights of gays and lesbians as a *group*.

¹⁵³ *Lawrence*, 123 S.Ct. at 2496. Justice Scalia writes,

Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.

Id.

¹⁵⁴ *Romer*, 517 U.S. at 635.

¹⁵⁵ And apparently how Justice Scalia continues to see gays and lesbians as well. See *Lawrence*, 123 S.Ct. at 2495–96 (Scalia, J., dissenting) (arguing that laws that regulate sexual behavior reflect society's belief "that certain forms of sexual behavior are immoral and unacceptable"); cf. *Romer v. Evans*, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting) ("I had thought that one could consider certain conduct reprehensible—murder[,] . . . or polygamy, or cruelty to animals—and could exhibit even 'animus' toward such conduct.").

¹⁵⁶ Subgroups of sex toy users may have a greater sense of affinity with one another—some leather fetishists frequent bars devoted to their kink. But a recent survey suggests that only half of people who use sex toys have ever talked to anyone but their partner about them. This survey also suggests that most people who use sex toys do so less than half of the time when they have sex. See *Toys in the Sheets* (1999),

cohesive and socially salient identity group—gay men and lesbians do not refer to themselves as “people who engage in same sex sodomy.” They call themselves “gay” or “lesbian.” Outsiders usually do the same. For gay men and lesbians, group identity informs an individual’s self-identity. Indeed, this is how *Romer* and *Lawrence* saw gays and lesbians. We cannot say the same things about most people who use sex toys, which is why the Eleventh Circuit was right that *Romer* and *Lawrence* did not invalidate Alabama’s sex toy ban.

II. SO WHAT MAKES Y’ALL THINK YOU’RE A GROUP?

The cases in which the Court has applied rigorous rational basis scrutiny to protect groups have made absolutely no effort to define what exactly a “politically unpopular group”¹⁵⁷ is. Virtually all laws disadvantage some people who, at a minimum, can be seen as the group of people disadvantaged by some law. The cases therefore seem either to beg—or not care about—an essential question: what distinguishes a “group” from a class of people who share a common activity or characteristic? What makes gays and lesbians a group but single adults going to “teen” dances not?¹⁵⁸ Why did hippies, illegal alien children, and persons with disabilities merit protection as groups, but polygamists and felons do not?

The Court’s failure to come to grips with this basic definitional question leaves *Lawrence*, *Romer*, *Cleburne*, and the whole line of rational basis plus cases vulnerable to Justice Scalia’s attack that the Court has no basis for striking laws that disadvantage gays besides its preference for the “gay agenda” over the political efforts of moral conservatives. If accurate, Justice Scalia’s claim strikes at the very legitimacy of these cases and of the Court’s recent constitutional adjudication. For judicial review of the constitutionality of legislation to serve as an effective and legitimate check on majority power, the Court must rely on reasons that are broader than growing political acceptance of certain conduct or emerging political acceptance and increasing power of groups.¹⁵⁹ As a practical, political matter, such reasons might suffice to support a decision today. Indeed, it seems that the Court accurately gauged the pulse of Americans on this issue—shortly before and shortly after *Lawrence* came down, a majority of Americans believed that private, consensual same-sex sex should no longer be a criminal offense. But it would be ironic indeed if the Court’s rational basis plus jurisprudence solely depended on *Carolene Products*’ inversion: that those who received constitutional protection from the exercise of majority power were those who had persuaded elites that their activities were worthy or at least unobjectionable.

available at <http://www.xandria.com/learn/ToysInSheets/default.asp> (reporting the results of the “Toys in the Sheets” study conducted by the Xandria Company, which was based on a survey of 246 people drawn from the Xandria Company’s database of 1.5 million purchasers) (site last visited March 14, 2005).

¹⁵⁷ See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 447 (1985) (quoting *United States Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

¹⁵⁸ Cf. *City of Dallas v. Stanglin*, 490 U.S. 19 (1989).

¹⁵⁹ Cf. *Lund & McGinnis*, *supra* note __ at 50-54 (arguing that unprincipled decisions like *Lawrence* squander the Court’s legitimacy).

The Court's lack of attention to this issue suggests that the Court thinks that it is obvious when a group is a socially salient identity group and that it is readily apparent when legislation is motivated by animus towards such "politically powerless" groups. This section will first show that the question is actually a difficult one. Indeed, the terms of its own definition—politically powerless groups made the targets of majority animus—fail to account for why some cases have triggered rigorous rational basis scrutiny and others have not. Second, I turn to other possibilities for distinguishing groups from classes of individuals. Finally, I sketch out a proposal for crafting such a distinction in the rigorous rational basis arena.

A. *The Court's Unworkable Social Fact Approach*

The Court's lack of attention to this issue suggests that the Court thinks that it is obvious when legislation is motivated by a bare desire to harm a socially unpopular group and that the existence of groups is itself an obvious social fact. For some of the groups that the Court has chosen to protect, this is true. Gays and lesbians are a social and political group. They have their own version of the NAACP in the Lambda Legal Defense Fund. They have organizations within both the Democratic and Republican parties (the latter fact seems to prove that there are no laws against self-abuse, despite Justice Scalia's contrary assumption¹⁶⁰) and lobbyists on Capitol Hill and in every state legislature in the nation. Gays and lesbians across the nation put on "Pride Parades" in most major cities in the United States in June each year. Law students can join gay and lesbian groups at most colleges and law schools, and bar associations in many cities have gay and lesbian sections, as does the AALS.

There are good reasons to believe gays and lesbians are an identity group, meaning that their sense of self is significantly influenced by their sexual orientation. Indeed, the fact that a person's identification as gay or lesbian *is* central to many gays' and lesbians' identities is certainly one of the reasons that they have created political and legal organizations to represent their interests.¹⁶¹ Sexual orientation by definition affects a person's choice of sexual and life-partners and whether and how someone will have children.¹⁶² Crucially, as well, it shapes others' perceptions of a person. Persons with

¹⁶⁰ See *Lawrence*, 123 S.Ct. at 2490 (Scalia J. dissenting) (bemoaning the fact that state laws prohibiting masturbation would be unconstitutional after *Lawrence*).

¹⁶¹ E.g., Lambda Legal Defense Fund, Inc., the Human Rights Coalition, Log Cabin Republicans.

¹⁶² And same-sex couples obviously can and do raise families. Firm figures are hard to come by but the Census reported that 594,691 same-sex couples listed themselves as unmarried partners in the United States. M.V. Lee Badgett & Marc A. Rogers, *Left Out of the Count: Missing Same-Sex Couples in Census 2000*, Institute for Gay and Lesbian Strategic Studies at 3 (2003) (available at http://www.iglss.org/media/files/c2k_leftout.pdf.) Some have argued that that figure is a significant undercount—between sixteen and nineteen percent according to a study commissioned by the Institute for Gay and Lesbian Strategic Studies. *Id.* at 5. The Human Rights Coalition reports that 2000 Census figures show that 34% of same-sex women partners are raising children and 22% of same-sex male partners are. Lisa Bennett & Gary J. Gates, *The Cost of Marriage Inequality to Children and their Same-Sex Parents*, Human Rights Campaign Foundation Report 3 (2004) (available at http://www.hrc.org/Template.cfm?Section=Get_Involved1&Template=/ContentManagement/ContentDispl

disabilities are probably an identity group too. Disability shapes people's perceptions of and experiences in the world. Depending on the extent to which a person requires and receives reasonable accommodations, disability can affect a person's opportunities and life plans. Knowing that a person has a disability can alter others' view of a person. All of these factors can contribute to a person's self-conception. Just as gay men and lesbians have, individuals with disabilities have created social, political, and legal organizations, and lobbyists represent their interests in Congress and in state houses.

We might be tempted to generalize that existing "identity groups" trigger rigorous rational basis scrutiny. The problem with this explanation is that it is just too powerful because people may constitute their identities in all sorts of ways the Court would not protect. A purely descriptive notion of identity group could suggest that classes of people like "Padre Fans" are an identity group deserving constitutional recognition. Such a result would seem odd, just as it would seem odd for a person to insist on choosing her spouse from only the pool of existing Padre fans—partly because she could well persuade her spouse to become a Padres fan, and partly because she might not always remain a Padres fan. Even with regard to sexual identity, a purely descriptive notion of group seems unlikely to predict when the Court would apply rigorous rational basis scrutiny. If it strikes you as unlikely that the Court would declare unconstitutional legislative efforts to discourage the practice of the "furry" fetish or the "furry" lifestyle, then it cannot be that the Court grants protects some groups from restrictions based in animus because they are identity groups.¹⁶³ There must be something more at work than "identity"—it may be necessary for a group to constitute itself, but it does not seem to be sufficient for constitutional protection.

Even if the Court had identified the facts that presumably define protected groups, it would be hard to apply these criteria consistently. For example, the Court said in *Moreno* that hippies were a group and efforts to discourage people from engaging in the hippie lifestyle were unconstitutional. Yet "hippie" is certainly not an immutable status (it is the larval form of "Yuppie," in many cases), and even sexual orientation seems to exist on a continuum. Some men and women marry and then give up on trying to be straight, some are bisexual, and some find the whole notion of such categories absurd. Disabilities may be permanent, but some may be tempered, as with medication for depression or diabetes. How can the Court rely on purely descriptive criteria when the real world is so fluid?

There is another problem with the assertion that the Court will strike down legislation motivated by the desire to harm a politically unpopular group. A strong case can be made that the Court's decisions protect groups that, even if unpopular in general, have amassed significant political power. Justice Scalia is probably right that, for a numerically tiny group, gays and lesbians have secured a stunning set of political and legal victories.¹⁶⁴ Most states that had had anti-sodomy laws before *Bowers* legislatively

[ay.cfm&ContentID=18078](#)). The study lacked figures from which a number could be derived, but the percentages suggest that there are between 100,000 and 250,000 same-sex families are raising children.

¹⁶³ For more on "furries," see Dan Savage's column, *Savage Love*, <http://www.thestranger.com/2002-08-08/savage.html> (Aug. 8–14, 2002).

