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GAY AMERICAN “DEVIANCE”: Using
International Comparative Analysis to
Argue for a Free Speech and
Establishment Clause Approach to
Furthering Gay Marriage in the United
States.

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**GAY AMERICAN “DEVIANCE:”
USING INTERNATIONAL COMPARATIVE ANALYSIS
TO ARGUE FOR A FREE SPEECH AND
ESTABLISHMENT CLAUSE APPROACH TO
FURTHERING GAY MARRIAGE IN
THE UNITED STATES**

BIJAL SHAH*

I. INTRODUCTION

The evidence from non-Western cultures shows clearly that relationships we call ‘homosexual’ were organized in quite different ways, making the development of a group’s identity and movement highly unlikely [M]any people in Asia, Africa and Latin America [are] characterized by . . . kinship and gender systems and precapitalist codes of homosexual desire.¹

There exists in America what appears to be a brilliantly orchestrated, massive conspiracy to keep all homosexuals locked in the closet. This conspiracy forces many of us to live in shame Anyone who dares venture out is threatened with destruction. The vast majority heed the warning. The conspiracy is a relatively unconscious one, ingrained as it is in our culture Those heterosexuals who participate in the closet conspiracy, conditioned within homophobic culture, are threatened by homosexuality, fearful of and uncomfortable with people who are open about it.²

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¹ BARRY D. ADAM, *THE RISE OF A GAY AND LESBIAN MOVEMENT* 1, 165 (1995).

² MICHELANGELO SIGNORILE, *QUEER IN AMERICA: SEX, THE MEDIA, AND THE CLOSETS OF POWER* xiii-xv (1993) (discussing the fact that the primary methods of keeping the closet door

When I came out to my mother, a traditional Indian woman who considers herself financially well off, she stated with confusion, indignity, and disgust that lesbianism does not occur in India except in poor communities. She could not conceive of homosexuality except among the prominent community of Indian male-to-female transsexuals known for their ancient mysticism and present-day status as beggars and dancers hired for baby showers. The concept of an upper middle-class, educated gay person is not one that she understands or accepts, and she sees my queer³ identity as the result of unfortunate Western influence.⁴

She may not be entirely off the mark. In fact, a brief survey of LGBT (lesbian, gay, bisexual, and transgender) communities worldwide reveals the figurehead of the wealthy⁵ and white⁶—that is, of the

shut involve the media, celebrity, and advertising info). Each closeting method that Signorile describes involves stifling the self-defining, expression of those who identify as queer.

³ While a specific definition of “queer” is difficult, I engage it in the Stychinian sense of oppositional identities that have developed due to societal resistance to them, within the general context of sexuality, sexual performance, and sexual relationships—fluid and constructed. This identity can be found in those who defy heterosexuality, gender choice, and precise definitions of sexuality, such as homosexuals, the transgendered, the intersexed, genderqueers, and a variety of others who express and conduct themselves in a distinctly non-heteronormative way. I believe that the term as I employ it will become easier to understand throughout its usage in this article. See, e.g., SEXUALITY IN THE LEGAL ARENA (Carl F. Stychin & Didi Herman eds., 2000); CARL F. STYCHIN, GOVERNING SEXUALITY: THE CHANGING POLITICS OF CITIZENSHIP AND LAW REFORM (2003); CARL F. STYCHIN, LAW’S DESIRE: SEXUALITY AND THE LIMITS OF JUSTICE (1995). Further, I also utilize the term “gay” in this paper when referring to a specifically Western history of mainstream homosexual communities; by “mainstream,” I mean as compared to post-modern queer politics. Finally, I use the word “homosexual” when I am describing someone in the narrow sense of a person who engages in same-sex sexual relations.

⁴ See, e.g., DEREK MCGHEE, HOMOSEXUAL LAW AND RESISTANCE 89-90 (2001) (discussing other gay Western cultures and that homosexuals have been kept from the “traditional minority category” in the United Kingdom because “a discourse of biological procreation and a discourse of the distinctiveness of the social group’s social and cultural differences”); NICHOLAS BAMFORTH, SEXUALITY, MORALS & JUSTICE: A THEORY OF LESBIAN & GAY LAW 5, 13 (1997) (discussing the similarities between laws affecting queer people in the United Kingdom, United States, and Canada).

⁵ See Rebecca M. Young & Ilan H. Meyer, *The Trouble With “MSM” and “WSW”: Erasure of the Sexual-Minority Person in Public Health Discourse*, 95 AM. J. PUB. HEALTH 1144, 1145 (2005) (quoting Allan Berube’s statement: “[i]n the United States today, the dominant image of the typical gay man is a white man who is financially better off than most everyone else”); see also DAVID BELL & JON BINNE, THE SEXUAL CITIZEN: QUEER POLITICS AND BEYOND 96-97 (2000) (discussing the term “pink economy,” which has labeled white lesbians and “more notably gay man” as “model consumers . . . in the new urban service economy of post-industrialist, post-Fordist western society”). But cf. Jeane W. Anastas, *Economic Rights, Economic Myths, and Economic Realities*, in FROM HATE CRIMES TO HUMAN RIGHTS: A TRIBUTE TO MATTHEW SHEPARD 108-09 (Mary E. Swigonski et. al. eds., 2001) (Noting that people living in cities without diversity who have “come out” in jobs without diversity and gay rights protection were more likely to express decreased job satisfaction. This study did not control for race or gender.).

dominant socio-economic status and ethnicity—educated, self-identified as “gay” man (living in San Francisco⁷ for example) to be an anomaly, born and bred exclusively in the West. Just as,

[l]eading Third World feminist theorist-critics like Gayatri Spivak, Chandra Mohanty, Trinh Minh-ha, and Hazel Carby have repeatedly censured First World feminists for denying the otherness of non-Western women and judging them according to the “high feminist norm” of Europe/Euro-America . . . and for eliding the divergences within nation-specific postcolonial feminist practices,⁸

the Western “gay rights” movement and American understanding of gay identity has begun to do the same in regards to non-Western and post-colonial queer communities.⁹ Sexual identity can, indeed, be based in a specified national community identity, and is not universally “understood as solely located in the individual in the same fashion as lesbian and gay identity in middle-class Western societies.”¹⁰ Queer identities abroad can be likened to representing an intersectional burden,¹¹ similar, for example, to the one created by race and sex for a Black American woman,¹² or by ethnicity and class for impoverished undocumented immigrants in the United States. This “social constructionist” view of

⁶ See, e.g., Damien W. Riggs, *Priscilla, (White) Queen of the Desert: Queer Rights/Race Privilege*, in *GENDER, SEXUALITY, AND CULTURE*, at 35-36 (William J. Spurlin, ed., vol. 6, 2006).

⁷ For examples of the man described here, see Robert W. Bailey, *Sexual Identity and Urban Space: Economic Structure and Political Action*, in *SEXUAL IDENTITIES, QUEER POLITICS* 231-232 (Mark Blasius ed., 2001).

⁸ Harveen S. Mann, *Sunita Namjoshi: Diasporic, Lesbian Feminism and the Textual Politics of Transnationality*, 30 *J. MIDWEST MOD. LANGUAGE ASS'N* 97, 101 (1997); see also Julie Watson, *Unspeakable Differences: The Politics of Gender in Lesbian and Heterosexual Women's Autobiographies*, in *DE/COLONIZING THE SUBJECT: THE POLITICS OF GENDER IN WOMEN'S AUTOBIOGRAPHY* 139, 146-147 (Sidonie Smith & Julia Watson eds., 1992).

⁹ See, Deborah P. Amory, “Homosexuality” in *Africa: Issues and Debates* 25 *J. OPINION* 5, 8 (1997) (stating that “anthropologists and others have been criticized for roaming the world in search of cross-cultural evidence of the universality of ‘homosexuality,’ in much the same way that Euro-American feminists have been criticized for collapsing all women into a single monolithic category of ‘woman’”).

¹⁰ Niko Besnier, *Polynesian Gender Liminality Through Time and Space*, in *THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY* 311 (Gilbert Herdt ed., 1996); see also BAMFORTH, *supra* note 4, at 49 (1997) (discussing, within the context of United States, United Kingdom and Canadian law, that a “constructionist [queer] account of sexual orientation . . . must be seen as claims for individual rights”).

¹¹ Amory, *supra* note 9, at 5 (1997) (observing that a respected lesbian and gay studies anthropologist “cautioned against the ethnographic cataloguing of same-sex desires and practices around the world, arguing instead for the importance of local, community-based studies that highlight the complex constructions of sexuality as informed by race, class, gender, and nation”).

¹² See, e.g., Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 *STAN. L. REV.* 777 (2000); Joane Nagel, *Ethnicity and Sexuality*, 26 *ANN. REV. SOC.* 107 (2000).

queer identity “echoed many observations made by feminist legal and critical race scholars—that identities are always multiple, and intersected with other identity components.”¹³ Yet American queer identity (similar to American Jewish cultural identity) is not easily fractured into traditionally subordinated elements. As Professor of Law and scholar of sexuality and Diaspora, Sonya Katyal, has noted, “many social constructionist scholars have persuasively shown [that] the development of [a specified] gay personhood is relatively recent and figures far more prominently in Western legal discourse than anywhere else in the world;”¹⁴ queer theorists who study non-Western communities claim that “[c]ategorized sexual identities, such as ‘homosexual,’ are a product of Western modernity”¹⁵ and that the “‘gay diaspora’ now emerging in the West not only disregard or misunderstand the specificity of social and sexual practices currently [abroad], but actually work to reconfigure their significance.”¹⁶ “Some scholars [have argued] that the terms and analytic categories of ‘homosexuality,’ ‘lesbian,’ and ‘gay’ are inappropriate to cross-cultural study of same-sex sexualities,”¹⁷ and Professor of Politics and prominent LGBT political scholar, Dennis Altman, “posits a recourse to ‘indigenous sexualities’ as a response and solution to Western globalization.”¹⁸

In the United States, homosexuality “challenge[s] the traditional assumptions of what nature will allow, the boundaries of moral order, and [American] ideals of middle-class family life;”¹⁹ to many, “[t]he problem with homosexuality during the Gilded Age was that it was fundamentally un-American.”²⁰ As Professor Jonathan Katz, historian of

¹³ Sonia Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM 97, 116 (2002).

¹⁴ Sonia K. Katyal, *Sexuality and Sovereignty: The Global Limits and Possibilities of Lawrence*, 14 WM. & MARY BILL RTS. J. 1429, 1442 (2006).

¹⁵ Ji-eun Lee, *Beyond Pain and Protection: Politics of Identity and Iban Girls in Korea*, in “LESBIANS” IN EAST ASIA: DIVERSITY, IDENTITIES, AND RESISTANCE 49, 57 (Diana Khor & Saori Kamano eds., 2006). See also Ronald Turner, *Traditionalism, Majoritarian Morality, and the Homosexual Sodomy Issue: The Journey from Bowers to Lawrence*, 53 U. KAN. L. REV. 1 (2004).

¹⁶ Phillip Brian Harper et. al., *Queer Transexions of Race, Nation, and Gender: An Introduction*, 53 SOC. TEXT 2 (1997).

¹⁷ Amory, *supra* note 9, at 8.

¹⁸ Jasbir Kaur Puar, *Global Circuits: Transnational Sexualities and Trinidad*, 26 SIGNS 1039, 1061 (2001).

¹⁹ Steven Shaw, *No Longer a Sleeping Giant: The Re-Awakening of Religious Conservatives in American Politics*, in ANTI-GAY RIGHTS: ASSESSING VOTER INITIATIVES 15 (Stephanie L. Witt & Suzanne McCorkle eds., 1997).

²⁰ JAY HATHEWAY, THE GILDED AGE CONSTRUCTION OF MODERN AMERICAN HOMOPHOBIA 11 (2003).

LGBT American history, says, "[e]arly on, the alleged enormity of our *sin* justified the denial of our existence, even our physical destruction. Our crime was not merely against society . . . but against nature . . . Long did we remain literally and metaphorically unspeakable."²¹ Even the word "gay" developed its meaning through the usage of queer American people for the purposes of communicating with one another freely in public while remaining unidentified at "the height of the demonization of homosexuals as 'subversive *aliens*'" and as "dangerous, irrational and unstable pariahs who threatened the nation's children as well as national security,"²² in the United States, unlike abroad, it was not "foreignness that [was] queer," but "queerness that [was] foreign."²³

In contrast to older traditions abroad that have a long history and specifically gendered, caste- or socio-economically-based understanding of sexual minorities, the young, mixing pot culture of the United States neither immediately isolated sexual minority status as a vector of oppression,²⁴ nor developed a conception of gay or queer that inherently and consistently implies the complications of race, ethnicity, or class.²⁵ Therefore, these sentiments about homosexuality became especially strong when sexual orientation became popularly understood as a specified population marker in the United States.²⁶

Prior to the twentieth century, the taboo on "homosexuality" was concerned more with anal sex, and less with who engaged in it.²⁷ In the late nineteenth century, conversely, a new "purity movement" targeted prostitution, issues of gender nonconformity, and the "degeneracy" inherent in "gender inversion."²⁸ Modern-day conceptions of queer identity in the United States began as an association with artistic expression in the early to mid-1900s,²⁹ and came to a head among what

²¹ BAMFORTH, *supra* note 4, at 1 (emphasis in original).

²² GEORGE CHAUNCEY, WHY MARRIAGE? THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY 24, 27-28, 34-35 (2004).

²³ NEVILLE HOAD, AFRICAN INTIMACIES: RACE, HOMOSEXUALITY, AND GLOBALIZATION 81 (2007).

²⁴ BAMFORTH, *supra* note 4, at 1 ("We have been the silent minority.").

²⁵ *Id.*

²⁶ HATHEWAY *supra* note 20, at 11.

²⁷ Andrew Koppelman, *Why Gay Legal History Matters*, 113 HAR. L.R. 2035, 2036-37 (2000) (reviewing WILLIAM N. ESKRIDGE, *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999)).

²⁸ *Id.*

²⁹ *See, e.g.*, HATHEWAY *supra* note 20, at 53-60. *See generally* Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 267, 286 (Carol Vance ed., 1984); MCGHEE, *supra* note 4, at i.

was known as the “Beat Generation.”³⁰ Sexual discussion within schools and communities also did not begin until then, indicating a societal ignorance of and taboo against sexual identities and practices in general.³¹ Rather, racial minority status, ethnicity, and gender were considered to be qualities that were more indicative of personal identity than queerness alone; the burgeoning civil rights movement considered being non-white or female as more burdensome than homosexual status as well, unless the sexual minority status became somehow visible or immediately identifiable, or became gendered, racialized, or ethnicized in some way.³² The first primarily gay and lesbian organizations in the United States such as the Mattachine Society, the Daughters of Bilitis, and the Arcadie circle came together only when the official sanction against homosexual assembly began in the 1940s and 1950s.³³ These sanctions came about because “the overwhelming majority of Americans found homosexuality thoroughly unnatural and abnormal . . . inimical to the American national ideology,” and condemned by God.³⁴ Herein began American queers’ exclusion from the norm, their antagonistic relationship with religious majoritarianism, and their categorization as a “deviant” minority group in the United States.³⁵

Sexual minorities in the United States are not an accepted part of the social order. Rather, this article posits that they embody an “unnatural” category that many believe can and should be changed, and

³⁰ See, e.g., Vincenzo Patanè, *Homosexuality in the Middle East and North Africa*, in *GAY LIFE AND CULTURE: A WORLD HISTORY* 12, 300 (Robert Aldrich, ed. 2006).

³¹ See, e.g., *GAY AND LESBIAN RIGHTS IN THE UNITED STATES: A DOCUMENTARY HISTORY* 41 (Walter L. Williams & Yolanda Retter, eds. 2003) [hereinafter *A DOCUMENTARY HISTORY*].

³² See *PARIS IS BURNING* (Fox Lorber 1991). See generally Cheryl Clarke, *Transferences and Confluences: The Impact of the Black Arts Movement on Literacies of Black Lesbian Feminism*, in *DANGEROUS LIAISONS: BLACKS, GAYS, AND THE STRUGGLE FOR EQUALITY* 189 (Eric Brandt, ed. 1999); Audre Lorde, *There Is No Hierarchy of Oppressions*, *id.* at 306; Mab Segrest, *Race and the Invisible Dyke*, *id.* at 45.

³³ *A DOCUMENTARY HISTORY*, *supra* note 31, at 79; see also NICHOLAS C. EDSALL, *TOWARD STONEWALL: HOMOSEXUALITY AND SOCIETY IN THE MODERN WESTERN WORLD* 300-313 (2003).

³⁴ See H.G. Cocks, *NAMELESS OFFENCES: HOMOSEXUAL DESIRE IN THE NINETEENTH CENTURY* 15, 18 (2003) (discussing prosecution of the “unnatural crime” in nineteenth-century America, and the persecution of “mollies” and “tommies” (gay men and women) by “vice societies and moralizing churchmen”); STEVE ENDEAN, *BRINGING LESBIAN AND GAY RIGHTS INTO THE MAINSTREAM* 320 (Vicki L. Eaklor, ed., 2006).

³⁵ See, e.g., BAMFORTH, *supra* note 4, at 82 (quoting John Boswell as saying, “[m]ajorities . . . create minorities . . . by deciding to categorize them,” and discussing ancient Greek and Roman society’s wherein classification “on the basis of the gender to which [people] were erotically attracted” was not considered useful or important). For more information about the “justifications for prohibition or restriction” of queer expression and activity, see, for example, *id.* at 148-95.

not merely pitied, let alone protected. This article further argues that there is an element of mutability believed of queers in the United States not believed of sexual minorities by other cultures. American sexual minorities are considered "inherently wrongful,"³⁶ deviant,³⁷ immoral actors³⁸ that are not necessarily of low socio-economic status³⁹ or second-class citizenship,⁴⁰ this was particularly evidenced by the "coming out," assimilationist, homophilia movement of the 1960s and 1970s that sought to render visible and "normalize" homosexuality by "insist[ing] that gay people are just the same as heterosexuals except for what they do in bed,"⁴¹ and stating further that this single difference could be resolved by a fairly simple expansion of the new moral code that distinguished this generation's sexuality from that of their parents.⁴²

On the other hand, American queer communities are not subordinated, poor, and politically disenfranchised, relatively speaking, when compared to many other Americans including women, racial minorities, and those living in rural areas. Further, while sexual minority status in the United States has been and continues to be seen as an avoidable sin chosen by immoral people, or, at best, a treatable medical

³⁶ See, e.g., *id.* at 49 (declaring regulations and justifications that treat homosexuality as "inherently wrongful" on moral terms to be the largest set of justifications against queer behavior in the United States and the United Kingdom).

³⁷ See, e.g., Steven Seidman, *From Polluted Homosexual to the Normal Gay: Changing Patterns of Sexual Regulation in America*, in THINKING STRAIGHT: THE POWER, THE PREMISE, AND THE PARADOX OF HETEROSEXUALITY (Chrys Ingraham, ed. 2004); BAMFORTH, *supra* note 4 (showing on its cover a photo of a man protesting "special rights for homosexuals" with a hat that has written on it "Just Say Normal").

³⁸ See, e.g., BAMFORTH, *supra* note 4, at 8-9 (stating that "conservatives . . . talk of the need for the law to defend 'traditional moral values' [and] hold that lesbian and gay sexual acts are immoral"); see generally CARLOS A. BALL, THE MORALITY OF GAY RIGHTS: AN EXPLORATION IN POLITICAL PHILOSOPHY (2003).

³⁹ For examples of the clash between and incongruence of sexual identity and poverty in the United States, see, e.g., Victoria A. Brownworth, *Life in the Passing Lane: Exposing the Class Closet*, in QUEERLY CLASSED 67 (Susan Raffo, ed., 1997); Elizabeth Clare, *Losing Home*, *id.* at 15; Joanna Kadi, *Homophobic Workers or Elitist Queers?*, *id.* at 29 (1997); Ruthann Ribson, *To Market, To Market: Considering Class in the Context of Lesbian Legal Theories and Reforms*, *id.* at 165; Jane Vanderbosch, *Notes from the Working Class*, *id.* at 83 (1997).

⁴⁰ For examples of the clash between sexual and racial/ethnic identity in the United States, see, Elvia Rosales Arriola, *Gendered Inequality: Lesbians, Gays and Feminist Legal Theory*, 9 BERKELEY WOMEN'S L. J. 103 (1994); Harper, *supra* note 16, at 1; Darren Lenard Hutchinson, *Ignoring The Sexualization Of Race: Heteronormativity, Critical Race Theory And Anti-Racist Politics*, 47 BUFF. L. REV. 1, 56 (1999); Jeffrey C. Mingo, *More Colors than the Rainbow: Gay Men of Color Speak About Their Identities and Legal Choices*, 8 L. & SEXUALITY 561 (1998).

⁴¹ ADAM, *supra* note 1, at 69. "The very term they used for their movement—homophile—was designed to minimize the source of their difference from 'normal Americans:' their homosexual desire." CHAUNCEY, *supra* note 22, at 29.

⁴² CHAUNCEY, *supra* note 22, at 32, 34.

malady ranging from the physiological to the psychological (perhaps brought on by sinful thoughts or actions),⁴³ abroad it is often a normal, “natural,” unchangeable quality of some lower classes of people.⁴⁴ This article will explore how, in contrast to the United States, gay in many nations worldwide often means poor, of a different and lower “caste” (which is seen as immutable in the same way race is in the United States), and of an experience related to long-standing subordinated status.

In fact, most discriminatory anti-gay measures in the United States were put in place between the 1920s and 1950s and “dismantled between the 1960s and 1990s,”⁴⁵ and therefore sexual minority status in the United States does not have the type of historical strife, current associations with low socio-economic status, or reduced exposure to basic resources and education that are correlated with pervasively subordinate social standing. Professor of Law and distinguished GLBT scholar, Janet Halley, notes that “sexual orientation and sexual identities have formed the basis for important social movements that [resemble ‘like race’] movements . . . [b]ut in important ways, they lack substance.”⁴⁶ This article argues that if to some extent sexual orientation scholars and leaders of sexuality movements in the United States can penetratingly criticize collective action based on group loyalty,⁴⁷ this is a function of this community’s relative freedom from the fear of potentially losing certain basic civil and political rights, such as the right to vote. This is often mirrored in the community’s presentation of itself in American queer legal theory and in American socialist feminist writing, where, for instance, there is rarely an automatic association between queer identity and poverty.

The documentary *Paris Is Burning*—in which sexuality is portrayed in terms of a work world and civic life, and in terms of complex sexual, racial, and class identifications—is of note because it portrays an American experience of queer identity unlike that of the

⁴³ See, e.g., EDSALL, *supra* note 33, at 69 (discussing how American society has caused a queer subculture to internalize the idea that they are deviant, “criminal or sick or sinful”).

⁴⁴ See, e.g., Theo van der Meer, *Sodomy and the Pursuit of a Third Sex in the Early Modern Period*, in *THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY* 137, 154 (Gilbert Herdt ed., 1996); Serena Nanda, *Hijras: An Alternative Sex and Gender Role in India*, *id.* at 373, 409.

⁴⁵ CHAUNCEY, *supra* note 22, at 14.

⁴⁶ Janet Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 115, 115 (David Kairys ed., 1998).

⁴⁷ See *id.* at 116, 119.

prototypical upper-middle class gay white male.⁴⁸ The movie shows a set of circumstances that link socio-economic status and race to sexual minority status; however, that gay, transgendered, and transsexual Americans are often poor and of color is not a standard popular assumption in the United States. Sexuality combined with poverty and racial minority status compounds the marginalization of the men in this film. This, in addition to the fact that they are in physical proximity of one another, has created an insular group out of their separately queer lives. Sexuality alone has not automated their formation of a discrete lower-class community.⁴⁹

In addition, the idea of affirmative action does not seem to apply as aptly to sexual minorities as it does to racial minorities or women. Affirmative action has been implemented to make up for a long-standing deficiency of baseline equal access to opportunities; queers, especially the closeted, have not necessarily lacked the many opportunities associated with equal education and access to political power. Granting that passing⁵⁰ as not queer compromises the identity and well-being of any queer individual and may not be possible in all instances, it remains an option for some Americans who might wish to gain access to many civil and political rights—except for those that involve the free expression and development of queer personhood and relationships within the context of those rights. For this reason, sexual minorities are a difficult category for American policy-makers, including Congress, to construe as deserving of suspect class status.⁵¹

Sexual minorities are not understood to be normal, immutable members of society that are discriminated against because of natural features beyond their control. Rather, according to courts, they have been restricted from engaging in certain activities because their lifestyles are “unnatural” and deviant, similar to past and present popular conceptions of religious minorities.⁵² Moreover, because of the apparent

⁴⁸ PARIS IS BURNING, *supra* note 32.

⁴⁹ *Id.*

⁵⁰ See generally Kenji Yoshino, *Covering*, 111 Yale L.J. 769, 813 (2002).

⁵¹ See, e.g., Jeffrey M. Goldman, *Protecting Gays From The Government's Crosshairs: A Reevaluation Of The Ninth Circuit's Treatment Of Gays Under The Federal Constitution's Equal Protection Clause Following Lawrence v. Texas*, 39 U.S.F. L. REV. 617, 619-32 (2005).

⁵² For discussions of homosexuality as deviant, see, for example, *Osborne v. Ohio*, 95 U.S. 103, 139 n.12 (1990); *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986); *Boutilier v. I.N.S.*, 387 U.S. 118, 119-20 (1967); *Ginzburg v. U.S.*, 383 U.S. 463, 489 (Douglas, J. dissenting) (1966) (stating that some “obscene” pieces of literature are “normal,” some are masochistic, [and] some deviant in other respects, such as the homosexual”). Further, many Muslims have increasingly been perceived as having deviant religious practices after the events of September 11, 2001 in New

mutability of many queer lifestyles and the historical invisibility and ignorance of queerness in the United States that has allowed some homosexuals to enter positions of privilege, queers are not taken to be a group of people who are historically discriminated against or truly politically powerless in the same way as traditional Fourteenth Amendment protected classes.⁵³

In the article, *From Redistribution to Recognition?*, Professor and constitutional law scholar, Nancy Fraser, highlights two models of rights protection in the United States⁵⁴ that reflect Fourteenth- and First-Amendment-based advocacies, respectively. “Redistribution” is a model in which rights that facilitate greater material equality are used to enhance substantive equality.⁵⁵ “Recognition” allows for the enrichment of substantive equality through a conscious understanding and acceptance of status and identity.⁵⁶ Fraser declares that sexual orientation is the archetype of those social collectivities that fit the recognition model of justice, and that the root of injustice in this model is wholly in culture rather than political economy.⁵⁷

While this is true in the United States and parts of northwestern Europe, this article argues that it is an incorrect general assessment of queer identity around the world, as many formulations of the queer communities and “third sexes” continue to fight for redistributive gains. In fact, if the idea of U.S. queer community as the universal paradigm is decentered, then sexual minority status abroad and in general is revealed to be more closely correlated with lower socio-economic class and “second-class citizenship.” Sexual minorities the world over have an immutable, politically powerless standing more akin to the historical and

York City. For discussion of religion as deviant, see, for example, Employment Div., Dept. of Human Resources of Or. v. Smith, 494 U.S. 872 (1990); Josiah N. Drew, *Caught Between the Scylla and Charybdis: Ameliorating the Collision Course of Sexual Orientation Anti-Discrimination Rights and Religious Free Exercise Rights in the Public Workplace*, 16 BYU J. PUB. L. 287 (2002); Mark A. Edwards, *Law and the Parameters of Acceptable Deviance*, 97 J. CRIM. L. & CRIMINOLOGY 49 (2006); Paul Horwitz, *Scientology In Court: A Comparative Analysis and Some Thoughts on Selected Issues in Law and Religion*, 47 DEPAUL L. REV. 85 (1997); Douglas Laycock, *Religious Freedom and International Human Rights in the United States Today*, 12 EMORY INT'L L. REV. 951 (1998).

