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Changing the Immutable Commentary

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Changing the Immutable

SUSAN R. SCHMEISER

*Over the past few decades, questions about the chosen or compelled nature of sexual orientation have become both a political and a constitutional litmus test for progressive approaches to LGBT rights. While choice occupies a hallowed place in American culture, its invocation in the context of sexual orientation generally has a more ambivalent, and often sinister, ring. High-profile gaffes by prominent politicians make clear that, in this context at least, pro-gay does not mean pro-choice. This Article illuminates the rhetorical confusion surrounding homosexuality and choice, linking it to a misguided jurisprudence of immutability. It reflects briefly on the emergence and persistence of immutability as a factor in equal protection challenges to discriminatory legislation, suggesting that the focus on immutability represents an unnecessary departure from the core purpose of equal protection jurisprudence: to ensure that the government not apportion rights according to such illegitimate considerations as paranoia or a desire to subordinate an unpopular group. The Connecticut Supreme Court's analysis of immutability in *Kerrigan v. Department of Public Health*, however, recasts the inquiry to focus on the social and legal ostracism that has defined gay identity for more than a century. This propitious approach is primarily concerned with status as subordination (the new immutability) rather than status as essence (the old immutability).*

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Changing the Immutable

SUSAN R. SCHMEISER*

To be 'gay,' I think, is not to identify with the psychological traits and the visible masks of the homosexual, but to try to define and develop a way of life.

-Michel Foucault, "Friendship as a Way of Life"¹

I. CONFUSION AND THE POLITICS OF CHOICE

In a nationally televised debate between Democratic presidential nominee John Kerry and Republican incumbent George W. Bush, moderator Bob Schieffer of CBS News posed a peculiar question to the candidates, one that would seem to have little relevance to presidential politics: "Do you believe homosexuality is a choice?" President Bush equivocated, affirming his support for a constitutional amendment limiting marriage to heterosexual couples while professing "tolerance," but Senator Kerry offered a more pointed response:

We're all God's children, Bob. And I think if you were to talk to Dick Cheney's daughter, who is a lesbian, she would tell you that she's being who she was, she's being who she was born as. I think if you talk to anybody, it's not choice. I've met people who struggled with this for years, people who were in a marriage because they were living a sort of convention, and they struggled with it. And I've met wives who are supportive of their husbands or vice versa when they finally sort of broke out and allowed themselves to live who they were, who they felt God had made them. I think we have to respect that.²

Kerry's "born-that-way" gesture of support for gay, lesbian and bisexual rights, however measured, took on the status of a calculated smear

* Professor, University of Connecticut School of Law. I extend hearty thanks to Chris Argyros, who provided superb research assistance, and to the many friends and colleagues who have indulged me over the years as I ranted against the politics of immutability. I am also grateful to Jill Anderson for her deft interventions and to the editors of the *Connecticut Law Review*, particularly Krystyna Blakeslee, for their labor and patience.

¹ MICHEL FOUCAULT, *Friendship as a Way of Life*, in FOUCAULT LIVE (INTERVIEWS, 1966-84) 204 (Sylvère Lotringer ed., John Johnston trans., 1989).

² *Third Bush-Kerry Presidential Debate* (CBS television broadcast Oct. 13, 2004) (transcript available at http://www.debates.org/pages/trans2004d_p.html).

with his ad hominem invocation of a prominent Republican family to illustrate the putative nature of sexual orientation. Whether slip or political strategy, Kerry's mention of Mary Cheney, daughter of the sitting vice president and Bush's running mate in the 2004 election, proved to be a costly indiscretion indeed. These remarks precipitated such negative and inflammatory reactions that many campaign observers identified this exchange as a decisive moment in Kerry's failed bid for president.³

His evocation of Mary Cheney's sexual orientation aside, Kerry's response performs a series of associations that resonate strongly with arguments for LGBT rights. In these remarks, Kerry juxtaposes the essential and God-given fact of homosexuality against the anguished performance of straight marriage, which has trapped men and women in lies until "they finally sort of broke out and allowed themselves to live who they were."⁴ Thus marriage as compulsory heterosexuality requires gay men and lesbians to sacrifice truth to convention. Hence, without expressing actual support for same-sex marriage—a position that few prominent figures in national politics have been willing thus far to take—Kerry conveyed the coercive force of institutionalized heterosexuality to pervert the natural order of things. In this account, nature, conceived here as divine creation, contravenes traditional morality; God's morality therefore trumps the human morality that would incarcerate our true selves.

At the time of this October 2004 exchange, calls for an amendment to the United States Constitution enshrining heterosexual marriage as an indelible component of American democracy and legal culture had reached a political crescendo. *Goodridge v. Department of Public Health*⁵ made marriage newly available to same-sex couples in Massachusetts, while the Republican platform eagerly embraced the Federal Marriage Amendment.⁶ With Vermont's civil unions yielding to full marriage rights in Massachusetts and beyond,⁷ rhetoric surrounding the so-called "culture wars" posited threats to the traditional family as a greater menace to

³ See, e.g., Ron Hutcheson, *Analysis: Many Bush Supporters Almost Voted for Kerry*, DETROIT FREE PRESS, Nov. 6, 2004, at 8A ("Kerry made a big mistake when he dragged Vice President Dick Cheney's lesbian daughter into the third presidential debate, the studies showed.").

⁴ *Third Bush-Kerry Presidential Debate*, *supra* note 2.

⁵ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 949 (Mass. 2003) (declaring exclusion of same-sex couples from state-sanctioned marriage a violation of the Massachusetts constitution).

⁶ S.J. Res. 40, 108th Cong. (2004), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:sj40pcs.txt.pdf. For discussion of the Federal Marriage Amendment's history in Congress, see Thomas B. Colby, *The Federal Marriage Amendment and the False Promise of Originalism*, 108 COLUM. L. REV. 529, 533–34 (2008); Ronald J. Krotoszynski, Jr. & E. Gary Spitko, *Navigating Dangerous Constitutional Straits: A Prolegomenon on the Federal Marriage Amendment and the Disenfranchisement of Sexual Minorities*, 76 U. COLO. L. REV. 599, 599–601 (2005); Joan Schaffner, *The Federal Marriage Amendment: To Protect the Sanctity of Marriage or Destroy Constitutional Democracy?*, 54 AM. U.L. REV. 1487, 1487–90 (2005).

⁷ Compare *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999) (recognizing same-sex unions), with *Goodridge*, 798 N.E.2d at 948 (recognizing full marriage rights).

American democracy than the battles roiling the Middle East and the ubiquitous threat of terrorism captured by the Department of Homeland Security's color-coded threat alert.⁸

By October 2008, when the Connecticut Supreme Court issued its decision in *Kerrigan v. Commissioner of Public Health* granting full marriage rights to same-sex couples,⁹ another presidential election-cycle neared completion. In the four years that had elapsed since Kerry incited outrage by identifying Cheney's daughter as a lesbian, the question that elicited Kerry's remark proved more tenacious than the proposed constitutional amendment itself, which last received serious consideration in 2006.¹⁰ For instance, when the Gallup News Service announced the results of its 2007 annual Values and Beliefs survey, the organization found support for gay rights approaching its highest level yet—a recovery from the backlash that surveys detected following the Supreme Court's decision in *Lawrence v. Texas*.¹¹ In its coverage of the survey results, Gallup emphasized that “Americans who believe homosexuals are born with their sexual orientation tend to be much more supportive of gay rights than are those who say homosexuality is due to upbringing and environment (and therefore, perhaps, more of a lifestyle choice).”¹² If anything, the question of choice only gained more salience in political discourse and popular culture, where media accounts of scientific research on sexual orientation in human society as well as the animal world confer ongoing relevance and strong entertainment value on the subject.¹³

⁸ The color-coded threat alert system emerged under former President George W. Bush in a 2002 Presidential Directive. See DEP'T OF HOMELAND SECURITY, HOMELAND SECURITY PRESIDENTIAL DIRECTIVE 3 (2002), available at http://www.dhs.gov/xabout/laws/gc_1214508631313.shtm#content (establishing the Homeland Security Advisory System, with five “Threat Conditions” identified by colors ranging from green, or low threat, to red, or severe threat). Same-sex marriage and other hot-button cultural issues factored as prominently in the 2004 elections, surfacing not only in debates and campaign rhetoric but in ballot measures across the country adopting bans on same-sex marriage and marriage-like recognition in state constitutions and statutory codes. Many commentators analyzed President Bush's victory and other election results as signs of a political backlash precipitated by *Goodridge* and *Lawrence v. Texas*. See, e.g., Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 466–72 (2005) (documenting “the backlash ignited by the issue of same-sex marriage” in the 2004 elections).

⁹ *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 482 (Conn. 2008).

¹⁰ See Colby, *supra* note 6, at 571 (describing the Amendment's failure to gain the required two-thirds majority in a House vote in 2006 and noting that the FMA was dropped from the legislative agenda when the Democrats gained control of Congress in the 2006 midterm elections).

¹¹ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (invalidating on due process grounds a Texas law that criminalized same-sex sodomy and overruling *Bowers v. Hardwick*).

¹² Lydia Saad, *Tolerance for Gay Rights at High-Water Mark: Public Evenly Divided over Whether Homosexuality Is Morally Acceptable or Wrong*, GALLUP NEWS SER., May 29, 2007, <http://www.gallup.com/poll/27694/Tolerance-Gay-Rights-HighWater-Mark.aspx>.