¹⁶⁴ See *Lawrence v. Texas*, 123 S.Ct. at 24xx–xx (Scalia, J., dissenting).

or judicially repealed them before *Lawrence* declared them unconstitutional. Two states, California and Vermont, have passed laws to enable gays and lesbians to have their relationships recognized by the state. These victories were difficult to imagine fewer than twenty years ago. Fifteen states and the District of Columbia passed laws to prohibit discrimination in employment against gays and lesbians, and thirteen states and the District of Columbia prohibit discrimination in public accommodations.¹⁶⁵

In the last three decades, persons with disabilities successfully petitioned Congress and state legislatures to enact a vast array of civil rights laws to protect them from discrimination in housing,¹⁶⁶ employment,¹⁶⁷ transportation,¹⁶⁸ the provision of medical care and other services;¹⁶⁹ these laws also require employers, businesses, and public services to restructure jobs and services so that persons with disabilities can work and enjoy the full panoply of public and private services that able bodied persons take for granted.¹⁷⁰ (And if these laws have not been applied as broadly as many persons with disabilities hoped, the fault appears to lie more with the Courts than with Congress.) They have also persuaded Congress to pass laws to require public school districts to educate children with disabilities in a manner that provides children with the most social contact possible with other children and in “the least restrictive environment” possible, even if it costs considerably more to do so than it does to educate the typical child.¹⁷¹

At the same time, the Court has expressly declined to apply heightened scrutiny to laws that disadvantage two of the groups with the least political clout—felons¹⁷² and poor people.¹⁷³ Several states, in fact, render felons politically powerless by denying them the right to vote after their prison sentences have been completed. And, as we will see

¹⁶⁵ See Lambda Legal Defense Fund, “Summary of States Which Prohibit Discrimination Based on Sexual Orientation,” <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=185>, (site visited October 8, 2004).

¹⁶⁶ See 42 U.S.C. §3604 (2004) (prohibiting discrimination in the sale or rental of housing on the basis of handicap).

¹⁶⁷ 42 U.S.C. §12111, *et seq.* (2004).

¹⁶⁸ *Id.* §§ 12143 (stating that public entities operating fixed route transportation systems must accommodate individuals with disabilities).

¹⁶⁹ *Id.* §§12182-12184 (stating that public services cannot discriminate whether operated by public or private entity). See also *Bragdon v. Abbott*, 524 U.S. 624 (1998) (interpreting ADA as requiring dentists to reasonably accommodate persons who were HIV positive).

¹⁷⁰ 42 U.S.C. §12112 (requiring reasonable accommodation in employment); §12184 (requiring accommodations by transportation systems); §12182 (reasonable modifications in provision of public accommodations); §12183 (requiring new construction of public accommodations to be readily accessible to persons with disabilities).

¹⁷¹ Education of the Handicapped Act, 20 U.S.C. §§1400-1485 (1988). See, e.g., Lisa Belkin, *Lessons of Classroom 506*, N.Y. TIMES, Magazine Section p. 41, Sept. 12, 2004 (describing the additional teachers and significant modifications to classroom, books, equipment, and curriculum required under the Individuals with Disabilities Education Act to provide a child with severe cerebral palsy with the least restrictive environment in public education).

¹⁷² See *Richardson v. Ramirez*, 418 U.S. 24 (1974).

¹⁷³ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (declining to find that poverty was a suspect class); see e.g., *error in tax code in 2003 that no one was hurrying to fix*.

below, the *Lawrence* Court explicitly backed away from extending protection to such politically unpopular groups as prostitutes, polygamists, or practitioners of adult incest.¹⁷⁴

It is possible that I am taking the Court too literally, for it may be using “politically unpopular” as shorthand for *Carolene Products*’ “discrete and insular minorities.”¹⁷⁵ A group is “discrete” if its members can be identified, so the majority can pass laws that target group members, and it is “insular” if it is unable to bridge its gap with other members of society to form effective political alliances that might better its members’ position. At any given snapshot in time almost any group could be seen as discrete and insular; when membership is not fluid, however, a group could suffer systematic and irreversible losses in the political process.

Some of the Court’s decisions are indeed better explained as attempts to protect “discrete and insular minorities.” *Plyler v. Doe*, which struck Texas’s decision to bar illegal immigrant children from public schools makes perfect sense as a case of protecting discrete and insular minorities from harm at the hands of the majority. If, as the late John Hart Ely argued, Justice Stone’s reference to discrete and insular minorities referred to “the sort of ‘pluralist’ wheeling and dealing by which the various minorities that make up our society typically interact to protect their interests”¹⁷⁶ there is probably no more discrete and insular minority than illegal immigrant children. By definition, they cannot protect—or even voice—their interests in the political process and are at the complete mercy of those with political power.

As an explanation for other cases, however, discreteness and insularity simply replicates many of the same problems that we had with political unpopularity. Gays and lesbians were probably a discrete and insular group when the Professor Ely argued in *Democracy and Distrust* that the Court should hold that gays and lesbians are a suspect class. In the late 1970s and early 1980s, many if not most gays and lesbians lived closeted lives and only expressed their sexual identities when they were safe in gay and lesbian neighborhoods and bars. Of course, that was when the Court handed down *Bowers* not *Lawrence*.

Today, it is harder to make the case that gays and lesbians are a discrete and insular minority. AIDS, ironically, outed many gay men. AIDS forced the families, friends, and neighbors of these men to recognize that their uncles, brothers, and friends were gay men who deserved their respect and love *as* gay men. Today, in most urban communities, gays and lesbians are not *insular* in the sense that they cannot form effective political alliances. Many American families now know that at least one of their clan is gay or lesbian, and there are out gay and lesbian entertainers, politicians, and religious and community leaders. The effect on the political process is palpable. When Vice President Cheney refuses to support his President’s anti-gay policies because (one presumes) his own daughter is a member of the targeted group, then the type of insularity that makes *Carolene Products* make sense is largely absent.

¹⁷⁴ See 123 S.Ct. at 2484.

¹⁷⁵ *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938).

¹⁷⁶ John Hart Ely, *DEMOCRACY AND DISTRUST* 151 (1980).

On a scale of discreteness and insularity, people with disabilities lie somewhere between gay men and lesbians and illegal immigrant children. In some respects, persons with disabilities are discrete and insular. The majority of persons with serious disabilities do not have jobs. In 2000, the Census reported that about half of persons with a sensory disability were employed, only a third of persons with a physical disability were, as were about thirty percent of persons with mental disabilities.¹⁷⁷ Unemployment cuts people off completely from the regular social contact that comes with work. Unsurprisingly, people with disabilities say that they socialize less and attend fewer movies, sporting events, and concerts than persons without disabilities.¹⁷⁸ People with disabilities are also far more likely to live alone.¹⁷⁹ Viewed in this light, persons with disabilities look “discrete and insular.”

If we focus on the ability of people with disabilities to protect their interests in the political realm, however, “discrete and insular” describes persons with disabilities less aptly. As a group, people with disabilities have political clout. Members of the disabilities rights community worked closely with Congress in drafting, revising, and shepherding the ADA through Congress. One of the most striking things about the passage of the Americans with Disabilities Act was that many members of Congress and members of the executive branch felt personally invested in the cause of civil rights for persons with disabilities. Many of the ADA’s congressional supporters either had disabilities themselves or had family members who had disabilities. Every member of congress had colleagues who had disabilities.¹⁸⁰ Members of Congress also spoke of the possibility that any one of them could become a person with a disability because of mishap and the probability that they would become disabled with age. A group of which anyone might become a member by accident or unknown genetic disorder, and is aware of that fact, is far less discrete and far less insular than blacks or gays and lesbians.

Phil Frickey and Bill Eskridge have argued that the Court’s practices over the last few decades stand *Carolene Products* on its head.¹⁸¹ “§ long as a group really is

¹⁷⁷ Census 2000 PHC-T-32. Disability Status of the Civilian Noninstitutionalized Population by Sex and Selected Characteristics for the United States and Puerto Rico: 2000, Table 2. Employment and Earnings by Disability Status for the Civilian Noninstitutionalized Population 21 to 64 Years: 2000. The Census classified a person as having a sensory disability if the person had “blindness, deafness, or a severe vision or hearing impairment,” and as having a physical disability if the person had “a condition that substantially limits one or more basic physical activities such as walking, climbing stairs, reaching, lifting, or carrying.” The Census classified a person as having a mental disability “if the individual had a physical, mental, or emotional condition lasting 6 months or more that made it difficult to learn[], remember[], or concentrat[e].” Definition of Disability Items in Census 2000, available at <http://www.census.gov/hhes/www/disable/disdef00.html> (site last visited on September 20, 2004).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Just to name a few—Bob Dole, then Senate Minority Leader, had lost use of his arm in World War II and Senator Daniel Inouye had lost his arm in the same war. Senator Max Cleland lost both legs and an arm in Vietnam, and Senator Bob Kerrey lost his leg in Vietnam as well. Tony Cohelo, the bill’s original House sponsor, had epilepsy. Richard Thornburgh, then Attorney-General, had a child with mental disabilities, and President Bush had a son with learning disabilities and an uncle who was a quadriplegic.

¹⁸¹ William Eskridge and Philip Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 54-55 (1994) (“the Court’s equal protection jurisprudence has shown an ‘inverted *Carolene*’ quality”).

politically marginalized, the Court will tolerate virtually any action by Congress or the states that adversely affects the minority.”¹⁸² It is only after groups have achieved a modicum of political power that the Court will use the constitution to protect these groups from discrimination. The case of hippies aside, Professors Eskridge and Frickey may well be right as a descriptive matter. They would likely agree, however, that their *realpolitik* description of the Court’s jurisprudence is not the most normatively attractive foundation on which to build a principle for the Court to apply in future cases. Is it possible to devise a principle for extending heightened scrutiny to groups that is more normatively attractive than “big, squeaky wheels get greased”?

B. *Groups and the Equal Protection Clause.*

Unless we are willing to resign ourselves to the group version of Justice Potter Stewart’s “we know it when we see it” obscenity standard, we have to identify what characteristics of a group justify the application of rigorous rational basis scrutiny. The next sections survey such justifications. I will sketch the strengths and weaknesses of possible methods for identifying which groups merit constitutional recognition and protection. Let me begin with one of the earliest and most prominent efforts to draw such a distinction.