⁵³ See, e.g., Vincent J. Samar, *Privacy and Same-Sex Marriage: The Case for Treating Same-Sex Marriage as a Human Right*, 68 MONT. L. REV. 335 (2007).

⁵⁴ See generally NANCY FRASER, *JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE “POSTSOCIALIST” CONDITION* (1997).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* See also Nancy Fraser, *Heterosexism, Misrecognition, and Capitalism, A Response to Judith Butler*, 53 SOC. TEXT 279, 286 (1997).

prevalent condition of American racial minorities than of American sexual minorities.⁵⁸ More so than the general standing of America's sexual minority, many foreign sexual minorities need to be shielded from anti-subordination through protections similar to those offered by the Fourteenth Amendment of the U.S. Constitution. This statement is not to imply that the Fourteenth Amendment should somehow be used to protect queer communities abroad, but to argue that anti-subordination measures are not comprehensive enough for the purposes of advancing gay rights in the United States.

Alternatively, homosexuals and queers in the United States are now seeking substantive due process protections that fall more in line with those that the First Amendment offers, including free expression, freedom of assembly, and freedom from suppression by a state-sponsored moral majority.⁵⁹ Professor of Law and noted LGBT scholar, David A. J. Richards, has "observed that homophobia today in the United States expresses a sectarian religious discrimination against the new forms of conviction and speech of gays and lesbians."⁶⁰ Professor of Law and a pioneer in the field of LGBT legal studies, William Eskridge, notes,

religion and sexual orientation have much in common as identity categories . . . antireligious prejudice is systemically similar to anti-gay prejudice, and . . . the religion clauses of the First Amendment as they have been developed in the last generation are a model for the state's treatment of sexuality. The First Amendment's protections of free speech, association, and press are the leading constitutional assurances against conflict between religious and secular authorities [and t]he religion clauses embody a more particularized vision of

⁵⁸ Many United States Supreme Court decisions (including footnote 4 of *United States v. Carolene Products*, 304 U.S. 144 (1938) which restructured the judicial responsibility behind upholding the anti-subordination clauses of Fourteenth and Fifth Amendments), as well as other formulations of rights and identity around the world unjustifiably assume the immutabilities of race and sex; for more on this discussion, see, for example, Janet Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994). That is not to say that I argue that "race" and "sex" are necessarily more immutable, nor any less created and continually shaped by politics and society, than the infinite varieties of queer identity. Regardless, my point in this paper is not to argue for or against the mutability or general innateness of identity. Rather I wish to highlight assumptions about mutability and other characteristics of various identities as shaped by law, politics, and community, and to utilize common understandings of racial, gendered, and sexual identity to explore queer identity in general for the procurement of queer rights in the United States.

⁵⁹ DAVID A.J. RICHARDS, THE CASE FOR GAY RIGHTS: FROM *BOWERS* TO *LAWRENCE* AND BEYOND 28 (2005).

⁶⁰ *Id.* at 114.

nomic⁶¹ diversity along lines of religious belief. [For example, t]he . . . First Amendment . . . prevents the state from censoring deviant religions and . . . from unduly discriminating against religious belief, [and t]he Establishment Clause prevents the state from enforcing religious orthodoxy. Similar rules against censorship, discrimination, and orthodoxy . . . should be developed, by courts and legislatures to protect sexual orientation minorities as well. Thus, I read the religion clauses as embodying a more general public law insight: The state must allow individual nomic communities to flourish or wither as they may, and the state cannot as a normal matter become the means for the triumph of one community over all others.⁶²

Concepts of queerness, just like those of religion, race, sex, or any variation on these and other themes, are each unique; however, the Fourteenth Amendment has been able to stretch to include women under its umbrella.⁶³ In the same way, there are many core similarities in the roles that queerness and religion play in a people's lives, and many characteristics of queer status to whose protection the First Amendment directly speaks. First Amendment protections for queers, specifically those involving free speech and freedom from suppression by a moral majority, should be given at least as much consideration as is warranted by the numerous broad analogies that exist between religious and queer identities.

Lawrence v. Texas has decriminalized sodomy, and the next step for many activists is the federal legalization of—and hopefully the constitutional protection of—gay marriage. Moreover,

[t]he gay rights question presses ever harder upon American culture, religion, politics, and law. Just as controversies over sodomy laws,

⁶¹ The expression of national values—like equality, liberty, dignity, family, or faith—establish a “realm of meaning” that Robert Cover has memorably called “nomos.” See generally, Robert M. Cover, *The Supreme Court 1982 Term Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

⁶² William N. Eskridge, Jr., *A Jurisprudence of “Coming Out:” Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2414-15 (1997).

⁶³ The law currently implies that “real differences” between men and women make race-based and sex-based discrimination substantively different from one another. Therefore, gender-based discrimination is not afforded the same level of scrutiny under Equal Protection law as is race-based discrimination, although this does not preclude protection under the Fourteenth Amendment for sex-based discrimination. For a description of this, see, e.g., Tuan Anh Nguyen v. I.N.S., 533 U.S. 53 (2001); Monica Diggs Mange, *The Formal Equality Theory In Practice: The Inability of Current Antidiscrimination Law to Protect Conventional and Unconventional Persons*, 16 COLUM. J. GENDER & L. 1 (2007); Jennifer S. Hendricks, *Essentially a Mother*, 13 WM. & MARY J. WOMEN & L. 429 (2007); Laura Weinrib, *Protecting Sex: Sexual Disincentives and Sex-Based Discrimination in Nguyen v. INS*, 12 COLUM. J. GENDER & L. 222 (2003).

child custody and adoption, and protection against discrimination begin to abate, with states (if not federal) law slowly moving toward equality for gays in many parts of the country, the national mind is troubled anew by questions of gays in the military and same-sex marriage.⁶⁴

To develop the addition to the body of work regarding espousing a First amendment method to gay rights furtherance, This article approaches it from the perspectives of two general questions: (1) To what extent are Fourteenth Amendment anti-subordination protections ill-suited to those seeking rights for American queers? and (2) To what extent are the protections afforded by Freedom of Expression and the Establishment Clause well-suited to American's true needs and development of queer identity and queer status? This article will discuss these questions primarily by contrasting queers to sexual minorities abroad that are better suited for traditional anti-subordination protection, as well as to sexual minorities abroad who have less of a need for expressive freedoms and for protection from state-supported conversion or eradication. Analysis inclusive of tenets of international and comparative law have been prevalent in recent Supreme Court decisions regarding civil rights issues, and making a comparison to queer communities outside of the Western world will prove useful in the same vein in understanding the true needs of LGBT communities in the United States.⁶⁵ In addition, this article will construct comparisons between queers and religious minorities, both of whom are considered deviant in the United States. This article will thereby utilize various contrasts and analogies to highlight the important categorization of queer people in the United States as deviant in the eyes of the moral majority,⁶⁶ and will therefore argue for a narrowly-focused, First Amendment-based, Freedom of Speech and Establishment Clause approach for procuring gay marriage in the United States.

Part II of this paper presents an overview of how Fourteenth Amendment anti-subordination protections have been difficult to employ for the purposes of gay rights. Using *Loving v. Virginia* and cross-

⁶⁴ Koppelman, *supra* note 27, at 2035.

⁶⁵ See, e.g., *Atkins v. Virginia*, 536 U.S. 304 (2002) (Scalia, J., dissenting); *Roper v. Simmons*, 543 U.S. 551, 576 (2005).

⁶⁶ See, e.g., ENDEAN, *supra* note 34, at 78 for usage of the term "moral majority" to describe the bulk of Americans anti-gay activists. See also Shaw, *supra* note 19, at 15; John M. Finnis, *The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations*, 42 A. J. JURIS. 97 (1997); John M. Finnis, *Law, Morality, and "Sexual Orientation"*, 69 NOTRE DAME L. REV. 1049 (1994); Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 YALE L.J. 2475 (1997); Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO L.J. 301 (1995).

cultural comparison, this paper further explains why Fourteenth Amendment anti-subordination protections are inadequate for the purposes of establishing legal gay marriage in the United States. Part III establishes two strains of queer rights movements in post-colonial countries such as India and Brazil. The first is a post-colonial, Western-influenced “gay rights” movement that mirrors the revolution occurring in much of the West. The second strain involves an anti-subordination movement sponsored by long-standing queer subcultures that have no counterpart in the United States. In fact, the latter queer movement is fighting for rights such as the right to vote, legal employment, and access to public education, in close analogy to the Black American civil rights movement; however, it is quite disparate from the face of queer culture and gay people’s position in society in the United States. Part IV of this paper develops the idea that American queers are in need of Freedom of Expression and Establishment Clause protection in regards, especially, to the right to marry. This section highlights queer relationships and marriages abroad that do not necessarily encompass expressions of “love” as understood in the West, and that are not labeled as deviant and in danger of suppression by their compatriots. This paper will then draw analogies between queers and religious minorities in the United States, both of whom require protection from suppression by a national moral majority’s assessment of them as deviant. This article also mentions how expressive and anti-establishment techniques for procuring gay marriage will preserve intra-group variance in the queer community by allowing some gays to marry without requiring others to conform to a caricature of “good queer.” In Part V, this paper discusses the potential drawbacks and conflicts inherent in suppressing the expression, identity, and growth of queer individuals, relationships, and communities in the United States. Finally, this paper explores the ways in which refocusing LGBT advocacy and retreating from the effort to gain Fourteenth Amendment suspect class status for homosexuals will legitimize the American gay rights movement both on its own terms as well as in the eyes of advocates of traditional civil rights.

Certainly, anti-subordination theories should not be completely abandoned as legal approaches to queer rights advocacy, especially in regards to hate crimes and within some employment, housing, and child adoption discrimination contexts (that is, within those cases where queers and other suspect classes are joined “in a shared exposure to danger”).⁶⁷

⁶⁷ Halley, *supra* note 46, at 121.

Moreover, homosexuality as "[l]ike race' arguments are so intrinsically woven into American discourses of justice that they can never be entirely forgone."⁶⁸ Instead, this paper shifts the focus to offer a broader base for understanding the needs of queers in the United States and the ways in which they can better obtain protections for these rights, as well as for others such as being out in the military and same-sex marriage. *Lawrence v. Texas*, a case in which "[f]or the first time in the history of American criminal law, the United States Supreme Court . . . declared that a supermajoritarian moral belief does not necessarily provide a rational basis for criminalizing . . . conduct,"⁶⁹ featured Justice Kennedy's statement that in this case a crucial constitutional issue was whether the majority may use the power of the state to mandate its own moral code against the gay community.⁷⁰ While *Lawrence* is couched in the language of privacy and substantive due process, the issue of protecting the rights and freedoms of all Americans from discriminatory suppression by a moral majority is both foundational to the thrust of First Amendment protections as well as key to the *Lawrence* decision. This paper argues that the need for this type of protection is unique to queer people in the United States as opposed to queer people elsewhere in the world, and should therefore fundamentally inform American gay rights legal action.

II. SHORTCOMINGS OF A FOURTEENTH AMENDMENT ANTI-SUBORDINATION APPROACH TO THE FURTHERANCE OF QUEER RIGHTS

Professor of Law, Robert Post, has pointed out that constitutional law and culture are involved in a symbiotic relationship; changes in the law are most successfully brought about when there is some consensus in regards to the intuition behind how law should be applied.⁷¹ Akin to this general rule, judges, lawyers, and those involved in legal battles sense that anti-subordination, as they understand it, is an inadequate label for

⁶⁸ *Id.* at 120.

⁶⁹ Bernard E. Harcourt, Foreword: "You Are Entering a Gay and Lesbian Free Zone:" *On the Radical Dissents of Justice Scalia and Other (Post-) Queers. [Raising Questions About Lawrence, Sex Wars, and the Criminal Law]*, 94 J. CRIM. L. & CRIMINOLOGY 503, 503 (2004).

⁷⁰ *Lawrence v. Texas*, 539 U.S. 559, 571 (2003).

⁷¹ Robert C. Post, Foreword: *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003).

the real experiences of many American queer communities, and this has contributed to the stymieing of the Fourteenth Amendment route for gay rights furtherance.

There are, in fact, two great American egalitarian amendments, the First and the Fourteenth, and “each dealt with what were the principle inequalities of the time: religion and slavery.”⁷² The First Amendment and Fourteenth Amendment approaches to rights protection each independently attempt to better a different harm. The former legally mandates the nomic or moral acceptance of a mutable expression or identity, thereby giving it a place in a society from which it would otherwise be shunned.⁷³ The latter attempts to elevate an identity that, while already accepted by society as valid and intrinsic in those in whom it occurs, is likely quite low in that society’s social hierarchy. Professor of Law and Sociology, Annie Bunting, notes that “essentialism from a dominant position can perpetuate oppression,” but that “as a means of challenging dominant ideologies, it can be necessary and persuasive.”⁷⁴ Yet essentialist arguments—so important to Equal Protection doctrine—unwittingly “suggest that gay rights is part of the neutral procedural republic so fondly imagined by liberal theorists,”⁷⁵ and were adopted by gay rights lawyers because they “fit the more recent American ethos that one should not be penalized for ‘being who one is.’”⁷⁶ Moreover, the Supreme Court’s historical conception of the Equal Protection doctrine has been at odds with the attempts by gay rights litigation to utilize it. While *Frontiero v. Richardson* opened the door for utilizing a history of discrimination, immutability, and increased Court sensitivity to sex-based classifications as means for gaining suspect class status, lawyers

⁷² Professor Guido Calabresi, Lecture at the Georgetown University Law Center (Mar. 24, 2004) (on file with author). During this lecture, Calabresi mentioned in passing the possibility of a “First Amendment” method to gay rights, and was subsequently met with fear by conservative Congressional leaders who saw true potential for gay activism in this approach.

⁷³ See generally, Fraiser *supra* note 57. I believe that nomic acceptance would be a national, moral acceptance of a lifestyle or set of community beliefs. For more information about the relationship between nomos and gay rights, see, for example, William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions For Lesbian and Gay Intimacy, Nomos, and Citizenship*, 1961-1981, 25 HOFSTRA L. REV. 817 (1997).

⁷⁴ Annie Bunting, *Theorizing Women’s Cultural Diversity in Feminist International Human Rights Strategies*, in FEMINIST THEORY AND LEGAL STRATEGY 6, 12 (Anne Bottomley & Joanne Conaghan eds., 1993).

⁷⁵ *Id.*

⁷⁶ *Id.*

were unsuccessful in their attempts to utilize *Frontiero*-type arguments to make a case for gay rights.⁷⁷

Post-*Bowers* courts would occasionally agree that there was a history of discrimination of some sort against homosexuals, but would further observe that gays as a group were not politically powerless, feeding off opinions such as that of the majority in *Bowers*, in which it was posited that homosexuals as a group are politically powerful and class-privileged.⁷⁸ Indeed, in the United States, queers can be class-privileged without categorical paradox. Although the opposite is true abroad, in this nation, queer communities need not be and often are not insular (although those that are poor, of color, or transsexual are more likely to be); therefore, queers in the United States are often specifically not tied to lower socio-economic status. To the extent that polygamy is associated with a poor and isolated Mormon faction, this is the closest the United States comes to an established association between non-mainstream sexual practices and low socio-economic status.⁷⁹

Moreover, immutability, as a characteristic of suspect classification, is theoretically part of a fairness inquiry. The fairness in question concerns whether it is just that equal access to civil rights require an individual to submit to criteria that may be difficult or impossible to fulfill; however, courts did not focus on the fairness of asking a gay person to act straight as much as on whether homosexuality is a choice in any sense of the word.⁸⁰ Upon finding a potentially

⁷⁷ In *Frontiero*, the majority embraced a heightened level of scrutiny for sex-based discrimination by drawing on *Reed v. Reed*, 404 U.S. 71 (1971)—which he read as a rejection of rational basis scrutiny—as well as on analogies between sex and race discrimination in the history of the nation, on the observation that “sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth,” and on Congress’ increased sensitivity to sex-based classifications (as evidenced in what were then recent changes in Title VII law and the attention on the Equal Pay Act). *Frontiero v. Richardson*, 411 U.S. 677, 682, 686 (1973).

⁷⁸ *Bowers*, 478 U.S. 186. See *Lawrence*, 539 U.S. at 571 (Scalia, J., dissenting); *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (displaying the underlying moral disapproval of homosexuality and association of homosexual with deviance by the Justices who joined in Scalia’s dissenting opinions).

⁷⁹ See, e.g., D. MICHAEL QUINN, *SAME-SEX DYNAMICS AMONG NINETEENTH-CENTURY AMERICANS: A MORMON EXAMPLE* (2002); In addition, anthropologist David Knowlton stated in an on-air interview that “Utah and the Mormons have been queer to the nation for a long time.” Paula Smith, *What’s So Queer About Mormons?*, *AFFIRMATIONS*, Apr. 2006, available at http://www.affirmation.org/news/2006_32.shtml.

⁸⁰ Janet Halley notes:

When gay rights advocates began to invoke the “immutable characteristic” simile, they were working from a set of scattered, sketchy rationales occurring at happenstance in race and sex discrimination cases. By translating these “immutable characteristic” references into an “indicia of suspectness” checklist, and implying its

mutable element to queerness, courts had difficulty applying Fourteenth Amendment protections to a group of people who appeared to have agency in identifying themselves in a way that racial minorities or women apparently did not.

Further, *Geduldig v. Aiello*, based on legislation codifying pregnancy-related discrimination, diluted the strict scrutiny applied to sex-based discrimination in *Reed* and *Frontiero*.⁸¹ Since that time, the congressional response to homosexuals has been patchy, and anti-subordination legislative provisions under the auspices of Fourteenth Amendment Equal Protection law have been a failure on the whole.⁸² Provisions under Title VII have also been repudiated by Congress; one such piece of legislation is the Employment Non-Discrimination Act (“ENDA”), a federal statutory response to employment sexual orientation discrimination.⁸³ However, even if ENDA were to eventually pass, Title VII case law and its current application are not analogous to the path that Constitutional Equal Protection law has taken, and cannot be seen as an assurance that Equal Protection law would eventually mirror Title VII advances. For instance, Title VII rights have been divorced from the tiers of scrutiny so fundamental to the treatment of various protected classes in the Equal Protection context. Under Title VII, women receive the same “level of scrutiny” as do racial minorities.⁸⁴ Therefore, while there was a 1976 amendment of Title VII to include the Pregnancy Discrimination Act, Fourteenth Amendment Equal Protection

items were not merely sufficient but necessary conditions for heightened judicial protection, they invited judges to “harden up” the law in this area. Which is just what judges did: federal district courts increasingly stipulated for immutability not as a mere factor but as a prerequisite for heightened scrutiny, even as they persistently concluded that sexual orientation was not an immutable characteristic.

Janet Halley, ‘*Like Race*’ Arguments, in WHAT’S LEFT OF THEORY: NEW WORK ON THE POLITICS OF LITERARY THEORY (Judith Butler et al. eds., 2000); BAMFORTH, *supra* note 4, at 203-06, 229 (1997) (discussing the failure of immutability as a justification for LGBT rights).

⁸¹ See generally *Geduldig v. Aiello*, 417 U.S. 484 (1974); *Frontiero*, 411 U.S. 677; *Reed*, 404 U.S. 71.

⁸² See generally Koppelman, *supra* note 27.

⁸³ For more background information about ENDA, see generally David M. Herszenhorn, *House Approves Broad Protections for Gay Workers*, NY TIMES, Nov. 8, 2007 available at <http://www.nytimes.com/2007/11/08/washington/08employ.html?ex=1195189200&en=7acba0764b689510&ei=5070&emc=eta1>; Joel Wendland, *A New Beginning for ENDA*, POL. AFF. MAG., April 9, 2007 available at <http://www.law.ucla.edu/williamsinstitute/press/ANewBeginningforENDA.html>; Chris Bull, *No ENDA In Sight—Employment Non-Discrimination Act of 1996*, THE ADVOCATE, May 13, 1997 available at http://findarticles.com/p/articles/mi_m1589/is_n733/ai_19736014.

⁸⁴ *Pa. State Police v. Suders*, 542 U.S. 129, 1334-34 (2004) (addressing the issue of the burden of proof in cases of sexual harassment and constructive discharge asserted under Title VII).

law offers absolutely no protection for pregnant women in relation to either men or non-pregnant persons because the ability to become pregnant is considered a "real difference" between men and women that serves as legal justification for sex discrimination.⁸⁵

Despite this fact, a popular yet unsuccessful legal tactic to procure protection for queers has been to claim a violation of the Fourteenth Amendment due to discrimination on the basis of sex.⁸⁶ An example is the Sixth Circuit decision in *Dillon v. Frank*, where Dillon's case was rejected because he was discriminated against on the basis of sexual orientation and not on the basis of sex (as respondent claimed).⁸⁷ Dillon argued that "on the basis of sex" means "because of anything relating to being male or female, sexual roles, or to sexual behavior."⁸⁸ The court found this argument unpersuasive, claiming that Dillon did "not show that his co-workers would have treated a similarly situated female any differently."⁸⁹ This decision is odd, because the slurs against Dillon refer specifically to his perceived attraction to men, while a *woman* who is perceived as attracted to men would likely have been treated differently.⁹⁰ Professor William Eskridge argues in favor of protections that acknowledge that discrimination on the basis of sex has been a constitutional reason for prohibiting gay marriage;⁹¹ Professor of Law and LGBT scholar, Andrew Koppelman, agrees that the argument has merit although he believes that it would be difficult for this line of reasoning to create the sweeping change that Eskridge envisions.⁹²

This article argues that part of the problem in utilizing an Equal Protection sex-based discrimination theory for the purposes of furthering gay rights is that, in the United States, homosexuals are not discriminated against on the basis of male supremacy in the same way that women are. For example, there is a breakdown of the sex-based theory of equal protection discrimination when it is applied to the case of gay marriage. To explain why Fourteenth Amendment Equal Protection precedent is

⁸⁵ See, e.g., Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471 (2001). Just recently, a post-*Hibbs* Supreme Court case ruled against *Boerne* by claiming that Title VII no longer applies to states—this is problematic for the potential for universal gay rights employment protection in the United States.

⁸⁶ See, e.g., *id.*

⁸⁷ *Dillon v. Frank*, 952 F.2d 403 (Table), 1992 WL 5436 (6th Cir. Jan. 15, 1992).

⁸⁸ *Id.* at *4.

⁸⁹ *Id.* at *9.

⁹⁰ See generally *id.*

⁹¹ WILLIAM ESKRIDGE, *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 223 (1999).

⁹² Koppelman, *supra* note 27, at 2053-55.

fairly unlikely to lead to gay marriage rights, Professor and constitutional law scholar, Cass Sunstein, examines the foundational anti-miscegenation case *Loving v. Virginia*.⁹³ The crux of the *Loving* theory of equal protection discrimination is as follows: within *Loving*, the Commonwealth of Virginia claimed its anti-miscegenation statute was “neutrally-applied,” as both whites and people of color were equally proscribed from marrying someone of the other group, and that therefore this law should not trigger strict judicial scrutiny.⁹⁴ The Court dismissed this justification because the inherent and unjustifiable reason for the Virginia ban on interracial marriage was white supremacy.⁹⁵ Therefore, a ban on miscegenation and interracial marriage “discriminates on the basis of race” in violation of the equal protection clause of the Fourteenth Amendment, and is also therefore suspect on its face and deserving of strict scrutiny under the Fourteenth Amendment.⁹⁶

According to Sunstein, the *Loving* framework yields a potential “discrimination on the basis of sex” framework that could potentially validate gay marriage rights under the Fourteenth Amendment.⁹⁷ The analogy has three steps. Each of these steps must make sense when applied to the sexual orientation context for the framework in favor of strictly scrutinizing a state ban on gay marriage. The first step is the claim that discrimination against gay people by prohibiting gay marriage is sex-based, just as the prohibition against interracial marriage prior to *Loving* was based on racial discrimination, and therefore suspect on its face.⁹⁸ The second move involves refuting the justification that the ban on gay marriage is “neutrally-applied;” this is rather easy within the *Loving* context.⁹⁹ The argument that the proscription against same-sex marriage is “neutrally applied,” as men and women are both not allowed to marry the same sex, is similar to the very justification dismissed in *Loving*, namely that the prohibition against interracial marriage was

⁹³ *Loving v. Virginia*, 388 U.S. 1 (1967); Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 16-19 (1994).

⁹⁴ See generally *Loving*, 388 U.S. 1.

⁹⁵ As evidenced partially by the fact that prior to *Loving*, different minority groups could marry each other, and only whites were required to marry within the white community. See generally *id.*

⁹⁶ *Id.*

⁹⁷ Sunstein, *supra* note 93 at 16-19.

⁹⁸ *Id.*

⁹⁹ *Id.*

"neutrally applied" because both whites and people of color were equally not allowed to marry each other.¹⁰⁰

The breakdown of the application happens at the third point in the *Loving* analogy. The Court said that white supremacy was the inherent and unjustifiable reason for the Virginia ban on interracial marriage;¹⁰¹ however, it is difficult to apply this idea wholesale to the situation of American sexual minorities. The cognate within the same-sex context is that male supremacy is the unjustifiable reason for a ban on gay marriage.¹⁰² Within the context of the right to marriage and other expressly identity-oriented, distinctively American gay rights (such as the right to claim one's identity in the military), the ideal counterpart in this comparison would be heterosexual supremacy. However, this counterpart is incongruent with the *Loving* analogy.

This is not to say that relationships between heterosexual and queer people in the United States developed apart from the considerations and activism of feminism.¹⁰³ Gender- and sex-based discrimination issues do play a vital part in violence and workplace discrimination against gays. Further, male supremacy has played a role in the legal power dynamics that have been inherent in the institution of marriage throughout its history. William Eskridge puts well the history of how the reinforcement of gender roles has led to fear and revulsion for queer people,

[s]etting up the effeminate man as a degeneration of masculinity, men were reassured of their manhood. Setting up the lesbian as an object to be feared, men asserted their central role in women's lives. The creation of homosexuals as a despised class reinforced the gender norms of male superiority and control.¹⁰⁴

However, "gay rights" began as a movement for gay men alone, focusing on neither socio-economic nor sexual power dynamics between men and women.¹⁰⁵ Conversely, any alliance between gay men and lesbians, even if sometimes unsuccessful,¹⁰⁶ shows that sexual activism need not be centered solely on issues of gender.¹⁰⁷

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 17-19.