¹³ See, e.g., Dinitia Smith, *Love That Dare Not Squeak its Name*, N.Y. TIMES, Feb. 7 2004 (documenting same-sex bonding and mating behavior among penguins); Deborah Solomon, *Same-Sex Selection*, N.Y. TIMES MAG., May 9, 2004, at 17 (interviewing Stanford biology professor Joan Roughgarden, who claims that “if you ask any biologist, they can verify for you that they have either seen homosexuality in animals, or they know someone who has seen it, and never reported it”); James

Not surprisingly, the 2008 election saw its own controversies over the etiology of homosexuality. During the primaries, Democratic candidate Bill Richardson, governor of New Mexico, committed a different sort of misstep in traversing the dangerous terrain of choice. Prominent advocacy organization Human Rights Campaign partnered with gay-themed television channel Logo to host an event for presidential candidates focused on issues germane to the LGBT community. (Since only the Democratic candidates agreed to participate in this event, the organizers staged a single forum.) Singer Melissa Etheridge posed an apparent softball question to Governor Richardson, asking, “Do you think homosexuality is a choice, or is it biological?” Heedless to cues prompting him toward the opposite conclusion, Richardson replied with alacrity, “It’s a choice.” His answer provoked gasps and hisses from the audience and a puzzled follow-up from Etheridge, who suggested that Richardson might not have understood the question. In subsequent remarks, Richardson declined to retract his answer, insisting instead that he was not a scientist and therefore preferred not to speculate on scientific explanations: “I see gays and lesbians as people, as a matter of human decency. I see it as a matter of love and companionship and people loving each other. I don’t like to categorize people.”¹⁴ Immediately following the event, though, Richardson’s campaign issued a statement negating the voluntarist account at work in his response.¹⁵

In an interview the following day with a journalist representing an online publication, Richardson explained his apparent stumble,

Owen, *Homosexual Activity Among Animals Stirs Debate*, NAT’L GEOGRAPHIC NEWS, July 23, 2004, http://news.nationalgeographic.com/news/2004/07/0722_040722_gayanimal.html (describing studies on the sexual habits of animals and their connection to human homosexuality); Steven Pinker, Editorial, *Sniffing Out the Gay Gene*, N.Y. TIMES, May 17, 2005, at A21 (discussing a study which detailed the human brain’s response to chemical signals called pheromones in an attempt to learn more about human sexuality); Michael Abrams, *Born Gay?*, DISCOVER, June 2007, at 58, 60 (arguing that studies on the sexuality of men have proved that a male’s sexual orientation has a genetic cause and is not the result of an individual’s environment); Alice Park, *What the Gay Brain Looks Like*, TIME.COM, June 17, 2008, <http://www.time.com/time/health/article/0,8599,1815538,00.html> (indicating that the use of brain scans of men and women can determine what role brain size has in determining an individual’s sexuality); John Schwartz, *Of Gay Sheep, Modern Science, and the Perils of Bad Publicity*, N.Y. TIMES, Jan. 25, 2007, at A1 (describing the controversy surrounding research on sexual orientation in sheep).

¹⁴ Quoted in CNN Politicalticker blog, *Richardson flubs answer at gay forum*, available at <http://politicalticker.blogs.cnn.com/2007/08/10/richardson-flubs-answer-at-gay-forum/>; see also Jonathan Capehart, *Wrong Answer, Governor: The Democratic Calculus on Gay Rights Issues*, WASH. POST, Aug. 13, 2007, at A11; Mike Dornig & Christi Parsons, *Dems Walk Fine Line at Gay Issues Forum; Rights Yes, Marriage No, Richardson Calls Orientation ‘A Choice,’* CHICAGO TRIBUNE, Aug. 10, 2007 at C4.

¹⁵ Richardson’s campaign ostensibly clarified the Governor’s position in an e-mail message distributed to reporters shortly after the event: “I do not believe that sexual orientation or gender identity happen by choice. But I’m not a scientist, and the point I was trying to make is that no matter how it happens, we are all equal and should be treated that way under the law.” Ewen MacAskill, *Democratic Candidates Tread Carefully at Gay Rights Forum*, THE GUARDIAN, Aug. 11, 2007, at 23; see also Capehart, *Wrong Answer, Governor*, *supra* note 14.

illuminating the lexical promiscuity of “choice” itself.

Andrew Belonsky: Let’s start with “I’m not a scientist.” Of course you’re not. You’re a governor. What was going through your head when you stepped off the stage whether or not homosexuality is a choice?

Bill Richardson: I immediately realized that I had to fix my statement. I was confused by the question. I just simply made a mistake. I misunderstood the question. My impression—I thought it was a tricky science question, where you put politics into science. I think the word Melissa used was “biological”. Since I use “choice” so much, I’m so committed to choice—a woman’s right to choose—I thought that was the appropriate answer.¹⁶

Although here and in subsequent coverage of this event Richardson blamed his confusion on fatigue, the account he provided to this interviewer supports a more complex explanation. While liberal politicians celebrate “choice” in the context of reproductive freedom and various areas of individual and group rights, persuaded by feminism and other political movements to reject the notion of biology as destiny, the progressive endorsement of choice requires an abrupt reversal where voluntarism becomes a basis for censure and discrimination. Another moment from the 2008 campaign will further illustrate this paradox.

Republican candidate Senator John McCain publicly opposed efforts to write heterosexual marriage into the United States Constitution, but his running mate, Governor Sarah Palin of Alaska, considered the matter suitable for constitutional intervention. An amendment to the Alaska constitution limiting marriage to heterosexual couples, one of the first of its kind, gained passage a decade earlier in 1998; Palin indicated her support for a similar measure at the federal level. In her much-lampooned television interview with CBS anchor Katie Couric, Governor Palin remarked:

I have, one of my absolute best friends for the last 30 years who happens to be gay. And I love her dearly. And she is not my “gay friend.” She is one of my best friends who happens to have made a choice that isn’t a choice that I have made. But I am not gonna judge people. And I love America where we are more tolerant than other countries are.

¹⁶ Queerty.com, Richardson’s Gay “Choice”: What He Was Thinking, Where God Fits and How Hubert Humphrey Got Him Started, <http://www.queerty.com/richardsons-gay-choice-20070810/> (last visited Apr. 11, 2009) (transcribing Queerty.com editor Andrew Belonsky’s August 10, 2007, interview with Governor Bill Richardson).

And are more accepting of some of these choices that sometimes people want to believe reflects solely on an individual's values or not. Homosexuality, I am not gonna judge people.¹⁷

Her insistence to the contrary notwithstanding, Governor Palin's comment deployed a some-of-my-best-friends-are-gay logic to convey a potentially less friendly message: that "being" gay is a matter of choice. When Richardson suggested as much, he came off as bumbling and ill-prepared; indeed, his campaign issued a correction eschewing the choice argument within hours after the HRC event.¹⁸ When Palin espoused the language of choice, however, she cannily aligned herself with the conservative position on sexual orientation, understanding homosexuality as a matter of individual values and preferences that, while no longer punished explicitly in a pluralist democracy, do not warrant governmental endorsement. Her rhetoric also resonates with discourses condemning same-sex eroticism as a deliberate rejection of civilized morality, an elevation of corporeal indulgence over spiritual devotion, and an embrace of self-gratification at the expense of family and community. The rhetoric of choice thus performs significant ideological work in these exchanges, however incoherently.

I recount these three incidents in an attempt to convey the high stakes surrounding the question of choice and to illuminate its oddly incendiary function in debates over homosexuality. While choice and its conditions of possibility occupy a hallowed place in American culture and politics, its invocation in the context of sexual orientation generally has a more ambivalent, and often sinister, ring. For several decades, the question of choice has polarized discussions of gay, lesbian and bisexual identities, communities, and practices. Conservative opponents of LGBT rights tend to argue that homosexuality is nothing more nor less than a series of behavioral choices: choices to sin, to indulge, to flout the moral strictures essential to a stable and virtuous life, to elevate hedonistic interests over altruistic ones.¹⁹ Even without explicitly embracing a model of choice,

¹⁷ Katie Couric's Interview of Sarah Palin and John McCain (Sept. 30, 2008) (transcript available at http://www.cbsnews.com/stories/2008/09/30/eveningnews/main4490788_page3.shtml); see also Nathaniel Frank, Editorial, *Gay Is a Choice? Not That Again; Palin's View Ignores That, as in Religion, the Attraction is Undeniable*, L.A. TIMES, Oct. 8, 2008, at A23 (criticizing Palin's responses).

¹⁸ See MacAskill, *supra* note 15.