In *Groups and the Equal Protection Clause*, Owen Fiss defended a conception of equal protection based on an anti-subordination principle. That principle held that the law should protect, and in some cases favor, members of socially subordinated groups. The principle obviously required a workable definition of social groups.

Fiss distinguished between groups and classifications, or, in his terminology, between “artificial classes”—“those created by a classification or criterion embodied in a state practice or statute”—and social groups, which had an independent social identity.¹⁸³ A “social group” was “more than a collection of individuals, all of whom . . . happen to arrive at the same street corner at the same moment.”¹⁸⁴ A social group is “an entity” that “has a distinct existence apart from its members” and “an identity.”¹⁸⁵ In other words, Fiss said, other people understand what you are talking about when you “talk about the group,” and you can do so “without reference to the particular individuals” who are its members.¹⁸⁶ Members of social groups are also “interdependent” on one another.¹⁸⁷ By this Fiss meant two things. Members of the group derive their personal identity partly from their membership in the group: if asked to explain who they are, part of that description would include their group membership.¹⁸⁸ Second, Fiss also means that the status of the group as a whole affects individual members’ status and well being; the converse is also true.¹⁸⁹ Fiss’s distinction could contain the beginnings of a principle that

¹⁸² *Id.* at 55.

¹⁸³ Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUBL. AFFAIRS 107, 156 (1977).

¹⁸⁴ *Id.* at 148.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 149.

¹⁸⁹ *Id.* at 148.

would distinguish, for example, laws banning sex toys from laws like Colorado Amendment 2 and the special use requirement in *Cleburne*.

Blacks were Fiss's prototypical social group, which hardly surprises; the equal protection clause was written with them in mind, and the foundations of modern equal protection doctrine were built in reaction to efforts discriminate against them. Membership in a social group is not exclusive. A person could identify herself as being both Black and as a woman, for example.

Women would seem another example of a social group as Fiss defines it, and why they are such a clear example of such a group helps to clarify Fiss's concept. We can talk about women as a group in the abstract (as in, "the women's vote in this presidential election is up for grabs") and of characteristics that are typically female or womanly. With respect to identity, one's gender is a basic foundation of personal identity. The status of women as a group also affects an individual woman's welfare.¹⁹⁰

Scholars have criticized Fiss's definition of social groups as being too amorphous to apply consistently and predictably. Larry Alexander, for example, has argued that it is a fool's errand to base equal protection on a concept of social group because the concept is impossible to define and apply with any precision.¹⁹¹ He argues, for example, that defining the paradigmatic social group of "Blacks" proves impossible. Race cannot be determined biologically or genetically. Appearance does not work either – some people who look white consider themselves Black. One might also ask whether recent immigrants from Africa or the Caribbean are "Black." And what race are children born to Asian American and Black parents?

Professor Alexander is correct that that boundary issues will plague all attempts to define various social groups. One might argue further that boundary issues plague most laws that contain legal classifications. Law regulates human behavior—not logical categories—and it reflects social practices that are, by their nature, imprecise. But these problems do not mean that that focusing on "groups" is always wrongheaded and

¹⁹⁰ This statement requires a few caveats. Certainly, individual women will identify more or less keenly with the successes or struggles of other women. Individual persons will also feel differently about how significant their gender is to them; that significance will likely vary as well by context. With these caveats, however, the statement is true—the status of women as a group affects the status of individual women. *Bradwell v. Illinois* provides a century-old example of the phenomenon: the Court upheld an Illinois law prohibiting all women from practicing as lawyers because *some* women (married women) were legally barred from making contracts and holding property. Today *Bradwell's* category mistake seems unimaginable, but women's successes and failures still affect other women. We continue to track the economic and occupational progress of women as women. I would also venture that most women feel a debt of gratitude to Justice Ginsburg for suffering through the indignity of having to justify her presence at Harvard Law School, and to Justice O'Connor for persisting to look for work as a lawyer even when law firms refused to consider her for anything but secretarial jobs. Today, hardly anyone would question that women can be effective lawyers, and that is due in part to the success that women like Justices O'Connor and Ginsburg have had.

¹⁹¹ See, e.g., Lawrence A. Alexander, *Equal Protection and the Irrelevance of 'Groups'*, ISSUES IN LEGAL SCHOLARSHIP: THE ORIGINS AND FATE OF ANTISUBORDINATION THEORY, available at <http://www.bepress.com/ils/iss2/art1> (2004).

unnecessary. Given our history, ignoring the role of social groups in our society would be bizarre. The Civil War was fought over slavery, which was a social institution aimed at a social group. Slave owners such as Thomas Jefferson indeed faced boundary problems (many of which they created themselves) but they certainly found satisfactory ways to resolve them. The Civil War amendments were driven by concern for groups, as were Jim Crow laws and the Civil Rights and Voting Rights Acts. The cases examined in Part I speak of hostility toward *groups*, and we must presume the Court means something by its references. It is true that groups cannot be defined with the precision needed for mathematics or formal logic, but it does not follow that groups play no role in the law. That being the case, it is worth the effort to try to clarify the concept of groups and the methodology for determining which groups deserve heightened scrutiny.¹⁹²

One way to deal with the problem of indeterminacy of groups is to examine groups, not in the abstract, but in relation to a particular law. The fact of boundary disputes does not make the concept of the group meaningless for particular legal purposes, such as the protections of the free exercise clause. For example, Mr. Thomas, in *Thomas v. Review Board of Indiana* held a contestable, possibly minority view, about the requirements of the Jehovah's Witness faith. The court explicitly refused to resolve the doctrinal dispute.¹⁹³ It found instead that Mr. Thomas was recognizably a member of the Jehovah's Witnesses in other respects—he overtly identified as a member of the Witnesses, discussed his beliefs with another Witness, and ultimately reached his own conclusion about his faith's requirements after reading and interpreting the group's religious texts. He also justified his belief by explaining that he read the Principles more strictly than his friend did. So long as Mr. Thomas had enough characteristics of a believer in the Jehovah's Witness faith (or, indeed, in any faith), it did not matter to the Court that he did not have all the characteristics needed, on some definitions, to qualify as a believer within that faith. So long as his beliefs were genuinely religious, it did not matter for free exercise purposes whether his beliefs were uniform and invariant among members of the religion.¹⁹⁴

These answers, of course, do not solve all the definitional problems posed Fiss's project of defining equal protection violations with reference to the relative social and socioeconomic status of different social groups.¹⁹⁵ Happily for me, however, Fiss's project is not my project. My project aims to devise criteria for determining which

¹⁹² In most cases, the statute itself identifies the group or classification at issue by classifying on that basis. For example, the Americans with Disabilities Act grants the right of reasonable accommodation only to persons with disabilities.

¹⁹³ The Court does not want to referee disputes over the internal group politics of religions. As a practical matter, however, keeping out means that the extension of "Jehovah's Witnesses" as a religion is contested and ambiguous.

¹⁹⁴ Similarly few American Catholics believe that contraception is forbidden. But the belief that contraception is forbidden is still a "Catholic" faith.

¹⁹⁵ As I will explain later in this paper, the distinction between social groups and legal classifications does not depend on the subordinate status of social groups. In a moment, however, I will criticize the Court for applying heightened rational basis scrutiny to protect some social groups that are not particularly politically vulnerable. I criticize the court for doing so because the Court's articulated standard (striking laws that exhibit animus toward politically powerless groups) departs from the Court's application of that standard, not because I think that standard is worthy on its own terms.

groups ought to receive some constitutional protection beyond minimal rational basis scrutiny. Boundary issues press less strongly on this project because we do not have to say whether a particular individual is a member of a given social group to determine whether a particular law classifies with reference to social groups.

Furthermore and unlike Fiss, my view of the equal protection clause embraces the antidiscrimination principle and its focus on individuals as rights-bearers. Creating a principle that justifies heightened rational basis scrutiny in some circumstances but not others does not alter the fact that individuals, not groups, hold rights. Such scrutiny simply uncovers when majorities have treated some individuals differently than others because they belong to a social group—which is nearly the opposite of group rights. John Lawrence and Tyron Garner were individuals; Texas’s anti-sodomy law was aimed at homosexuals as a group.

We might wish that the Court’s equal protection doctrine applied simply to individuals and did not depend on one’s membership in a group.¹⁹⁶ For most purposes, that wish can be fulfilled, because a law’s classification scheme, not an individual’s membership in a group, generally determines whether the court will strike or uphold a statute. Laws that classify on the basis of race or national origin are almost always unconstitutional, unless they are educational affirmative action plans; generally laws that classify on the basis of sex are unconstitutional, unless the law classifies on the basis of biological differences as opposed to gender differences.¹⁹⁷ (It is a matter of debate whether biological differences are actually distinct from gender differences.)¹⁹⁸

Rigorous rational basis scrutiny, however, makes it necessary to describe and differentiate “group classifications” from other kinds of classifications. One might argue that we should deal with the problems of group recognition by just stopping. Stop recognizing new groups even if we are now stuck with the Court’s recognition of some socially salient groups. This position has some attractions, but it would not altogether get courts out of the business of group recognition. One type of group practice is textually embedded in the constitution—religion. In the next section, I explain why, as a practical matter, the courts cannot help but be in the business of defining groups, and how their standards for assessing religious belief shed light on the groups to which the Court applies rigorous rational basis scrutiny.

¹⁹⁶ See Alexander, *supra* note ____.

¹⁹⁷ Of course doctrine is more complicated in practice with strict scrutiny and intermediate scrutiny blending into each other in affirmative action cases and in gender cases. Michael Stokes Paulsen sent up this phenomenon with his sharp and accurate wit in *But cf. . . . Medium Rare Scrutiny*, 15 CONST. COMM. 397, 399 (1998).