¹⁰² *Id.* at 20.

¹⁰³ See generally ADAM, *supra* note 1; CHAUNCEY, *supra* note 22 at 30.

¹⁰⁴ ESKRIDGE, *supra* note 91, at 224.

¹⁰⁵ See, e.g., BAMFORTH, *supra* note 4, at 64 (discussing "gay rights" as originally gender-specific).

¹⁰⁶ See, e.g., ADAM, *supra* note 1, at 102-04.

¹⁰⁷ See, e.g., *id.* at 101.

On the other hand, the *Loving* analogy in which male supremacy is the root cause of discrimination against queers fits some international queer rights cases well. In non-Western countries, an understanding of the denial of gay rights as discrimination on the basis of sex makes sense. Many queer identities internationally have a caste¹⁰⁸ attached to them that is uniquely their own, and therefore difficult to include in a social hierarchy except in countries that have an explicit caste system.¹⁰⁹ Therefore, the label of a “third sex”¹¹⁰ is applied to many queer (often transgendered)¹¹¹ identities abroad, including the Thai *Kathoey*,¹¹² the Indian *Hijra*, the Brazilian *Travesti*, and others, partially because these communities appear to outsiders to be heavily concerned with constructions of performative gender.¹¹³ Therefore, perhaps for lack of a better hierarchy, queer identity abroad as a “third sex” is placed on a sex/gender continuum in which male supremacy is the leading factor in the subordination of queer identities.¹¹⁴ It is also for this reason that there is a particular ignorance of, or denial of, “lesbian” or same-sex women’s relationships and identities in these countries as opposed to that of queer men.¹¹⁵ Male supremacy is a likely cause of the denial of political,

¹⁰⁸ Caste is a relatively immutable, hazy combination of class and race. It can also include sex, as in the present case of queer identities or “third sexes.”

¹⁰⁹ An explicit caste system may be official or unofficial, and may even be assigned based on a variety of other identifying characteristics or even based on sexual identity.

¹¹⁰ See, e.g., Puar, *supra* note 18, at 1060.

¹¹¹ Erick Laurent, *Sexuality and Human Rights: An Asian Perspective*, in *SEXUALITY AND HUMAN RIGHTS: A GLOBAL OVERVIEW* 163, 169 (Helmut Garupner & Phillip Tahmindjis eds., 2000).

¹¹² “Transgenders [in Thailand] . . . are known as *Kathoey*, where they are often viewed as a third sex.” For instance, “the winners of their annual beauty contest are often favorably compared with the winners of the official Miss Thailand contest held at the same time.” *In Brief: Transgenders in Asia*, PLANETOUT (Oct. 6, 2000), <http://www.planetout.com/news/article.html?2000/10/06/5>. See also Laurent, *supra* note 111, at 187-90 (discussing general Thai tolerance for queer people).

¹¹³ See, e.g., Rosalind C. Morris, *All Made Up: Performance Theory and the New Anthropology of Gender*, 24 ANN. REV. OF ANTHROPOL. 567 (1995).

¹¹⁴ The “third sex” is in some sense primarily an issue of “gender” (as defined by first-wave feminists) over sex, as sexual minorities are often “primarily defined in social and cultural terms.” Besnier, *supra* note 10, at 286. This allows the category a level of complexity that the other two “sexes” (male and female) do not have, while still placing it on the same sex/gender spectrum as that of “male” and “female.”

¹¹⁵ See, e.g., Dennis Altman, *Global Gaze/Global Gays*, in *SEXUAL IDENTITIES, QUEER POLITICS* 96, 100 (Mark Blasius ed., 2001) (discussing a greater global space for the self-discovery of gay men and a general lack of lesbian and gay alliance in “Gay Asia”); Juanita Díaz Cotto, *Lesbian-Feminism Activism and Latin America Feminist Encuentros*, in *SEXUAL IDENTITIES, QUEER POLITICS* 73 (Mark Blasius ed., 2001); Rosalind Pollack Petchesky, *Sexual Rights: Inventing a Concept, Mapping an International Practice*, *id.* at 118-133 (discussing “sexual rights” as queer politics and as a new concept in human rights). I argue also that the flip side of this sexism inherent in many cultures conceptions of queerness is a disgust for male-male relationships

educational, and socio-economic rights to queers abroad to an extent that is not found on nearly the same scale in the United States, and in turn has shaped and defined queer communities internationally in a way that has not occurred to the same extent in the Western world. Yet, more common than the American born into poverty and a lack of access due to his queer status, is the American youth who feels compelled to give up wealth, status, and family/community support to protect himself and preserve his identity after being rejected in response to his coming out; claimed gay identity is evenly distributed across socio-economic lines, and may even be concentrated in upper class families where children are more likely to be exposed to information that aids in their self-realization.¹¹⁶ In the end, subordinating laws and historical patterns are not what deny these children access to employment, education, and even housing, as they do in other countries. Rather, it is societal and parental revulsion to the expression, assertion, and performance of their identities that results in the suppression of queer American youth.¹¹⁷

III. QUEERS ABROAD COMPARED TO THOSE IN AMERICA: NATURAL AND INFERIOR vs. DEVIANT AND IMMORAL

A. INTERNATIONAL AND ETHNIC QUEER CASE STUDIES

"Dennis Altman suggests that most approaches to theorizing globalization and gay and lesbian identities involve some kind of hybridization of 'indigenous' and imported concepts of identity,"¹¹⁸ and

because they are seen as feminizing of the men, and even, in some rare instances, a celebration of women who take on queer, masculinized roles, such as female berdache two-spirits. See, e.g., Leila J. Rupp, *Loving Women in the Modern World*, in *GAY LIFE AND CULTURE: A WORLD HISTORY* 225 (Robert Aldrich, ed. 2006).

¹¹⁶ John Cloud, *The Battle Over Gay Teens*, TIME, October 2, 2005 (discussing the Point Scholarship, which encourages strong gay teenagers and is available only in certain high schools.); Sarah Wildman, *Queer Lit for the Gay Teen*, SALON, Nov. 11, 2003, http://dir.salon.com/story/mwt/feature/2003/11/11/queer_lit/index.html?source=search&aim=/mwt/feature.

¹¹⁷ See, e.g., BAMFORTH, *supra* note 4, at 68 (Quoting a United States Department of Health and Human Services report that said "[g]ay and lesbian youth are strongly affected by the negative attitudes and hostile responses of society to homosexuality. The resulting poor self-esteem, depression and fear can be a fatal blow to a fragile identity.").

¹¹⁸ Puar, *supra* note 18, at 1061.

an intricate combination of the two does exist internationally in regards to homosexual communities. Many countries are influenced by conflicting ideology: the first being that of queers as long-standing members of an indigenous lower class; and the second being that of queers as the import of immoral colonists.¹¹⁹ An additional complicating factor is that European and other colonizing governments and societies exported homophobia itself to colonial and tribal societies through forced law and the spread of missionaries.¹²⁰ The resulting scorn for homosexuals is a contempt borne of religion that is itself often an import and it has contributed to the representation of queer populations as foreign contaminants.¹²¹ Yet, rather than the queer population itself being a leftover of foreign rule, it is possible that the more prevalent colonial residue is hatred for that population.¹²² European settlers certainly did not introduce homosexual male sex in southern Africa,¹²³ and Professor Neville Hoad, expert on issues of homosexuality in Africa, even argues that continued sodomy was a primary form of resistance against colonizing Christian missionaries.¹²⁴ However, the settlers did

¹¹⁹ MARC EPPRECHT, HUNGOCHANI: THE HISTORY OF A DISSIDENT SEXUALITY IN SOUTHERN AFRICA 152-83 (2004) (discussing post-colonial “African cultures of discretion or denial around same-sex desire”).

¹²⁰ See, e.g., Laurent, *supra* note 111, at 172; Claudia Roth, German Parliamentary Member and Federal Gov’t Comm’r for Human Rights Pol’y & Humanitarian Aid at the Ger. For. Off., Keynote Speech on the 22nd Lesbian and Gay Ass’n Conference in Manila, Philippines (Nov. 18, 2003), available at http://www.ilga.org/news_results.asp?LanguageID=1&FileCategory=1&FileID=409.

¹²¹ “One of the foundational fears underlying [post-colonial, Christian] homophobia [in Africa] is that homosexuality is contagious” EPPRECHT, *supra* note 119, at 184.

¹²² Ahmar Mustikhan, *A Ruling Heard Around the World*, PAC. NEWS SER., June 30, 2003

London-based international gay rights activist Peter Tatchell says [India’s anti-sodomy statute], a relic of British colonial rule, is the unfinished business of India’s emancipation struggle. Tatchell adds, “India’s current anti-gay laws were imposed by the British colonial administration. The real Western import is homophobia, not homosexuality.” Though Britain struck its own anti-sodomy law off the books in 1967, it still exists in at least half a dozen of its former colonies.

<http://www.alternet.org/story/16301>. See also Amory, *supra* note 9, at 5-6 (stating that “[v]irulent homophobia may be the real western perversion at work” and that “the anxieties of ‘homosexuality’ from a European perspective pervade the unequal relations between colonizer and colonized”); Laurent, *supra* note 111, at 163-214 (discussing the homophobic Western colonial influence, such as through British imposed anti-sodomy laws, on India, Sri Lanka, China, Hong Kong, Thailand, Singapore, Laos and Indonesia); Altman, *supra* note 115, at 106 (discussing the same for Bali, which was once considered a “gay paradise”).

¹²³ See, e.g., Amory, *supra* note 9, at 5 (stating that “there is a long history of diverse African peoples engaging in same-sex relations”).

¹²⁴ HOAD, *supra* note 23, at 12-20.

coin the understanding of sodomy as "an unnatural offence."¹²⁵ For instance, Zambian anti-gay laws were either non-existent or unenforced until the recent Westernization of the country—since then, laws targeting homosexuals have become more stringent.¹²⁶

Accepted and even idolized portrayals of homosexuality, bisexuality, and androgyny, as well as express recognition of the "natural" existence of transsexuals and hermaphrodites, date farther back than 2700 BCE in countries of the Indus Valley civilization (including India, Pakistan, and Middle Eastern nations); 1890 BCE in the region of South America that is now Brazil;¹²⁷ and 722 BCE as "a[n unexceptional and accepted] component of the sex life of the rulers in many [Chinese] states."¹²⁸ An exploitive retelling of the Christian story of Ham arguably contributed to the creation of "Blackness" and equated it with sin, making it part of the foundation of the modern-day oppression of "Black" people.¹²⁹ Similarly, the Indian "third sex" *Hijra*¹³⁰ community's religious story, portraying them as pious and sacred,¹³¹ has been suppressed by latter-day mainstream Indian Hindu culture, especially the

¹²⁵ See, e.g., EPPRECHT, *supra* note 119, at 130.

¹²⁶ Karen Tranberg Hansen, *Part of the Household Inventory: Men Servants in Zambia*, in *AT WORK IN HOMES: HOUSEHOLD WORKERS IN WORLD PERSPECTIVE* 119-145, 135 (Roger Sanjek & Shellee Colen, eds., 1990).

¹²⁷ For further exploration of the history of the accepted queer practices of South American, Asian, African, European and Native American peoples dating back to the classical period, through the Renaissance and until the present time, see Harry Benjamin, *The Transsexual Phenomenon*, SYMPOSIUM, http://www.symposion.com/ijt/benjamin/appendix_c.htm#Cross-cultural%20data.

¹²⁸ Laurent, *supra* note 111, at 179.

¹²⁹ The Genesis 9 story:

[T]ells of Ham, who dared to look at his naked father, Noah, lying in a drunken torpor in a tent When Noah later hears of Ham's slight, he curses Ham's son Canaan to slavery—for all time, some say. While the Genesis story does not mention skin colour, Ham has been represented as a "black" person in retellings and art "In antebellum America, for instance, that belief was the single greatest justification for maintaining black slavery, and for keeping that social order in place for centuries [W]hat white people saw when they looked at black people" . . . was the personification of sin In early Christianity . . . black Africans served as a metaphor for sin This equation of blacks with sinfulness persisted for centuries.

Ham's Curse, Blackness and Sin, MONDAY PAPER, Mar. 29, 2004,, available at <http://www.news.uct.ac.za/mondaypaper/archives/?id=4373>.

¹³⁰ This Hindi word is most easily translated to "eunuch," because this was the simplistic terminology associated with the term "Hijra" by nineteenth century European anthropologists. A careful examination into Sanskrit texts reveals a much wider definition that includes homosexual, transgendered, and transsexual (generally "male → female") individuals as well as "effeminately" gay, intersexed, and castrated males.

¹³¹ *Hijra* community history is founded on a number of religious tales from the pages of a Hindu epic/instructional text called the *Mahabharata*, as well as on foundational writings such as the *Vedas* and the *Puranas*.

fundamentalist faction that developed after the beginning of British rule. The elision of this Hindu scripture has perhaps provided a basis for the oppression of the *Hijra* community in India analogous to the oppression of Black communities in the United States and elsewhere, as furthered by both the mutation of Christianity and the historical impulse towards abuse of vulnerable populations. In this way, *Hijras* have become relegated to religious minority status as well as ghettoized into sexual minority status in India.¹³² The long tradition of *Hijra* subculture showcases them as marginalized low-caste groups structured like families of subordinated, insular minorities who, while in the past often enjoyed the patronage of Hindu kings or maharajas, now survive as entertainers.¹³³

In fact, the legal subordination of sexual minorities in the Indus Valley may be almost entirely due to outside influence.¹³⁴ However, despite increased persecution during colonial times, the sizeable, currently disenfranchised *Hijra* community has respected and honored roots in Indian Hindu society; this is reflected by the fact that their presence is still often requested at weddings and the baby showers of male children. In fact, further example of this phenomenon can be seen in Native American tribes, where “Berdache typically were men who

¹³² See, e.g., *South Asian Gay Rights*, *supra* note 112. Now and in the past, *Hijra* have kept their own societies or town quarters and have performed specific occupations such as that of masseur, hairdresser, flower-seller, and domestic servant. Yet they continue to be generally attributed a semi-divine status. Their participation in religious ceremonies, especially as dancers and devotees of certain temple gods/goddesses, is considered auspicious and a symbol of good luck, peace, and cultural prosperity in traditional Hinduism. While this custom has diminished since pre-colonial times, Hindus continue to believe somewhat that third-sex people have special powers allowing them to bless or curse others. AMARA DAS WIEHELM, TRITIYA-PRAKRITI, PEOPLE OF THE THIRD SEX 6 (2003). For further, general information about the history of *Hijra*, see G. BUHLER, THE LAWS OF MANU (2001); DEVDUTT PATTANAIK, THE MAN WHO WAS A WOMAN AND OTHER QUEER TALES FROM HINDU LORE (2002). Other “third sex” groups in India include the Aravani of Tamil Nadu, the South Indian Jogappa, and the Sakhi Bekhi and Gauranga-Nagaris of Bengal, Orissa and Uttar Pradesh. Each of these groups has festivals and worship that date back for centuries, and the practices and presence of each was denounced and became more closeted after the arrival of British colonizers.

¹³³ Interestingly, in the United States, Harlem (a well-known Black neighborhood in New York City), as well as many immigrant neighborhoods, were the site of some of the first manifestations of queer identity. Indeed, Harlem was considered a somewhat more open atmosphere in part due to the fact that associations with either Black people or queers by the dominant majority were considered a form of either cultural or moral transgression. CHAUNCEY, *supra* note 22, at 15.

¹³⁴ Laurent, *supra* note 111, at 172, 176; Jyoti Sharma, *Why Should Homosexuality Be a Crime?*, TIMES OF INDIA, Sept. 18, 2003 (noting that “while the British drafted Section 377 of the IPC, replacing a tolerant Indian attitude towards sexuality with a highly oppressive one, this law was repealed in the UK in 1967”).

dressed as and performed the roles of women but also acted as healers and spiritual leaders, integral to everything from childrearing to mediating disputes between tribal members."¹³⁵

Currently *Hijra* are treated by Indian society with a mixture of scorn and respect/fear,¹³⁶ which shows confusion over their hierarchical status in society, due to the opposing influences of ancient Hindu authority and colonial rule. Similarly in the Native American community, many tribes once considered gay men to be "Two Spirit," a unique mix of feminine and masculine characteristics that were once considered to be good fortune in the Native American community, but whose reputations have now been tainted by the forced morality of the American government.¹³⁷ In Brazil, common law has long accepted gay couplings despite the influence of official European anti-gay policy, a paradox that also implies a tenuous relationship between indigenous legal and social acceptance of queers and foreign homophobic pressure.¹³⁸ In such instances, there is a curious interplay between the intranational (or "native") treatment of homosexual as an inferior but nonetheless immutable and therefore fairly acceptable category of person, and the transnational (or "foreign") dismissal of homosexuality as a moral deviance.

Professor and expert in LGBT Studies, William J. Spurlin, writes,

[t]hough it is politically important to expose and critique nationalist representations of homosexuality that may be oppressive and impede further decolonization of the mind, it is equally important to challenge assumptions coming not only from cultural nationalism but also from western queer politics that appropriate queer movements in the developing world as mere mimicry of queer identities and political practices in the West.¹³⁹

From this context come two threads of queer rights action in, for example, India and Brazil, in which "'gay' is . . . seen as a new

¹³⁵ See, e.g., Will Roscoe, *How to Become a Berdache: Toward a Unified Analysis of Gender Diversity in THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY* 329 (Gilbert Herdt ed., 1996); *Berdache Marriage*, Sept. 30, 2004, <http://answers.google.com/answers/threadview?id=408324>.

¹³⁶ Adrian Carton, *Desire and Same-Sex Intimacies in Asia*, in *GAY LIFE AND CULTURE: A WORLD HISTORY* 326 (Robert Aldrich, ed. 2006); Nanda, *supra* note 44 at 373, 377.

¹³⁷ Susan M. Barbieri, *Celebrating His Spirit*, STAR TRIB.-VARIETY (Minneapolis-St. Paul), June 25, 2005, available at 2005 WLNR 10122835; HATHEWAY *supra* note 20, at 50-51.

¹³⁸ *What about Brazil?*, <http://www.loveseesnoborders.org/brazil.html>.

¹³⁹ WILLIAM J. SPURLIN, *IMPERIALISM WITHIN THE MARGINS: QUEER REPRESENTATION AND THE POLITICS OF CULTURE IN SOUTHERN AFRICA* 104 (2006).

[Western] category, not replacing traditional [queer categories], but existing beside them.”¹⁴⁰ The first strain of activism—“gay” rights—can often be mapped back to resistance to colonialism, and arguably tries to combat the view that same-sex relations are immoral, unnatural, and repugnant to the national [religious] majority.¹⁴¹ The protections sought by this activism are of the type established in the U.S. First Amendment, including expressive freedoms, freedom from suppression by a moral majority, and freedom of identity and religious rights. Legal queer rights activism in India, Brazil, and a few nations in Southern Africa is attempting to secure these protections by eliminating proscriptions against freedom of association for gays, gay activism, same-sex sodomy, as well as other laws subjugating gay identity, including the persecution of those identified as “homosexual”¹⁴² and bans on gay unions and marriage.¹⁴³ To a great extent, this type of advocacy parallels the general American gay rights movement, in which LGBT advocates are attempting to secure rights such as marriage and those related to conceptions of identity, including the right to change one’s gender (with or without sex reassignment surgery) on official governmental documentation such as birth certificates and licenses.¹⁴⁴

The second form of advocacy in India, Brazil, and many other nations arguably pushes against the conception of queer identities as indigenous and natural but inferior. The types of protections sought by this form of advocacy would fare well with Fourteenth Amendment anti-subordination-type legal activism, as utilized for suspect classes in the United States. The queer movement against this kind of anti-subordination, without as much of a counterpart in the United States, involves the progression of sexual minorities from the lower echelons of societal hierarchy into the social, economic, and political mainstream. This type of advocacy has led to the inclusion of sexual orientation as a protected status in South Africa’s constitution, titled “Section 8 on

¹⁴⁰ Laurent, *supra* note 111, at 169.

¹⁴¹ See, e.g., ADAM, *supra* note 1, at 92-93 (stating that “[t]he postwar hegemony of the United States” has had an impact on the “social organization of homosexuality,” but national traditions, social preconditions, differences in language and economic systems have caused the movement to branch into different paths in third world countries).

¹⁴² See, e.g., Amory, *supra* note 11, at 5.

¹⁴³ As a side note, a lack of colonial history has meant that “[i]n Southern Europe and [parts of] Latin America, gay organizations have proved much more ephemeral, traceable to important differences in economies and politics.” ADAM, *supra* note 1, at 95.

¹⁴⁴ For a discussion of this issue and inside and outside of the United States, see Dean Spade, *Resisting Medicine/Re/Modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15 (2003).

Fundamental Rights,"¹⁴⁵ and to the passing of the Brazilian Resolution on "Human Rights and Sexual Orientation" in 2003 to protect the rights and freedoms of sexual minorities such as the prominent, but poor and relatively powerless, *Travesti* in a manner similar to the protection American civil rights legislation affords racial minorities.¹⁴⁶ The closest U.S. legislation to South Africa's Section 8 is the Fourteenth Amendment, while the Brazilian Resolution is analogous to the unique sovereign nation protections offered by the United States government to Native Americans.

Moreover, Indian *Hijra*, currently "forbidden to take regular jobs,"¹⁴⁷ are taking this advocacy tact by forming unions to protest their socio-economic, labor, and political subordination; suggesting further that they might form their own political party and contest the country's future parliamentary elections;¹⁴⁸ and (analogous to the U.S. civil rights movement) working towards access to education and the right to vote.¹⁴⁹ An example of this movement is the situation of an Indian *Hijra*, "Kamla Jaan, [who fought] a legal battle to retain the mayorship of Katni in Madhya Pradesh. Elected mayor of the town [in 2000] from a constituency seat reserved for women, Jaan [challenged] a verdict which ruled her a 'he' and not a 'she.'"¹⁵⁰ Here, a subordinated sexual minority was originally implicitly included in the sex/gender spectrum as a victim of male supremacy. Ostensibly to combat this male supremacy, the state of Madya Pradesh has reserved spaces for women in government and allowed one to go to Jaan, a sexual minority. But the system breaks down when Jaan's subordinated place in the hierarchy is challenged by a religious, moral, post-colonial perspective that will not recognize Jaan's *Hijra* identity as valid or constitutive be it considered inferior or

¹⁴⁵ Amory, *supra* note 11, at 8 (1997).

¹⁴⁶ *Travesti* are a highly visible but poor, insular group of Brazilian "male to female" transgendered/transsexuals. They support themselves as entertainers and escorts, and through legalized prostitution. They don't identify as women, and many regard men that do so as mentally disturbed. *Travesti* don't quite see themselves as gay either, but have formed a new category for themselves that embodies, in some ways, the idea of a "third sex." See generally DON KULICK, *TRAVESTI: SEX, GENDER, AND CULTURE AMONG BRAZILIAN TRANSGENDERED PROSTITUTES* (1998).

¹⁴⁷ Laurent, *supra* note 111, at 172.

¹⁴⁸ David Orr, *India's Impotent Are a Force to be Reckoned With*, SCOTLAND ON SUNDAY, Oct. 6, 2002, available at <http://news.scotsman.com/latestnews/Indias-impotent-are-a-force.2366893.jp>.

¹⁴⁹ *Hijra* were given voting rights in India in 1994. Ayesha Hoda, *Accepting the Third Gender*, SOUTHASIA MAGAZINE, Sept., 2007, available at <http://ayeshahoda.blogspot.com/2007/10/accepting-third-gender.html>; see also SERENA NANDA, GENDER DIVERSITY: CROSSCULTURAL VARIATIONS 37-40.

¹⁵⁰ Orr, *supra* note 148.

otherwise and insists that she is simply male. On the other hand, in 2002 Shabnam Mausi became the first *Hijra* in India to occupy a seat in a state assembly.¹⁵¹ The Indian media explicitly mentioned that she did this, however, not based on a female or *Hijra* ticket, but on her anti-corruption policy.¹⁵² These cases together parallel the fight for political inclusion that women and racial minorities have undertaken in American history by highlighting the desire of a Fourteenth Amendment suspect class minority to first to be included in our system of political representation even if only as a “token minority,” and then to be included based on “objective” qualities of excellence unrelated to the previous token minority status.

Additionally, the U.S. Armed Forces have a history of soliciting servitude from poor or second-class citizen communities of color (Black and Latino, for example). While they have been segregated from white troops, African-Americans have never been banned from serving. On the other hand, while homosexuals in the United States were freely allowed in the military at first,¹⁵³ once they began revealing or expressing their sexual identity in any way, they were banned and thrown out from the services.¹⁵⁴ The question remains as to whether it was the revelation of their queer identity itself that caused rejection from military culture, or whether their identity (as separable from expression) is tolerable but its expression is not (as implied by the phrase “Don’t Ask, Don’t Tell”).¹⁵⁵ Professor Sonia Katyal notes that in *Ben-Shalom v. Marsh*,

¹⁵¹ *Id.* See also Shabnam Mausi, WORLD AIDS CAMPAIGN 2001, available at <http://www.thebody.com/content/art768.html>.

¹⁵² *Id.*

¹⁵³ War instigated the first mass movement of queers in the United States—consisting of those enlisting in the service—towards finding national community. They were still closeted after joining the services, but were at least no longer as geographically isolated. BEFORE STONEWALL (Jezebel Productions 1985). Finding community is not an issue for ghettoized Fourteenth Amendment subordinated classes such as race and ethnicity, nor for those sexual minorities abroad that are forced to live in their own communities. Gender-based community in the United States treads a line between that of race (the classic characteristic associated with subordinated classes in the United States) and sexuality.