¹⁹ In the words of one newspaper editor, "If you want to condemn gays to hell, it helps to believe they have chosen a 'lifestyle' based 'simply on the premise of selfish hedonism,' as Alan L. Keyes, the GOP candidate for Senate in Illinois, recently said of the Cheneys' lesbian daughter, Mary. For people such as Mr. Keyes, homosexuality has to be viewed as a choice. Otherwise, it couldn't be a sin." Cynthia Tucker, *No, It's Not a Choice*, BALTIMORE SUN, Oct. 25, 2004, at 15A. One young conservative author is currently traveling to college and university campuses to lecture students on the "born gay hoax" in an effort to debunk popular theories of congenital homosexuality. See Matt Maguire, *Smith College Students Protest the 'Born Gay Hoax'*, BAY WINDOWS, May 5, 2008; see also

some conservative commentators advance anti-gay arguments by noting the inconclusive evidence of biological determinism and exploiting the epistemological uncertainty surrounding the causes of sexual orientation.²⁰ Perhaps Governor Richardson's alleged "confusion" around the function of choice in discussions of sexual orientation makes more sense when one learns that the president-elect of the National Association for the Research and Therapy of Homosexuality ("NARTH"), an organization devoted to "curing" homosexuality, recently announced to a crowd of therapists convened to discuss treatment methods: "When it comes to homosexuality, I'm pro-choice!"²¹

With choice increasingly conscripted into the service of homophobic causes, it comes as little surprise that many pro-gay arguments wield determinism to counter discriminatory policies. Advocates for LGBT rights have seized upon—and catalyzed—scientific research into the etiology of sexual orientation to contend that homosexuality has a basis in biology or is otherwise determined by factors outside of individual control yet essential to self-development.²² For instance, HRC distributes

Gary Greenberg, *Gay By Choice? The Science of Sexual Identity*, MOTHER JONES, Sept.–Oct. 2007, at 60 (describing the centrality of choice to anti-gay therapies seeking to convert patients to heterosexuality or celibacy); Exodus International, www.exodusinternational.org (last visited May 15, 2009) (offering "freedom from homosexuality through the power of Jesus Christ").

²⁰ In one recent example of this rhetorical strategy, a law professor and prolific critic of gay-friendly family policies challenged immutability claims while advocating a shift in focus from the etiology of homosexuality to its putative health risks. See Lynne D. Wardle, *The Biological Causes and Consequences of Homosexual Behavior and Their Consequences for Family Law Policies*, 56 DEPAUL L. REV. 997, 1012–14 (2007) (arguing for the mutability of sexual attraction); *id.* at 1016 (maintaining that, even if of unknown origin, homosexuality produces known risks). Professor Wardle's article represents a striking example of the extent to which opponents of LGBT rights exploit the manifold inconsistencies haunting accounts of sexual orientation predicated on genetic determinism. Although I disagree strongly with Professor Wardle's conclusions, I think he makes a powerful case against the spurious hunt for the "causes" of homosexuality and its role in organizing movements against discrimination on behalf of sexual minorities.

²¹ Greenberg, *Gay By Choice?*, *supra* note 19, at 60. NARTH was founded by psychiatrist Charles Socarides, the doctor who famously championed "reparative therapy" for gay patients and vigorously opposed the American Psychiatric Association's 1973 decision to "delist" homosexuality from the second edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-II). See *id.*; see also RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* 115–38 (1986) (recounting events culminating in the deletion of homosexuality from the DSM-II).

²² One of the strongest proponents of this position is writer Chandler Burr, author of *A Separate Creation: The Search for the Biological Origins of Sexual Orientation* (1996). In a white paper written on behalf of the Log Cabin Republicans, an advocacy organization supporting gay and lesbian rights in conjunction with conservative policies, Burr declared provocatively that the question of choice, along with the scientific evidence debunking volitional theories of sexual orientation, is and should remain at the heart of debates over gay issues: "At its core, the answer to this question is the only one that matters, the one that determines the most appropriate public policy course, and the one that will win the political struggle over gay rights: Is homosexuality a lifestyle choice or is homosexuality an inborn biological trait? Put another way, does someone choose to be gay or are they just born that way?" Chandler Burr, *The Only Question that Matters: Do People Choose Their Sexual Orientation?* LOG CABIN REPUBLICANS WHITE PAPER, June 2005, available at http://www.chandlerburr.com/articles/Burr_White_Paper.html.

educational literature on issues affecting lesbian, gay, bisexual and transgender people; a widely disseminated pamphlet devoted to “Coming Out” reassures its readers that “Your Sexuality or Gender Identity Is Not a Choice. It Chooses You.”²³

Is homosexuality in fact a choice? This deceptively facile question suffers from a confounding incoherence, including potentially incommensurable descriptive and normative implications.²⁴ What referential parameters mark the subject (“homosexuality”) of such a question? Does “homosexuality” refer to desires, fantasies, attractions, arousals, advances, nongenital contacts, or genital contacts directed toward same-gendered objects? To what extent does this referent encompass self-attribution, identification by others, or membership in a particular community?²⁵ Is homosexuality the opposite of heterosexuality? Does the category describe only human phenomena, or does it capture the activities and affective states of non-human animals? And what of choice? Is choice any exercise of “free will”? Does “choice” require a process of selection, or merely an intentional act? If a process of selection, then against what other options is homosexuality chosen? What conditions of possibility must obtain to enable choice: unfettered freedom, or merely the absence of coercion? Is choice necessary for autonomy and self-determination? Such a simple question quickly dissolves into a conceptual muddle.

Even if readers dismiss this inquiry as an exercise in sophistry, I hope to persuade them in the remainder of this Article that the question posed to Kerry, Richardson, and others should be put to rest in politics and jurisprudence alike. In particular, I suggest that the potential mutability of sexual orientation lacks relevance to a reasoned analysis of whether laws that discriminate on this basis warrant heightened scrutiny. Toward that end, I offer a condensed account below of the jurisprudential and political forces that elevated this question to a state of spurious magnitude. Part II provides a brief introduction to the emergence and persistence of immutability as a factor in equal protection challenges to discriminatory legislation, suggesting that the focus on immutability represents an

²³ HUMAN RIGHTS CAMPAIGN FOUNDATION, RESOURCE GUIDE TO COMING OUT FOR GAY, LESBIAN, BISEXUAL AND TRANSGENDER AMERICANS 11 (2004).

²⁴ See, e.g., EVE KOSOFKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 83–84 (1990) (“For surely, if paradoxically, it is the paranoid insistence with which the definitional barriers between ‘the homosexual’ [minority] and ‘the heterosexual’ [majority] are fortified, in this century, by nonhomosexuals, and especially by men against men, that most saps one’s ability to believe in ‘the homosexual’ as an unproblematically discrete category of persons.”).

²⁵ In her pioneering conceptualizations of queer theory, then only a burgeoning field, Eve Kosofsky Sedgwick brilliantly troubled the assumption that sexual identity constitutes a “unitary category,” noting in one essay that “what’s striking is the number and difference of the dimensions that ‘sexual identity’ is supposed to organize into a seamless and univocal whole.” EVE KOSOFKY SEDGWICK, *Queer and Now*, in TENDENCIES 8 (1993).

unnecessary departure from the core purpose of equal protection jurisprudence: to ensure that the government not apportion rights, benefits and obligations according to such illegitimate considerations as paranoia or a desire to subordinate an unpopular group, and that its laws and policies not in fact enact such stratification.²⁶ In other words, as the United States Supreme Court famously declared in *Palmore v. Sidoti*, “[p]rivate biases may be outside the reach of law, but the law cannot, directly or indirectly, give them effect.”²⁷

Part III turns to recent applications of immutability in cases challenging sexual orientation discrimination. Within this jurisprudence, some courts find sexual orientation, and homosexuality in particular, insufficiently immutable to warrant judicial solicitude. Other courts take a more permissive approach to immutability as a factor, deeming it relatively inconsequential to equal protection analysis and/or broadening its scope to include qualities central to personhood that may be resistant, if not entirely immune, to change. Among these latter cases, I identify the Connecticut Supreme Court’s analysis of immutability in *Kerrigan* as a particularly welcome departure from the misplaced focus on the nature of group identity, specifically its conditions for entry and exit, in favor of an inquiry into the nature of discrimination and its pernicious effects. In its brief but compelling analysis of the immutability factor and, more generally, its application of heightened scrutiny to a marriage regime relegating gay men and lesbians to second-class status in their partnerships and families, the majority opinion deftly elucidates the perlocutionary force of legislative classifications. *Kerrigan* exemplifies the role of judicial review as a bulwark against the ills of majoritarian democracy and its potentially tyrannical excesses, and thereby provides a means of graceful exit from the immutability morass in which equal protection analysis has become mired. With the decline of criminal sanctions for same-sex eroticism in *Lawrence* and beyond, there is no longer any jurisprudential reason to embrace a model of homosexuality as compulsive and ineluctable.

Finally, in Part IV, I evoke a broader cultural and theoretical context for my contention that progressive arguments on behalf of sexual-

²⁶ As the Supreme Court has noted on several occasions, “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.” *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973); *see also Romer v. Evans*, 517 U.S. 620 (1997) (striking down an amendment to the Colorado constitution that barred antidiscrimination measures on behalf of sexual minorities). Thus mere animus will not survive even rational basis review. In *Democracy and Distrust*, John Hart Ely observed famously that, “[f]or whatever else it may or may not be, prejudice is a lens that distorts reality. We are a nation of minorities and our system thus depends on the ability and willingness of various groups to apprehend those overlapping interests that can bind them into a majority on a given issue; prejudice blinds us to overlapping interests that in fact exist.” JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 54 (1980).

²⁷ *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

orientation minorities need not and must not cede choice and self-determination to the realm of homophobia. This Part offers a brief historical account of the development of a medico-legal discourse around homosexuality, with an eye toward the ways in which attributions of diminished will cast gay men and lesbians as incapable of full autonomy or democratic participation. In light of this history and the jurisprudential incoherence that has plagued immutability, it seems essential to continue along *Kerrigan*'s path toward retiring the issue altogether.