¹⁹⁸ Compare, *Nguyen v. INS* 533 U.S. 53(2001) (upholding federal law bestowing automatic United States citizenship to children born in foreign countries to United States citizen mothers, but requiring such children born to United States citizen fathers to be legally acknowledged their fathers to be eligible for citizenship because women were more likely than men to know who their children were) with *United States v. Virginia*, 518 U.S. 515 (1996) (finding that Virginia Military Institute’s male-only admission policy was unconstitutional because it was, in part, based on stereotypes about men’s superior physical strength and women’s desire to avoid conflict).

C. *Groups and the Religion Clauses*

A basic question underlying all free exercise claims is whether an individual's or group's beliefs are religious, rather than secular, in character.¹⁹⁹ The first amendment's religion clauses protect only religious beliefs because "the very concept of ordered liberty precludes allowing" a person "a blanket privilege 'to make his own standards on matters of conduct in which society as a whole has important interests.'"²⁰⁰ Over time, new religions develop, and as they do, their adherents' practices will merit protection under the free exercise clause. The Church of Jesus Christ of Latter-Day Saints (the Mormons) did not exist at the founding, but now has more than five million members in the United States and eleven million members worldwide.²⁰¹

At least within the domain of the religion clauses, this fact commits constitutional doctrine to determining when groups come into being and merit constitutional solicitude. Judge John T. Noonan, Jr. has observed that free exercise claims often resemble free speech claims and may be analyzed by borrowing concepts from free speech doctrine.²⁰² In the same vein, some clarity about groups and the equal protection clause could be gained by taking a page from free exercise jurisprudence.²⁰³

Lower courts have approached the question of whether a set of beliefs is religious in character by comparing the unfamiliar or non-traditional ideas or beliefs to "more familiar religions" to determine "whether the new set of ideas or beliefs" confronts "the same concerns, or serv[es] the same purposes" as well settled and accepted religions.²⁰⁴ In particular, Courts examine three criteria. First, does the claimed religion "address[] fundamental and ultimate questions having to do with deep and imponderable matters" such as, questions of life and death and the nature of evil?²⁰⁵ Put slightly differently,

¹⁹⁹ Though this question usually arises in free exercise cases, whether some practices or beliefs are religious in character sometimes arises in Establishment clause cases. *Malnak v. Yogi*, 592 F.2d 109 (3d Cir. 1979), for example, decided a claim that a public school class in meditation violated the Establishment clause. The meditation methods and philosophy taught in this class reflected the teachings of Transcendental Meditation. Transcendental Meditation, the Court found, was not just meditating or a particular set of breathing and relaxation techniques. Rather, using the factors explained in the text, the court determined that Transcendental Meditation was a religion; a class in public school that embodied its teachings therefore violated the Establishment clause.

²⁰⁰ *Africa v. Pennsylvania*, 662 F.2d 1025, 1031 (3d Cir. 1981).

²⁰¹ *LDS FAQs*, <http://lds.about.com/library/bl/faq/blmembership.htm> (website visited October 9, 2004).

²⁰² John T. Noonan, Jr. *THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM* (1998).

²⁰³ I have previously argued that the Court's free exercise analysis in cases like *Lukumi Babalu Aye, Inc. v. City of Hialeah* (a post-*Smith* case) resembles its analysis in heightened rational basis scrutiny cases. See McGowan, *supra* note __ at 1327-28.

²⁰⁴ *Africa*, 662 F.2d at 1031.

²⁰⁵ *Id.* at 1032; *Malnak v. Yogi*, 592 F.2d 197, 208 (3d Cir. 1979) (Adams, J., concurring). Interestingly the Court has used similar language to describe the scope of personal liberty that underlies "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Lawrence*, 123 S.Ct. at 2482. Justice Kennedy's opinion in *Lawrence* quotes this passage from *Casey*:

At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

courts inquire whether the claimed beliefs occupy a place in the lives of its members parallel to that filled by God and religious beliefs in more common religions.²⁰⁶ Second, are the teachings and beliefs of the claimed religion “comprehensive” and systematic, rather than “isolated”?²⁰⁷ Third, does the claimed religion have “formal and external signs”—for example, an actual organization built around the beliefs; leaders to guide followers and to teach them about the belief system; set holidays and formal meetings, services, or ceremonies; and attempts to explain (and perhaps spread) beliefs to non-believers?²⁰⁸

These three criteria probe three distinct but related issues. *First*, courts appear to want to ensure that the claims being made are based on obligatory beliefs and practices. If a person’s beliefs include “ultimate” questions such as her moral duties to others and the meaning of life, being unable to act according to those beliefs could undermine a person’s sense of herself as a moral person and as someone who lives a worthwhile life. Though courts have certainly recognized non-theistic belief systems as religions, claimants have had an easier time if their belief system includes a belief in a supreme being. A supreme being that demands obedience and can withhold or deliver salvation strengthens a claimant’s assertion that she will suffer if forced to act contrary to her beliefs.

One of the most extensive treatments of the question whether a belief is or is not “religious” is found in *Africa v. Pennsylvania*.²⁰⁹ Frank Africa belonged to MOVE, a revolutionary group devoted to ending violence, bringing “about absolute peace,” and living in tune with nature uncorrupted by civilization.²¹⁰ While he was in prison, Mr. Africa argued that he was entitled to receive a special diet of raw fruits and vegetables because MOVE was a religion to which he adhered and MOVE’s tenets required that he stick to this diet.²¹¹

Mr. Africa’s claim that MOVE was a religion was weaker in the court’s eyes because it lacked a supreme being. Many of MOVE’s beliefs were pragmatic and political rather than other-worldly: it counseled a raw food diet because such diets were “healthy,” directed its members to avoid impure food and water because such substances were “polluted” and “hazardous,” and described itself as a revolutionary organization. MOVE’s practices and beliefs also did not supplant the other religious beliefs of its members. As Mr. Africa described his adherence to MOVE’s doctrines, they provided him with a desirable, but not “morally necessary,” way to live.²¹²

Id. (quoting *Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833, 851 (1992)).

²⁰⁶ *United States v. Seeger*, 380 U.S. 163, 166 (1965).

²⁰⁷ *Africa*, 662 F.2d at 1035; *Malnak v. Yogi*, 592 F.2d 197, 209 (3d Cir. 1979) (Adams, J., concurring).

²⁰⁸ *Africa*, 662 F.2d at 1035-36; *Malnak*, 592 F.2d at 209-210.

²⁰⁹ *Africa*, 662 F.2d 1025 (3d Cir. 1981).

²¹⁰ *Id.* at 1026.

²¹¹ *Id.* at 1026-1030 (explaining MOVE’s beliefs).

²¹² *Id.* at 1033.

Second, courts ask whether a belief system is comprehensive and authoritative to ascertain two things: the place of importance that the belief system has in the claimant’s life, and the extent to which the particular claim is a necessary part of the beliefs. By the Third Circuit’s lights, MOVE looked less like a religion and more like a political movement or personal philosophy because it had no set or settled doctrine. Many of MOVE’s practices and doctrines were optional or recommended, not required.²¹³ Furthermore, all members of MOVE possessed authority to speak for what MOVE stood for. That fact implied that each member could conceivably adjust religious requirements to fit particular circumstances or even personal preferences—a “flexible requirement” is an oxymoron.

Third, if a belief system has “formal and external signs,” it is likely that many individuals share the belief system, and that believers engage and practice their beliefs in concert with others. A belief system does not need a minister to teach doctrine if the religion if there are so few believers that they can resolve conflicts about doctrine among themselves. Ministers also make it easier for religions to educate and recruit new members. The existence of a community of others who share the belief system also increases the feeling of obligation one has to fulfill the religion’s requirements, as members can pressure each other to follow the religion’s requirements. The loss of approval by others in a religious community could exert powerful pressure on an individual to comply with the religion’s dictates. Other external signs such as holidays, rituals, and ministers distinguish religions from each other; their observance binds members to the religion and separates them from the members of other religions.

Finally, the existence of external manifestation of a belief system—such as holidays, rituals, or places or objects of worship—help to make an individual’s claim to follow a religion appear more sincere and less opportunistic. MOVE did not require its members to believe or do anything distinct or distinctive, a fact that counted heavily against Mr. Africa’s claim to be practicing a religion. If nothing else, such external signs are useful evidence that reduces the risk of judicial error, so it is not surprising that judges would consider it.

The Supreme Court’s free exercise jurisprudence reflects the same concerns, though it fits less neatly into three-part tests. In *Yoder*,²¹⁴ the Court analyzed Amish parents’ claim that mandatory education past the eighth grade conflicted with the practice of their religion by examining a number of factors. First, did the Amish want to educate their children at home after the eighth grade because of a deep religious conviction; second, did they share those convictions with others as part of an organized group; and, third, were the Amish’s beliefs were inextricably intertwined with aspects of daily living. These questions probe similar concerns as the lower courts’ three-part test—whether the

²¹³ Mr. Africa’s brief to the district court had explained that among MOVE prisoners, “there will be members requesting food that is not listed in MOVE’s religious diet, which is understandable and expected, as everybody in MOVE understands [that] people coming to MOVE with customs other than MOVE’s must run clear of these customs at their own pace.” 528 F. Supp. 967, 971 (E.D. Pa. 1981).

²¹⁴ *Wisconsin v. Yoder*, 406 U.S. 205 (1971).

beliefs and practices were mandatory, whether they pervaded adherents' lives, and whether these beliefs and practices were embedded in community life.

The Amish parents were asking for a significant concession from the state—to be allowed to remove their teenagers from school permanently after the eighth grade. Being raised in a close-knit religious community makes it hard for a person to choose a significantly different religion later in life. Keeping Amish teenagers out of high school made it even less likely that they would ever chart a life course separate from the Amish community later on. Even beyond the practical difficulties that the lack of a high school diploma creates, Amish teens would not meet other kids who had different beliefs and thought differently than they and their parents did. Indeed, this was precisely the point for the parents who feared that the worldly influences of a typical American high school would tempt teens away from the Amish way of life.