¹⁵⁴ *Id.*

¹⁵⁵ *Meinhold v. U. S. Dep’t of Defense*, 808 F. Supp. 1455, 1457 (C.D. Cal. 1993) (noting that the Navy maintains the policy despite a commissioned study revealing that sexual orientation was unrelated to job performance), *aff’d in part, rev’d and vacated in part*, 34 F.3d 1469 (9th Cir. 1994) (holding that while the Navy’s policy of mandatory discharge of service members who engage in homosexual conduct was permissible, plaintiff’s discharge was impermissible because he only stated he was gay). See also *Able v. United States*, 880 F. Supp. 968, 974 (E.D.N.Y. 1995), *vacated and remanded*, 88 F.3d 1280 (2d Cir. 1996). But see *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996) (en banc) (upholding the policy), *cert. denied*; Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 59 (1996). There is evidence that the “Don’t Ask,

the Seventh Circuit rejected First Amendment protections for an army member who had been denied re-enlistment based on her statement that she was a lesbian, despite the lack of proof that she had ever engaged in sexual activity with another woman It was the "act of identification," the Court observed, the simple assertion of an "identity that makes her ineligible for military service," rather than the "speaking of it aloud."¹⁵⁶

This distinction between the U.S. military's treatment of homosexuals versus racial minorities seems to point to queers in the United States as a distasteful and unnatural presence that should be rejected by consummate American institutions regardless of their utility. This is a contrast to the idea of some racial minorities as inferior but an expected staple of American society, and useful for labor.¹⁵⁷

On the other hand, the status of some, more "foreign" racial minority groups within American society may be more similar to that of queers in the United States than are those racial minorities for whom the Fourteenth Amendment was explicitly passed. Racial minorities such as Asians (Chinese, Japanese and others) and Arabs appear to inhabit a space between the subordinated and excluded politic in the United States. Minorities who were not indigenous to the United States nor integral to its youth and formation have an inherent "foreignness" that caused the United States to shun them and deny them the definition of "human" in a different way than has been denied of Blacks. For example, while the Chinese were instrumental in building a series of railroad systems in the West and Northwest, the Chinese Exclusion Act of 1882 completely denied the Chinese entry to the United States during "an absolute 10-year moratorium on Chinese" immigration as "the first significant law restricting immigration into the United States."¹⁵⁸ Here, "for the first time, Federal law proscribed entry of an ethnic working group on the premise that it endangered the good order of certain localities."¹⁵⁹ The Gentlemen's Agreement provided a similar arrangement for Japanese in

Don't Tell" policy held in general society for gay people when they first began to gain an identity in the 1950s. CHAUNCEY, *supra* note 22, at 26-27.

¹⁵⁶ Katyal, *supra* note 13, at 106-107.

¹⁵⁷ One could compare the situations of these two groups to the Indian *Hijra* community, who are considered distasteful but also useful for religious purposes as well as for labor, and relegated to a low caste at the intersection of ethnic and sexual minority status. For an example of an intersection between queer people as immoral and as second-class during a brief period in United States history, see *infra* note 217.

¹⁵⁸ *Chinese Exclusion Act (1882)*, TEACHING WITH DOCUMENTS: USING PRIMARY SOURCES FROM THE NAT'L ARCHIVES (U.S. Nat'l Archives & Records Admin., Wash. D.C.), available at <http://www.ourdocuments.gov/doc.php?flash=true&doc=47>.

¹⁵⁹ *Id.*

the early 1900s, in exchange for the humane treatment of Japanese already in the United States.¹⁶⁰

Similarly, while Blacks and whites were segregated from one another in public places and on public transport, the idea of a Chinese person riding a train in the white section was problematic to some on the Supreme Court in the late 1800s because they were considered so unlike whites—more so than Black citizens, despite the ill-treatment of them—that they were otherwise denied citizenship, and there was no obvious space for them within life in the public American domain.¹⁶¹ Apparently, an understanding of the Asian races as “inferior” could not be separated from the view of them as “foreign.” This perspective applies also to many queer persons, who are excluded from the military and from the institution of marriage, unless they can conform to heteronormative society. To the extent that “foreign” racial minorities could never pass in this way, the Fourteenth Amendment, while not explicitly developed for the purposes of “foreign” minorities, is still the sole provider of access to the rights it guarantees.

However, civil and political rights,¹⁶² fundamental to an understanding of what the Fourteenth Amendment guarantees, are a non sequitur when discussed in terms of those sought by the American gay rights movement. As explained below, most of these rights have never been explicitly or even systemically denied to homosexuals in the United States. Gay activism emulated the civil rights movement during its nascent period and found that, as soon as the most basic anti-civil rights measures were taken against them, merely ten or so years later they were

¹⁶⁰ The Gentlemen’s Agreement was a “U.S.-Japanese understanding, in which Japan agreed not to issue passports to emigrants to the United States In return, President Theodore Roosevelt agreed to urge the city of San Francisco” to rescind an order which sent Chinese and Japanese children to segregated schools. *Gentlemen’s Agreement*, ENCYCLOPÆDIA BRITANNICA, available at <http://www.britannica.com/eb/article-9036439>; see also *Japanese-American Relations at the Turn of the Century, 1900–1922*, U.S. DEPT. OF STATE, available at <http://www.state.gov/r/pa/ho/time/ip/88117.htm>.

¹⁶¹ “There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race.” *Plessy v. Ferguson*, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting) (arguing elsewhere in his opinion, counter to the majority, that “[t]he arbitrary separation of [black and white] citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the constitution”).

¹⁶² For a description of these rights in the way that I am referring to them, see, for example, T.H. Marshall, *Citizenship and Social Class*, in *CLASS CITIZENSHIP AND SOCIAL DEVELOPMENT* 71-122 (1964).

revoked.¹⁶³ Furthermore, these measures were limited to the banning of businesses that catered to gay customers and that prohibited gay people from public displays of affection, prescriptions that were in many ways related to the performance of gay identity.¹⁶⁴ Moreover, while gay rights activists continued to fashion themselves as minorities in the Black civil rights tradition so as to gain Fourteenth Amendment suspect class citizenship, the most famous victories of each movement are entirely unlike one another in the rights they gained for each group.¹⁶⁵ While the desegregating decision of *Brown v. Board of Education* gave Black Americans the right to equal educational opportunities and helped to fulfill the promise of voting rights, *Lawrence v. Texas* afforded gay people increased privacy for sex between consenting adults,¹⁶⁶ to the extent that their identities and expression as gay people had barred them from sexual activity before (as exemplified by *Bowers v. Hardwick*).¹⁶⁷ What *Lawrence* and *Bowers* have made clear is that the law neatly sidesteps resolution of discrimination that results from openly expressing and practicing queer identity.

In keeping with the suppression of gay identity, there is a greater likelihood of gay civil union being instituted on a state-by-state basis or at the federal level than there is of gay marriage.¹⁶⁸ Civil unions allow gays access to tax breaks and other legal advantages that counter economic anti-subordination, while a denial of marriage is a denial of recognition and of the right to claim an identity and lifestyle as morally equal to that of straight married couples.¹⁶⁹ Fourteenth Amendment-

¹⁶³ CHAUNCEY, *supra* note 22, at 31-38.

¹⁶⁴ *Id.* at 35-36.

¹⁶⁵ *Id.* at 32.

¹⁶⁶ See, e.g., Richard Mohr, *The Shag-a-delic Supreme Court: "Anal Sex," "Mystery," "Destiny," and the "Transcendent" in Lawrence v. Texas*, 10 CARDOZO WOMEN'S L.J. 365, 373 (2004), (stating that for Justice Kennedy, "sexual behavior is constitutionally protected, not on its own, but because of some relationship that it has to what he goes on to call the 'personal relationship[s]' which 'homosexual persons' choose to enter upon"); Catharine A. MacKinnon, *The Road Not Taken: Sex Equality in Lawrence v. Texas*, 65 OHIO ST. L.J. 1081 (2004). For a general discussion of the respect for privacy argument for LGBT rights, see, for example, BAMFORTH, *supra* note 4, at 206-20 (1997). Later in the book, Bamforth asserts the weakness of right to privacy arguments. *Id.* at 229.

¹⁶⁷ 478 U.S. 186 (1986).

¹⁶⁸ See, e.g., Stanley Kurtz, *Marriage Radicals*, NAT'L REV. MAGAZINE, July 31, 2003, available at <http://www.nationalreview.com/kurtz/kurtz073103.asp>.

¹⁶⁹ Through acts such as the Federal Marriage Amendment Act ("FMA") which would write a ban against same-sex marriage into the United States Constitution. For information about FMA, see, for example, President George W. Bush, Remarks by the President: President Calls for Constitutional Amendment Protecting Marriage (Feb. 24, 2004), available at <http://www.whitehouse.gov/news/releases/2004/02/20020224-2.html>.

based civil rights solutions are not reaching the crux of what many queers need in this country: recognition and the right to freely and openly identify and practice their lifestyle without risking rights and privileges. Homosexuals do not have access to all Fourteenth Amendment rights when they openly claim their queer identities, including freedom against discrimination in the workplace and in regards to housing, among other things; however, it is important to note that the basis for discrimination against them in these contexts is different from that which traditional suspect classes face. While gay people are considered to be deviant once identified as queer, racial minorities and women are viewed as inferior.

A final example of an instance in which the proportional influence of anti-subordination versus identity-based conceptions of sexual minority status in the United States differ from those elsewhere is found in the case study of Durgjane Gllavolla.¹⁷⁰ Durgjane was born in 1937 in Serbia.¹⁷¹ He lived as a female to male transsexual who never married, but was a schoolteacher and guardian of children for most of his life (and who rose to some level of national fame as a handball champion).¹⁷² Durgjane was perceived in Serbia similarly to the way Black nannies and housekeepers were often seen in the United States in times of slavery and until the Civil Rights Movement, and the way they are viewed even now. Both transsexuals like Durgjane in Serbia and African-Americans in the United States were considered inferior in status within their communities, but arguably neither was “unnatural” or necessarily morally abhorrent. The parents of Durgjane’s students and of her foster children felt no concern or disgust in exposing their children to Durgjane, perhaps in the same way that a white child’s exposure to a Black nursemaid was not automatically seen as offensive. Occurrences of comfort with, acceptance of, and even the explicit welcoming of contact between queers and children exist currently elsewhere as well: Indian *Hijra* are invited to baby showers and births, especially those of baby boys, because their blessings and touch are seen as especially valuable to children.¹⁷³

In contrast, the legal conception of queers in the United States conceives of them as deviant and morally dangerous to children,¹⁷⁴ and

¹⁷⁰ René Grémaux, *Woman Becomes Man in the Balkans*, THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY 262 (Gilbert Herdt ed., 1996).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ See *supra* note 131.

¹⁷⁴ CHAUNCEY, *supra* note 22, at 19.

thereby keeps gays from "exposing their lifestyles" to children in any way and causing children in their custody to be "stigmatized."¹⁷⁵ In fact, "[w]hether or not lesbians and gay men should be allowed to adopt children or teach them were the two most explosive gay rights issues before marriage entered the scene."¹⁷⁶ The opinion in *Lawrence v. Texas* itself stated that many Americans do not want gay people as teachers and leaders of their children, to protect themselves from "a lifestyle that they believe to be immoral and destructive."¹⁷⁷ This is apparent as well in cases of employment discrimination in which teachers are fired for seeming or being gay.¹⁷⁸ This view is also implied in a Kansas Appellate Court application of *Lawrence* that said the *Lawrence* ruling was valid precedent only for adults, and not for children.¹⁷⁹

The American religious majority's repugnance for gay people's connections to children is a primary factor in our government's rejection of gay marriage. One common state mantra against gay marriage takes advantage of the rational basis standard for state enforcement of a law that upholds public morality.¹⁸⁰ This position is that gay couples cannot have children, and so they should not be allowed to marry, because marriage is state-sanctioned support for procreation. When faced with the factual information that sterile couples, elderly couples, and couples who do not plan to have children are allowed to marry if they are heterosexual, states (most notably, Florida and Utah) counter with the point that gay parents are not fit to provide for the best interests of a child because they cannot fulfill the "vital role that dual-gender parenting plays in shaping sexual and gender identity and in providing heterosexual role modeling," and are not well-positioned to "provide adopted children with education and guidance relative to their sexual development

¹⁷⁵ BAMFORTH, *supra* note 4, at 49.

¹⁷⁶ CHAUNCEY, *supra* note 22, at xvii.

¹⁷⁷ Katyal, *supra* note 14, at 1431-32.

¹⁷⁸ CHAUNCEY, *supra* note 22, at 30.

¹⁷⁹ *State v. Limon*, 32 P.3d 229 (Kan. App. 2004) (upholding a heightened punishment for gay sex between minors, even though under the "Romeo and Juliet" exception, the penalty would be far less if the couple had been heterosexual). For information about a similar policy in Britain, see, for example, MCGHEE, *supra* note 4, at 116-61.

¹⁸⁰ "Chief Justice Rehnquist wrote . . . that the police power of the states has been defined as 'the authority to provide for the public health, safety, and morals,'" and that a rational basis standard for a state's "moral preference" will suffice. In fact, "Scalia views this reasoning as identical to that in *Bowers v. Hardwick*, in which 'moral opposition to homosexuality' provided the rational basis for upholding the Georgia sodomy statute." D. Don Welch, *Legitimate Government Purposes and State Enforcement Of Morality*, 1993 U. ILL. L. REV. 67, 87-88 (1993).

throughout pubescence and adolescence.”¹⁸¹ Therefore, that homosexuals cannot have children in the same way as infertile couples is not based on biology, identity, or lifestyle as such; queer people or gay couples often do not have the privilege of adoption, and states ignore situations in which a same-sex couple and a third party share responsibility for a child who is the biological progeny of one member of the couple and the third party.

To the extent that marriage is indeed to be understood as state-sponsored support for the production of family, that which is keeping gays from marriage rights is not that they *cannot* have children, but that the American state believes that they *should not* be caretakers of children.¹⁸² In fact, the idea of queers taking care of children is so morally repulsive that even a family with two fathers (one of whom is a registered nurse) that has lovingly taken care of many HIV-positive orphan children since their births, is abhorrent enough to the established majority to warrant taking a cherished child away when he remarkably and unexpectedly sero-reverted.¹⁸³

B. QUEERNESS IN POST-COLONIAL NATIONS AS COMPARED TO THE UNITED STATES

In many post-colonial nations there exists a national discussion regarding whether queer identity is native to that nation, or whether it was one of many evils brought in by colonists. For instance, “South Africa’s inclusion of ‘sexual orientation’ in the equality clause of its 1996 constitution nationalized a debate about homosexuality and colonialism [For some], homosexuality has come to signify the

¹⁸¹ John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323, 336-39 (2004).

¹⁸² EDSALL, *supra* note 33, at 71 (stating that beginning in mid-nineteenth-century America, “the distinction between procreative and nonprocreative sex, which was often explicitly equated with the natural and the unnatural, was scarcely less a concern than the sex of a person’s partner”).

¹⁸³ *Lofton v. Sec’y Dep’t of Children and Family Servs.*, 358 F.3d 804 (11th Cir. 2004). The definition of sero-reversion is as follows:

Babies are born with elements of their mothers’ immune system including antibodies to many different viruses. These maternal antibodies help a baby’s developing immune system to respond to infections. Maternal antibodies to different viruses stay with the child for differing periods of time. In the case of HIV, babies born to positive women will lose their maternal antibodies by 18-20 months of age and, if uninfected, would then test antibody-negative—or sero-revert.

Virg Parks, *Boy Clears HIV Infection: What Does It Mean?*, BAY AREA REP., July 12, 1995, available at <http://www.aegis.com/news/bar/1995/BR950702.html>.

colonial and capitalist formations to which 'African culture' was subject."¹⁸⁴ Those who, in many nations such as South Africa, feel a "post-colonial imperative to locate and resuscitate pre-colonial tradition,"¹⁸⁵ sometimes hold a conception of homosexuality as the residue of international invaders.¹⁸⁶ This stance posits that these "homosexual contaminants" have therefore created the queer communities within the post-colonial nation today. This view, sometimes propagated by conservative Christian (or other neo-religious) ideology, holds that homosexuality and other queer sexualities have been *imported*.¹⁸⁷ For example, Robert Mugabe's trials in Zimbabwe for the "sexual corruption of men" reprised a conception of a pre-colonial normative structure in which gender equality and homosexuality were assaulted as "decadent products of a corrupt West;" Mugabe was often quoted as characterizing homosexuality as "Un-African."¹⁸⁸

Queer identity in India is similarly cast as a Western import that is "targeting Indian youth and stripping them of the secure mantle of Indian cultural values, which reside in the institution of heterosexuality."¹⁸⁹ In India and South Africa, sexually transmitted diseases such as AIDS are also sometimes construed as an export of lustful Western culture: many arguments barely stop short of arguing that "sex as a whole is a contaminating and corrosive import of Western cultural value"¹⁹⁰—"un-Indian [and] imported through the capitalist free

¹⁸⁴ Jennifer Spruill, *Sexual Orientation and the Post-Colonial 'Moment' in South Africa*, in LAW AND SEXUALITY: THE GLOBAL ARENA 4 (Carl Stychin & Didi Herman eds., 2001).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ This ideology is explored in Wayne Dynes, *Homosexuality in Sub-Saharan Africa: An Unnecessary Controversy*, GAY BOOKS BULL., Spring/Summer 1982, at 20. However, the terms "import," "export," "natural," and its variants in reference to these beliefs are my own.

¹⁸⁸ Larry Cata Backer, *Emasculated Men, Effeminate Law in the United States, Zimbabwe and Malaysia*, 17 YALE J.L. & FEMINISM 1, 3, 13 (2005); see also SPURLIN, *supra* note 139, at 91-96. Sonia Katyal notes that in 1995:

President Robert Mugabe publicly delivered a "stinging attack on homosexuals," [declaring,] "[i]f we accept homosexuality as a right . . . what moral fibre shall our society ever have to deny organised drug addicts, or even those given to bestiality, the rights they might claim and allege they possess under the rubrics of individual freedom and human rights, including the freedom of the press to write, publish and publicise their literature on them?"

Katyal, *supra* note 13, at 124.

¹⁸⁹ Ratna Kapur, *Postcolonial Erotic Disruptions: Legal Narratives of Culture, Sex, and Nation in India*, 10 COLUM. J. GENDER & L. 333, 377 (2001).

¹⁹⁰ *Id.*; Neville Hoad, *Between the White Man's Burden and the White Man's Disease*, 5 GAY & LESBIAN Q. 559, 564 (1999).

market.”¹⁹¹ As a result of this ideology, sexual minorities abroad are not always conceived of as indigenous, longstanding phenomena that are *natural*, or native to that society, but instead are considered to be deviant to society. While few in India would deny the indigenous nature of a well-known ancient religious text connecting sexuality and spirituality—the *Kama Sutra*¹⁹²—“the 145-year-old colonial Indian Penal Code clearly describes a same sex relationship as an ‘unnatural offence.’”¹⁹³

Those in South Africa, Zimbabwe, India, and other post-colonial nations who denounce homosexuality as imported and colonial, and who insist on queer identities’ unnaturalness or inherent foreignness, imply that the development and subsequent appearance of queer identity came after that of the national or cultural identity of their country’s citizens.¹⁹⁴ In other words, these commentators believe that queer identity is post-colonial and a shock to their “true” national and cultural identity, pre-dating colonial rule. This understanding of queer identity is similar to the development of the public face of queer identity in America, which in the early 1900s, was confronted by Americans who “consider[ed] homosexuality as a more or less foreign importation [that] “offered a real danger to the American way.”¹⁹⁵ At that time, and continuing today, many heterosexual Americans thereby regarded themselves “as the true exponents of the sane and uncompromising traditions of . . . pioneer ancestors.”¹⁹⁶

Indeed, in the United States, the crystallization of queer groups as understood today has not been entirely gradual or indigenous, but appears to have been somewhat abrupt and originating from outside of mainstream American culture, in the way that the national occurrence of the Western gay rights movement appears to many in post-colonial nations today. The make-up of queer groups in the United States today likely reflects that of the general population, which is populated by members whose ancestors came from a variety of backgrounds. Generations ago, people’s national identities (and subsequent societal sub- or super-ordination) were originally structured primarily in terms of

¹⁹¹ Kapur, *supra* note 189 at 377; *see also* SPURLIN, *supra* note 139, at 68.

¹⁹² Carton, *supra* note 115, at 326.

¹⁹³ Sanjaya Jena, *Tribe Blesses Lesbian ‘Marriage’*, BBC NEWS, available at http://news.bbc.co.uk/2/hi/south_asia/6212756.stm.

¹⁹⁴ *See* Katyal, *supra* note 13, at 98 (noting that many foreign governments see the formation of gay communities as a foreign threat and have mounted vocal and often violent attacks against gay and lesbian movements within their borders).

¹⁹⁵ BYRNE FONE, *HOMOPHOBIA: A HISTORY* 386-88 (2000).

¹⁹⁶ *Id.*

their racial or immigrant status, and not in terms of their sexual minority status.¹⁹⁷ For example, it is likely that in colonial America, queer Native Americans (such as the *Berdache*) were seen primarily as Indian; later, Irish immigrant homosexuals (for example) were considered to be Irish first and gender inverting or queer second, or third, if at all.¹⁹⁸ However, prior to their addition (forced or willing) to the American salad bowl, their tribes or native countries viewed them as sexual minorities, because their nationalities/ethnicities had been the norm in their home countries and native communities. One can see this phenomena occurring in the United States currently, as whites make up the typical, or consummate, countenance of the out queer community, while many homosexuals and transgendered people of color continue to find their dual racial and sexual identities in conflict with or in elision of one another.

After a group of people were effectively colonized by, dragged to, or otherwise immigrated to the United States, their race, nationality, gender and such seemingly more visible and immutable characteristics trumped their sexual minority standing—the United States became “a heterosexual regime.”¹⁹⁹ Further, queer members of a nation were probably less likely to immigrate, to the United States or elsewhere. This decreased likelihood of queer migration could have been because of their relative lack of means: (i) as effectively mandated by second-class citizenship in their nation of origin; or (ii) due to their status as an isolated community in their country.²⁰⁰ In any case, this likely contributed to the heteronormativity of early American culture. Sexuality was thereby separated from an assessment of actual, “natural” status in America’s developing status hierarchy. Homosexuality in a community was therefore even concealed at times by minorities or immigrants so as to put forth a “morally superior public face” that served both to elevate their community’s status in the eyes of whites and the dominant majority, as well as to subjugate queers and women within their community.²⁰¹

¹⁹⁷ SHANE PHELAN, *SEXUAL STRANGERS: GAYS, LESBIANS, AND DILEMMAS OF CITIZENSHIP* 1 (2001).

¹⁹⁸ See, e.g., CHAUNCY, *supra* note 22 (stating that the gay movement did not exist and that gay people were not a visible community in the United States until the 1950s and 1960s).

¹⁹⁹ PHELAN, *supra* note 198.

²⁰⁰ Examples of this can be seen in research that examines “how gay Mexican men’s social networks and gay identities shape and create obstacles for migration to California.” Pierrette Hondagneu-Sotelo, *Feminism and Migration*, 571 *ANNALS AM. ACAD. POL. & SOC. SCI.* 107, 118 (2000).

²⁰¹ *Id.* (discussing this phenomena within the Filipino community in the United States).

During moments when the dust of racial tension had settled a bit (or had spurred the exploration and revelation of queer identity) and sexual minority identities developed in, revealed themselves to, or were acknowledged by this country (periodically throughout history and steadily from the 1960s onwards), they were seen as strange,²⁰² foreign to real American identity, and alterable add-ons to the “true” identities of the gendered, racialized, class-stratified American people.²⁰³ This perception of strangeness or foreignness shaded queer identities as corrupt or deviant in the view of the standing moral majority, a view that culminated in the 1952 Congressional ban on the immigration of those apparently homosexual, to keep them from “polluting” the government and the nation as a whole.²⁰⁴ In these cases, all would-be immigrants had to sign a waiver stating that they were not homosexual.²⁰⁵ They were thereby preemptively prohibited from flaunting their identity.²⁰⁶ This suppression of queer expression and identity very likely meant that legal residents and citizens who were homosexuals were not immediately targeted for more explicit civil rights restrictions.

Indeed, the Stevens dissent in *Bowers v. Hardwick*, the majority opinion in *Romer*, and the majority opinion in *Lawrence v. Texas* all support the idea that laws directed at homosexual conduct do not have a “longstanding history in this country as a distinct matter. Far from possessing ‘ancient roots,’ American laws targeting same-sex couples did not develop until the last third of the 20th century.”²⁰⁷ This may be because, until the advent of the fiercely restrictive period known politically as a “crackdown on crime and vice,”²⁰⁸ homosexuals did not appear to exist as a category of persons in the United States.²⁰⁹

²⁰² See generally GRAHAM ROBB, STRANGERS: HOMOSEXUAL LOVE IN THE NINETEENTH CENTURY (2004). See also ARLENE STEIN, THE STRANGER NEXT DOOR 33-34 (2001); PHELAN, *supra* note 197, at 9 (positing that “sexual minorities will remain strangers in the United States for a long time to come”); Florence Tamagne, *The Homosexual Age, 1870-1940*, in GAY LIFE AND CULTURE: A WORLD HISTORY 326 (Robert Aldrich, ed. 2006) (referring to the general understanding of gays as foreign to their class by both the wealthy and working-class alike in late-nineteenth-century America).

²⁰³ FONE, *supra* note 195, at 386-88.

²⁰⁴ CHAUNCEY, *supra* note 22, at 20-21.

²⁰⁵ *Id.* at 21.

²⁰⁶ *Id.*

²⁰⁷ *Lawrence v. Texas*, 539 U.S. 558, 559 (2003); *Romer v. Evans*, 517 U.S. 620, 621 (1996). See *Bowers v. Harwick*, 478 U.S. 186 (1986).

²⁰⁸ CHAUNCEY, *supra* note 22, at 8.

²⁰⁹ Popular discourse and lawmakers were fairly ignorant of queer identity before the late-1930s. BEFORE STONEWALL, *supra* note 153.

By the mid-nineteenth century, northwestern European nations had begun to consider the task of regulating "deviant sexuality . . . [and] render[ing] it relatively harmless,"²¹⁰ explicit antigay discrimination in the United States was an "unprecedented . . . development of the twentieth century"²¹¹ that was "barely a blip on America's radar screen."²¹² "Only in the twentieth century did the government and many Americans identify a category of people as outsiders to the nation, or even as its enemy, on the basis of their 'sexual identity' alone."²¹³ Official state and federal policies banning homosexuals from federal employment,²¹⁴ forcing the dismissal of gay and lesbian faculty at state universities,²¹⁵ prohibiting references to homosexuality in movies²¹⁶ and making it illegal for restaurants and bars to serve homosexuals²¹⁷—all based on the idea of gays as deviant and threatening to American society—were established no earlier than the mid-1930s.²¹⁸ These laws often came about due to pressure from religious leaders, and resulted in the forced psychiatric evaluation of gay people for "deviance"²¹⁹ and a psychopathic refusal to adjust to social norms.²²⁰ The final, most

²¹⁰ EDSALL, *supra* note 33, at 69.

²¹¹ CHAUNCEY, *supra* note 22, at 13.

²¹² PHELAN, *supra* note 197, at 1.

²¹³ CHAUNCEY, *supra* note 22, at 14.

²¹⁴ In 1953, President Eisenhower banned homosexuals from government employment. *Id.* at 6.

²¹⁵ In 1958, the Florida Legislative Investigation Committee forced the dismissal of numerous "suspected gay" teachers and students from state-run institutes of education. *Id.* at 7.