My purpose throughout this Article is neither to champion nor to debunk theories of biological or congenital immutability in the context of sexual orientation.²⁸ Nor do I wish to propose an alternative conception of immutability in individual self-definition that would circumvent the difficulties of scientific proof in this area.²⁹ A rich scholarly literature that first emerged some fifteen years ago has begun to accomplish all of these missions already.³⁰ Instead, I perceive immutability as a constitutional red

²⁸ For accounts supporting scientific research into sexual orientation and its origins, see generally TIMOTHY F. MURPHY, *GAY SCIENCE, THE ETHICS OF SEXUAL ORIENTATION RESEARCH* Ch. 2 (1997) (*The Value of Sexual Orientation Research*) (arguing that the potential benefits of scientific research on sexual orientation outweigh its potential misuse); Kari Balog, Note, *Equal Protection for Homosexuals: Why the Immutability Argument is Necessary and How it is Met*, 53 CL. ST. L. REV. 545, 557–58 (2005–2006) (“The plethora of scientific and medical research available on sexual orientation answers the question of immutability in the affirmative. Homosexuals do not take a risk in invoking the immutability argument in equal protection claims because the medical and scientific research positively shows sexual orientation to be as immutable as gender.”); Timothy R. Holbrook, *The Expressive Impact of Patents*, 84 WASH. U.L. REV. 573, 583–90 (offering positive reviews of scientific research into the basis for sexual orientation).

For critiques of the scientific approach to immutability and equal protection, see EDWARD STEIN, *THE Mismeasure of Desire: The Science, Theory, and Ethics of Sexual Orientation* Ch. 10 (1999) (*Rights and the Science of Sexual Orientation*); *id.* Ch. 12 (*Should Scientific Research on Sexual Orientation Be Done?*); JENNIFER TERRY, *AN AMERICAN OBSESSION: SCIENCE, MEDICINE AND HOMOSEXUALITY IN MODERN SOCIETY* (1999) (offering an historical account of scientific fascination with homosexuality as the abnormal other against which to measure the shifting bounds of the “normal”); *id.* at 394 (contending that arguments for the immutability of homosexuality betray a misreading of the scientific research).

²⁹ For recent proposals advancing conceptions of immutability that transcend the nature vs. nurture divide, see, for example, Shannon Gilreath, *Of Fruit Flies and Men: Rethinking Immutability in Equal Protection Analysis—With a View Toward a Constitutional Moral Imperative*, 9 J.L. & SOC. CHANGE 1, 31 (2006) (eschewing trait immutability as a basis for equal protection in favor of trait coercion where a trait such as homosexuality describes an essential aspect of individual identity); Samuel A. Marcossou, *Constructive Immutability*, 3 U. PA. J. CONST. L. 646, 650 (2001) (proposing a “new vision of immutability” that encompasses the social construction of identity). Professor Marcossou in particular seeks to reinvigorate immutability, arguing that, “[p]roperly understood and argued, immutability has resonance both within and outside the legal sphere, and can be of particularly great force in winning the fifth for equality for sexual and gender minorities.” *Id.* at 649. Marcossou’s approach most closely resembles the one pursued by the majority in *Kerrigan*. The focus on qualities central to personal identity found early expression in a *Harvard Law Review* Note, where the editors wrote: “An alternative view of the importance of immutability might . . . focus on the argument that the characteristics of race and sex are important not because they are (usually) determined at birth, but because they are such determinative features of personality.” Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1303 (1985).

³⁰ In a 1994 article routinely cited by scholars and courts alike (both supporting and challenging sexual orientation discrimination), Professor Janet Halley offered a trenchant critique of biological

herring, a perilous strategy for demanding civil rights,³¹ and a cultural side-show whose dramatic contrivances, evident in the incidents I relayed above, distract us from the real questions of liberty and equality that demand jurisprudential resolution.³²

II. THE IMMUTABILITY MORASS

In a story familiar to students of constitutional law, the Supreme Court opinion in *United States v. Carolene Products* (1938) famously gestured toward a “more searching judicial inquiry” in cases where legislation targeting unpopular groups reflects the sort of “prejudice against discrete and insular minorities” that also “tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.”³³ In other words, the Court suggested that the very animosity

determinism as a basis for identity-based legal protections. See Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 567–68 (1994) [hereinafter *Politics of Biology*] (denouncing efforts to ground pro-gay advocacy on the inconclusive and conceptually muddled science of homosexuality and advocating instead a middle ground between constructivist and essentialist conceptions of identity). My own understanding of the choice morass is substantially influenced by Halley’s work, which eloquently documents the incoherence surrounding scientific claims to immutability when the very categories organizing this scientific research, homosexuality and heterosexuality, remain thoroughly unstable. See *id.* at 567; see, e.g., Carmen M. Butler, *Victimhood to Agency: A Constructionist Comparison of Sexual Orientation to Religious Orientation*, 4 SEATTLE J. SOC. JUST. 147, 166 (2005) (contending that “[a]dvocates who use essentialist theory to promote gay rights inadvertently support a static image of sexuality in general and a victim image of gays in particular”); Janet Halley, *Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1770 (1993) [hereinafter *Act and Identity*] (noting the instability of acts and identities in the Court’s focus on “homosexual sodomy” and calling upon “those of us who inhabit gay and lesbian identity [to] loosen our grip on these identities”); Jonathan Pickhardt, Note, *Choose or Loose: Embracing Theories of Choice in Gay Rights Litigation Strategies*, 73 N.Y.U. L. REV. 921 (1998) (cataloguing the strategic failure and collateral effects of “choice-denying” arguments for LGBT rights litigation and advocating instead a “choice-affirming” approach).

³¹ Nancy Knauer makes a compelling case for the perils of embracing immutability, asserting provocatively that “the pro-gay insistence on immutability represents the Achilles’ heel of the contemporary gay political narrative. Claims of immutability rest on a shaky factual basis, produce stable desexualized gay subjects with no transformative value, and they are ultimate unresponsive to the pro-family characterization of homosexuality as a chosen and immoral behavior.” Nancy J. Knauer, *Science, Identity, and the Construction of the Gay Political Narrative*, 12 L. & SEXUALITY 1, 7 (2003). The writings of Lynne Wardle and other anti-gay conservatives amply bear out these warnings. See generally Wardle, *supra* note 20 (suggesting that homosexuality constitutes a public health menace, whatever its etiology).

³² See generally Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 2 (2000) (arguing that equal protection analysis should focus on “the meaning or expressive content of the law or policy at issue” and whether that “meaning conflicts with the government’s obligation to treat each person with equal concern”).

³³ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). The relevant passage reads in full:

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or racial minorities . . . ;

catalyzing legislation that disfavors certain groups likely yields formidable hurdles as well to their use of political processes to seek and achieve equal treatment under law.

Out of this recognition emerged the tiers of scrutiny that now organize equal protection analysis, to significant consternation.³⁴ This “more searching judicial inquiry” traverses different paths depending, at least in theory, on the likelihood that the laws under review reflect “prejudice against discrete and insular minorities” and therefore warrant heightened scrutiny by courts.³⁵ Oddly, however, efforts to illuminate and counter irrational prejudice frequently metamorphosed into efforts to identify the precise nature of the group alleging prejudice. Odder still, courts paid particular attention to the criteria of group membership, specifically the conditions for entry and exit. In other words, an inquiry into the nature and effects of prejudice succumbed to an inquiry into the nature of identity: voluntary or involuntary, essential or inessential?

Viewed from this angle, heightened-scrutiny analysis took a series of obfuscatory detours that led courts astray from the central precepts of equal protection and judicial review in guarding against government-sponsored subordination. Indeed, scholars have argued persuasively that the interpolation of immutability as a factor in equal protection analysis—much less a requirement—was itself historically contingent and likely unnecessary to the effective review of discriminatory classifications.³⁶ Immutability first surfaced as a litigation strategy in equal protection cases to highlight parallels between racism and sexism (rather than race and sex) as irrational prejudices predicated on stereotypes and unfounded assumptions. Yet it soon became an inconsistent litmus test for access to

whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. . . .

Id.

³⁴ See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (declaring racial classifications “immediately suspect” and “subject . . . to the most rigid scrutiny”). See generally, e.g., Suzanne Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004) (offering a comprehensive account and critique of the multi-tiered approach); *id.* at 527–33 (proposing a uniform alternative that would hew more closely to the spirit of equal protection analysis). *Korematsu*, which upheld the internment of Japanese Americans during the Second World War, reflected the first explicit application of strict (although remarkably indulgent) scrutiny to a racial classification.

³⁵ *Carolene Prods.*, 304 U.S. at 153 n.4.