The Court agreed with the Amish's position with alacrity. Sending Amish teenagers to secondary school would impair the practice of the religion and imperil the Amish people's survival as a community. The Court found the Amish parents' arguments persuasive for several reasons, not the least of which was that the Amish could point to religious texts and a long history of consistent practices to back up their claims. The Amish took the Apostle Paul's injunction in the Bible, "be not conformed to the world" literally.²¹⁵ For more than three hundred years the Amish had practiced their faith and lived an agrarian existence separate from others and according to consistent practices.²¹⁶ The requirements of their faith pervaded and influenced every aspect of their lives—the work the Amish did and the manner in which they did it,²¹⁷ the clothes they wore, the roles men and women had in and outside the family, and the extent to which they used modern technology. Consistent religious practice and written religious documents confirmed that the Amish's practices were settled and obligatory—Old Order Amish communities believed that "salvation requires life in a church community separate and apart from the world and worldly influence."²¹⁸ Simply put, Amish history, texts, doctrine, and practices confirmed that the Amish could not both send their children to American high schools and practice their faith.

The cases that have assessed whether a individual's beliefs or practices are religious ones have probed whether the individual is being asked to *do* something distasteful or whether the individual is being asked to *be* someone different. Only in the latter case have courts found a set of beliefs to be religious or tantamount to religious beliefs. To use a concrete example, if Mr. Africa ate cooked foods, he would feel as though he had consumed unhealthy food, but he would still be a member of MOVE in good standing. In contrast, a practicing Muslim prisoner forced to eat pork would believe that the act had polluted him, and he could no longer consider himself to be someone who adhered to his faith. His body might or might not suffer but, by his lights, his soul definitely would. Similarly, *Yoder* found that the compulsory school laws required the

²¹⁵ *Id.* at 216.

²¹⁶ *Id.* at 216-17.

²¹⁷ *Id.* at 210.

²¹⁸ *Id.*

Amish to do more than expose their children to beliefs and ideas with which they disagreed; the laws required the Amish to raise their children in a manner contrary to the Amish faith. In other words, if enforced, the law would require the Amish to go to jail or to raise their children as non-Amish.

III. DEFINING THE PARAMETERS OF RIGOROUS RATIONAL BASIS SCRUTINY.

The Court's willingness to strike laws that are based on a bare desire to harm a group or based in animus toward a group parallels the Court's inquiry in the religion cases. In both the Court inquires whether has a state has prohibited something or treated a class of persons differently because it does not like who some people *are*, rather than because it does not like what some people have *done*. Put this way, the question resembles the old status/conduct conundrum. The religion cases, however, implicitly recognize that sometimes status and conduct are inextricable—some action or practice can be embedded in a person's identity. The religion cases provide a potential method for determining when identity is embedded in practice.

Indeed, sometimes identity is so intertwined with an act that for such people the act is transformed into something entirely different. Poisoning pigeons in the park²¹⁹ or killing guinea pigs for the fun of it *is* different than slaughtering them as part of a religious rite.²²⁰ Animal cruelty—the intentional or malicious killing of an animal—is a crime in California, punishable by up to a year in jail and a hefty fine.²²¹ What makes ritual slaughter not animal cruelty? *Church of Lukumi Babalu Aye v. City of Hialeah* dealt with just that distinction.

Animal sacrifices were integral to the practice of the Santeria religion.²²² Santeria emerged among African slaves as a hybrid of Catholicism and the ancient African Yoruba religion during the Nineteenth-Century in Cuba.²²³ Its adherents immigrated to the United States during the Cuban Revolution. By the early-1990s, there were between fifty- and sixty-thousand followers of Santeria in Florida alone.²²⁴ The Santeria believed that saints, which they called “orishas,” were not immortal. These saints fed on the nourishment from animal sacrifices. The Santeria sacrificed animals at particular times throughout the year and on special occasions.²²⁵ Killing animals to feed the saints was the central practice of their religion; it held a central place in its adherents' identities.²²⁶ The Court's references to this practice as “animal sacrifice” showed that the Court

²¹⁹ Tom Lehrer, *Poisoning Pigeons in the Park* (“We'll murder them all amid laughter and merriment/ Except for the few we take home to experiment./ My pulse will be quickenin'/ With each drop of strychnine/ We feed to a pigeon./ (It just takes a smidgin!)/ To poison a pigeon in the park.”).

²²⁰ See *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 525 (1992) (explaining that guinea pigs and pigeons are two of the animals slaughtered in sacrifice to Santeria saints, or orishas).

²²¹ California makes it a crime to “maliciously and intentionally kill[] an animal.” Offenders of the law can be sent to jail for up to a year and fined up to \$20,000. Cal. Pen. Code §597(a) (2004).

²²² *Lukumi*, 508 U.S. at 525-26.

²²³ *Id.* at 525; see also *Church of Lukumi Babalu Aye v. City of Hialeah*, 723 F. Supp. 1467, 1470-71 (S.D. Fl. 1989) (describing Santeria religion's connection to African religions), *aff'd*, 508 U.S. 520, 525 (1992).

²²⁴ *Lukumi*, 723 F. Supp. at 1471.

²²⁵ *Lukumi*, 508 U.S. at 526.

²²⁶ *Id.*

understood this to be a religious practice that was important to the identity of Santeria's believers. The Court's view of gay sex in *Lawrence* reflects a similar understanding of sex's importance to the lives of gay men and lesbians. In contrast, animal cruelty for its own sake is just sadism. Our view of the relationship between a practice and a practitioner's identity fundamentally transforms the way we see the practice. Where *Bowers* saw acts of sodomy as the practice of perverts; *Lawrence* saw people honestly expressing their sexual identities.

In the free exercise context the Court is concerned with the relationship between religious belief and practice with personal and religious identity. This relationship between identity and practice is not logically limited to religion, however, and can be extended to describe most of the groups in the Court's rigorous rational basis cases.

First, whether the claimed conduct, belief, or characteristic constitutes the identity of many people and provides a point of shared identity or commonality among those who share it. *Second*, how hard it is to change the conduct, belief, or characteristic. *Third*, whether outsiders would consider this conduct, belief, or characteristic to be salient to making some decisions such people. *Fourth*, whether outsiders consider the conduct, belief, or characteristic to be important to the identity of those who share it.²²⁷ *Fifth*, whether some outside the group constitute a similar aspect of their identity in opposition to the group or the group's conduct, belief, or characteristic. And, *sixth*, if an outsider uses a name to refer to the class of people who engage in some conduct or possess some characteristic or belief, others who are conversant in the culture will understand to whom the speaker refers and what those people do or believe.²²⁸

Interestingly, this set of factors also resembles Fiss's definition of a social group. He spoke of a social group as "an entity" that "has a distinct existence apart from its members."²²⁹ The *group's* "identity,"²³⁰ means that other people understand what you are talking about when you "talk about the group" even if you do so "without reference to

²²⁷ For example, being a Democrat or a Republican, being a serious stamp collector (or a serious collector anything, really), or being an artist or musician. Here I mean to speak of things that people do that are so important to who they are that if you invited two such persons to a dinner party, you'd think they would have something important in common and to say to each other even if they've got *nothing* else in common.

²²⁸ A few examples of what I mean by this last factor. Classifications that would not satisfy this factor would include "furries," "bohemians," and "bad mothers." If I told you that I knew a "furry," you would not know whether I was referring to (a) a guy who has a lot of hair on his body, including his back, (b) someone who really loved and collected stuffed animals, or (c) someone who derived erotic pleasure from dressing up in furry character costumes (say, Yogi Bear) and having his or her partner do the same (use your imagination). For the answer see Dan Savage, *Savage Love*, <http://www.thestranger.com/2002-08-08/savage.html> (Aug. 8–14, 2002). If you mention in conversation that you met a "bohemian" the other day, and said nothing more, the listener will wonder whether you met someone from the Czech Republic, a long-haired Berkeley professor who drives an old Fiat convertible, or an artist who lives in Greenwich Village and smokes Gauloises. If you refer to a "bad mother," the listener does not know whether you are referring to a woman who works at Skadden, Arps and bills 3000 hours per year and has children under 2 years of age, a woman who spans her children, a woman who uses guilt to manipulate her children, or a woman who lets her children whine annoyingly in the grocery store. Classifications that would satisfy this factor:

²²⁹ Fiss, *supra* note __ at 148.

²³⁰ *Id.*

the particular individuals” who are its members.²³¹ The set of factors identified here, however, de-emphasizes one of the more controversial parts of Fiss’s definition—that individual group member’s welfare depends on the group’s status or well being.

Fiss’s interpretation of the equal protection clause as mandating the redistribution of resources and wealth from one group to another necessitated building a strong assumption of interdependence into his definition. Efforts to redistribute resources will always fall short of perfection: some will get more than they need, others less; some will have to relinquish more than they can comfortably. Redistribution’s imperfections are easier to smooth over if you believe that group members—those on both the giving and receiving end—are interdependent. The benefits to one will redound to the benefit of others, and the losses suffered by one will be partly borne (and mitigated) by others.

In the set of factors I have identified, interdependence of group members is implied, but it a weaker kind of interdependence implied by shared social identity and assumptions of common characteristics among group members. It is the kind of interdependence that animates penalty enhancements for hate crimes, an interdependence in which my sense of security and behavior is affected by attacks on others motivated by some characteristic I share.²³²

Let us now turn to applying these factors to some concrete cases of classes of person to see how well they explain the Court’s use of rigorous rational basis scrutiny. I will take three examples of classifications that could be groups. I have chosen the first, felons, because I have criticized the Court as unprincipled for refusing to apply rigorous rational basis scrutiny to laws disadvantaging felons as a class. Second, I will turn to hippies. You will recall that in *Moreno* the Court used rigorous rational basis scrutiny to strike food stamp eligibility restrictions . Those restrictions did not stand because they were designed specifically to prevent hippies living in communes from living off of food stamps. Third, I will examine polygamists as a class to see if the Court’s efforts to distinguish them from gay men and lesbians in *Lawrence* and *Romer* will hold up under this analysis.

A. *Felons*

In *Romer v. Evans*, the Court observed that its decision did not undermine precedents holding that “a convicted felon may be denied the right to vote.”²³³ In *From Outlaws to Ingroup*, I criticized this dictum and the Court’s holding in *Richardson v. Ramirez*. In that case, the Court upheld a California law that denied felons who had completed their sentences the right to vote.²³⁴ I argued,

²³¹ *Id.*

²³² *Wisconsin v. Mitchell*, 508 U.S. 476, 488 (1993) (noting that Wisconsin justified penalty enhancement for bias-motivated crimes on the ground that such crimes cause greater social harm than other crimes).