²¹⁶ In 1935, Hollywood studios established the "Hays Code" at this time "under pressure from a censorship movement led by Catholic and other religious leaders, who threatened them with mass boycotts and restrictive federal legislation." *Id.* at 5-6.

²¹⁷ "[Following the repeal of Prohibition t]he New York State Liquor Authority, for instance, issued regulations prohibiting bars, restaurants, cabarets, and other establishments with liquor licenses from employing or serving homosexuals or allowing homosexuals to congregate on their premises [charging that establishments became] 'disorderly in permitting homosexuals, degenerates and other undesirable people to congregate on the premises.'" *Id.* at 7-8. Here, there is an interesting intersection between queer people as immoral and as second-class. While gay people were considered officially banned from restaurants because they were considered "degenerates" and "sex deviates," restaurants with a reputation for serving queer people suffered so much harassment at the hands of police that some posted signs reminiscent of the Jim Crow era stating, "If You Are Gay, Please Stay Away," and "We Do Not Serve Homosexuals." *See id.* at 8. Strict enforcement of laws against "degenerate" homosexuals caused a de facto social and community segregation that continues to exist today in some parts of the United States.

²¹⁸ *Id.* at 7-8.

²¹⁹ In the 1950s, over half of the United States—including New York, Michigan and California—"authorized the indefinite confinement of homosexuals in mental institutions, from which they were to be released only if they were cured of their homosexuality." CHAUNCEY, *supra* note 22, at 11.

²²⁰ *Id.* at 19.

enduring, and restrictive elements of this period consisted of censorship against gay literature and media such as the Mattachine Society newsletter, the denial of free speech to gay rights organizers, and police crackdowns that effectively limited homosexuals' right to assembly with one another.²²¹

There is debate abroad as to whether queerness is a "moral contaminant" or whether it is a natural and native (if inferior) element of any particular nation's population.²²² Some "insist[] on the presence of homosexuality throughout African [and other national and continental] history,"²²³ and often the ethno-centric anti-gay view of homosexuality as post-colonial and nativist pro-gay perspectives together weave patterns of queer identity that complicate the hierarchical status of queers in the country in question. Also, like in the United States, some nations may rely on post-colonial rhetoric about the evils of homosexuality to divert attention from more pressing national matters. A political cartoon that appeared in the Johannesburg *Star*, shortly after Mugabe denounced queers, shows him dressed as Marie Antoinette, with a speech bubble that reads, "The peasants are hungry? Let them bash gays!"²²⁴ while less than a decade later, the Bush administration arguably created a frenzy around gay rights issues to divert attention away from a depressed

²²¹ The Mattachine Society was one of the first organizations created to further the homophile movement. It "was formed by Harry Hay, a leading gay activist and former Communist Party member, along with seven other gay men. The name refers to the Société Mattachine, a French medieval masque group that allegedly traveled from village to village, using ballads and dramas to point out social injustice. The name was meant to symbolize the fact that 'gays were a masked people, unknown and anonymous.'" Craig Kaczorowski, *Mattachine Society*, GLBTQ: AN ENCYCLOPEDIA OF GAY, LESBIAN, BISEXUAL, TRANSGENDER, & QUEER CULTURE (2004), available at http://www.glbtq.com/social-sciences/mattachine_society.html. For more information, see generally HARRY HAY, *RADICALLY GAY: GAY LIBERATION IN THE WORDS OF ITS FOUNDER* (1996); STUART TIMMONS, *THE TROUBLE WITH HARRY HAY: FOUNDER OF THE MODERN GAY MOVEMENT* (1990); JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970* (1983); Martin Meeker, *Behind the Mask of Respectability: Reconsidering the Mattachine Society and Male Homophile Practice, 1950s and 1960s*, 10 J. HIST. SEX. 78 (2001).

²²² HOAD, *supra* note 23, at 81.

²²³ See, e.g., Bill Stanford Pincheon, *An Ethnography of Silences: Race, (Homo)sexualities, and a Discourse of Africa*, 3 AFR. STUD. REV., Dec. 2000 at 39. Note that the South African parliament passed legislation recognizing same-sex marriages on November 14, 2006. However, "[t]he bill's supporters had to overcome criticism from both traditionalists and gay activists." On the other hand, homosexual acts and gay identity itself are taboo and illegal in Zimbabwe, Kenya, Uganda, Nigeria, Tanzania, Ghana and most other nations in sub-Saharan Africa. *South Africa Oks Gay Marriage*, ASSOCIATED PRESS, Nov. 14, 2006, available at <http://www.gaymarketnews.com/2006/11/south-africa-oks-gay-marriage.html>.

²²⁴ HOAD, *supra* note 23, at 68.

economy and failed "War on Terror," and to help secure a second-term presidency.²²⁵

Yet, in the United States, there is no significant "deviant versus natural" debate, in the sense that there is no prevalent argument supporting the notion of the development of queer people in the United States as foundational and as occupying a standard place in early American history and society, even as merely an inferior class. Certainly, queerness is wholly immoral, deviant, and unnatural to conservative American society. Moreover, only recently have arguments that engage the idea of genetic constitution entered the debate.²²⁶ While these arguments are used differently based on perspective—conservatives employ them to argue for deviance and the need for mental health care²²⁷ and eugenics,²²⁸ while gay rights advocates utilize them to fight for rights based on immutability—scientists who "study homosexuality" seem to be saying that "we still find gay people foreign to our core identity as Americans, but perhaps there is a biological basis to their difference."²²⁹ In any case, the ideology that queer identity is biologically-based lends it an inferiority in the eyes of many that may appear similar to that which is associated with Fourteenth Amendment suspect classes, but that the origins of this inferiority are in queer identity's classification as wrong and abhorrent, and not as immutable and lower-class.

²²⁵ See, e.g., John Tierney, *Can This Party Be Saved?*, NY TIMES, Sept. 2, 2006; Frank Rich, On 'Moral Values,' It's Blue in a Landslide, NY TIMES, Nov. 14, 2004; Bob Herbert, *Tuning Out The G.O.P.'s Siren Song*, NY TIMES, Feb. 6, 2004.

²²⁶ See, e.g., MCGHEE, *supra* note 4; Halley, *supra* note 58; Neil Swidey, *What Makes People Gay?*, BOSTON GLOBE, Aug. 14, 2005, available at http://www.boston.com/news/globe/magazine/articles/2005/08/14/what_makes_people_gay/; Chandler Burr, *Homosexuality and Biology*, ATLANTIC MONTHLY, June 1997, available at <http://www.theatlantic.com/atlantic/issues/119706/homosexuality-biology>.

²²⁷ *On the Biological Basis of Homosexuality*, Rationally Speaking, <http://rationallyspeaking.blogspot.com/2006/07/on-biological-basis-of-homosexuality.html> (July 11, 2006).

²²⁸ Albert Mohler, *Is Your Baby Gay? What If You Could Know? What If You Could Do Something About It?*, http://www.albertmohler.com/blog_read.php?id=891 (Mar. 2, 2007).

²²⁹ See, e.g., Judy Foreman, *The Biological Basis of Homosexuality*, BOSTON GLOBE, Dec. 2, 2003, available at http://www.boston.com/yourlife/health/other/articles/2003/12/02/the_biological_basis_of_homosexuality/; *Biological Basis of Sexual Orientation*, STAN NEWS SERV., March 10, 1995, available at <http://news-service.stanford.edu/pr/95/950310Arc5328.html>; Sandra Blakeslee, *Panelists Cite Biological Roots Of Homosexuality*, N.Y. TIMES, Aug. 25, 1985, available at <http://query.nytimes.com/gst/fullpage.html?sec=health&res=990CEEDA173BF935A1575BC0A96394820>.

As the majority in *Lawrence v. Texas* notes, “[t]he condemnation [of homosexuality as immoral] has been shaped by religious beliefs [and] conceptions of right and acceptable behavior”²³⁰ and in the United States “is firmly rooted in Judeo-Christian moral and ethical standards.”²³¹ The label of “deviant and immoral” by the American moral majority makes sexual minorities analogous to religious minority and secular populations (such as Mormons, Jews, and Communists) and the conception of queer communities as “amoral” makes them analogous to secular populations. This religious majority has, after all, historically oppressed religious minorities such as Mormons, secular political populations, and queer communities²³² due to the general notion that the beliefs, behaviors, and lifestyles of each community are unnatural and immoral in kind and “foreign” to whom Americans really are and should be.²³³ This view characterizes same-sex sexual activity as did Justice Burger when he described homosexuality as “the infamous crime against nature [and] an act the very mention of which is a disgrace to human nature.”²³⁴

IV. EXPRESSION AND FREEDOM FROM ESTABLISHMENT PROTECTIONS FOR “DEVIANT” (GAY) MARRIAGE

The view of homosexuality as a foreign import, and the majoritarian and religious majority disapproval associated with this view, can be found in many post-colonial nations. This perspective is analogous to the religious/moral majority’s past and present denunciation of queers in the United States, through the vehicle of legal restriction and

²³⁰ *Lawrence v. Texas*, 539 U.S. 558, 571-72.

²³¹ *Bowers v. Hardwick*, 478 U.S. 186, 196 (Burger, C.J., concurring); see also CRAIG A. RIMMERMAN, FROM IDENTITY TO POLITICS: THE LESBIAN AND GAY MOVEMENTS IN THE UNITED STATES 121-55 (2002); SIGNORILE, *supra* note 2, at 242-43, 331; see generally BALL, *supra* note 38; DIDI HERMAN, RIGHTS OF PASSAGE: STRUGGLES FOR LESBIAN & GAY LEGAL EQUALITY 77-102 (1994) (discussing “Normalcy on the Defensive: New Christian Right Sexual Politics”); STEIN, *supra* note 202.

²³² Neil Swidey, *God on the Quad*, BOSTON GLOBE, Nov. 30, 2003, available at http://www.boston.com/news/globe/magazine/articles/2003/11/30/god_on_the_quad (“[H]omosexuality has become the defining issue for evangelical groups, replacing the cleavage points of the past [that related to the activities of religious minority groups]: abortion, race, predestination.”).

²³³ FONE, *supra* note 189, at 386-88.

²³⁴ See, e.g., *Bowers*, 478 U.S. at 194, 197 (Burger, C.J. quoting W. BLACKSTONE, 4 COMMENTARIES 215).

sociopolitical persecution.²³⁵ In 1820s England (a period when U.S. law was still directly influenced by the British system), those debating whether sodomy should continue to be punishable by death, when the death penalty was all but abolished, could not bring themselves to use the word of the Victorian era, "buggery," choosing instead to refer to it as the crime "not named amongst Christians."²³⁶ In the modern era, this view is reflected in the United States by the McCarthyism that demonized queers in the early 1950s,²³⁷ all the way to the current, multifaceted proclamations of queerness as an "alternative" lifestyle antithetical to the very essence of traditional, "normal" American ways of living.²³⁸

In the majority opinion of *Lawrence v. Texas*, Justice Kennedy substantively vacillates between whether the issue of queer rights at hand is one of due process or equal protection, despite the fact that ostensibly the opinion addresses only due process,²³⁹ harkening back to the 1920s when more men were arrested by "morals squads" for misdemeanor loitering and lewdness charges than for the felony charge of sodomy, since the latter required greater procedural protections.²⁴⁰ Further, *Lawrence v. Texas* moves away from a relational construction of privacy²⁴¹ and instead contains privacy and intimate association claims that include the idea of "constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."²⁴² The intersection of these two issues creates room for an identity expressive- and practice-based substantive due process claim.²⁴³

²³⁵ See, e.g., RICHARDS, *supra* note 59, at 39.

²³⁶ STEPHEN JEFFERY-POULTER, PEERS, QUEERS & COMMONS: THE STRUGGLE FOR GAY LAW REFORM FROM 1950 TO THE PRESENT 9 (1991).

²³⁷ BEFORE STONEWALL, *supra* note 153; FONE, *supra* note 196, at 390-92 (2000). "At the height of the McCarthy witch-hunt, the U.S. State Department fired more homosexuals than communists," and gay people were often "interrogated and coerced into identifying the names of other gay residents." CHAUNCEY, *supra* note 22, at 6, 9.

²³⁸ See, e.g., BAMFORTH, *supra* note 4.

²³⁹ See, e.g., Adrienne Butcher, Note, *Selective Constitutional Analysis In Lawrence v. Texas: An Exercise In Judicial Restraint Or A Willingness To Reconsider Equal Protection Classification For Homosexuals?*, 41 HOUS. L. REV. 1407 (2004).

²⁴⁰ CHAUNCEY, *supra* note 22, at 10.

²⁴¹ A relational construction of privacy might, for example, merely allow consenting homosexual adults to be free from intrusion in their own homes as long as their decisions do not affect anyone else; the point is there the sphere of privacy protection is quite limited within this model. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 217 (Stevens, J. dissenting).

²⁴² *Planned Parenthood of S.E. PA v. Casey*, 505 U.S. 833, 851 (1992).

²⁴³ Katyal, *supra* note 14, at 1478 (2003).

Professor of Law and LGBT scholar, Nan Hunter, has stated, “the First Amendment has provided the most reliable path to success of any of the doctrinal claims utilized by lesbian and gay rights lawyers.”²⁴⁴ Justice Jackson, in writing for the majority in a seminal First Amendment case, famously stated, “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters . . . or force citizens to . . . act their faith therein.”²⁴⁵

This Part compares American queer communities to those in post-colonial nations to uncover the special relevance of expression, establishment, and exercise-based protections for American (and perhaps other New World) queer communities.

A. EXPRESSIVE RIGHT TO MARRIAGE

The classic second-class citizenship status of queers internationally highlights the extent to which queers in the United States do not suffer in the same way. In contrast to American racial minorities and to queers abroad, many American homosexuals are people whose other characteristics have often overshadowed their sexuality in the public eye. Perhaps for this reason, they have always had legal access to integrated education, the right to vote, and the opportunity to run for and hold office in the United States. Moreover, that an *out* gay politician may have difficulty running for office is an issue that is not paralleled by racial minorities, women, or homosexuals internationally, who have been explicitly barred from civil and political rights in the past; the protections required by a queer politician so that he may exercise his rights with complete freedom of personhood are those that would protect his right to express and completely manifest his identity. The current state of legal affairs amounts more to a proscription against “flaunting” than to any explicit ban on gay candidates. “Flaunting” is a complex phenomenon likely related to First Amendment freedoms of expression.²⁴⁶

The potential of Freedom of Expression claims for the furtherance of gay rights has been discussed by many legal theorists,²⁴⁷

²⁴⁴ Nan D. Hunter, *Commentary, Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1695 (1993).

²⁴⁵ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

²⁴⁶ See generally, Yoshino, *supra* note 50, at 776.

²⁴⁷ See, e.g., David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319,

including most notably by William Eskridge.²⁴⁸ This article enters the discussion from a comparative cultural perspective, by highlighting that the Western context provides a unique environment for the proliferation of expression as constitutive of identity. For example, in the United States one could imagine a possible "expressive" First Amendment action that a discriminated-against queer employee can take against private or public employers. While a private actor employee cannot discriminate against an applicant or employee for qualities currently protected under the Fourteenth Amendment (or Fifth Amendment), the actor can discriminate against someone for queer or any other expression.²⁴⁹ This expression includes, but is not limited to, someone being fired for having been an activist before she accepted her current employment, having a picture of his partner on his desk, being seen dancing at a gay club, or being seen in an erotic magazine.²⁵⁰ An employee who sues for freedom of expression under a § 1983²⁵¹

323 (1994); J.F. Walsh, Jr., *First Amendment Protection Of Homosexual Conduct*, 48 CASE W. RES. L. REV. 381, 412 (1998).

²⁴⁸ ESKRIDGE, *supra* note 91, at 199.

²⁴⁹ If a gay employee files for a Fourteenth/Fifth Amendment claim of discrimination, she cannot be retaliated against for filing that claim, or displaying any "gay" behavior discussed within (or relevant to) the claim, unless the claim is settled in the respondent's favor. The problem in this situation is that it is very likely that the claim will be dismissed, necessarily leaving the homosexual employee with no protection against retaliation and dismissal from her job.

²⁵⁰ It is worth noting that a heterosexual person might also be pictured in an erotic publication. This possibility leads to an examination of the potentially uneven application of company policy, which could be another form of action for an employee discriminated against for being (or "acting" gay). This is like the uneven application of the sodomy law struck down in *Lawrence*. Firing someone for an activity such as appearance in a publication could be an example of a prejudicial practice unevenly directed at homosexual persons if queer people are *more likely to* either: (a) partake of this activity; or (b) be fired for this activity (for example, as compared to straight people who also appear in erotic magazines). In fact, Section 15(1) of the Canadian Charter of Rights and Freedoms provides an "analogous grounds" protection for sexual orientation. HOAD, *supra* note 23, at 150-73.

²⁵¹ A § 1983 claim can include a First Amendment action against a state actor. 42 U.S.C. § 1983, commonly referred to as "section 1983" provides:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

Ian D. Forsythe, A Guide To Civil Rights Liability Under 42 U.S.C. § 1983: An Overview Of Supreme Court And Eleventh Circuit Precedent, *available at* http://www.constitution.org/brief/forsythe_42-1983.htm.

(privately) or *Bivens*²⁵² (in the government domain) claim, and who wants to claim standing, would require only the proof that her action expression was “chilled.”²⁵³ One can imagine, further, that a valid example would be if a woman’s expressive speech or act of “speaking” as a lesbian was stopped, either by discrimination in the workplace, or by the very act of being fired. Theoretically, a victim of discrimination could claim standing in this way, as we can conceive of the idea that being discriminated against or fired from one’s employment for any particular expression would hamper that act of expression. Indeed, this rings true for expression as deeply indicative and constitutive of identity and personhood in the United States as both religious and queer identity expression, both of which today are inclusive of facets such as one’s beliefs in the equality of queer and straight people, one’s gendered and sexual identity, or one’s partner or marriage status.²⁵⁴

To conceive of this distinction, we must understand sexual orientation as related to identity specifically in the United States. On the other hand, the city of Riyadh in Saudi Arabia is a rapidly growing gay mecca in which gay men and lesbians exist as homosexual without claiming any such identity, unlike the way they do with their holistic societal identification with Islam.²⁵⁵ In Saudi Arabia, a racially diverse nation with many immigrants like the United States, homosexual activity exists in freedom and is easier to practice than is heterosexuality (under Shari’a) precisely because of a lack of the need claim to sexual orientation as identity.²⁵⁶ In the United States, the fact that religious majoritarianism mandates heterosexuality increases the political impulse to claim a queer identity. Yet, despite the illegitimacy of homosexual relations under Shari’a, “[f]or many Saudis, the fact that a man has sex with another man has little to do with ‘gayness.’ The act may fulfill a desire or a need, but it doesn’t constitute an identity.”²⁵⁷ In Afghanistan,

²⁵² A *Bivens* claim can be a First, Fourth or Sixth Amendment action against a federal actor. “Named for *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), it is a judicially created Constitutional claim that is outside the purview of the Federal Tort Claims Act. (28 U.S.C. S 2679(b)(2)(A)). Prior to this judicial decision there was little effective recourse to blatant constitutional violations by federal agents and authorities.” ‘Lectric Law Library Lexicon, “Bivens Claim” Defined, <http://www.lectlaw.com/def/b070.htm>.

²⁵³ See Calabresi *supra* note 72.

²⁵⁴ See generally, Fadi Hanna, *Gay Self-Identification and the Right to Political Legibility*, 2006 WIS. L. REV. 75 (2006).

²⁵⁵ See, e.g., JOHN R. BRADLEY, SAUDI ARABIA EXPOSED: INSIDE A KINGDOM IN CRISIS (2005); Patanè, *supra* note 30, at 279.

²⁵⁶ See Patanè, *supra* note 30, at 279.

²⁵⁷ Nadya Labi, *The Kingdom in the Closet*, THE ATLANTIC MONTHLY, May 2007, at 2.

for example, especially in the city of Kandahar²⁵⁸ among the Pashtun,²⁵⁹ there is evidence that Afghan men engage in homosexuality at a higher rate than do American men.²⁶⁰ Arguably, some of the acts occur because of the strict segregation between the sexes²⁶¹ while others have roots in Pashtun ceremony and tradition,²⁶² although those who engage in it are often considered "uneducated" or of a lower class.²⁶³ In any case, men who engage in homosexual relations often have wives and children as well.²⁶⁴ This appears to be another instance of Middle Eastern homosexuality that involves acts that fulfill a desire or need, but that do not create in these men a homosexual "identity." Nadya Labi, who studies homosexual communities in the Middle East, observes:

In *The History of Sexuality*, a multivolume work published in the 1970s and '80s, Michel Foucault proposed his famous thesis that Western academic, medical, and political discourse of the 18th and 19th centuries had produced the idea of the homosexual as a deviant type: In Western society, homosexuality changed from being a behavior (what you *do*) to an identity (who you *are*). In the Middle East, however, homosexual behavior remained just that—an act, not an orientation. That is not to say that Middle Eastern men who had sex with other men were freely tolerated. But they were not automatically labeled deviant.²⁶⁵

Other examples of the dissociation between act and orientation can be found in Africa. A queer studies anthropologist explains that West African Hausa gay men do not conceive of "their sexuality as do North

²⁵⁸ See, e.g., Dennis O'Neil, Sex and Marriage: Homosexuality, http://anthro.palomar.edu/marriage/marriage_6.htm; Brian James Baer, *Kandahar: Closely Watched Pashtuns*, THE GAY AND LESBIAN REV., Mar.-Apr. 2003, at 25; Tim Reid, *Kandahar Comes Out Of The Closet*, THE TIMES, Jan. 12, 2002, at 16.

²⁵⁹ See, e.g., *BTW: The Passions Of Pashtuns*, THE GAY & LESBIAN REV., May-June 2002, at 8; Richard Ammon et al., *Gay Afghanistan, After the Taliban: Homosexuality as Tradition*, GLOBAL GAYZ.COM, Feb. 2002, <http://www.globalgayz.com/g-afghanistan.html>.

²⁶⁰ See, e.g., O'Neil, *supra* note 258; Ammon, *supra* note 259.

²⁶¹ See, e.g., Michael T. Luongo, *Gay Afghanistan: Homoeroticism Among Kabul's Warrior's*; GAY CITY NEWS, Apr. 29, 2004, <http://www.globalgayz.com/g-afghanistan2.html>; Ammon, *supra* note 259; Chris Stephen, *Startled Marines Find Afghan Men All Made Up To See Them*, THE SCOTSMAN, May 2002, at 15; Maura Reynolds, *Kandahar's Lightly Veiled Homosexual Habits*, LA TIMES, Apr. 3, 2002, available at <http://www.globalgayz.com/afghan-news02-04.html#article3>.

²⁶² See, e.g., Chris S. Smith, *Shh, It's an Open Secret: Warlords and Pedophilia*, NY TIMES, Feb. 21, 2002, at A4; Ammon, *supra* note 259.

²⁶³ See, e.g., Ammon, *supra* note 259.

²⁶⁴ ÅSNE SEIERSTAD, *THE BOOKSELLER OF KABUL 259* (Ingrid Christopher trans., 2003).

²⁶⁵ *Id.* at 4-5.

American gay men.²⁶⁶ For example, Hausa people generally refer to homosexuality as an act rather than a psychological drive or predisposition, and homosexual men are more often described as men who do homosexuality than as men who want other men sexually.²⁶⁷

Sonya Katyal notes that in West Africa, “[h]omosexual” is mainly used in describing a rather queer, feminine man who likes to play the passive sexual role. Homosexuality itself connotes transvestism and transsexuality Sex between men is not automatically labeled as homosexual behavior.²⁶⁸ Professor William J. Spurlin observes that “[t]he reductive imposition of such terms as ‘bisexuality’ and ‘lesbian’ to understand the emotive and erotic ties between [South African] Basotho women enacts further sites of discursive colonization, radically suppressing difference and denying the heterogeneity and the erotic agency of the women in question.²⁶⁹ In addition, Professor of Anthropology, Erick Laurent, explains a similar theory for many East Asian communities.²⁷⁰

One question asked by Labi is whether, “as a more Westernized notion of gayness—a notion that stresses orientation over acts—takes hold in the country, will queerness as it is currently manifested in the Middle East survive?”²⁷¹ Labi’s studies also suggest that those most likely to be prosecuted for sodomy or other *haram* (forbidden) acts in Saudi Arabia are Filipinos and other racial minorities, both of whom are most often immigrants present in Saudi Arabia on temporary work permits.²⁷² It is unclear whether this persecution occurs due to the

²⁶⁶ Rudolf P. Gaudio, *Male Lesbians and Other Queer Notions in Hausa*, in BOY-WIVES AND FEMALE HUSBANDS 117-118 (1998);

If “gay” is seen to refer only to the overt, politicized gay communities that have emerged in the West in the past one hundred years, it surely does not apply to the Hausa men I met in Nigeria, most of whom have little if any knowledge of Western gay life. If, however, “gay” is understood to refer to men who are conscious of themselves as men who have sex with men, and who consider themselves to be socially (if not temperamentally) distinct from men who do not have this kind of sex, then these Hausa men are undoubtedly “gay,” and it is in this sense I use it.

see also Amory, *supra* note 17, at 7 (describing how some Hausa men in an anthropological study expressed surprise “that American men also engage in same-sex relations”).

²⁶⁷ Gaudio, *supra* note 302, at 117.

²⁶⁸ Katyal, *supra* note 14, at 133.

²⁶⁹ SPURLIN, *supra* note 139, at 62.

²⁷⁰ *See generally* Laurent, *supra* note 111, at 163.

²⁷¹ *See* Labi, *supra* note 257, at 2. *See also* Altman, *supra* note 115, at 108 (noting that Filipino-American poet R. Zamora Linmark asks the same question on behalf of gay men in the Philippines).

²⁷² Labi, *supra* note 257, at 6-7.

inexperience of these immigrants in leading a lifestyle in which queer acts and an understanding of personal identity do not traditionally intersect, or whether there is a large component of racial/ethnic discrimination involved. Considering that Saudi Arabia and many wealthy countries in the Middle East are infamous for their implicit racial hierarchies and subsequent division of labor by race,²⁷³ it is likely that the persecution of gay foreigners is due to both their "gay identity" and racial/ethnic make-up. The existence of Filipinos as a third gender, or at least as effeminate gay-identified men, is not dissimilar to the early understanding of homosexual American men as effeminate by nature and therefore a separate gender from the category of "men;" this notion was deconstructed in the 1950s, when homosexual styles became more masculinized due to a variety of factors resulting in greater sexual freedoms for many Americans.²⁷⁴ Further, while both have moved away from an understanding of gay men as by definition "effeminate," Saudi Arabian culture is distinguished from the U.S. culture in the direction it has gone. In the United States, the partial disintegration of this stereotype has created within American queer culture a variety of visible, identitarian sexualities. Yet in Saudi Arabia, the movement away from an understanding of gay men as that of the effeminate Filipino "third

²⁷³ See, e.g., Nisha Varia, *Sanctioned Abuses: The Case of Migrant Domestic Workers*, 14 NO. 3 HUM. RTS. BRIEF 17, 17-18 (2007); Naeem Mohaiemen, *Slaves in Saudi*, THE DAILY STAR, July 24, 2007, available at <http://www.thedailystar.net/2004/07/27/d40727150297.htm>; *Saudi Arabia: Migrant Domestic Workers Killed by Employers Brutal Beatings and Killings Symptomatic of Wider Abuse*, 4 HUM. RTS. BRIEF 18, Aug. 11, 2007, available at <http://hrw.org/doc/?t=mideast&c=saudia>; Brian Evans, *The Plight of Foreign Workers in Saudi Arabia*, available at <http://www.geocities.com/capitolhill/Parliament/3251/spring99/saudi.html>; 3rd World View, *Racism in Saudi Arabia*, <http://rezwanul.blogspot.com/2005/11/racism-in-saudi-arabia-saudi-blogger.html>.