³⁶ See generally Donald Braman, *Of Race and Immutability*, 46 UCLA L. REV. 1375 (1999) (challenging biological theories of race and their significance to equal protection analysis); *id.* at 1453 (chronicling the litigation strategy of ACLU attorney Ruth Bader Ginsburg to tether sex differences to biology in two early sex discrimination cases seeking heightened scrutiny for sex-based classifications); Nan D. Hunter, *The Sex Discrimination Argument in Gay Rights Cases*, 9 J.L. & POL’Y 397, 402–04 (2001) (recounting the same events); Marc R. Shapiro, *Treading the Supreme Court’s Murky Immutability Waters*, 38 GONZAGA L. REV. 409, 437–38 (2002/2003) (lamenting the Supreme Court’s failure to define immutability and the extent to which the concept perpetuates discredited scientific theories of race).

heightened scrutiny.³⁷ In *Frontiero v. Richardson*, one of its earliest decisions invalidating sex-based classifications under Equal Protection analysis, the Supreme Court noted that:

[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate ‘the basic concept of our system that legal burdens should bear some relationship to individual responsibility’³⁸

This passage represents the debut of immutability in federal equal protection analysis.³⁹ Its emergence as a basis on which to challenge sex discrimination required a series of logical leaps, since biological differences between the sexes had hitherto seemed like a generally valid rationale for legislative distinctions.⁴⁰ In the context of race and other axes of identity, however, mere difference had become an insufficient justification for discriminatory treatment. Then-attorney Ruth Bader Ginsburg, writing on behalf of amicus ACLU in *Frontiero*, invoked immutability to analogize the mechanisms of sexism to those of racism and

³⁷ See Braman, *supra* note 36 at 1453.

³⁸ *Frontiero v. Richardson*, 411 U.S. 677, 686 (quoting *Weber v. Aetna Cas. & Surety Co.*, 406 U.S. 164, 175 (1972)) (plurality opinion) (1973). In *Weber*, the Court noted:

The status of illegitimacy has expressed through the ages society’s condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth, and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.

Weber, 406 U.S. at 175.

³⁹ Immutability emerged as an equal protection factor merely two years earlier in state court. To my knowledge, the California Supreme Court issued the first and only judicial decision prior to *Frontiero* that invoked immutability as a basis for identifying a suspect classification. In 1971, the court struck down a state law prohibiting women from tending bar. *Sail’er Inn, Inc. v. Kirby*, 485 P.2d 529, 540 (Cal. 1971) (deeming sex a suspect classification warranting strict scrutiny to invalidate a state law excluding most women as bartenders).

⁴⁰ A few years before these arguments surfaced, the editors of the *Harvard Law Review* had pondered the peculiar skepticism accorded laws that wield racially discriminatory classifications. Why, the editors wondered, should race, ethnicity and what the editors called “lineage” garner exceptional treatment? “Perhaps the answer is that race and lineage are congenital and unalterable traits over which an individual has no control and for which he should receive neither blame nor reward. . . . Yet these factors, though significant, clearly do not constitute the complete explanation for the special judicial treatment of suspect traits.” The editors proceed to distinguish race, lineage and ethnic origin from “other congenital and unalterable characteristics such as sex or certain physical disabilities” on the ground that the former classifications “will usually be perceived as a stigma of inferiority and a badge of opprobrium.” Note, *Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1065, 1126–27 (1969). Oddly, the California Supreme Court cited this discussion in *Sail’er Inn* while determining that sex, as a suspect classification based on an immutable characteristic, did warrant strict scrutiny. *Sail’er Inn*, 485 P.2d at 540.

xenophobia: all biases that reify difference to justify status distinctions.⁴¹

Although the Court's "accident of birth" language would seem clearly to locate the unfairness of such an apportionment of burdens in the congenital origins of disfavored qualities, this paradigm does not necessarily rest on biological determinants. As one scholar has demonstrated persuasively, the Court generally operated with a social rather than a biological conception of race at the time that *Frontiero* was decided,⁴² and its inclusion of national origin among legislative classifications warranting special concern affirms the primacy of social and cultural categories to the constitution of legally salient identities.

The decision from which the Court drew its language of burdens and individual responsibility, *Weber v. Aetna Casualty & Surety Company*, invalidated a state law disadvantaging non-marital children and privileging marital children with respect to inheritance rights.⁴³ This case thus dealt squarely with the ultimate "accident of birth," or illegitimacy, holding that the children born to unmarried parents bore no responsibility for their plight and hence seemed especially undeserving of the burdens with which discriminatory legislation saddled them.⁴⁴ Yet the quality distinguishing these children from those with two legally recognized parents is a *social fact* with no biological significance at all; rather, it clearly bears the legacy of cultural norms favoring domesticated sexuality over sex outside of marriage.⁴⁵

What's more, the jurisprudence of so-called illegitimacy long equivocated on the degree of scrutiny to be accorded laws that deploy such classifications. If the "accident of birth" language seems essential to delineating those qualities that warrant the most stringent protection from the majority, then it makes little sense that the Court has wavered in its application of heightened scrutiny to children born outside a marriage, occasionally applying minimal scrutiny and other times clearly heightened scrutiny.⁴⁶ In 1988, the Court finally identified its approach to

⁴¹ See Braman, *supra* note 36, at 1451 & n.324, 1452 (describing Ginsburg's involvement as the ACLU introduced immutability to the Court in the context of sex-based classifications).

⁴² See *id.* at 1446 (noting the Court had understood racial status to be a product of social institutions).

⁴³ See *Weber*, 406 U.S. at 176 (recognizing the Equal Protection Clause as a tool to invalidate "discriminatory laws relating to the status of birth").

⁴⁴ See *id.* at 175 (disapproving of liabilities imposed on illegitimate children because they bear no responsibility for their births); see also *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (describing legislation which seeks to punish children for actions of their parents fails as unjust).

⁴⁵ See *Weber*, 406 U.S. at 175-76 ("Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise.") (footnote omitted).

⁴⁶ See, e.g., Richard L. Brown, *Disinheriting the "Legal Orphan": Inheritance Rights of Children After Termination of Parental Rights*, 70 MO. L. REV. 125, 153-63 (2005) (detailing the evolution of Supreme Court jurisprudence on non-marital children during the decades of the 1970s and 1980s).

classifications of nonmarital children as intermediate scrutiny.⁴⁷ This trajectory suggests that government policies burdening children for the circumstances of their birth over which they have no control may epitomize unfairness, but they have not elicited the degree of judicial concern associated with certain other governmental distinctions.

Most post-*Frontiero* cases contemplating heightened scrutiny directed focus toward the traits that characterize members of a group disadvantaged under discriminatory legislation, elaborating those qualities of group identity that give rise to a suspicion of animus. For example, in *Lyng v. Castillo*, the Court reversed a lower court ruling applying strict scrutiny to a provision of the federal Food Stamp Act that imposed different eligibility requirements for close relatives—specifically parents, children, and siblings—and distant relatives or unrelated cohabitants. Justice Stevens, writing for the majority, declared that “[c]lose relatives are not a ‘suspect’ or ‘quasi-suspect’ class. As a historical matter, they have not been subjected to discrimination; they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they are not a minority or politically powerless.”⁴⁸ If such characteristics mark a group, then the motive for singling that group out may well be invidious, but these qualities have no *necessary* relationship to de jure discrimination. And immutability stands as only one possible feature of group identity that might suggest unjust treatment, a feature assembled with adjectives that, read together, signal the likelihood that a particular class has garnered recognition and disapprobation. Most disturbing of all, many courts have missed the disjunctive locution altogether, either eliding the terms “obvious” and “distinguishing” while citing only “immutability,” or oddly conflating all three as mandating an inquiry into the voluntary or involuntary nature of class membership.⁴⁹

Scholars argued convincingly in the 1990s that courts should discard immutability as a requirement for heightened scrutiny, compiling instances where courts already had done so.⁵⁰ Its persistence as a litmus test for

⁴⁷ See *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (“Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.”).

⁴⁸ *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (holding that cohabitating relatives presumed under federal food stamp program to constitute a single household do not garner heightened scrutiny, which obtains when members of the class “exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group”); see also *Bowen v. Gilliard*, 483 U.S. 587, 602–03 (1987) (quoting *Lyng*, 477 U.S. at 638).

⁴⁹ See, e.g., *Andersen v. King County*, 138 P.3d 963, 974 (Wash. 2006) (“To qualify as a suspect class for purposes of an equal protection analysis, the class must . . . have as the characteristic defining the class an obvious, immutable trait that frequently bears no relation to ability to perform or contribute to society . . .”).

⁵⁰ After persuasively debunking the rationales for protecting immutable groups over immutable groups that identify fixed qualities as the greatest source of disability, Professor Kenji Yoshino contended in 1998 that “[i]t is thus unsurprising that courts have begun to withdraw the immutability

exacting judicial review of sexual orientation discrimination, however, seems to belie this account of obsolescence.⁵¹ Instead, immutability arguments have regained salience in gay rights litigation and scholarship.⁵² Some courts construe immutability as a central factor in equal protection analysis, deeming the failure to prove it an effective bar to heightened protection for gay men and lesbians; other courts and commentators have recast the immutability inquiry as a discussion about the centrality of sexual orientation to personal identity. In the next Part, I briefly survey such arguments, focusing in particular on the Connecticut Supreme Court's salutary contribution to this woefully muddled jurisprudence.

III. KERRIGAN AND THE NEW IMMUTABILITY

With few exceptions, claims embracing immutability proved a losing strategy in gay rights litigation until cases began changing the object and nature of the immutability inquiry. Most courts evaluating equal protection challenges to discrimination on the basis of sexual orientation in the 1980s and 1990s declined to apply heightened scrutiny, often noting specifically that homosexuality fails the immutability prong. They rejected arguments for sexual orientation as a suspect classification and for the application of strict or intermediate scrutiny on the ground that homosexuality lacks the properties of a true identity. These cases understood sexual orientation to describe a collection of preferences,

factor and that recent academic commentary seems univocal in calling for its retirement even as a factor." Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 518 (1998) (citations omitted); see also *id.* at 510 (lamenting the tolls exacted by assimilationist pressures to abandon putatively mutable traits). Yoshino drew on the work of prominent scholars who had challenged the legitimacy and continued relevance of immutability to sexual orientation discrimination. See, e.g., J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2323–24 (1997) (characterizing immutability as neither necessary nor sufficient because status depends on a stable social meaning); Halley, *Politics of Biology*, *supra* note 30, at 507–16 (arguing that courts privilege political vulnerability over immutability and noting the "lackluster track record" of the immutability argument); Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531, 550 (1992) (arguing that the question of immutability is less important than the question of coercion).