²³³ In the Court’s words, *Richardson v. Ramirez* is “not implicated by our decision and is unexceptionable.” *Romer v. Evans*, 517 U.S. 620, 634 (1995).

²³⁴ California had a Byzantine system for restoring civil rights to felons once they had completed their sentences. The upshot of this system was that very few felons were ever restored to their civil rights. *See*

As a matter of descriptive social fact, felons who have completed their sentences seem to be a “group.” A person’s status as a felon affects many different aspects of his economic, social, and political life. Felons are among the most discriminated against groups in America.²³⁵ Most job applications ask whether the applicant has ever been convicted of a felony, and most employers will not knowingly hire people who have a criminal record.²³⁶ Felons often cannot be bonded, which means that felons cannot hold jobs that require them to handle money, and state and federal law prohibit felons from holding certain types of jobs.²³⁷ Being a former felon forges a persons’ identity—if by nothing else, than by mere force of circumstance and treatment by those on the outside.²³⁸

The Court’s failure to use heightened rational basis scrutiny to examine laws that stripped felons as a group of their civil rights, I contended, was inconsistent with the Court’s use of such scrutiny in cases involving illegal immigrants (*Plyler v. Doe*), gay men and lesbians (*Romer v. Evans* and *Lawrence*), persons with disabilities (*Cleburne*), and hippies (*Moreno*). These laws, as much as did sodomy laws in *Lawrence*, reflected negative stereotypes about felons and had as their sole purpose the desire to brand felons as strangers to the civil and political community.²³⁹ This Court’s failure to protect felons

Ramirez v. Brown, 507 P.2d 1345, 1347 (CA. S.C. 1973), *revd sub nom* Richardson v. Ramirez, 418 U.S. 24 (1974).

²³⁵ The Urban Institute found that employers were less willing to hire former felons than they were any other disadvantaged group, such as applicants who only had a GED, were on welfare, had a spotty work history, or were unemployed. HARRY J. HOLZER ET AL., URBAN INST., CAN EMPLOYERS PLAY A MORE POSITIVE ROLE IN PRISONER REENTRY? 14 (2002), *available at* http://www.urban.org/UploadedPDF/410803_PositiveRole.pdf. There is little information about the unemployment rate of former felons, but a study of California parolees in the 1990s suggested that fewer than twenty-one percent of parolees had full-time jobs; ex-convicts also make less than people without criminal records. JEREMY TRAVIS ET AL., URBAN INST., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 38 (2001), http://www.urban.org/pdfs/from_prison_to_home.pdf; *see also* DINA ROSE & TODD CLEAR, URBAN INST., INCARCERATION, REENTRY AND SOCIAL CAPITAL: SOCIAL NETWORKS IN THE BALANCE 186–87 (2002) (documenting myriad difficulties that former felons have in finding employment due to social stigma of having a criminal record), http://www.urban.org/UploadedPDF/410623_SocialCapital.pdf.

²³⁶ Two-thirds of employers surveyed in five major cities said that they would not “knowingly hire an ex-offender” and “at least one-third checked the criminal histories of their most recently hired employees.” Travis et al., *supra* note __, at 31.

²³⁷ Holzer et al., *supra* note __, at 4.

²³⁸ McGowan, *supra* note __ at 1334-35.

²³⁹ The practice of stripping felons of their civil rights began with the Greeks who believed that felons forfeited their civil rights because felons had committed not just harmed another individual but had committed a crime against society. (Walter M. Grant et al., Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 941–42 (1970) (describing ancient Greek practice of stripping felons of all of their civil rights). Earlier provisions of the California Constitution at issue in *Ramirez* had referred to felonies as “infamous crimes” in a nod to this Greek concept. (*Ramirez v. Brown*, 507 P.2d 1345, 1346 (CA. S.C. 1973), *revd sub nom* Richardson v. Ramirez, 418 U.S. 24 (1974).) Being stripped of civil rights communicates an unambiguous message: You are no longer one of us. *See United States v. Boney*, 977 F.2d 624, 638 (D.C. Cir. 1992) (Randolph, J., dissenting in part and concurring in part).

from such measures, I argued, revealed the essential normative nature of the Court's decisions to protect some groups but not others from group-based animus. The Court apparently considered only some but not others worthy of protection from majoritarian impulses to impose hardships on the group. Let us see how my initial impressions about felons hold up against the criteria outlined above.

The first factor asks whether being a felon forges personal identity and whether being a felon is a point of commonality or shared identity between people. Returning to the example of religion from which these factors are drawn, these questions probe whether having been convicted of a felony shapes how people live their lives. Whether it influences the persons with whom one is likely to associate or befriend, where a person lives, the kind of work a person does, and a person's sense of her place in a community and in the larger world. The answer to these questions is probably both yes and no. It would be difficult to believe that any person who served time in prison and then faced the (largely negative) reactions of people on the outside would not change a person's sense of self. Prison renders a person a prisoner or an inmate who lacks agency over basic life decisions—from when to wake, eat, shower, and use the bathroom, to what one wears, when and with whom one can socialize, what books one can read. Incapacitation is the point of prison. All of these things could change a person's view of herself.

Outside of prison, whether a person would choose to associate with others who had served time because of that common experience seems less certain. Depending on the norms of the community that a person left when he went to prison, he might or might not. If mafia films and TV shows are at all accurate, having been to prison is badge of honor—the felon took a hit for the mafia family rather than squealing to squeak out of prison. The same goes for gang members. If a felon was a member of a law-abiding community, however, the knowledge that another did time too probably would not be a positive point of shared experience and identity. Not that Martha Stewart is out of prison, I'm betting that she will not make a beeline for Michael Milken when they run into each other at New York charity functions. Martha will hope that people will just forget—or at least *pretend* to forget—that she was ever in prison.

Some ex-cons do identify as ex-cons, however, and feel a strong sympathetic kinship with other ex-cons. Some ex-cons work with other ex-cons to help them successfully re-integrate into society. They sympathize with the trouble that newly freed prisoners will face finding a place to live, finding work, renewing old ties, and trying to stay out of prison. The mission of such organizations, however, is to help ex-cons negotiate the transition from being a felon to being someone who has a felony on her record and now is a law-abiding citizen. The point is therefore to help other ex-cons change their identity from “ex-con” to “law-abiding citizen.”

Whether being a felon is a positive or a negative identifying characteristic depends on the norms of the community to which the person belonged before she went to prison and will return to when she gets out. If a community considers being a felon is a badge of honor, and someone wants to remain a member of that community, that opinion probably matters at least as much the person's own opinion. If a felon wants to rejoin a

community that values law-abidingness, she will try to expunge her status rather than emblazon it on her sleeve.

The second factor weighs both for and against felons being a socially salient group. Peer pressure or economic circumstances might encourage someone to commit a felony, but ultimately committing a crime is something an individual *decides* to do. Once an individual is convicted of a felony, expunging that status runs from difficult to impossible. The third factor cuts in favor of felons as a socially salient group—if someone is a felon, employers, the bar association, and potential friends and dates would consider that fact an important one to consider when deciding whether to hire, license, befriend, or date him. The fourth does as well—other people would likely expect that having committed a crime and gone to prison would shape someone’s view of himself.

The fifth and the sixth probably cut against considering felons to be a socially salient group. Generally law abiding people do not appraise themselves or their worth in opposition to felons. They do not, for example, justify having rolled through the odd stop sign by saying “Well, at least I don’t poison my neighbor’s dog before slipping strychnine in my neighbor’s drink.” Moreover, the term “felon” is too general to summon particular characteristics to mind (sixth). A felon could be the nerve-wracked neighbor of a barking Jack Russell terrier driven to peticide, an embezzler, a shoplifter at *Neiman-Marcus*, an inside-trader, a murderer, a cat-burglar, and so on. To the extent that each of these different felonies paints a picture in our minds, each different crime paints a *different* image of a different kind of person.²⁴⁰

Despite the enormous effect having a felony record has on a person’s life, felons as a class seem to far short of being a coherent, socially salient group.²⁴¹ This is not to say that felons could not someday be a socially salient group. Group identity and group formation are dynamic, cultural practices. What is true today may not be true in a decade or so. (Back in the 1940s, gays and lesbians might not have met the criteria for being a socially salient group, either. Most gays and lesbians were closeted, which rendered them largely invisible to the straight community and made it much more difficult for gays and lesbians to identify with each other.)

Felons reveal one additional point about why some groups form around identity characteristics and others do not. The norms of a person’s community and the norms of the larger society (both informal norms and norms enforced by laws) profoundly influence whether someone will openly identify themselves as having some characteristic or conceal that fact. Settled societal norms about the undesirability of some characteristic or behavior make group formation more difficult. The willingness openly to identify

²⁴⁰ How do your mental images compare to mine? In order: Cruella deVile (or me in my very cruel, but highly justified, fantasies), James O’Hagan, Winona Ryder, Martha Stewart, Ted Bundy, and, of course, Cary Grant.

²⁴¹ I reserve judgment about the wisdom of the court’s view of laws that strip felons from exercising their civil rights, however. Even if felons are not a socially salient group, the Court’s precedents identifying the right to vote as a fundamental right would suggest that these laws should be scrutinized more closely than the Court did in *Richardson v. Ramirez*.

oneself as having some characteristic, and to identify with others on that basis, is a prerequisite to group formation.