²⁷⁴ For example, one reason for the masculinization of homosexuality was that heterosexual men, until then the typically masculine counterparts to effeminate homosexual men, "became less likely to indulge in same-sex relations" as birth control and changing more increased accessibility to female sexual partners. Gert Hekma, "A Female Soul in a Male Body": *Sexual Inversion as Gender Inversion in Nineteenth Century Sexology*, THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY 238 (Gilbert Herdt ed., 1996). In general, a cult emphasizing brotherhood and uber-masculinity was developing around this time in the United States in both the heterosexual and homosexual communities, as a backlash to first-wave feminism; this also contributed to the changing personality of gay males. Charisa Smith, *'Rebel Without a Cause' and the Cult of Masculinity* (2000) (unpublished article, on file with the author) (discussing the work of Ruth Feldstein); see also RUTH FELDSTEIN, MOTHERHOOD IN BLACK AND WHITE: RACE AND SEX IN AMERICAN LIBERALISM, 1930-1965, 81-82 (2000); Ruth Feldstein, Book Review, J. OF COLD WAR STUD. 193, 194 (2005) (reviewing ROBERT D. DEAN, IMPERIAL BROTHERHOOD: GENDER AND THE MAKING OF COLD WAR FOREIGN POLICY (2001)); Ruth Feldstein, *The Personal is (Still) Political: Marriage, Citizenship, and Women's and Gender History*, 30 REV. AM. HIST. 106, 112 (2002) (reviewing NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION (2000)).

gender” has resulted in the embrace of a homosexuality that is less dependent on the need to claim a sexual identity.

The current American understanding of expression as integral to sexuality, and sexuality as in turn foundational to identity, as compared to the Middle Eastern view of sex acts (both homosexual and heterosexual) as flexible and traditionally not related to identity, should give pause to those working to procure gay rights in the United States. To the extent that expressive sexual identity is especially important to gay people in the United States, there is a need to protect the expression required by any queer American for the complete manifestation of his identity.

Further, while one theorist argues that the “turn to love” has been fairly recent in the discussion of Western sexual politics,²⁷⁵ others believe there to be a long history of “love” as an element in Western same-sex relationships,²⁷⁶ and a long-held method for expressing love and sexual partnership in the United States has been that of marriage. The well-known Brief of Amicus Curiae Professors of Expression and Constitutional Law submitted in the Massachusetts gay marriage case *Goodridge v. Dept. of Public Health* proclaims, “[j]ust as communication about need is an ‘an inherent aspect’ of begging . . . communication of a couple’s love and commitment is ‘an inherent aspect’ of marriage.”²⁷⁷ Until very recently, the tradition of marriage in gay communities in the United States has served only to express the gay and partnered identity of the couple, both individually and as a pair.²⁷⁸ Certainly gay marriage ceremonies did not, and for the most part still do not, bequeath upon gay couples any economic privileges under the law. Yet many consider the largest disadvantage of the legal invalidity of gay marriages to be that it hampers the expressive value of marriage for gay couples.²⁷⁹ If gay marriage isn’t recognized as acceptable to society at large and, to a far lesser extent, as bequeathing certain material resources to the couple—as it would be, were it legally valid—then the belief in the United States is

²⁷⁵ See, e.g., Bell & Bennie, *supra* note 5, at 123, 144 (discussing also the “economic geography” of historical forms of sexual citizenship”).

²⁷⁶ Rupp, *supra* note 115, at 227.

²⁷⁷ Brief of Amicus Curiae Professors of Expression and Constitutional Law: William E. Adams et al., *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (N.E.2d 2003) (No. SJC-08860), 2002 WL 32364782.

²⁷⁸ See, e.g., GRETCHEN A. STIERS, FROM THIS DAY FORWARD: COMMITMENT, MARRIAGE, AND FAMILY IN LESBIAN AND GAY RELATIONSHIPS 75 (1999).

²⁷⁹ RICHARDS, *supra* note 59, at 134 (2005).

that the partnership and coupling of the gay couple is not respected as "real," and is therefore considered fundamentally lacking.²⁸⁰

As noted earlier, *Loving v. Virginia*²⁸¹ was used as an analogy to explain how discrimination against homosexuals in the United States, including the ban on gay marriage, is not due to male supremacy but to heterosexual supremacy.²⁸² In addition, the support for gay marriage in the United States currently occurs for the purposes of expressing identity, lifestyle, and romantic love, and not merely for the purposes of gaining economic rights such as tax breaks and spousal benefits.²⁸³ In fact, civil unions are denounced by most gay activists regardless of whether or not they would confer the same number of legal and material benefits on the homosexual partnerships as would marriage; the exception to this view can be found only in those who prefer that queers not get married at all, that there be only civil unions for both homosexuals and heterosexuals, or that there be a more expansive definition of civil union to include nonsexual household partners.²⁸⁴

In contrast to the American view of same-sex marriage as mainly for the purposes of conferring dignity, validity, and identity onto committed gay unions, the fairly robust phenomenon of same-sex union

²⁸⁰ *Id.*

²⁸¹ *Loving*, 388 U.S. 1.

²⁸² In addition, Ian Ayres crystallizes the definition of "heterosexual privilege"—made possible by cultural privileging of the ideals of heterosexual supremacy—as "the range of perks and incentives with which heterosexually identified persons are rewarded for conforming to the dominant sexuality." IAN AYRES & JENNIFER GERARDA BROWN, STRAIGHTFORWARD: HOW TO MOBILIZE HETEROSEXUAL SUPPORT FOR GAY RIGHTS 3 (2005).

²⁸³ Currently, civil unions (such as in Vermont) are recognized only on a state level; however, gay marriage in Massachusetts is also recognized only on a state level, and therefore does not offer any of the benefits available to federally-recognized heterosexual marriage. In fact, gay couples that are not residents of Massachusetts are currently not allowed to get married. Jay Lindsay, *Mass. High Court Says Nonresident Gays Cannot Marry In State*, BOSTON GLOBE, Mar. 30, 2006, available at http://www.boston.com/news/local/connecticut/articles/2006/03/30/mass_high_court_says_nonresident_gays_cannot_marry_in_mass. Further, the majority opinion in the *Goodridge* case declared on behalf of its plaintiffs, "Barred access to . . . civil marriage, a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community's most rewarding and cherished institutions." *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (2003). It is based on these reasons—that currently gay marriage in the United States does not offer any further economic or legal benefits than civil marriage, and because marriage is considered a "cherished institution"—that I draw the conclusion that the current valuation of gay marriage in the United States is based on its symbolic value, and not merely on the conference of tax breaks and spousal benefits.

²⁸⁴ See, e.g., Alexander Cockburn, *Gay Marriage: Sidestep on Freedom's Path*, COUNTERPUNCH, March 21, 2004, <http://www.counterpunch.org/cockburn03202004.html>. For further information about male-male intimate companionship and female "Boston marriages" in which women set up households with one another, see, for example, A DOCUMENTARY HISTORY, *supra* note 31, at 41-42; Rupp, *supra* note 114, at 227.

and marriage in the non-Western world occurs as a way for women or queers to gain economic and political rights and privileges for themselves and their families vis-à-vis dominant male society, and not often for the purposes of queer expression. For instance, Non-Western women have argued that “their feminism centers not on sexuality, but on . . . economics and politics” as well as health and environmental issues;²⁸⁵ in this way, one can conceive of queer cultures and a queer rights movement in many nations that includes these elements as well. Examples of this include Native American, African, and Chinese models in which men and women both took on same-sex marriages to continue lineage or to gain access to power and wealth (the latter applies mostly to women) that they and their families might not otherwise be permitted. For example, “among the Kwakiutl Indians of the Pacific Northwest, a man may marry the male heir of a tribal chief as a means of inheriting certain privileges from his father-in-law.”²⁸⁶ In the Navajo, Illinois, Nadouessi, and Lakota tribes, the existence and same-sex marriages of “Two-Spirit” and variously androgynous people were considered to be a lucky gift from the spirits, and were cherished as fortunate to their extended family.²⁸⁷ In China, “Fujian boy-marriages involved a man paying bridewealth to a teenage boy’s parents, [and s]ometimes same-sex couples adopted and raised children,”²⁸⁸ while in South Africa male-male “mine marriages” flourished in certain Black working-class environments under colonialism and apartheid.²⁸⁹

²⁸⁵ Amory, *supra* note 17, at 9; *see also* Puar, *supra* note 18, at 1057-1059 (discussing how Indo-Trinidadians gay/transgendered men link their sexuality to work status and cultural institutions within the broader Trinidadian context while showing a “refusal of a politics around sexuality [and gender identity, of the kind] that often occupies center stage in U.S.-based queer theory.”). I argue that—like Indo-Trinidadian couples in general—it is their complex lives (including their sexuality and relations, same-sex and otherwise) that most occupy them, and not a constant reflection upon and reassessment of their identity as *is de rigueur* for gay Americans. The strict “us and otherness” dichotomy that exists between homosexuals and heterosexuals in the United States is perhaps not found in the more fluid, diverse and intermingled Trinidadian culture, in which two men dancing a traditional heterosexual Indian Bollywood (modern film) dance are not viewed as gay, or in drag, but as primarily Indian.

²⁸⁶ Peter S. Cahn, *Marriage ‘American Style’ Not the Only Way to Go*, PAC. NEWS SERVICES, March 12, 2004, <http://www.berkeleydailyplanet.com/article.cfm?archiveDate=03-12-04&storyID=18460>.

²⁸⁷ A DOCUMENTARY HISTORY, *supra* note 31, at 1-10.

²⁸⁸ *Same-Sex Marriage in the Non-European World*, COLORQ, <http://www.colorq.org/Articles/article.aspx?d=2004&x=ssmarriage>.

²⁸⁹ While these marriages may have occurred within a context of oppression, they are not necessarily for this reason invalid instances of same-sex coupling. SPURLIN, *supra* note 139, at 33-55; *see also* EPPRECHT, *supra* note 119, at 198-201.

The various woman-marriages of Africa are well-documented examples of same-sex marriage.²⁹⁰ Communities in Benin, Nigeria, and South Africa each have woman-marriages that have over many generations served to "secure[] a gender position in the kin structure that sewed to protect rules of succession and descend[]; define[] gender position; [and] in turn define[] the status, rights, and authority included in that position."²⁹¹ Woman-marriage, into which some women marry as a function of their economic independence, features wives who subsequently "[bear] children for her female husband [or] for deceased, suppositious, or childless kin of her female husband."²⁹² In this way, woman-marriage serves to recognize and rectify the extent to which queer women suffer from male supremacy by altering the traditional gender structure.²⁹³ What constitutes a valid marriage is therefore differently understood than in the gay American community, although these marriages otherwise fulfill many of the Western criteria for "identification as a visible signifier of same-sex desire."²⁹⁴

If one accepts my argument that American gay marriage has been banned in the United States due to its label of deviant and not necessarily because of the second-class citizenship of either party involved (such as, perhaps, in the case of white men), and that the relative importance of marriage to Westerners is as an expression of love and identity, protection for the "expressive nature of marr[iage]"²⁹⁵ can be constructed from a variety of rights that the United States government holds in place for the protection of speech that is deviant from the status quo. The *Goodridge* Amicus Brief also notes,

Free expression principles should invalidate the mixed-sex requirement for civil marriage Even if admitting same-sex couples to the institution of civil marriage modulated the symbolic messages that marrying might convey, that is the consequence of our commitment to expressive freedom. It is not constitutional for government to discriminatorily reserve civil marriage for mixed-sex couples to try to keep the term "marriage," the symbol that

²⁹⁰ See, e.g., Joseph M. Carrier & Stephen O. Murray *Women-Women Marriage in Africa*, in *BOY-WIVES AND FEMALE HUSBANDS: STUDIES OF AFRICAN HOMOSEXUALITIES* 255, 255 (Stephen O. Murray & Will Roscoe eds., 1998) [hereinafter *BOY-WIVES*].

²⁹¹ Beth Greene, *The Institution of Woman-Marriage in Africa: A Cross-Cultural Analysis*, 37 *ETHNOLOGY* 395, 396 & 399; See also Clare Burton, *Woman-Marriage in Africa: A Critical Study for Sex-Role Theory?*, 15 *AUSTRAL. & N.Z. J. OF SOC.*, July 1997 at 65.

²⁹² *BOY-WIVES*, *supra* note 290, at 256-57.

²⁹³ *Id.* at 255-61.

²⁹⁴ SPURLIN, *supra* note 139, at 68.

²⁹⁵ Goodridge, *Brief of Amicus Curiae*, *supra* note 277, at 16-17.

“marriage” is, or the social notion of ‘marriage’ from coming to be understood as embracing same-sex couples. That some persons take a contrary position does not authorize the [government] to deny the expressive resource and intimate association that is civil marriage to same-sex couples.²⁹⁶

Moreover, since queer expression is understood as a deviation from governmental moral majoritarianism, it should be protected by keeping in mind this precise issue. As noted earlier, if there is a singular principle underlying First Amendment expression protections, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself “offensive or disagreeable,”²⁹⁷ and that it is “individuals’ expression [that should be protected] against governmental restriction, not . . . government expression [that should be shielded] at the expense of individuals’ speech.”²⁹⁸ In other words, the government should not be allowed to speak out against homosexuality by restricting gay marriage, and in general should “abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”²⁹⁹ This idea implies that disapproval of a majority should not keep certain citizens from defining marriage as they desire.

The *Goodridge* Amicus Brief states, “[t]he indisputably expressive nature of marrying and living as a married person must be accorded at least as much constitutional protection as begging, nude dancing or tattooing.”³⁰⁰ This gives a flavor for the fundamental role that marriage plays in expressing gay couples’ identity, which in turn helps to fully establish that identity in the United States. Moreover, “the United States Supreme Court supports the position that the issuance of a government permit or license does not convert speech from private expression into government speech,”³⁰¹ and also holds the position that a shared neutral funding scheme does not violate the First Amendment

²⁹⁶ *Id.* at 47-48.

²⁹⁷ *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

²⁹⁸ See e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963); David B. Cruz, *Just Don’t Call It Marriage: The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 987 (2001).

²⁹⁹ *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

³⁰⁰ *Goodridge*, *Brief of Amicus Curiae*, *supra* note 277, at 16-17.

³⁰¹ *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) (unanimously holding that applying Massachusetts’s public accommodations law to the private organizers of a St. Patrick’s Day-Evacuation Day parade to require them to allow a unit of lesbian, gay, and bisexual persons to march under its banner, a group with whom the parade organizers disagreed, violated the First Amendment).

rights of college students who disagreed with the messages of some groups that were supported by the mandatory student activity fee required of each student.³⁰² This means that even if the government provides marriage licenses and permits and subsidizes marriage benefits funded by a conservative national majority, this is still not adequate justification for the denial of the expressive rights of marriage to homosexuals. In other words:

If private persons can define their parades as they wish—even with an official permit, and via a public thoroughfare, policed and maintained by public money—and despite an official policy against discrimination, then private persons can define their marriages (surely more central to personhood than parades) as they wish—even with an official license and despite an official policy against same-sex unions.³⁰³

To the extent that marriage in the United States is more about the private, individual definition of a couple's identity,³⁰⁴ and not about economic and social hierarchy-based considerations as they have been for many years in post-colonial nations internationally, protection for the expressive nature of marriage is especially applicable to queer rights furtherance in the United States.

B. FREEDOM FROM MORAL MAJORITARIAN ESTABLISHMENT

Before "free" or civil marriages became sanctioned in the American colonies, wealthy Protestants in the United States were once able to exclude lower-economic class society from the institution.³⁰⁵

³⁰² Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 233 (2000).

³⁰³ Massaro, *supra* note 155, at 67. See also Larry W. Yackle, *Parading Ourselves: Freedom of Speech at the Feast of St. Patrick*, 73 B.U.L. REV. 791, 793, 794 (1993).

³⁰⁴ Goodridge, *Brief of Amicus Curiae*, *supra* note 277.

³⁰⁵ *History of Marriage*, ESSORTMENT, http://ks.essortment.com/historyofmarri_rimr.htm. As a side note, *Lawrence* decriminalized sodomy that was once directly and explicitly illegal when engaged in by "homosexuals," even if heterosexuals were able legally engage in the exact same behavior in certain states. Any uneven application of a law that penalizes status, and not activity itself, appears to me to be unacceptable in the United States under a combination of *Lawrence* and *Robinson v. California*. *Lawrence v. Texas*, 539 U.S. 559; *Robinson v. California*, 370 U.S. 660 (1962) (noting that narcotics status-related crime was prohibited under the Eighth Amendment and holding that mere status (without conduct) cannot be penalized as criminal). Another sexuality-related argument against the criminalization of status utilizes minors by saying that just because people between ages sixteen and eighteen may have sex does not mean that they should be allowed to marry. Yet, similar to the case of polygamous Mormons and of queers, this population is also a socially disfavored group. Although there may be public policy arguments against polygamy or teen marriage (as is argued for the case against gay marriage), straddling the line between protective and oppressive has always been a concern for the law, including, for

However, although the eradication of church-sanctioned civil unions now bars the wealthy from prohibiting the poor to marry,³⁰⁶ the heterosexual Christian majority is not yet proscribed from keeping marriage from religious minority or secular populations wishing to engage in same-sex unions.³⁰⁷ If one religion is allowed to marry people of the opposite sex, than that another religion (or the secular population) is not allowed to marry people of the same sex appears counter to First Amendment Freedom from Establishment protections.

Arguably, antireligious prejudice and anti-gay prejudice follow similar trajectories. Professor Eskridge notes that “[t]he scholarship describing antireligious prejudice in the United States and other western societies discovers the same pattern as that found in anti-gay prejudice: Disempowered segments of the majority demonize or scapegoat religious ‘deviants’ as predatory threats and invoke their supposed predation as a justification for violence against deviants;”³⁰⁸ the threats warned against include that the national community will be perverted, as based on a “depiction of the despised religious group as dirty, immoral, lecherous, subversive, disloyal, and . . . [a] fixation on the ways in which the despised group is bent on ‘recruiting’ normal citizens, particularly the young.”³⁰⁹ In this way, both religious and sexual minorities have formulated histories of subordination based on comparable moral persecution, and religious persecution is in this way similar to gay-bashing and hate crime.³¹⁰ For instance, governmentally policed “[a]nti-vice societies organized by Protestants in the late nineteenth century

example, within rape, murder and suicide doctrine. See, e.g., Chamallas, *supra* note 298, at 747; Lea Vandervelde, *The Legal Ways of Seduction*, 48 STAN. L. REV. 817 (1986). In the 1910s, New York expressed “moral disapprobation” of the act of suicide, but it was decriminalized in the state nonetheless, and those attempting to engage in suicide were to deal with the disapproval of the moral majority on a socio-cultural level. Similarly, a judiciary that allows gay people to engage in civil unions and decide to incur the disapproval of the society avoids the type of undue religious and cultural regulation against which Robert Post warns.” Post, *supra* note **Error! Bookmark not defined.**, at 8. As noted in *Toward a Constitutional Definition of Religion*, “the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere” including even the most subtle intertwining of their two aims. 91 HARV. L.R. 1086 (1978).

³⁰⁶ United States Attorney General, *Laws Regulating the Forms of Marriage in the United States*, 12 AM. L. REG. 3, 129 (1864).

³⁰⁷ See, e.g., Mann, *supra* note 8, at 97, 107 (1997) (describing lesbian love-making as “sacred and secular”).

³⁰⁸ Eskridge, *supra* note 62, at 2420.

³⁰⁹ *Id.* at 2420-21.

³¹⁰ See, e.g., STEIN, *supra* note 86, at 9 (discussing how communism and other issues regarding speech and identity have contributed to hate crimes and gay-bashing in small towns across the United States).

initially . . . regarded [the gay world] as one more egregious sign of the loosening of social controls on sexual expression in cities dominated by Catholic and Jewish immigrants . . . and were [in fact] much more concerned about prohibiting heterosexual than homosexual vice.³¹¹ Arguably, the anti-Mormon sentiment that came to a head in the mid 1830s,³¹² resulting in one well-known murder of seventeen Mormons,³¹³ bears similarity to the gay hate crimes of today.

Another prominent characteristic of the common view of both religious as well as sexual identity in the United States, unlike the traditional national views of the *Hijra* and *Travesti* communities, is mutability. In regards to the Fourteenth Amendment Equal Protection Clause, immutability has often been a prerequisite for conceiving of the protection of racial minorities, women, and other suspect classes, and, as mentioned earlier, has been an obstruction for the categorization of homosexuals as a suspect class.³¹⁴ An American understanding of queers, both within and outside the community, is that their deviance from the norm is, at least in part, a choice; conservative politicians and judges who do not support "deviant" queer behavior are loath to apply Fourteenth Amendment protections to homosexuals.³¹⁵ However, in the First Amendment context, the mutability of religion apparently does not require it to forfeit protected class status;³¹⁶ the fundamental importance of religion to identity is accepted notwithstanding.³¹⁷

Due to this apparent mutability and the potential lack of obvious visibility of both those with religious and queer identities, another key common requirement of both religious and gay communities in the United States is the need to "flaunt" or freely and openly claim one's identity for the purposes of fully manifesting that identity. To be of a certain religion is to engage in self-presentation and choices that create

³¹¹ CHAUNCEY, *supra* note 22, at 15-17.

³¹² See, e.g., *Timeline: The Early History of the Mormons*, FRONTLINE, Apr. 30, 2007, <http://www.pbs.org/mormons/timeline/index.html>.

³¹³ *Id.*

³¹⁴ Haley, *supra* note 80.

³¹⁵ See, e.g., Turner, *supra* note 15; *Bowers v. Hardwick*, 478 U.S. 186; *Lawrence v. Texas*, 539 U.S. 559, 586-602 (Scalia, J., dissenting); *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

³¹⁶ See, e.g., Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, n.33 (1998).

³¹⁷ See, e.g., Samuel A. Marcossou, *Constructive Immutability*, 3 U. PA. J. CONST. L. 646, 670-71 (2001); Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 109-10 (1990).

and reflect one's religious identity. Similarly, to be and feel queer is to be able to freely act and present oneself as queer. Unlike the way in which queers abroad conceive of themselves and their communities within a broader cultural context, such as in Saudi Arabia and India, the idea of openly claiming one's religious or queer identity is integral to the experience of either identity in the United States. Although one's religion and sexual orientation are often the same as those of one's parents, they need not be. Unlike American racial minorities or queer identities abroad that are considered less mutable and more visible, queers in the United States often begin self-identification through expression. Scholars such as Judith Butler, Janet Halley, Nan Hunter, and others³¹⁸ begin with the premise that "[s]elf-identifying speech . . . [i]s a major factor in constructing identity,"³¹⁹ and "view[] homosexuality as one of the identities whose existences are *contingent* upon expression,"³²⁰ presumably in the United States.

Certainly, the expressive practice of coming out to a family or community is unlike the experience of those in most families and many communities into which people of specific racial or ethnic identities are born and those specified, isolated communities to which many queers in other countries are relegated. In the United States, the family or community of origin is not as likely to reflect the queer identity as it is the racial or ethnic identity of any particular child or adult, who must therefore establish herself as queer by speaking out. On the contrary, to dissociate or distinguish oneself from a lower socio-economic neighborhood to which a certain racial/ethnic community (in the United States) or queer community (in the non-Western world) has been relegated to is an option only for those who put in certain efforts and who especially value transitioning out of the community. In the same way, individual religious identity also has its own coming out or self-ownership process, especially if a person chooses a religion other than that with which he was raised. In any case, a religious minority or queer person is bound to find herself in a group of people who are both not of the same religion and who will not know what religion he is unless he expresses it to them with self-conscious declaration such as "This is my

³¹⁸ See, e.g., Darren Lenard Hutchinson, *Accommodating Outness: Hurley, Free Speech, and Gay and Lesbian Equality*, 1 U. PA. J. CONST. L. 85, 116-124 (1998) (arguing that the law should view gay coming out as a major factor in identity construction).

³¹⁹ Hunter, *supra* note 244, at 1718; see also Yoshino, *supra* note 50, at 836 ("stating that "[s]ometimes self-identifying speech can constitute one's identity").

³²⁰ Hanna, *supra* note 254, at 75, 102 (emphasis added) (quoting Nan Hunter).

lifestyle," "this is how I *choose* to live," and "I *believe* this is the right way for me to act."³²¹

For these reasons, in the United States combative anti-religious minority discourse is thereby similar to the rationalization of anti-gay rallies in that both can deny "that there is discrimination based upon belief or status and insistence that any legal disabilities or discrimination is based upon the deviant group's (vile) behavior"³²² or expression. Certainly, while in the United States one's religion and sexual orientation are both "not predetermined, neither are they completely voluntary,"³²³ some of the impulse towards sexual orientation and religion comes from feelings not consciously processed or understood. Still, Americans are more and more likely to engage in a process of "information-gathering, deliberation, and shopping"³²⁴ to chose a sexual orientation and in attempting to "find religion" in our increasingly open and explorative society. That the impulse behind religion and sexual orientation is not completely predetermined by family or community in the United States is part of what allows the American mainstream to view its "own religion and sexual orientation as 'given,' impelled, or even driven by inner needs or external forces, but to view a 'deviant' religion or sexual orientation as 'chosen' for some perverse or even malignant reason."³²⁵

Further in keeping with this judgment, the moral majority in the United States holds analogous attitudes towards both religious minority and queer communities regarding the body and how it should be controlled. Many politically powerful groups have denounced some religions for their acceptance of divorce, pre-marital sex, and birth control,³²⁶ or for a usage of drugs (such as Peyote).³²⁷ Queers are similarly condemned as immoral for their sexual activity, non-nuclear (non-assimilationist) families and choices, and other lifestyle activities. Parallels and even overlap in attitudes exist between conceptions of certain types of marriage as deviant and uncertainties regarding the moral validity of gay marriage. Examples can be found on a spectrum that includes Catholic marriage, Mormon polygamist marriage, and

³²¹ See, e.g., BALL, *supra* note 38, at 147, 202-04.