⁵¹ In 1996, Professor Chai Feldblum noted that, despite her misgivings about the approach, she continued to invoke immutability in briefs filed on behalf of LGBT groups. See Chai R. Feldblum, *Sexual Orientation, Morality and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237, 277–79 n.189 (1996); see also William Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1639–44 (1997) (describing the controversy among pro-gay litigators over advancing arguments from immutability).

⁵² Scholars such as Marcossou have taken up Halley's challenge to bridge the gulf between essentialist and constructivist accounts of gay, lesbian and bisexual identity by offering a version of immutability predicated on the idea that "social and cultural influences shape individual identity" in powerful ways. Marcossou, *supra* note 29, at 650. Marcossou contends that, "[p]roperly understood and argued, immutability has resonance both within and outside the legal sphere, and can be of particularly great force in winning the fight for sexual and gender minorities." *Id.* at 649. Marcossou's approach seems to have won the day in recent marriage-equality decisions issuing from California, Connecticut and Iowa.

propensities, behaviors, or attractions that have little or nothing in common with group identities based on race, ethnicity, sex, or any of the other “accidents of birth.”⁵³ Many of these courts relied on *Bowers v. Hardwick* to dismiss the notion that a class of persons defined by their potentially criminal conduct might receive heightened judicial solicitude.⁵⁴

But heresy began brewing in isolated opinions arguing for a broader conception of immutability. The first and most extensive analysis of heightened scrutiny for sexual-orientation discrimination appeared in Judge Norris’s lengthy concurrence in *Watkins v. United States Army*.⁵⁵ Judge Norris maintained that, in reviewing a model soldier’s discharge predicated solely on his admission of homosexuality, the Ninth Circuit should apply strict scrutiny to strike down the military’s policy of discriminating on the basis of sexual orientation.⁵⁶ He distinguished *Bowers* as a due process holding with no bearing on equal protection analysis⁵⁷ and disputed the claim that the Supreme Court’s immutability jurisprudence required an inability to change one’s distinguishing traits.⁵⁸

⁵³ See, e.g., *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 267 (6th Cir. 1995) (“Those persons who fall within the orbit of legislation concerning sexual orientation are so affected not because of their orientation but rather by their *conduct* which identifies them as homosexual, bisexual, or heterosexual.”). Although the Supreme Court vacated and remanded this case for reconsideration in light of *Romer v. Evans*, 517 U.S. 620 (1996), the Sixth Circuit affirmed its earlier decision not to apply heightened scrutiny to legislation targeting sexual orientation and upheld the discriminatory policy once again. *Equality Found. of Greater Cincinnati, Inc. v. Cincinnati*, 128 F.3d 289, 301 (6th Cir.1997); see, e.g., *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) (“Homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender or alienage”); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (“Members of recognized suspect or quasi-suspect classes, e.g., blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in nature.”); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) (denying “suspect class status for practicing homosexuals” because “[i]t would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause”); *Rich v. Sec’y of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984) (“A classification based on one’s choice of sexual partners is not suspect.”); cf. *Thomasson v. Perry*, 80 F.3d 915, 939 (4th Cir. 1996) (distinguishing the “propensity” toward homosexuality targeted by the military’s Don’t Ask, Don’t Tell policy from “a predetermined and immutable characteristic like race or sex” because the former reflects “an inclination” to engage in certain conduct).

⁵⁴ See, e.g., *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) (“If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes.”); *Padula*, 822 F.2d at 103 (“We therefore think the courts’ reasoning in *Hardwick* and *Dronenburg* forecloses appellant’s efforts to gain suspect class status for practicing homosexuals. It would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause.”).

⁵⁵ See *Watkins v. United States Army*, 875 F.2d 699, 711–28 (9th Cir. 1989) (Norris, J., concurring).

⁵⁶ *Id.* at 711, 728.

⁵⁷ *Id.* at 716–17.

⁵⁸ *Id.* at 726. Judge Norris advocated “[r]eading the case law in a more capacious manner, [such that] ‘immutability’ may describe those traits that are so central to a person’s identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically.” *Id.*

In 1998, an Oregon appellate court found that a state university policy denying insurance benefits to same-sex couples while granting them to married heterosexual couples violated the state's constitutional guarantee of equality with respect to the privileges and immunities of citizenship. It ruled in the process that the lesbian plaintiffs belonged to a suspect class. The opinion noted that Oregon courts had deemed suspect certain classes defined by mutable characteristics such as religious affiliation and alienage, and by potentially alterable ones such as gender. In the court's reading of relevant state law, "immutability—in the sense of inability to alter or change—is not necessary" for suspect class definition. Indeed, this inquiry properly focuses on not "the immutability of the common, class-defining characteristics, but instead the fact that such characteristics are historically regarded as defining distinct, socially-recognized groups that have been the subject of adverse social or political stereotyping or prejudice."⁵⁹ Such a shift may seem subtle, but its impact should not be understated. A focus on the particular traits that characterize members of a disparaged group, including the origins and malleability of those traits, yields to scrutiny of their use by the majority as a basis for adverse treatment.⁶⁰

More recently, a number of state courts have evaluated exclusionary marriage policies as a matter of sexual orientation discrimination, some addressing the question of immutability and others deciding the issues without particular attention to the nature of gay, lesbian and bisexual identity.⁶¹ Among the courts that have evaluated access to marriage as an equal protection matter, those in California, Connecticut, and now Iowa ruled in favor of heightened scrutiny for legal classifications based on sexual orientation.⁶² The high courts of New York, Maryland, and

⁵⁹ See *Tanner v. Oregon Health Sciences Univ.*, 971 P.2d 435, 446–48 (Or. Ct. App. 1998) (holding that the discriminatory policy violated Ore. Const. Art. I, § 20).

⁶⁰ While this move corresponds to a shift in emphasis from the nature of class identity, especially its ontological groundings, to the nature of discrimination, it should not be confused with what scholars have lamented as the "class to classification shift" characterizing the Supreme Court's affirmative action jurisprudence. In the affirmative action context, the Court demonstrated an increasing unwillingness to distinguish between racial classifications that function to subordinate historically disadvantaged groups and such classifications that function to protect or even prioritize such groups. See Darren Lenard Hutchinson, "Unexplainable on Grounds Other Than Race": *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 639 (2003); *id.* at 692–93 (proposing an antisubordination approach to equal protection that would "look[] toward ending only those governmental practices that reinforce caste").

⁶¹ *Goodridge* exemplifies this latter approach, focusing on the nature of the right restricted—marriage—rather than on the nature of the class excluded. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 954–58 (Mass. 2003). A court's analysis is of course circumscribed, at least in part, by the arguments before it; among the marriage cases, the parties' arguments have emphasized due process considerations, equal protection challenges, or both.

⁶² See generally *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, No. 07-1499, 2009 Iowa Sup. LEXIS 31 (Iowa Apr. 3, 2009).

Washington State, on the other hand, found that gay men and lesbians as a class, and sexual orientation as a classification, fail the test for heightened scrutiny; hence legislation affecting their interests or allotting state benefits on the basis of heterosexual orientation warrants only rational basis review.⁶³

Recent cases construing immutability as a strict requirement for heightened scrutiny tend to hold that claims to such scrutiny for sexual orientation classifications fail not because homosexuality describes mere conduct or inclination, but because insufficient evidence exists to resolve the question whether sexual orientation is static and predetermined or fluid and volitional. For example, in *Conaway v. Deane*, which applied rational basis review to a marriage statute limiting marriage to different-sex couples, the Maryland Court of Appeals invoked immutability as a feature of suspect and quasi-suspect classifications even though the parties had not addressed immutability in their briefs.⁶⁴ Citing to *Frontiero* and other federal cases, the court asserted confidently that “[t]he term ‘immutability’ defines a human characteristic that is determined ‘solely by the accident of birth,’ or that the possessor is ‘powerless to escape or set aside.’”⁶⁵ Because “the scientific and sociological evidence currently available to the public” remains equivocal on the etiology of sexual orientation and its fixity, the court declared itself “unable to take judicial notice that gay, lesbian, and bisexual persons display readily-recognizable, immutable characteristics that define the group” for the purpose of heightened scrutiny.⁶⁶ In “the absence of some generally accepted scientific conclusion identifying homosexuality as an immutable characteristic,” no suspect or quasi-suspect classification obtained.⁶⁷

In a case decided shortly before *Conaway*, the Washington Supreme Court applied rational basis review to uphold a state law restricting marriage to different-sex couples after finding that gay and lesbian persons

⁶³ New York’s Court of Appeals found specifically that gay men and lesbians excluded from marriage to their partners do not belong to a suspect or quasi-suspect class with respect to the legislation at issue because their distinguishing characteristics *are* relevant to the state’s interests in defining marriage and family. The majority defined the paramount characteristic as a “preference for the sort of sexual activity that cannot lead to the birth of children” *Hernandez v. Robles*, 855 N.E.2d 1, 11 (N.Y. 2006); *see also id.* (“Those who prefer relationships with people of the opposite sex and those who prefer relationships with people of the same sex are not treated alike, since only opposite-sex relationships may gain the status and benefits associated with marriage.”).