B. *Hippies—A Stigmatized Caste?*

Two cases invalidated statutes that apparently had been passed because legislators disapproved of hippies and the hippie lifestyle. The first was *Parr v. Superior Court*, in which the California Supreme Court struck a 1968 Carmel-by-the-Sea ordinance banned sitting or lying on the grass in Carmel's parks "to rid the city of the blight it perceived to be created by the presence of the hippies."²⁴² The second was *Department of Agriculture v. Moreno*. In *Moreno*, the United States Supreme Court invalidated a 1971 amendment to the food stamp program. That amendment rendered ineligible for food stamps households containing unrelated, unmarried adults who shared a kitchen and bought food communally.²⁴³ The congressional record revealed that Congress could not stand the idea of "hippies" in "communes" filling their cupboards with comestibles gotten with taxpayer dollars. In striking the eligibility requirement, the Court observed for the first time, "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."²⁴⁴

Were hippies a socially salient group? Hippies are hard to see clearly through the haze of pot smoke separating the mid-1960s from today, but the hippie movement probably evolved out of Ken Kesey's "Merry Pranksters" sometime around 1965 in San Francisco and Berkeley.²⁴⁵ Hippies embraced peace and love and pot and LSD and communal living. They rejected consumer society, corporate culture, materialism, and the keep-up-with-the-Joneses mentality.²⁴⁶ They rejected engagement with politics,²⁴⁷ preferring to drop out of mainstream society entirely.²⁴⁸ "Tune in turn on drop out" was their creed. (Some hippies refused to work (too corporatist), which probably made it easier for them to be non-materialistic.) Many hippies explored meditation, Buddhism,

²⁴² 3 Cal. 3d 861 (1971). Carmel passed an urgency resolution at the same time to make the statute effective as passed. The resolution said, "The City Council of Carmel-by-the-Sea has observed an extraordinary influx of undesirable and unsanitary visitors to the City, sometimes known as 'hippies,' and finds that unless proper regulations are adopted immediately the use and enjoyment of public property will be jeopardized if not entirely eliminated." *Id.* at 863.

²⁴³ Congress exempted households that had "live-in attendants" for medical, housekeeping, or child care reasons.

²⁴⁴ 413 U.S. 528 (1973).

²⁴⁵ Warren Hinkle, *A Social History of the Hippies*, in *THE CALIFORNIA DREAM* 329, 330 (Dennis Hale & Jonathan Eisen, eds.) (1968).

²⁴⁶ *Id.* at 330-31, 351; *see also*, Hunter S. Thompson, *The "Hashbury" Is the Capitol of the Hippies*, N.Y. TIMES (magazine section) 29, 120-21 (May 14, 1967) (describing the chosen squalor and poverty of hippies, their ethic of sharing, and some leaders' urgings to solve problems with getting enough food by getting "back to the land").

²⁴⁷ Thompson at 123 (describing conflicts political activists had with hippies who preferred to "lie back in their pads and smile at the world"); *id.* (describing demonstrations where few carried picket signs and most carried flowers, balloons, and posters with Timothy Leary slogans).

²⁴⁸ *Id.* at 125 (reporting that the political activists lamented that hippies had given up on political or revolutionary change and were escaping and dropping out of society. They chose to "live on the far perimeter of a world that might have been . . . and strike a bargain for survival on purely personal terms.")

and other Eastern religions and spiritual practices.²⁴⁹ Hippies also experimented with communal living as an alternative to traditional family life.²⁵⁰ Within communes, boundaries between nuclear families blurred as adults pooled childcare and household responsibilities. Communes were famously hotbeds of free love.²⁵¹

By the spring of 1967, the hippie movement had attracted a lot of hangers-on who were less interested in adopting a creed and were more interested in listening to psychedelic music in parks, growing long hair, wearing beads, smoking pot and dropping acid, and having as much sex with as few strings attached as possible.²⁵² The Summer of Love was true hippie culture's coda.²⁵³ By October 1967, disillusioned hippies proclaimed the 'Death of Hip'²⁵⁴ complete with "mock funeral to the protest at the commercialization" of hippie culture.²⁵⁵ Warren Hinkle summarized, "The hippies have not only accepted assimilation, . . . but swallowed it whole."²⁵⁶ Hippies, nevertheless, continued on to inspire countless marketing campaigns²⁵⁷ for the next forty years, including the recent reintroduction of the Volkswagen Bug, complete with flower power vase.

For those individuals who embraced and pursued the hippie creed seriously, being a hippie undeniably shaped one's identity. Becoming a pacifist, meditating, embracing a new religion or spiritual tradition, eschewing private property, and abandoning traditional family structures to live in communes are fundamental life changes that would alter a person's self-concept. These beliefs and practices could also create a sense of shared identity among practitioners.

Hippies run into problems under the factors I have identified at criterion number two: the difficulty involved in changing the conduct, belief, or characteristic. One might expect that the hippie's beliefs and practices would be difficult to abandon because they are so constitutive of identity. For most hippies, however, that did not prove to be the case. Less-committed hangers-on swamped and diluted the influence of the early-hippies. The anti-war movement and the press of necessity of political engagement

²⁴⁹ Edwin John Bobrek, *The Hippies: Movement or Fad?* 11 (1970) (Master's Thesis, University of San Diego) (citing Hinkle, *supra* note __ at 337).

²⁵⁰ See Thompson, *supra* note __ at 122 (describing communal living arrangements springing up in the Haight-Ashbury district of San Francisco in the mid-1960s).

²⁵¹ See TIMOTHY MILLER, THE 60S COMMUNES 48-49 (1999) (describing free love at the Morning Star commune). One woman who lived at the Morning Star commune said a bit ruefully, "I'll tell you, it was pretty interesting to wake up in the night and find someone in your sleeping bag with you. It was just kind of an assumed thing that everyone wanted to have sex with everybody else. . . . [I]t was part of the deal." *Id.*

²⁵² See Thompson at 122-23.

²⁵³ See Bobrek, *supra* note __ at 12 (observing that the movement reached its "crest" by 1967).

²⁵⁴ Miller, *supra* note __ at 68.

²⁵⁵ <http://www.nostalgiacentral.com/pop/haightashbury.htm>. Miller reports that the atmosphere in the Haight-Ashbury took a steep downward turn, with homeless and jobless newcomers "swamp[ing] the district." Crime rates spiked and "the euphoric and relatively harmless psychedelics gave way to speed, heroin, and other less benign drugs." Miller, *supra* note __ at 68.

²⁵⁶ Hinkle, *supra* note __ at 346.

²⁵⁷ *Id.* at 346-47 (describing rampant commercialization of hippie culture).

eroded the movement's cohesion, as well. "Tune in turn on drop out" sounded less plausible by 1968 as both the Vietnam War and protests against it heated up, MLK, Jr. and RFK were assassinated, and cities across the nation rioted. By the 1980s, a lot of old hippies had become the new yuppies. Others joined other alternative cultures that became important to their personal identities—becoming Zen Buddhists or joining ashrams and following particular gurus.

Parr and *Moreno* underscore, however, that outsiders thought poorly of hippies who practiced free love, listened to loud music, and lounged on the grass. "Hippie" was a salient category to non-hippies ("squares"), who wanted to keep them out of public parks and off of beaches and wanted to keep them off government programs (factor three). Outsiders might also perceive that being a hippie would be a central part of someone's personality (four); but at the same time others doubted hippies' seriousness and commitment. Ronald Reagan's famous campaign joke about hippies shows that, for a time, hippies provided a rallying point for others who wanted to restore public order and respect for established values (five).²⁵⁸ But hippies do not pass the name test of factor six, as hippie fashion and drug culture tended to dominate pop culture's view of hippies, not the more serious aspects of the hippie creed.

Hippie culture qua hippie culture proved too malleable to create a stable, identifiable group or to provide a stable basis for individual identity. Hippies had something in common with MOVE in the sense that much of being a hippie was optional. Though nonconformists can be the most rigid people of all, there was, as one might expect, a lot of variety within the class of hippies. Some belonged to communes, others did not. Some did not work, others did,²⁵⁹ and others studied in school. Some hippies seriously pursued meditation and Buddhism or other Eastern spiritual traditions while others dabbled or pretended to dabble.²⁶⁰ Still others just attended concerts and took the LSD shortcut to enlightenment.²⁶¹ Hippies had no authoritative leadership or centralized message—the same things that made MOVE too diffuse a set of beliefs to be a religion. It is probably a safe bet that no hippie sought active duty in Vietnam, but neither did George W. Bush. Hippie life was too varied to sustain the sort of group identity the Court perceived in *Cleburne*, *Romer*, and *Lawrence*. *Parr* and *Moreno* may have reached the right results, but these cases appear to be outliers in the rigorous rational basis line of cases.

²⁵⁸ When campaigning to be governor of California, Ronald Reagan told a joke defining a hippie as someone (implicitly a man) who: "dresses like Tarzan, has hair like Jane, and smells like Cheetah." LOU CANNON, GOVERNOR REAGAN (2003).

²⁵⁹ Thompson, *supra* note __ at 29, 120.

²⁶⁰ *See id.* at 124. Thompson describes an interview with Joyce Francisco, who edited a hippy newspaper, in which she described "what the hippy phenomenon meant."

"I love the whole world," she said. "I am the divine mother, part of Buddha, part of God, part of everything." . . . [¶] "Do you use drugs often?" [¶] "Fairly. When I find myself becoming confused I drop out to take a dose of acid. It's a short cut to reality; it throws you right into it. Everyone should take it, even children. Why shouldn't they be enlightened early, instead of waiting till they're old?"

Id.

²⁶¹ *Id.*

C. Polygamists

Three years before the Court struck down sodomy laws in *Lawrence*, a state prosecutor in Utah won the conviction of Thomas Green for violating Utah's bigamy law.²⁶² That law prohibited being legally married to one person and cohabiting with another.²⁶³ When he was convicted, Mr. Green was legally married to one woman, Linda Kunz Green, and lived with her and four other women²⁶⁴ and twenty-five²⁶⁵ of his thirty children²⁶⁶ in a compound of mobile home trailers in rural Utah.²⁶⁷ Mr. Green's wives lamented his prosecution and wept over his conviction.²⁶⁸ They proclaimed that they had freely chosen to live with and be married to Mr. Green as plural wives.²⁶⁹ Mr. Green and all of his wives considered themselves to be Mormons (though the LDS Church did not recognize them as such) and were members of a splinter sect—the Fundamentalist Latter Day Saints. Tom Green and his “wives” lived in a remote part of Utah alongside others who practiced plural marriage and believed that plural marriage was divinely sanctioned.²⁷⁰

Justice Scalia insisted in dissent that the ruling in *Lawrence* logically committed the Court to striking down laws against polygamy.²⁷¹ The Court did not take the bait. Instead, without mentioning them specifically, the *Lawrence* majority distinguished laws against plural marriage from sodomy laws: Sodomy laws, the Court wrote, do “not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused.”²⁷² The implication was clear—laws against

²⁶² Michael Vigh & Kevin Cantera, *Jurors Say No Bias in Green Trial*, SALT LAKE CITY TRIB., A1 (May 23, 2001).