³²² Eskridge, *supra* note 62, at 2420-21.

³²³ *Id.* at 2419.

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ See, e.g., Alan Riding, *New Catechism for Catholics Defines Sins of Modern World*, N.Y. TIMES, Nov. 17, 1992, at A1.

³²⁷ See, e.g., *Employment Div. v. Smith*, 494 U.S. 872, 874 (1989).

homosexual marriage. In regards to each of these cases there is a judgment of deviance made by the moral majority, and each of these lifestyle choices has in turn been described as queer by various theorists.³²⁸

A similar overlap occurs at the intersection of religious caste and queer status in India, serving to elevate or subordinate certain populations, as in the case of traditionally heterosexual, celibate Indian *Brahmins* and the *Hijra*, respectively. In this case, the overlap is explicitly acknowledged, as in the case of *Hijra*, whose sexuality and its manifestations are an integral part of their religious as well as queer identity. In the United States, various court cases and even Thomas Jefferson himself have professed that religious rights and freedoms apply even to the “Hindoo,” or Hindu, of whom the *Hijra* are a part.³²⁹ In a country where the “conduct and cognition” of both queers and of Middle Eastern/South Asian religious minorities are viewed as immoral and deviant, how could the *Hijra* find protection in the United States for access to all of the rights and privileges that would help her engage in full personal identification and practice?

This article has highlighted similarities between religious and queer life practices, beliefs, and self-identification and the perception of these as deviant. This article has also identified a religion—Hinduism—of which sexuality is a major component; this category of religion includes evangelical and fundamentalist Western Christianity, due to its strong focus on sexual restriction. Even beyond this rich intersection of sexuality and religion, *Toward a Constitutional Definition of Religion* analyzes three major Supreme Court cases that establish an expansive definition of religion that could encompass queer identity.³³⁰ In this significant piece, the authors highlight the Framers’ “core guarantees” of the Free Exercise and Establishment clauses, which could provide an avenue for the security of queer rights supportable even by strict interpreters of the Constitution, under the ideology that there is “no clear

³²⁸ See, e.g., CATHOLIC FIGURES, QUEER NARRATIVES, *supra* note 79.

³²⁹ See, e.g., *United States v. Seeger*, 380 U.S. 163, 192-93 (1965). Jefferson notes his Act for Establishing Religious Freedom “was meant to be universal . . . to comprehend within the mantle of its protection the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and infidel of every denomination.” AN ACT FOR ESTABLISHING RELIGIOUS FREEDOM (1785), *reprinted in* AMERICAN STATE PAPERS BEARING ON SUNDAY LEGISLATION 132, 133 n.1 (Gen. Conf. Corp. of Seventh-Day Adventists 1911) (1890).

³³⁰ *Toward a Constitutional Definition of Religion*, *supra* note 305, at 1063-66, (discussing *Torasco v. Watkins*, 367 U.S. 488 (1961), *United States v. Seeger*, 380 U.S. 163 (1965) and *Welsh v. United States*, 398 U.S. 333 (1970)).

evidence" that the founders of the First Amendment wished to include only theism under the rubric of the religious, and particular human experiences and orientation imply that everyone has some sort of religion.³³¹

According to this article, the Supreme Court has supported these core guarantees by observing in their decisions that the "freedom of conscience" and "freedom of belief" are good in and of themselves and a "precondition of emotional well-being," and that they promote a desirable pluralism of thought "contribut[ing] to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society."³³² Therefore, noted the Supreme Court, a First Amendment inquiry,

must proceed at a level of inquiry that does not discriminate among creeds on the basis of content, that does not circumscribe the very choices which the Constitution renders inviolate. What those choices are—and thus the meaning of religion for free exercise purposes—can therefore be limited only by a broader inquiry which looks at the role played by a system of belief in an individual's life.³³³

Moreover, not only is the Establishment Clause formulated in terms of what the government may not do to the individual (and not in terms of what an dominant individual or community may exact from the government),³³⁴ but the Supreme Court has also said:

Freedom of religious choice is assured by the [establishment] clause's proscription of all favoritism—even the most subtle—in matters of belief. [This includes a prohibition of] the imposition of penalties that burden some religions relative to others. Additionally, it prohibits the government's directly or indirectly aiding a religion in a way that would seem to cloak that belief with the imprimatur of government [or aiding a powerful group that is perceived as religious, so as to] "prevent compulsion in matters of belief [and] the prohibition of indirect coercion which might result from subtle discrimination."³³⁵

For this reason, the similarities between gays and religious minorities in the United States mean that both should be protected from the religious majority's view that each is deviant and immoral, and not suppressed by a government complicit with that majority.

³³¹ *Id.* at 1058-60 (emphasis added).

³³² *Id.* at 1058.

³³³ *Id.* at 1075.

³³⁴ *Sherbert v. Verner*, 374 U.S. 398, 412 (1963).

³³⁵ *Toward a Constitutional Definition of Religion*, *supra* note 305, at 1058-59.

In regards to the Establishment Clause, focusing on whether queer communities can actually be construed as “religious” for the purposes of legal procedure may regretfully cause us to overlook the most useful intuition behind the queer identity/religious identity analogy: it is not the individual practices of queers or religious minorities that need necessarily be similar,³³⁶ but rather it is the way in which they are viewed as deviant by the moral majority that unites them meaningfully under the First Amendment. Professor of Law and constitutional scholar, Dean Toni Massaro, notes that the question that should be asked by LGBT litigants is “‘What is wrong with homosexuality?’”, not ‘What is homosexuality?’”³³⁷ Moreover, when the question is asked from the perspective of the moral majority and general American populace,³³⁸ it is most effectively asked as “What is considered to be wrong about homosexuality?” The answer to this question—that it is considered deviant and immoral—becomes useful to advocates that wish to further constitutional bases for a variety of queer rights by highlighting the specific prejudice against homosexuals that drives the vagaries and inconsistencies of judicial decisions regarding gay rights. In many cases, “asserting the . . . ‘widespread moral disapproval of same-sex relations’ [has allowed judges to] avoid[] the constitutional inquiry that [they] are obliged to make,”³³⁹ and has further revealed the inadequacy of any attempt by queer litigants to conform to a descriptive or behavioral pattern to qualify for suspect class status. As Professor Janet Halley notes:

The next generation of constitutional arguments for gay, lesbian, and bisexual rights must accommodate the complexities These arguments must be supple enough to explain why official imposition of fixed identities and the official administration of incoherent and labile ones undermine civic values; they must be capacious enough to claim constitutional protection not only for assertions of consolidated and even essentialist gay, lesbian, bisexual, and queer identities, but also for the choice to be queer.³⁴⁰

Finally, it is worth noting that not only do the function, language, and outsider perspective of each religious and queer group resemble one

³³⁶ See, e.g., Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 261-262 (1993).

³³⁷ Massaro, *supra* note 155, at 47.

³³⁸ *Id.*

³³⁹ *Id.* at 94.

³⁴⁰ Janet Halley, *The Construction of Heterosexuality*, in FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY 99 (Michael Warner ed., 1993).

another, but that there are also similarities in regards to the content of religious and queer expression and practice in the United States. "Religious and sexual orientation communities are institutionalized, albeit in different ways."³⁴¹ Religious minority community is focused around churches, but also temples, mosques, and meeting places that may have been co-opted from their usual purposes for religious usage.³⁴² Some of these religious communities are often seen by the greater populace as strange or counter-cultural—or even evil and dangerous, as in the case of Muslim communities in the wake of 9/11—to the underlying Christian American popular culture; the size of this religious community, marked as foreign to the United States even if located within its borders, can be anywhere from a neighborhood to entire portions of major cities or states. Examples of this include Haitians (predominantly Catholic) as populating large sections of the city of Boston³⁴³ or South Asian Indians (almost entirely Hindu) as constitutive of a significant portion of New Jersey's population.³⁴⁴ In the same way, "sexual community is . . . focused around a . . . variety of sub-cultural institutions, including churches or faith groups, newspapers, professional associations and social clubs, and 'gay ghettos,'"³⁴⁵ and these communities constitute large parts of San Francisco³⁴⁶ and

³⁴¹ Eskridge, *supra* note 62, at 2420.

³⁴² See, e.g., Melissa Evans, *Churches Find Creative Meeting Places*, OAKLAND TRIBUNE, Mar. 16, 2004.

³⁴³ See, e.g., *Haitians in America—Dynamics of an Evolving Community*, <http://www.haiti-usa.org/modern/boston/index.php>. In 2001, some Haitians believed the Haitian population in Boston was over 80,000. Steve Desrosiers, *Counting Boston's Haitians: Boston's Haitian Community and the United States Census of 2000*, HAITIAN REPORTER ARCHIVES, Mar. 2001, available at <http://www.websteruniv.edu/~corbetre/haiti-archive/msg06903.html>.

³⁴⁴ Indians are the biggest Asian ethnic community in New Jersey. George Joseph, *Indian Population Explodes in the U.S.*, INDIA ABROAD, Sept. 1, 2006, http://www.usindiafriendship.net/indian_population_explodes.htm.

³⁴⁵ Eskridge, *supra* note 62, at 2420.

³⁴⁶ See, e.g., Adam Tanner, *San Francisco May Be World's Gayest City*, REUTERS, Apr. 7, 2006, available at http://www.redorbit.com/news/health/462865/san_francisco_may_be_worlds_gayest_city_report; DAVID M. SMITH & GARY J. GATES, SAME-SEX UNMARRIED PARTNER HOUSEHOLDS: A PRELIMINARY ANALYSIS OF 2000 UNITED STATES CENSUS DATA, 6-10 (2001), available at <http://www.hrc.org/documents/gayandlesbianfamilies.pdf>.

Massachusetts³⁴⁷ (such as in the cities of Northampton³⁴⁸ and Provincetown³⁴⁹).

Professor Eskridge posits as well that “sexual orientation . . . is based on a similar mix of cognition and conduct as religion.”³⁵⁰ In the United States, in describing someone being persuaded to change religion or sexuality, the term used in both cases is “conversion.” Further, many queer couples consider religion and ceremony to be important to the institution of same-sex marriage,³⁵¹ and many have argued that access to marriage should be between a couple and their God and that state sanction should be irrelevant.³⁵² Conversely, a large percentage of “ex-gay” programs are administered by religious organizations. These paradoxes show how queer status and religion both play similar roles in American’s lives and how being gay has been set in fundamental opposition to religion in the United States. This complicated relationship between queer and religious identity in the United States has in fact led to difficulties for many who have tried to reconcile both identities and associations within themselves.³⁵³

Finally, it is noteworthy that freedom from establishment has required religious orthodoxy to “affirmatively accommodate”³⁵⁴ secular,

³⁴⁷ SMITH & GATES, *supra* note 346, at 5-6, 11.

³⁴⁸ The Northampton Chamber of Commerce proclaims Northampton “home to a sizeable lesbian community, earning it the nickname ‘Lesbianville, USA.’” Everything About Northampton, MA, <http://www.visitnorthampton.net/> (last visited Feb. 3, 2008).

³⁴⁹ The New York Times has described Provincetown as “[f]riendly, flamboyant, [and] overwhelmingly gay.” David Colman, *Rich Gay, Poor Gay*, NY TIMES, Sept. 4, 2005, available at <http://query.nytimes.com/gst/fullpage.html?res=9D00E7DD1431F937A3575AC0A9639C8B63>. See also MICHAEL CUNNINGHAM, *LAND’S END: A WALK IN PROVINCETOWN* (2002).

³⁵⁰ Eskridge, *supra* note 62, at 2417.

³⁵¹ See, e.g., Douglas C. Haldeman, *Ceremonies and Religion in Same-Sex Marriage*, in *ON THE ROAD TO SAME-SEX MARRIAGE: A SUPPORTIVE GUIDE TO PSYCHOLOGICAL, POLITICAL AND LEGAL ISSUES* (Robert P. Cabaj & David W. Purcell eds., 1998).

³⁵² Even more, as the reformist phrasing goes, marriage is a matter for the church. Legislatively speaking, many activists want the government to keep out of the same-sex marriage issue—that is, to protect it as the individual choice of couples (and their God). For instance, the Church of Scotland recently approved the idea of sanctioning homosexual relationships, but “insisted the vote would have to be ratified by all of its 46 local presbyteries,” thereby allowing religious judgment to take the place of governmental sanction.” In fact, “more than 900 gay and lesbian couples have ‘married’ in Scotland since the Civil Partnership Act came into force” in December of 2006. Jason Allardyce & Mark Macaskill, *Kirk’s Moderator to Fight for Gay Marriages*, SUNDAY TIMES, Nov. 5, 2006, available at http://www.timesonline.co.uk/tol/newspapers/sunday_times/scotland/article625703.ece.

³⁵³ See, e.g., Eskridge, *supra* note 62, at 2411, 2418-19.

³⁵⁴ Establishment Clause claims also speak specifically to a type of “affirmative action” for secular citizens, see, e.g., *Locke v. Davey*, 570 U.S. 712 (2004). This type of affirmative action has, as

possibly queer, beliefs; for a period of time, the Establishment Clause mandated a sort of pro-secular affirmative action which endorsed the exclusion of religion and the religious from otherwise generally available opportunities.³⁵⁵ A residual example of this is that an individual cannot be required to swear on a Bible to gain acceptance as a witness in a court of law.³⁵⁶ Similarities between the secular population and queer American communities vis-à-vis religious orthodoxy in the United States exist, as can be seen by comparing the two sets of rights for which each has fought. The first includes rights fought for and won by secular people and those open to secular views, including the right not to have God/Christ imposed on children and not to have creationism taught exclusively in school. The second, currently being fought for by homosexuals, includes the right to have one's children spared the teaching of "Dick and Jane" heteronormativity in schools.³⁵⁷ The progress of such freedom from establishment protections is support for eradicating the requirement that a homosexual follow the religious moral obligation of marrying someone of the opposite sex to gain access to a civil right, such as civil marriage.

of such, been the only remedial element of the Establishment Clause. See, e.g., Calabresi, *supra* note 72.

³⁵⁵ *Locke*, 540 U.S. at 271.

³⁵⁶ For a period of time in the 1950s, the emphasis on the Establishment Clause was such that the government gave active preference to the financial support of non-religious organizations, because they had historically been denied freedoms by the heavily state-sponsored religious majority. Abstract, Mary Anne Case, *Lessons for the Future of Affirmative Action from the Past of the Religion Clauses?*, SUPREME COURT REVIEW (2000), available at <http://ssrn.com/abstract=269656>. I suggest even that, to the extent that the secular populace of the United States is united by a common characteristic of being "not religious," that this combined with their history of suppression and with their sometimes queer practices could be defined as a sort of religious minority.

³⁵⁷ See, e.g., Lori Arnold, *Calif. Governor Signs School Bill That Protects Teaching On Gay Lifestyle*, CHRISTIAN EXAMINER, Nov. 2007, http://www.christianexaminer.com/Articles/Articles%20Nov07/Art_Nov07_06.html; Bob Unruh, *Judge Orders 'Gay' Agenda Taught To Christian Children*, WORLDNETDAILY, Feb. 24, 2007, available at http://www.wnd.com/news/article.asp?ARTICLE_ID=54420; 'State Interest' Argued In Teaching Homosexuality, WORLDNETDAILY, Feb. 14, 2007, available at http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=54241; Tracy Jan, *Parents Rip School Over Gay Storybook*, BOSTON GLOBE, Apr. 20, 2006, available at http://www.boston.com/news/local/articles/2006/04/20/parents_rip_school_over_gay_storybook/; Joseph Berger, *Board Is Given Ultimatum On a Gay Teaching Plan*, N.Y. TIMES, Nov. 10, 1992, at B2.

C. PRESERVING INTRAGROUP VARIANCE

One might argue the need for a single definition of “queer” (queer goals, queer identity, or the “religion” that queerness is) to define queer for the purposes of Freedom from Establishment protections. Presenting a uniform understanding of queerness in the United States is not an unreasonable goal. Putting on a united public face is a technique commonly utilized by intra-diverse groups of people who have fought for access to specific rights or privileges. Moreover, uniformity has been an important and elusive requirement for access to Fourteenth Amendment protections that queer people have attempted to fulfill throughout their history of advocacy in the United States, most notably within the homophile movement.³⁵⁸

However, the potential need for uniformity in the queer community, especially for purposes of procuring gay marriage, has come under fire from many as part of the “straightening” of queer identity.³⁵⁹ Professor and foundational feminist philosopher, Judith Butler, argues that the essence of being queer is counter-cultural, stating that “the sexual field is circumscribed in such a way that sexuality is already thought of in terms of marriage,”³⁶⁰ while Professor, social theorist and gay activist, Michael Warner, says that marriage and traditional notions of coupling allow heterosexuals to judge which queers should be allowed certain protections, and which should not.³⁶¹ In general,

Butler points out that marriage invites gays and lesbians into a realm of sexuality defined by the state, undercutting further reaching efforts to reshape the normative constitution of the sexual field, while [Michael] Warner follows up on these insights with the observation

³⁵⁸ See, e.g., ADAM, *supra* note 1, at 69.

³⁵⁹ Cockburn, *supra* note 284 (advocating for civil unions for all, and against the notion of assimilation for the purposes of gay marriage)

Peter Tatchell, [a] British gay leader, [said,] “[e]quality is a good start, but it is not sufficient. Equality for queers inevitably means equal rights on straight terms, since they are the ones who dominate and determine the existing legal framework. We conform—albeit equally—with their screwed up system. That is not liberation. It is capitulation.”

³⁶⁰ Judith Butler, *Is Kinship Always Already Heterosexual?*, in LEFT LEGALISM/LEFT CRITIQUE, 229, 232 (Wendy Brown & Janet Halley, eds., 2002).

³⁶¹ See, e.g., MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND ETHICS IN QUEER LIFE 108 (1999); RIGGS, *supra* note 6, at 82-88 (discussing how “passing off our relationships as ‘just like’ heterosexual relationships, and in not being ‘too threatening,’” queers can establish themselves as “good” in mainstream society).

that gay marriage allows the state and dominant cultural groups to define "good" and "bad" gays.³⁶²

In fact, the idea of "gay marriage" is rooted in the homophilia movement, in which "homophile 'married' couples" were standard, and whose leader "found a long-term commitment to another man a preferable way of life."³⁶³

Moreover, Professor Janet Halley has argued that the anti-subordination approach to gay rights furtherance crystallizes a "universal understanding[] of race" that hides the "assumption that racial discrimination would be morally acceptable if blacks could change the color of their skin;"³⁶⁴ she posits that this approach also forces queers to constrain their communities and identities to suspect class status in ways that pervert intragroup variation.³⁶⁵ Based on a similar view in regards to race, Professor of Law and constitutional theorist, Neal Gotanda, has proposed that race be dealt with as is religion in the United States.³⁶⁶ Such an approach would include free racial expression and varying racial identity protection as per a First Amendment approach, and would also incorporate direct governmental support of racial diversity and racial affiliation. Gotanda explains that a better approach than by way of the Fourteenth Amendment for racial equality is that taken by the courts towards religion, one that would recognize the importance of racial affiliation and prevent the establishment of any one race.³⁶⁷ Thus, he states, the courts should not try to eradicate varying racial status as an institution, but encourage its practice without favoring one over others.³⁶⁸ "Free exercise of race" and freedom from racial establishment would allow the government to remedy past wrongs, and for racial minority groups to experience and celebrate their cultures. Banning the establishment of the notion of "one race," or of white supremacy, would

³⁶² Butler, *supra* note 360, at 237. See also Posting of Susan Jacoby to The Secularist's Corner, <http://www.washingtonpost.com> (follow "Opinions" hyperlink; then follow "Discussion Groups" hyperlink; then follow "The Secularist's Corner" hyperlink; then follow "America's Gay Fixation" hyperlink) (discussing a recent decision by "the Evangelical Lutheran Church . . . to leave gay clergy alone if they are in chaste, committed relationships").

³⁶³ CHAUNCEY, *supra* note 22, at 87.

³⁶⁴ See, e.g., Halley, *supra* note 46, at 138; Halley, *supra* note 58, at 503.

³⁶⁵ Halley, *supra* note 46, at 115.

³⁶⁶ Neal Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 64-65 (1991).

³⁶⁷ *Id.* at 67.

³⁶⁸ *Id.* at 67-68.

require the government to prevent domination, hierarchy, and exploitation.³⁶⁹

This article argues, similarly, that greater freedom of expression and freedom from the establishment of state-sponsored moral culture will aid in preserving the variance within queer communities, which many who are against gay marriage fear will be lost to assimilation. Just as there are many types of religious identity and practice that may be protected from similar types of suppression, there is also room for many interpretations of queerness within this legal approach. Various interpretations of queerness should not preclude access to the most relevant legal rights.

Imagine, for example, a freedom of religion suit brought during the 1920s Prohibition era for the right to drink wine at mass. Indeed, an argument against this case could be as follows: there are many Christians, and even Catholics, who do not require a taste of wine as a representation of the blood of Christ to feel that they fully follow their religious practices. In addition, it has been argued that some First Amendment claims (most notably Free Exercise) trigger only rational basis scrutiny if they are brought against laws of “general applicability,” such as Prohibition.³⁷⁰ Therefore, this argument states that the right to drink wine for religious purposes is not necessarily protected under the First Amendment.

However, the Supreme Court has also invoked First Amendment standards when a law applies to behavior that is engaged in exclusively for religious or expressive purposes,³⁷¹ with the understanding that one person may have a need for wine during mass that another does not have under the rubric of what is ostensibly the same Christian, or even Catholic religion.³⁷² If both religious conceptions are equally deserving

³⁶⁹ *Id.* at 67.

³⁷⁰ Laws of “general applicability” are universal sanctions that are not considered discriminatory even though they may disparately impact different populations. *See, e.g.*, Brian A. Freeman, *Expiating The Sins of Yoder and Smith: Toward a Unified Theory of First Amendment Exemptions From Neutral Laws of General Applicability*, 66 MO. L. REV. 9, 63 (2001).

³⁷¹ For more information about the inconsistency of the Court’s standards for a generally applicable law in regards to the First Amendment expression and exercise protections, *see*, David Bogen, *Generally Applicable Laws And The First Amendment*, 26 SW. U. L. REV. 201 (1997); David S. Bogen, *The Religion Clauses and Freedom of Speech in Australia and the United States: Incidental Restrictions and Generally Applicable Laws*, 46 DRAKE L. REV. 53, 54-55 (1997).

³⁷² *See, e.g.*, Michael J. Perry, *Freedom of Religion in the United States: Fin De Siecle Sketches*, 75 IND. L.J. 295, 312-13 (2000); *see also* Michael Dehaven Newsom, *Some Kind of Religious Freedom: National Prohibition and The Volstead Act’s Exemption for the Religious Use of Wine*, 70 BROOK. L. REV. 739 (2005).

of protection, then why are not both the pro-marriage and anti-marriage conceptions of queer identity? This allows for the judicial understanding that some homosexuals need, for example, access to the right to marry to fully express their queer status, but it also creates room for different queer lifestyles that do not require this without jeopardizing protection for the right to marry, and thereby accomplishes dual goals. The first goal is that queer rights movements—such as same-sex marriage activism—are not undermined by criticism that any particular right—such as marriage—is not fundamental to queer identity, even though some do not care about gaining access to it, or are even actively against the “right to marriage” movement. The second goal is that queers can support activity in favor of the right to marry, for example, without sacrificing the many other ways to be queer. In other words, in this instance there can be a classification for queers that allows them the cohesiveness to fight for specific identity-based rights but that does not hold them to a narrow definition of what it means to be “queer.”³⁷³

Beyond both the marriage debate, beyond the unifying popular understanding of queers as deviant, and beyond all valid assertions of intragroup variance, this article argues, still, that there is a general understanding of queer identity that unites the community such that the individualism of queer-centrism is better served by First Amendment protections than by the group-based, difference-eradicating politic of Fourteenth Amendment-based advocacy.³⁷⁴ The Supreme Court has expansively and functionally formulated First Amendment protections as “embrace[ing] whatever for the individual is [the *ultimate*] concern [that] gives meaning and orientation to a person’s whole life” as definable *only by the adherent*.³⁷⁵ This terminology comes from the work of theologian Paul Tillich, on whose views the Supreme Court heavily relied in one of its most in-depth deliberations on the definition of religion for First Amendment purposes.³⁷⁶ The “ultimate concern” approach is appropriate

³⁷³ The only limit to this might be a denial of a certain type of right if the queer identities and actions being protected do “not rest at all upon moral, ethical, or religious principle but instead rest[] solely upon considerations of policy, pragmatism, or expediency.” *Welsh v. United States*, 398 U.S. 333, 342-43 (1970). An example might be found in the case of two people espousing a “queer” lifestyle who wish to marry for economic considerations alone; in this case, marriage in the United States requires a dedication to a notion of love, beyond the more pragmatic or economic needs that might be served by civil union.

³⁷⁴ Douglas NeJaime, *Marriage, Cruising, and Life In Between: Clarifying Organizational Positionalities in Pursuit of Polyvocal Gay-Based Advocacy*, 38 HARV. C.R.-C.L. L. REV. 511, 539, 550 (2003).

³⁷⁵ *Toward a Constitutional Definition of Religion*, *supra* note 305, at 1056, 1067 (emphasis added).

³⁷⁶ *See e.g.*, *United States v. Seeger*, 380 U.S. 163, 180, 186-87 (1965).

for queer issues because it focuses on functional rather than content-oriented criteria³⁷⁷—that is, on the role and meaning the identity has in a person’s life over the content of that identity—and “reject[s that which] for the individual . . . is capable of compromise.”³⁷⁸ This approach is formed on the basis of human experience so as to avoid “religious chauvinism” and is “peculiarly appropriate to the preferred status given to religious freedom by the first amendment.”³⁷⁹ Further, an orientation of ultimate concern “categorically requires [one] to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets.”³⁸⁰ This is evidenced by the fact that many in the United States give up a plethora of straight privilege, risk isolation, and make themselves vulnerable to discrimination by choosing to make the ultimate, self-defining step to come or be out.³⁸¹

V. SOCIOLEGAL IMPLICATIONS

Thus far, this article has made no normative claims regarding which stance on gay rights activism—classic anti-subordination or identity-based discrimination—is more desirable or useful. The framework utilized, be it the “recognitional” of the First Amendment, or the “redistributive” of the Fourteenth, should be the one that fits the situation best; depending on the needs of a social community or nation, both might be used in tandem. However, the sociopolitical impact and likelihood that either framework will incite backlash is important knowledge for the purposes of analyzing the efficacy of the two approaches in comparison to one another.

³⁷⁷ A number of legal scholars have contemplated the extent to which the definition of a belief system should incorporate an analysis or methodology that takes into account relevant and individual context, as opposed to the being mired in a specific dictionary definition. Eduardo Penalver, *The Concept of Religion*, 107 YALE L.J. 791, 794 (1997); see generally George Freeman III, *The Misguided Search for the Constitutional Definition of Religion*, 22 GEO. L.J. 1519 (1983), Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984).