⁶⁴ *See Conaway v. Deane*, 932 A.2d 571, 615 n.57 (Md. 2007) (contemplating the scientific evidence supporting the immutability of sexual orientation and the critiques of that evidence, even though the court notes that no party has raised the issue in its briefs, and concluding that “there does not appear to be a consensus yet among ‘experts’ as to the origin of an individual’s sexual orientation”).

⁶⁵ *Id.* at 614.

⁶⁶ *Id.*

⁶⁷ *Id.* at 616.

do not qualify for heightened scrutiny.⁶⁸ Enumerating the criteria for suspect-class status, the court noted that “the class must have suffered a history of discrimination, have as the characteristic defining the class an obvious, immutable trait that frequently bears no relation to ability to perform or contribute to society, and show that it is a minority or politically powerless class.”⁶⁹ Note the reformulation of the *Lyng* factors here: “obvious, immutable, or distinguishing characteristics”⁷⁰ become “an obvious, immutable trait.” Under this stringent requirement, a failure to establish the immutability of homosexuality becomes a disqualification for heightened scrutiny:

The plaintiffs do not cite other authority or any secondary authority or studies in support of the conclusion that homosexuality is an immutable characteristic. They focus instead on the lack of any relation between homosexuality and ability to perform or contribute to society. But plaintiffs must make a showing of immutability, and they have not done so in this case.⁷¹

The *Andersen* court thus takes immutability to be a *sine qua non* of heightened scrutiny under equal protection analysis.

Since *Andersen* and *Conaway*, however, challenges to marriage discrimination have succeeded in winning heightened scrutiny of classifications based on sexual orientation. Before *Kerrigan*, the California Supreme Court applied strict scrutiny to legislation relegating gay couples to domestic partnership while reserving civil marriage for straight couples. In striking down this distinction, the court adopted an understanding of immutability as essential to self-definition.⁷² Most recently, in *Varnum v. Brien*, the Iowa Supreme Court looked to California and Connecticut’s marriage decisions to hold unanimously that a state ban on same-sex marriage violated the state constitution, evaluating the exclusion of gay and lesbian couples under heightened scrutiny.⁷³ This opinion marked the third in a year to find that sexual orientation satisfied the immutability inquiry because of its centrality to individual identity,

⁶⁸ See *Andersen v. King County*, 138 P.3d 963, 974 (Wash. 2006).

⁶⁹ *Id.*

⁷⁰ See *Lyng v. Castillo*, 477 U.S. at 638.

⁷¹ *Id.*

⁷² See *In re Marriage Cases*, 183 P.3d 384, 442–43 (“Because a person’s sexual orientation is so integral an aspect of one’s identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment.”). The California court’s approach to the question of immutability echoes that of the 9th Circuit in *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1093 (9th Cir. 2000) (“Sexual orientation and sexual identity . . . are so fundamental to one’s identity that a person should not be required to abandon them.”).

⁷³ See *Varnum v. Brien*, No. 07-1499, 2009 Iowa Sup. LEXIS 31, at *7 (Iowa Apr. 3, 2009) (holding that the Iowa marriage statute violates the equal protection clause of the Iowa Constitution).

holding that “the trait defining the burdened class” need not be “absolutely impervious to change.”⁷⁴ While the California and Iowa decisions obviate the problem of etiology, rendering scientific certainty on the origins of homosexuality irrelevant, neither departs fully from the framework that denies scrutiny to discriminatory policies targeting putatively volitional qualities. *Varnum*, in particular, seems to accept this framework as proper, explaining that immutability implicates “the ability of the individual to change the characteristic responsible for the discrimination. This aspect of immutability may separate truly victimized individuals from those who have invited discrimination by changing themselves so as to be identified with the group.”⁷⁵ In other words, the immutability inquiry purports to exempt victims from blame, while in fact carving out a narrow category of “true” victims and reserving blame for voluntary victims. Such a distinction is both unfortunate and unnecessary.⁷⁶

I noted above that some courts construe immutability as a bar to heightened protection for gay men and lesbians, while others undertake an analysis of immutability by emphasizing the centrality of sexual orientation to personal identity. Although the *Kerrigan* decision corresponds generally to this latter category, its brief analysis of the immutability issue dramatically alters its scope and implications. The court’s discussion of the immutability factor embarks on a deceptively modest track, one that, when read carefully, augers a major discursive shift:

A third factor that courts have considered in determining whether the members of a class are entitled to heightened protection for equal protection purposes is whether the attribute or characteristic that distinguishes them is immutable or otherwise beyond their control. Of course, the characteristic that distinguishes gay persons from others and qualifies them for recognition as a distinct and discrete group is the characteristic that historically has resulted in their social and legal ostracism, namely, their attraction to persons of the same sex.⁷⁷

Far from stating the obvious as its “of course” would suggest, this gloss on the significance of the distinguishing characteristic that separates gays from straights offers a subtle corrective to existing analyses, with their

⁷⁴ *Id.* at *73.

⁷⁵ *Id.* at *75.

⁷⁶ See Note, *The Constitutional Status of Sexual Orientation*, *supra* note 29, at 1303 (“Such instances evoke abhorrence not because the state is burdening the individual for an ‘immutable’ characteristic, but rather because it is burdening the individual’s choice to be different.”).

⁷⁷ *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 436 (Conn. 2008) (citation omitted).

misguided inquiry into the causes and permanence of sexual orientation. In the discussion that follows, the *Kerrigan* court proceeds persuasively to discount the significance of immutability to heightened scrutiny, and to read its scope broadly—consistent with Judge Norris’s concurrence, the *Tanner* court, and the two recent opinions out of California and Iowa—to implicate characteristics central to personal identity, if not either genetic in origin or entirely impervious to change.⁷⁸ But the passage above offers yet another reading of immutability, one that turns not on the significance of individual self-definition or the question of volition, but rather on the persistence of “social and legal ostracism” as the relevant aspect of group definition.

On the one hand, then, Justice Palmer’s majority opinion falls prey to the same analytic oversight that plagues the jurisprudence of immutability, setting up its discussion of the relevant factors for according suspect or quasi-suspect status to a class by quoting the language from *Lyng* and then eliding two of the three enumerated criteria. It identifies as one of two additional considerations whether “the characteristic that defines the members of the class as a discrete group is immutable or otherwise not within their control,”⁷⁹ and then cites as support the passage from *Lyng* announcing a test for suspect status in determinations whether “members of the class ‘exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group.’”⁸⁰ Again, this cluster of adjectives collapses into one: “immutable,” with its emphasis on the permanent and involuntary nature of defining qualities.

On the other hand, the emphasis on the “social and legal ostracism” of gay men, lesbians and bisexuals, both here and throughout the opinion, offers a welcome antidote to the misplaced focus on group identity and membership that the immutability jurisprudence has invited. This conception of identity underscores its social and legal dimensions rather than stressing the significance of internal self or group-definition. In other words, it reminds us that equal protection analysis is centrally concerned with status—not in the sense of one’s stable identity, but in the sense of one’s access to the rights and protections afforded the majority.⁸¹ Throughout the opinion, *Kerrigan* eloquently recounts the history of de

⁷⁸ *Id.* at 438 (“In view of the central role that sexual orientation plays in a person’s fundamental right to self-determination, we fully agree with the plaintiffs that their sexual orientation represents the kind of distinguishing characteristic that defines them as a discrete group for purposes of determining whether that group should be afforded heightened protection under the equal protection provisions of the state constitution.”).

⁷⁹ *Id.* at 426.

⁸⁰ *Id.* (citing *Lyng v. Castillo*, 477 U.S. 635, 638 (2006)).

⁸¹ In his recent book *Racial Culture*, Professor Richard Ford analyzed the immutability question in terms of ascriptive status: “Once a status is ascribed, it is ‘immutable’ in the pragmatic sense that the individual cannot readily alter it. This is the sense in which immutability is relevant to anti-discrimination law.” RICHARD THOMPSON FORD, *RACIAL CULTURE: A CRITIQUE* 103 (2005).

facto and de jure ostracism that has defined the gay community in the United States.⁸² This history and the inferior status that attends pervasive cultural norms around homosexuality offer ample grounds for satisfying the new immutability inquiry.⁸³

IV. CHOOSING SELF-DETERMINATION

Let us return to the vexed issue of choice in discussions of sexual orientation. Its political currency notwithstanding, the question of whether homosexuality is chosen or determined at birth need not play a role in equal protection jurisprudence. But what about in public debate? Although scholars in a variety of disciplines have challenged biological immutability as a fruitless or even dangerous avenue of inquiry,⁸⁴ the biological approach to sexual orientation has taken hold in popular culture. Many commentators have noted a strange throwback to taxonomical discourses of the late nineteenth and early twentieth centuries: theories of homosexuality that posited a third sex, the separate identity of “invert,” or a pathology that differed from mere sinful or criminal behavior.⁸⁵ This trope of congenital homosexuality—in contrast to theories of acquired or mutable homosexuality—boasts a long history in Western culture, one that scholars have recounted extensively. In most of its nineteenth and early twentieth-century elaborations, the figure of “the homosexual” constituted a physiological and psychological anomaly whose mystery could be deciphered only by the medically trained investigator.