²⁶³ Utah Code Ann § 76-7-101 (2004). The statute reads in full:

(1) A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person or cohabits with another person.

(2) Bigamy is a felony of the third degree.

(3) It shall be a defense to bigamy that the accused reasonably believed he and the other person were legally eligible to remarry.

²⁶⁴ Vigh & Cantera, *supra* note __ at A1; *Too Many Wives? Troubling Issues in Bigamy Verdicts*, ROCKY MTN. NEWS, 6B (May 26, 2001).

²⁶⁵ Vigh & Cantera, *supra* note __ at A1.

²⁶⁶ His thirtieth child was born in June, 2001. *Too Many Wives?*, *supra* note __ at 6B.

²⁶⁷ Michael Janofsky, *Trial Opens in Rare Case of a Utahan Charged With Polygamy*, N.Y. TIMES, A1 (May 15, 2001).

²⁶⁸ Geoffrey Fattah, *Polygamy Legal Battle May Begin to Heat Up*, DESERET NEWS, B1 (May 20, 2001)

²⁶⁹ *See The Five Wives Of Thomas Green*, SCOTSMAN, 2 (May 15, 2001). At least one of Tom Green's former wives, however, claims that she was coerced into marrying him when she was a minor. He was also tried and convicted of child rape for having sex with a 13-year-old girl he claimed to have married. *See Lisa Rosetta, Green loses appeal of rape conviction*, SALT LAKE TRIB., C2 (Feb. 2, 2005) (reporting that Tom Green had been convicted of the child rape of his 13-year-old stepdaughter in 2002).

²⁷⁰ *See also* Silvia Moreno, *Polygamous Sect Moves In, And Texas Town Asks 'Why?'; Mormon Offshoot Accused of Abuses in Arizona and Utah*, WASH. POST, A3 (Sept. 7, 2004) (reporting that about 600 members of the FLDS sect were planning to move into a compound being constructed outside of the town of Eldorado, Texas in order to escape the persecution they perceived in Utah and Arizona).

²⁷¹ *Lawrence*, 123 S.Ct. 2472, 2490 (2003) (Scalia, J., dissenting).

²⁷² *Id.* at 2484. *Romer* also strongly implied that the Court would still uphold laws banning polygamy. *See Romer*, 517 U.S. 620, 634 (1996). In *Davis v. Beason* the Court upheld laws that disenfranchised

plural marriage in the Court's eyes would easily be upheld because the state would have an interest in ensuring the free consent.

Were these laws subjected to rigorous rational basis scrutiny, however, this conclusion seems less clear. Absolute bans on plural marriage are an extreme reaction to problems of consent. Restrictions on plural marriage to ensure consent was freely granted,²⁷³ not absolute bans, would seem the most rational response to the problem of consent. The disjunction between stated concern (consent) and response (ban) might suggest that other reasons, such as moral objections to the practice or animus toward polygamists, were the real reasons for banning the practice. The question for me is, then, are polygamists a socially salient group such that heightened rational basis scrutiny should apply to laws banning the practice?

In considering the place polygamy has in forming an individual's identity and whether it is a point of commonality or identification among people, we should distinguish two different practices—bigamous or polygamous marriages entered into through deception and those entered into openly and with the knowledge of all of the parties. By the first, I mean to refer to people who marry multiple times without divorcing and represent to each of their spouses that he or she is only wife or husband. (I will call these people “bigamists”). By the second I mean people like Mr. Green who have spouses who got married knowing that they are entering into a plural arrangement (“polygamists.”)

How constitutive of identity are these plural marriages? Whether one is a bigamist or a polygamist, being married to more than one spouse would affect a person's self-conception—so part of the first factor is satisfied. A bigamist or polygamist would feel (and would be thought to owe) responsibilities and duties to more than one family. Interestingly, however, a bigamist and a polygamist would each probably feel very different things. A bigamist would know that he was deceiving his spouses and would be living a double life. Necessarily, he would have to conceal at least part of his identity all of the time. Not so with polygamists. Polygamists may sometimes conceal their practices to evade going to jail, but within their plural families and within communities that share the practice, they can identify themselves as polygamists (and many FLDS members are practicing polygamy openly).²⁷⁴ Bigamists and polygamists differ in another respect—bigamists who conceal their multiple marriages would be unlikely to

polygamists and persons who *advocated* polygamy. *Romer* disavowed that portion of *Davis* that suggested that people who advocated polygamy could be disenfranchised or that suggested that people could be disenfranchised because of their status. In the next breath, the Court observed that laws denying convicted felons the right to vote were “unexceptionable.” The Court said nothing about whether laws banning polygamy were constitutional, but the distinction between people who hold the “status” of polygamy and those who have been *convicted* of felonies implies that the Court currently sees no constitutional problem with banning polygamy, convicting those who violate the law, and denying those felons the right to vote.²⁷³ For example, states could require persons entering into plural marriage to be over 21, require the parties to attend counseling sessions (akin to required counseling before obtaining abortions), and make parties wait for some extended period of time between application for a marriage license and formalization of the marriage.

²⁷⁴ Many individuals who practice plural marriage appear to do without trying to conceal their marriages from the outside world. See *Moreno*, *supra* note __ at A3.

seek out associations with other bigamists (no “Men with Many Wives” support groups for them). Polygamists, however, especially ones who practice plural marriage as part of their religion, would strongly identify with others who also form such marriages. People have to associate with each other before they can be a *group*, and so the failure to satisfy criterion three disqualifies bigamists as a potential group.²⁷⁵

Polygamists would not be able to alter their practices and their beliefs without great difficulty (criterion two), particularly if they believed that their religion commanded the practice or if they lived within a community that shared and valued the practice and considered polygamy to create proper (and superior) familial relationships. The brute facts of family and marriage—living with someone, having children together, owning things together, sharing memories and experiences—would only make it harder change that belief and practice. Outsiders would probably consider someone’s having more than one spouse relevant in forming opinions about the person and would also expect it to shape the polygamist’s identity (factors three and four).²⁷⁶

Fifth, other people and other groups do constitute similar aspects of their identity in opposition to polygamists and to plural marriage. The LDS Church, for example, has taken pains to disavow the practice of plural marriage and to distance themselves from persons purporting to be Mormon who engage in it. The LDS Church excommunicates members who practice plural marriage. Protestants and Catholics, too, reject plural marriage and distinguish themselves from Muslims on that basis. The sixth factor also tilts in favor of polygamists being a socially salient group. If I speak of polygamists to a group of Americans we will understand that I am referring to men who are married to and live with more than one wife, most likely for religious reasons. (Here, the use of the word “polygamist” will connote something very different from “bigamist,” which would be understood in the secretive, deceptive sense described above.) My listeners would probably understand me to refer to people who live in rural Utah or Idaho and who think that they are adhering to the Mormon faith. If I refer to Saudi Arabia or the Middle East listeners would then think I am speaking of Muslims.

If the Supreme Court chooses to review a polygamy-based conviction,²⁷⁷ the justices will have to choose between being principled and being popular. Relative to the relationship between practice and identity, little distinguishes polygamy and animal sacrifice. They are both potentially criminal acts—deceptive bigamy and the intentional killing of animals—transformed because of that relationship. A decision that strikes state laws banning polygamy (on the grounds that states could more appropriately assuage concerns about consent and coercion with laws addressing *those* particular issues) will spark a firestorm of protest from feminists and conservatives alike. If the Supreme Court

²⁷⁵ For a discussion of the thick group sociology in some plural marriage communities, see John Krakauer, *UNDER THE BANNER OF HEAVEN* (2003).

²⁷⁶ You might, for example, think that someone who was a polygamist would either be a lousy or a very interesting addition to your feminist reading group.

²⁷⁷ Cf Jonathan Turley, *Polygamy laws expose our own hypocrisy*, USA Today, 13a (Oct. 4, 2004) (reporting that convicted polygamist Tom Green was expected to file a cert petition). Some polygamy prosecutions include charges for uncontroversial crimes, such as having sex with minors, so it is not clear that a polygamist’s petition would present the polygamy issue squarely.

upholds bans on polygamy, Professors Eskridge and Frickey will be proved right that it's just about power and politics, not principle; my attempt to provide a principle for the Court's rigorous rational basis jurisprudence will be proven wrong.

IV. CONCLUSION.

The Court has applied rigorous rational basis scrutiny in several cases over the past thirty years. It has not justified this scrutiny, nor explained when it should be applied. Nevertheless, most of the Court's applications can be defended as an extension of values animating constitutional protection of the free exercise of religious belief. In particular, the Court has protected members of groups when membership in the group is constitutive of individual identity. The Court's decisions represent a secular analogue to the manner in which the Court is willing to accept that even nontraditional religions may deserve constitutional recognition. Identity and practice can be inextricably intertwined. When they are, and when prohibitions of the practice are aimed at what the Court perceives as an identity, rather than the practice itself, the court will block regulation of the practice in order to protect individual identity. Facts that constitute identity in a way courts are willing to recognize tend to constitute identity for many people, which is why groups are central to the analysis.

The factors discussed here relate the Court's rigorous rational basis precedents to constitutional values. They show which precedents are correct and which are mistakes, and provide a template for future applications of the doctrine. In particular, *Moreno* was likely wrong, and the Court got off on the wrong foot with hippies. *Cleburne*, *Romer*, and *Lawrence*, however, represent appropriate exercises of the doctrine. If the Court follows the principles that animate and justify those cases, it will not extend rigorous rational basis scrutiny to some classifications, such as the truly discrete and insular class of felons, but it will apply such scrutiny to other groups whose practices or characteristics are constitutive of identity, such as (adult) polygamists.