³⁷⁸ *Toward a Constitutional Definition of Religion*, *supra* note 305, at 1075.

³⁷⁹ *Id.*

³⁸⁰ *United States v. Kauten*, 133 F. 2d 703, 708 (2d Cir. 1943).

³⁸¹ See generally Eskridge, *supra* note 62, at 2414.

A. THE DANGERS OF SUPPRESSION TO SOCIETY

"The first great cultural war in American history was between the indigenous Native Americans and the invading Europeans, [and it] centered around the Catholic priests' attempts to convert the Indians to Christianity One of the major criticisms leveled against" Native Americans was their acceptance of and great respect for homoeroticism, 'Two Spirit' (androgenous) peoples and same-sex couplings and marriage.³⁸² Ironically, however, "[t]he [American] principle of free conscience and speech rests on the argument for universal toleration [stated by European thinkers such as] Pierre Bayle and John Locke" forbidding "a dominant religion or group to unreasonably deprive other groups of their rights of conscience and speech."³⁸³

In general, freedom from establishment was endorsed early on by Jeffersonians for the purposes of avoiding the damaging political battles and possible civil wars due to sectarian clashes.³⁸⁴ The types of conflicts the Founders imagined were those similar to the religious wars of Europe that led to many fleeing to the American colonies in the first place.³⁸⁵ Subsequently, the

avoidance of political strife . . . was extremely important to the drafters of the Bill of Rights, [who] recognized that some of the most bitter instances of social discord and division involved those political issues over which the opposing parties divided along denominational lines and in which sectarian interests fueled the fires of secular disagreement.³⁸⁶

The results of such a conflict in which the opposing parties are not equally powerful are that one set of interests is suppressed. Professor William Eskridge notes,

suppression creates unnecessary risks for a society, especially the possibility of a malignant dynamic of anger, as it raises the stakes of

³⁸² A DOCUMENTARY HISTORY, *supra* note 31, at 1.

³⁸³ RICHARDS, *supra* note 59, at 39.

³⁸⁴ See, e.g., Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 93, n.45, 401-02 (1998); Michael Troy, *First Amendment and Free Speech*, ALLEXPERTS, <http://en.allexperts.com/q/1st-Amendment-Free-342/free-exercise-establishment-clauses.htm>. See also ARLIN M. ADAMS & CHARLES J. EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES (1990); CHESTER J. ANTIEAU ET AL., FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGIOUS CLAUSES (1964).

³⁸⁵ Troy, *supra* note 384.

³⁸⁶ *Toward a Constitutional Definition of Religion*, *supra* note 305, at 1059.

clashing nomic communities. When the state makes it a crime to express oneself as a Jew . . . or as a homosexual, the state is likely to embitter the objects of the suppression [and give] its most potentially vicious citizens power over its most vulnerable. This is not only cruel but counterproductive, as it creates resistance among the vulnerable, and even anger that can spill over into violence. By demonizing a vibrant nomic community, the state is inviting social turmoil.³⁸⁷

Famed biologist Alfred Kinsey observed on behalf of other researchers that homosexuals are “far too large a group to be repressed without severe consequences to society.”³⁸⁸ Arguably, it is this social turmoil that precipitates movements, borne of the aforementioned resistance. For instance, judicial rulings and policy change had curtailed widespread harassment of homosexuals in major cities by the mid-1960s,³⁸⁹ but by then, arguably, a heretofore fairly ignored population had been made acutely conscious of the suppression of its voice by the dominant majority.³⁹⁰ For this reason, the raid on the Stonewall bar³⁹¹ was, at that point, an active, volatile act of suppression that created a tremendous outrage in the gay community that spread to most of the Western world, whose conception and persecution of “queer” as deviant were similar those of the United States.³⁹² To discuss these types of scenarios, Eskridge utilizes the concept of “*Kulturkampf*,”³⁹³ “a state struggle to assimilate a threatening minority, or to force conformity upon it.”³⁹⁴ He goes on to note that *Kulturkampf* referred to programs (beginning from the 1800s and onwards and including the years of the Nazi regime) to subvert and oppress religious sects, including Roman Catholicism in the 1870s and 1880s and those that did not fall under Hitler’s ideology during World War II.³⁹⁵ As Eskridge explains:

³⁸⁷ Eskridge, *supra* note 62, at 2446-47 (emphasis added).

³⁸⁸ A DOCUMENTARY HISTORY, *supra* note 31, at 80.

³⁸⁹ CHAUNCEY, *supra* note 22, at 36.

³⁹⁰ *Id.* ADAM, *supra* note 1, at 89.

³⁹¹ The Stonewall Rebellion, occurring in New York City, encompassed a series of violent conflicts between police officers and queer people that began on June 28, 1969. Many consider the clash a climactic moment for the American gay rights movement. *See generally* DAVID CARTER, STONEWALL: THE RIOTS THAT SPARKED THE GAY REVOLUTION (2004).

³⁹² *See generally id.*

³⁹³ Eskridge, *supra* note 62, at 2414 (noting that in his dissent to *Romer v. Evans*, Scalia misuses the term).

³⁹⁴ *Id.* at 2413-14.

³⁹⁵ *Id.* at 2414.

Once mobilized at the state level, social prejudice against a religious or sexual minority [in the West] aims at suppression or erasure of the minority The extreme goal is elimination, from outright genocide to expulsion and exile to forced conversion. The more moderate goal is assimilation Whatever the ultimate goal, the processes for achieving it are expensive, requiring great mobilization of the state apparatus to hunt down deviants and reprogram, expel, or imprison them. Because an intense campaign of re-education, suppression, or erasure is so costly, it usually does not last long and is succeeded by an accommodation of some sort. Sometimes the accommodation is a truce premised on the view that the deviant group has survived. More often, it is premised on the view that the deviant[s have] been defeated and can be assimilated into the mainstream culture. In the latter instance, a remnant of the deviant minority goes underground This regime, where the minority pays homage to the shame attributed to them by keeping their identity secret in exchange for survival, is now known as the "closet."³⁹⁶

Recently, a seemingly similar situation occurred in India. The showing of the lesbian movie *Fire*, directed by Toronto-based director Deepa Mehta, was attacked nationwide by the Hindu nationalist party,³⁹⁷ sparking a "visible crackdown"³⁹⁸ by police that arguably marked the beginning of a true post-colonial Western-style "gay rights" movement in India.³⁹⁹ However, even though the suppression of *Fire* was, on face value, that of queer expression alone, the Hindu Nationalist party denounced the foreign, "Western" nature of the film⁴⁰⁰ while simultaneously using the event to violently solidify the place of sexual subalterns (such as *Hijra*) in the caste system.

Professor of Law and constitutional scholar, Jack Balkin, famously discussed the broad, potentially negative affect on society not in terms of the suppression of expression, but in terms of the anti-subordination struggles of subjugated classes against the inconsistencies of socio-economic systems.⁴⁰¹ The paradox he developed is as follows: societies with relatively rigid social roles and hierarchical orderings tend to appear quite stable and peaceful on the surface; however, as status hierarchies weaken, it takes considerably greater effort to keep

³⁹⁶ *Id.* at 2421.

³⁹⁷ Katyal, *supra* note 13, at 121.

³⁹⁸ *Id.* at 162.

³⁹⁹ *Id.*

⁴⁰⁰ See, e.g., Madhavi Sunder, *Intellectual Property and Identity Politics: Playing with Fire*, 4 J. GENDER RACE & JUST. 69, 81 (2000) (noting how denouncers of the movie believed Mehta was "attempting to influence India with ideas about sexuality imported from a decadent West").

⁴⁰¹ See generally Jack Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2314 (1997).

subordinate groups subordinate and inferior meanings and identities inferior.⁴⁰² Although a deteriorating status hierarchy is theoretically a positive occurrence for civil rights movements, sometimes violent and “intense social conflict between status groups [often] emerges . . . during [the] decline” of a rigid social hierarchical system.⁴⁰³ There is, therefore, the promise of extreme hostility and powerful conflict in the de-legitimization and ultimate destruction of strongly supported social hierarchies.⁴⁰⁴ This appears to be illustrated most clearly in the United States by the tragic bloodshed that followed African-Americans during their prolonged (and still unfinished) progress from slave to full-fledged citizen within a meaningfully desegregated society; the social structural changes that led to a substantial increase in Black freedom and civil rights were accompanied, at very least, by an upheaval in the form of the only internal conflict the United States has ever known: the Civil War.

Conversely, there may not be reason to expect intense, violent backlash if gay marriage and other freedom from establishment and free expression provisions are instated in the United States, as the system in the United States means that these changes will not function to tear down Balkin’s “strongly supported social hierarchies.”⁴⁰⁵ Consequently, there appears little reason to anticipate a need for a *Brown II*-type of judicial admonishment of resistant legislatures or citizens to clarify and effectively implement recognition gay rights legislation and social action faster than “with all deliberate speed.”⁴⁰⁶ We do not have much data to examine yet, but for example, when gays finally began to get married in Massachusetts, “nobody on the ground really cared.”⁴⁰⁷

⁴⁰² *Id.* at 2334.

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*

⁴⁰⁵ *See generally id.*

⁴⁰⁶ Michael C. Dorf, *Fallback Law*, 107 COLUM. L. REV. 303, 310 n.30 (2007)

Following its holding that de jure racially segregated schools violate the Equal Protection Clause in *Brown v. Board of Education* . . . the Supreme Court did not insist on immediate compliance with its holding, instead demanding that state and local officials act “with all deliberate speed” That formula was taken by many to permit foot dragging . . . leading the Court, thirteen years later, to demand a desegregation plan “that promises realistically to work, and promises realistically to work now.”

see also RICHARD KLUGAR, *SIMPLE JUSTICE* 752-53 (1976).

⁴⁰⁷ Commentators have stated that the sky has not fallen since gay marriage came to Massachusetts, and the issue is no longer the political third rail it once was. Raphael Lewis, *After Vote, Both Sides in Debate Energized*, BOSTON GLOBE, Sept. 15, 2005, available at http://www.boston.com/news/local/articles/2005/09/15/after_vote_both_sides_in_debate_energized.

However, in any case, to avoid the potent combination of violence and *Kulturkampf*, societies abroad must implement a system in which both queer expression and free existence is encouraged, despite its potential for cultural change antithetical to the traditions espoused by the majority.⁴⁰⁸

B. LEGITIMIZING LGBT ADVOCACY IN THE UNITED STATES

In the United States, those of Jewish, Italian, and Irish heritage were once considered of different "races"⁴⁰⁹ and were the "objects of intolerance and state-imposed disabilities," while now these ethnic labels are at most fairly benign (if stereotyped) proxies for religious or national origin status.⁴¹⁰ Similarly, there is no confirmation that the current status of American sexual minorities will remain static, or any proof that they will not be drafted into a type of suspect class.

As this paper has argued, queers overseas move in and out of the sex/gender continuum and are understood by their societies as either a "third sex" or an "immoral, sacrilegious colonial import," or both. American queers in the twenty-first century might themselves be undergoing any or all of the following: (a) moving towards a "third sex" status; (b) finding their lifestyles aligned in the popular view with those of [some] religious minorities (such as [polygamous] Mormons); or (c) becoming a suspect class under their own conditions. Indeed, many gay rights advocates hope to give homosexuals a new place as a Fourteenth Amendment suspect class on their own terms as a group in need of suspect class protection related to, yet distinct from, the scales on which race, sex, disability, class, and others are measured legally, in government policy, and in socio-legal theory. Perhaps they want to establish the validity of the subordination of sexual minorities by heterosexual supremacy, not male supremacy—that is, subordination on the basis of sexual orientation, not on the basis of sex. Such advocates ask for a concrete, official allowance of both redistributive as well as recognitional rights for queers under the Fourteenth, regardless of whether they really need to emphasize the redistributive rights issues, and regardless of whether their tact will effectively procure any recognitional rights. They continue to pursue the Fourteenth

⁴⁰⁸ See generally Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 498-99 (2001).

⁴⁰⁹ See, e.g., Steven A. Holmes, *The Politics of Race and the Census*, N.Y. TIMES, Mar. 19, 2000.

⁴¹⁰ Eskridge, *supra* note 62, at 2420.

Amendment route to rights procurement in part because the Fourteenth Amendment approach to rights procurement is familiar to Congress and the Court. But the fact that the First Amendment was activated at the state level by the Fourteenth can not only facilitate its direct use within pro-gay legal action, but also furthers the intuition that both Amendments should be utilized for the comprehensive furtherance of gay rights.⁴¹¹ Professor Janet Halley notes:

The fact that minoritizing understandings of homo-/heterosexual differences are so adaptable to the “like race” approach to advocacy means that pro-gay lawyers will be more likely to use them, and maybe also more likely to respond with indifference, obtuseness and even hostility when universalizing models are proposed. At the same time the utility to lawyers of minoritizing models makes those models more salient, more widely diffused, and more likely to take the shape of an identity script than they would otherwise be. The questions of accuracy, strategy, speaking for others, and loyalty are all implicated in the resulting dynamics.⁴¹²

Moreover, the utility of an approach that encompasses freedoms related to expression and identity for the furtherance and establishment of sexual minority rights and equalities in the United States is important even from a non-legal frame of reference. The effective absorption by popular gay rights, and other socio-political discourse, of a perspective based on expressive and identity-based conceptions of freedom would have the effect of clarifying boundaries and creating alliances between queers and groups that consider themselves “truer” members of the Fourteenth Amendment suspect classes, such as racial minorities and women. Certainly, there is no ultimate, concrete division between a second-class citizen who needs greater access to economic opportunities and civil rights and a deviant actor who requires greater access to expressive and practice-based rights claims. For example, in the Bible (a text fundamental to much of the majority religions’ Judeo-Christian

⁴¹¹ The First Amendment originally limited the establishment of an official religion and prohibited unlawful censorship by the federal government. During the period of slavery, many slave states defied the First Amendment and censored abolitionists’ pamphlets, writings and speeches. The states’ defense for ignoring the protections of the First Amendment referenced the vague wording of this amendment, in that it stated that “Congress shall make no law,” which, presumably, applied only to the federal government. Michael Troy, *First Amendment and Free Speech*, ALLEXPERTS, <http://en.allexperts.com/q/1st-Amendment-Free-342/free-exercise-establishment-clauses.htm>. For this reason, even after the First was passed, many states had official state-sponsored religions. In 1865, the Supreme Court applied First Amendment principles to states through ratification of the Fourteenth Amendment, thereby eliminating state-sponsored religion as a whole. See, e.g., *id.*

⁴¹² Halley, *supra* note 46, at 174.

community and practice in the United States today), femaleness and darker skin have both been related to sin,⁴¹³ and the Quaker religious mentality that empowered repressed voices played a large part in "destabilizing slavery as well as racism and sexism."⁴¹⁴ This article views minority communities on a spectrum, as opposed to categorized status groups, that contains anti-subordination; the author places Fourteenth Amendment-based claims on one end and expressive, individual identitarian First Amendment-claims on the other. On this scale, the author places racial minorities on the end closest to the Fourteenth, women in the middle, and queers in the United States on the far end, closest to the First. The intuition behind this placement is that the closer a minority group is to the First Amendment end of the spectrum, the more likely it is that judgments about identity performance have played a role in whether suspect class status was granted to that minority group.⁴¹⁵ The placement on the scale also determines what level of scrutiny the minority group is accorded in regards to suspect class status. In sum, the closer a group is to the First on the spectrum, the more important it becomes to establish constitutional protection for that group that does not rely on immutability and "biological identity," and that shields people with a variety of identity performances from unlawful discrimination.

Although this article argues for the furtherance of American gay marriage through expressive and anti-establishment claims alone, a shared burden on the Fourteenth and First is likely the best route, ultimately, for complete set of American queer rights. However, it is important to underscore the particular importance of recognitional rights to the American queer community for certain issues such as gay marriage, while simultaneously not diminishing the importance of other gay issues that may have greater anti-subordination components, such as employment discrimination. "Thinking of culture in terms of hybridization [can operate] as an impetus for radical social change,"⁴¹⁶ and it is key in the case of American gay rights to realize that discrimination and anti-subordination may be based on as assessment of

⁴¹³ Eve is the purveyor of original sin in Judaism, Catholicism, and Orthodox Christianity.

⁴¹⁴ RICHARDS, *supra* note 59, at 41. See generally *id.* at 38-62.

⁴¹⁵ For an example of this regarding gender, see generally *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

⁴¹⁶ SPURLIN, *supra* note 139, at 109 (discussing the Western influence and African roots present in the phenomenon of queer culture in Southern Africa). As I mentioned earlier, this dualism to some extent mirrors the expressive/identitarian and antisubordination strains of minority rights procurement in the United States.

gays (as deviant) that is distinct from the assessment of traditional Fourteenth Amendment suspect classes (as inferior).

Further, “[if the gay and lesbian movements] are to be successful, [they] will require cooperation within and between progressive movements and serious efforts to transcend narrow identity politics.”⁴¹⁷ In taking an alternate approach, LGBT activists will be seen to have rightly given minorities and women more claim on the Fourteenth, and will perhaps garner their greater support. Currently, racial minorities sometimes see homosexuals as trying to “take credit” from those who have had particular second-class citizenship experiences, such as enslavement, segregation, and the denial of education and voting rights, that queers in the United States have not had to endure.⁴¹⁸ This view could change if queers were instead seen as taking a different route, for a somewhat different set of rights. Women’s rights advocates also might more wholeheartedly support gay activism if they could distance themselves from a history in which feminism was diminished in the public eye when judged as merely veiled support of lesbianism.⁴¹⁹ Perhaps, with a decrease in the pressure on feminists to separate feminist and gay issues, there could be a greater focus on feminism’s and queers’ shared practical goal of the at least partial disintegration of gender stereotypes and the expansion of sexual freedom.

Finally, it is sometimes the case that official, legal moral legitimacy leads to social and interpersonal legitimacy. In this way, legally legitimizing queer expression and identity will help to expand the acceptance of queerness in the American cultural *nomos*. The two largest recent examples showcasing the effects of legal censure on social and cultural perspective in the United States began in the 1880s in association with the Church of Jesus Christ of Latter Day Saints and in the 1950s in regards to homosexuality.⁴²⁰ Today, to the extent that Mormonism is associated with polygamy, and polygamy with illegality (and deviance), Mormons often feel, at the very least, the need to defend their religion and choices in popular conversation, and further may not be comfortable identifying as Mormon at all under certain circumstances. This is true despite the fact that many the Church of Latter Day Saints—the main Mormon sect in the United States—officially prohibited

⁴¹⁷ RIMMERMAN, *supra* note 231, at 184.

⁴¹⁸ See Henry Louis Gates, Jr., *Blacklash?*, in DANGEROUS LIAISONS: BLACKS, GAYS, AND THE STRUGGLE FOR EQUALITY 25 (Eric Brandt ed., 1999).

⁴¹⁹ See, e.g., ADAM, *supra* note 1, at 97.

⁴²⁰ Eskridge, *supra* note 62, at 2414.

polygamy in 1890,⁴²¹ and that most Mormons do not practice it.⁴²² One method of attaining greater social legitimization of Mormonism under circumstances in which it is associated with polygamy would be to effectively communicate the widespread Mormon disassociation from polygamy; however, another method of legitimizing the Mormon religion would be to socially validate the practice of polygamy itself, possibly through its legalization.⁴²³

Similarly, due to widespread social disapproval of homosexuality, those gay people who find themselves able to "cover" often feel pressure to do so even under circumstances where it is not legally mandated (as opposed to a situation such as in the military). In simple terms, this is because they feel judged. The social validation that laws protecting queer lifestyles, identities, and activities would provide would be one more tool for queers to better establish their identities, be truer to themselves, and to engage in open-minded conversations about themselves. This would lead to greater cultural and societal support, and even more future legal protection, such as laws prohibiting discrimination on the basis of sexual orientation in adoption cases, as well as laws involving other privilege-based (as opposed to rights-based) scenarios. A useful analogy can be made to the Jewish community, as "old tropes of anti-Semitic rhetoric [have been] especially influential in shaping depictions of homosexuals, [both of whom] have been denounced as . . . outsiders whose loyalties are not to the nation but to . . . [an] extranational community of people like themselves."⁴²⁴ A prominent scholar of queerness in Jewish culture has said that,

Jews have been conspicuously missing from the multicultural equation [because] of the empowered status of this ethnic

⁴²¹ See The Church of Jesus Christ of Latter-Day Saints, *Polygamy (Plural Marriage)*, 2007, <http://www.lds.org/ldsorg/v/index.jsp?vgnextoid=bbd508f54922d010VgnVCM1000004d82620aRCRD&locale=0&sourceId=9887ec6f164b2110VgnVCM100000176f620a>. See also *What Is The Church's Stance On Polygamy And Modern-Day Groups Who Practice It?*, FRONTLINE, Apr. 30, 2007, <http://www.pbs.org/mormons/faqs/controversies.html#4>.

⁴²² See, e.g., *Polygamy—Frequently Asked Questions*, Absalom Collection (Mormon Fundamentalism), <http://www.absalom.com/mormon/polygamy/faq.htm>. For information regarding the intersection of Mormonism and gay identity, see, e.g., *The Mormon Church and Gays*, FRONTLINE, Apr. 30, 2007, <http://www.pbs.org/mormons/themes/gays.html>. For a comprehensive documentary exploring recent information and reflection regarding the Mormon faith in the United States, see, e.g., *The Mormons*, FRONTLINE, Apr. 30, 2007, <http://www.pbs.org/mormons>.

⁴²³ See *id* (polygamous Mormons have historically been a socially disfavored religious group in the United States).

⁴²⁴ CHAUNCEY, *supra* note 22, at 19; see also PHELAN, *supra* note 197, at 9-10 (making an analogy between anti-gay and anti-Semitic rhetoric).

minority However, in order to obtain institutional access, Jewish artists . . . were typically required to shed their ethnic identity. “Passing” meant that Jewish identity had to be effaced and that related religious or cultural iconography had to be tastefully submerged if not totally excluded. For decades, one of the great taboos for Jewish artists was to represent ethnicity in their work [and therefore a]bstraction became a natural refuge.⁴²⁵

Only in a post World War II environment of active governmental support for Jewish people have Jewish artists begun to concretely represent their religious and cultural identity in their art.⁴²⁶

First Amendment protection for queers would help further broader respect for queer lifestyles and “choices” by designating them as deserving of the protection accorded religious “choices.” On the other hand, Fourteenth Amendment protection may further evoke narrow pity for what may be construed as the “unchangeable” biological deviation of homosexuality; this pity may even be contingent on the immutability of queerness and may, to paraphrase Halley, be accompanied by the assumption that discrimination against homosexuals and queers would be morally acceptable if they could change who they were.

Further, official respect for queer people, in the form of legal expressive and anti-establishment protections, is crucial to many queer people’s abilities to fully and comfortably assert their complete identities within social and political discourse, and fully integrate their complete selves into American culture.⁴²⁷ On the other hand, “if protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons.”⁴²⁸

⁴²⁵ In conjunction with this, *Moment* magazine, the *Village Voice*, *Tikkun*, and other publications have run stories dealing with “the many individuals in America for whom Jewish, lesbian and gay identity are plainly merged.” Norman L. Kleeblatt, *Multivalent Voices: Gay and Lesbian Artists Who Are Also Jewish Search for Ways to Address Questions of Ethnicity and Sexuality in Their Work*, 83 *ART IN AM.* 29 (1995).

⁴²⁶ *Id.*

⁴²⁷ See, e.g., PHELAN, *supra* note 197, at 139-40 (observing “the role of acknowledgement” in fostering real citizenship for queer people in democratic regimes such as the United States, and noting that “conceptions of bodies and kinship” must be broadened to open citizenship to all). Further, a study by The Williams Institute on Sexual Orientation Law and Public Policy at the University of California, Los Angeles shows that people in more cities with greater tolerance and acceptance of queer lifestyles (such as San Francisco and Seattle) “do not show a sharp increase in the number of gays, lesbians and bisexuals in general, [but instead that] people are now more willing to disclose their sexual orientation in government surveys.” *Study: San Francisco, Seattle, Atlanta Top List of Cities with Highest Percentage of Gays*, *ADVOCATE*, Nov. 17, 2006, available at http://www.advocate.com/news_detail_ektid39474.asp.

⁴²⁸ *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

VI. CONCLUSION

The classic, ancient and enduring second-class citizenship status of queers internationally is different from the institutional experiences of queers in the United States. In the 1920s and 1930s, burgeoning gay culture was exoticized and met with popular fascination;⁴²⁹ the opposing side of this fascination for the queer is its conception as unnatural and deviant, a notion which remains the strongest anti-gay sentiment in the United States today. This issue highlights the need for a different rights furtherance framework than that which is utilized by traditional "suspect classes" in the United States, whose "natural inferiority"—as opposed to unnatural deviance—has been more of an obstacle to securing civil rights.

Thus far, anti-subordination frameworks have been heavily explored by gay rights activists. Instead, a gay rights framework should identify that queer individuals and communities have been cast in the role of deviant "other" in opposition to a national moral majority, and should therefore pursue expressive freedoms and freedom from state-sponsored majoritarianism, similar to those available to religious minorities. Such strategies can be used to broaden the current understanding of gays among other minority groups, to further number of legal claims for the protection of queer status and conduct in place such as on the job and in the military, and to procure gay marriage.

Finally, a gay rights framework should further the protection of variation among queer people as well as the variant sexuality of those who do not, and may never, consider themselves to be queer. The latter category may include, for example, those who inhabit unique sexual identities within the context of apparently heterosexual relationships. Professors Adam and Bamforth explain that,

when "gay liberation" began in the 1960s, it never thought of itself as a civil rights movement for a particular minority, but as a revolutionary struggle to free the homosexuality in everyone For gay liberation, there was no "normal" or "perverse" sexuality, only a world of sexual possibilities Once everyone was free to express her or his latent sexualities, boundaries between the homosexual and the heterosexual should fade into irrelevance.⁴³⁰

⁴²⁹ CHAUNCEY, *supra* note 22, at 14-15.

⁴³⁰ ADAM, *supra* note 1, at 84; *see also* BAMFORTH, *supra* note 4, at 64 (stating that "the Gay Liberation Front presented itself, on both sides of the Atlantic, as a revolutionary force dedicated to overthrowing . . . fixed sexual categories of any sort").

Sonia Katyal has argued against the notion that the “American-style model of gay identity is a ‘universal human condition.’”⁴³¹ This article argues for the uniqueness of the American model as opposed to other models, and claim further that the singularity of the American LGBT movement implies a need for a distinct approach to gay rights furtherance in the United States. The “identity” has served as the center of queer culture in for the United States for the past forty years, and the cultural dissent that it produces should harness legal change for its own well-being.

⁴³¹ Katyal, *supra* note 13, at 175.