Historians of science and sexuality have traced the two primary strains

⁸² See in particular *Kerrigan*'s lengthy discussions of the political powerlessness and history of discrimination afflicting gay persons. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 431–34 (Conn. 2008).

⁸³ The court draws heavily from Justice Thurgood Marshall's concurring and dissenting opinion in *Cleburne v. Cleburne Learning Center, Inc.*, where he wrote:

The discreteness and insularity warranting a “more searching judicial inquiry” . . . must therefore be viewed from a social and cultural perspective as well as a political one. To this task judges are well suited, for the lessons of history and experience are surely the best guide as to when, and with respect to what interests, society is likely to stigmatize individuals as members of an inferior caste or view them as not belonging to the community. Because prejudice spawns prejudice, and stereotypes produce limitations that confirm the stereotype on which they are based, a history of unequal treatment requires sensitivity to the prospect that its vestiges endure. In separating those groups that are discrete and insular from those that are not, as in many important legal distinctions, “a page of history is worth a volume of logic.”

Kerrigan, 957 A.2d at 429–30 n.22 (quoting *Cleburne v. Cleburne Learning Center, Inc.*, 473 U.S. 432 472–73 n.24 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) (citation omitted)).

⁸⁴ For an overview of this argument, see generally STEIN, *supra* note 28; TERRY, *supra* note 28; Halley, *supra* note 30; Knauer, *supra* note 31; Yoshino, *supra* note 50.

⁸⁵ See, e.g., Knauer, *supra* note 31, at 10 (“The science of immutability that undergirds the contemporary gay political narrative belongs to a longstanding tradition that attempts to explain or define the homosexual condition in scientific terms.”).

of investigative inquiries into homosexuality that reigned through most of the twentieth century, both following from the work of late nineteenth-century sexologists: one focused on the particular psychical and physiological qualities of gay men and lesbians, and the other interested more broadly in sex practices and erotic desires across broad swaths of the population.⁸⁶ For the majority of the twentieth century, scientific interest in homosexuality coalesced largely around its allegedly psychopathological dimensions; indeed, until its elimination from the *DSM* in 1973, homosexuality constituted a psychic malady of considerable moment.⁸⁷

The embrace of immutability within LGBT communities reflects a notable shift: where these communities once organized around a commitment to sexual freedom and rejection of compulsory heterosexuality, they began to self-define according to a shared essence. A model of sexual orientation predicated on innate but benign differences offered itself as an alternative to the view of gay men, lesbians, and bisexuals as mentally ill; instead, they could be understood as a distinct and natural species of person. Whereas *Bowers* construed homosexuals as both the sum of their sodomitical acts and the reason such acts are despised and immoral,⁸⁸ the mainstreaming of LGBT politics evident in *Lawrence* and the marriage litigation has mobilized the argument that gays are just like straights, only (benignly) different.⁸⁹

Arguments around choice and determinism have evolved dialectically. As I indicated above, religious conservatives seized upon choice to counter claims that homosexuality is organic and that gay persons deserve tolerance because their identity reflects a harmless and involuntary difference. In response, mainstream LGBT organizations and advocates reaffirmed the we-can't-help-it logic in order to avert the blame attached to

⁸⁶ These two strains correspond to Eve Kosofsky Sedgwick's minoritizing and universalizing models of homosexuality: "To be gay, or to be potentially classifiable as gay . . . is to come under the radically overlapping aegises of a universalizing discourse of acts or bonds and at the same time of a minoritizing discourse of kinds of persons." SEDGWICK, *supra* note 24, at 54.

⁸⁷ See generally JENNIFER TERRY, AN AMERICAN OBSESSION: SCIENCE, MEDICINE, AND HOMOSEXUALITY IN MODERN SOCIETY *passim* (Univ. of Chicago Press 1999); SCIENCES AND HOMOSEXUALITIES *passim* (Vernon A. Rosario ed., Routledge 1997).

⁸⁸ See, e.g., Halley, *Act and Identity*, *supra* note 30, at 1770.

⁸⁹ See generally Marc Spindelman, *Surviving Lawrence v. Texas*, 102 MICH. L. REV. 1615, 1619–32 (2004) (identifying the like-straight logic of *Lawrence*, which grants liberty protections to gay people to the extent they resemble idealized straight people); Marc Spindelman, *Homosexuality's Horizon*, 54 EMORY L.J. 1361, 1399–1400 (2005) (identifying the like-straight logic of *Goodridge* and lamenting the strategic decision to promote an "immaculate conception of gay and lesbian identities" in marriage litigation); see also Courtney Megan Cahill, "If Sex Offenders Can Marry, Then Why Not Gays and Lesbians?": An Essay on the Progressive Comparative Argument, 55 BUFFALO L. REV. 777, 796–99 (critiquing the like-straight logic of recent gay rights litigation).

willful deviance and subversion of community norms.⁹⁰ And marriage as the central, normalizing goal of the gay rights movement from mid-1990s on has taken the just-like-you-only-different argument to a new level. These days, few proponents of same-sex marriage predicate their strongest claims to access for gay and lesbian couples on the argument that this bundle of state-sponsored benefits should be broadly available to diverse family forms. Much less do they advocate that marriage be evacuated of its disciplinary force to privilege conforming subjects over nonconforming ones. Instead, their rhetoric emphasizes the extent to which same-sex couples embrace all the norms of marital heterosexuality save the one that their essential nature disallows.⁹¹

Not only is the “we-can’t-help-it” approach unpalatable, but the ceding of choice to opponents of gay rights is misguided on other grounds. Historians of science, queer theorists, and other scholars have challenged the new sexual orientation research and the scientific turn in LGBT rights arguments, claiming that the studies themselves suffer from conceptual flaws. They contend that those who wield such research to argue for legal protection and popular acceptance ignore the dangers of eugenics and the use of scientific research in the past to isolate and pathologize gay men and lesbians.⁹² Moreover, choice remains central to liberal democratic ideals of self and culture, and the historic treatment of homosexuality cautions against embracing compulsion over volition. As I have documented elsewhere, the psychiatric turn in medico-legal reasoning cast homosexuality as a state of diminished will and impaired self-governance. Medico-legal discourse figured “the homosexual” as a subject incapable of exercising self-restraint and self-determination.⁹³ Hence models of identity that posit sexual orientation as an innate condition outside of human agency, despite their apparent expediency in arguments for

⁹⁰ A recent column in *Slate* magazine reported that the much-remarked racial disparities in support for California’s Proposition 8, the constitutional amendment overriding the California Supreme Court’s landmark decision in the Marriage Cases, derived primarily from different views among black and white voters about the immutability of sexual orientation.

The mutability question is hardly academic. It has been driving public opinion toward gay rights for decades. . . . In Pew and Gallup surveys, respondents’ positions on mutability overwhelmingly predict their positions on gay marriage and homosexuality’s acceptability. Pew puts the equation bluntly: ‘Belief that homosexuality is immutable [is] associated with positive opinions about gays and lesbians even more strongly than education, personal acquaintance with a homosexual, or general ideological beliefs.’

William Saletan, *Original Sin: Blacks, Gays and Immutability*, SLATE, Nov. 13 2008, available at <http://www.slate.com/id/2204534/>.

⁹¹ See generally MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* (2000).

⁹² See generally, NANCY ORDOVER, *AMERICAN EUGENICS: RACE, QUEER ANATOMY, AND THE SCIENCE OF NATIONALISM* (2003).

⁹³ See Susan R. Schmeiser, *The Ungovernable Citizen: Psychopathy, Sexuality, and the Rise of Medico-Legal Reasoning*, 20 YALE J. L. & HUMAN. 163, 169–71 (2008).

equality, resonate strongly with views of homosexuality as incompatible with self-control and therefore full democratic citizenship.

V. CONCLUSION

In a dialogue with philosophers Ian Hacking and Martha Nussbaum upon the publication his book *The Mismeasure of Desire: The Science, Theory and Ethics of Sexual Orientation*, Ed Stein addressed their concern that his anti-essentialist position on homosexuality might undermine his ability “to convince people that sexual orientations are unchosen and unchangeable.”⁹⁴ Eschewing this approach altogether, Stein instead maintained that:

[A] more promising and important project would be to try to convince them that a person’s sexual orientation is not something one should want to change. Rather than trying to convince people that sexual orientations are immutable, I would prefer to try to convince them that we should change the legal and social norms regarding lesbians, gay men, bisexuals and others whose sexual desires make them social pariahs.⁹⁵

The jurisprudence of equal protection offers a perfect forum for such persuasion, at least in theory. In practice, doctrines of immutability have, until recently, frustrated efforts to combat systematic discrimination against sexual minorities. While I contend that these doctrines reflect a muddled and often misguided jurisprudence, the conception of immutability that *Kerrigan* represents might indeed prove germane to the project Stein outlines here. *Kerrigan* situates immutability as an effect, rather than a cause, of discrimination—capturing the inalterable status of social pariah that results from a history of ostracism and censure. Legal reform might indeed change the immutable.

⁹⁴ Edward Stein, *Reply to Martha Nussbaum and Ian Hacking*, 21 LAW & PHILOS. 349, 352 (2002).

⁹⁵ *Id.*