

NO PROMO HOMO: THE SEDIMENTATION OF ANTIGAY DISCOURSE AND THE CHANNELING EFFECT OF JUDICIAL REVIEW

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Arguments against equal rights for gay men, lesbians, bisexuals, and transgendered people have shifted from, "Those are bad people who do sinful, sick acts," to "A progay reform would promote homosexuality." Professor Eskridge's article presents a history of this rhetorical shift, tying it to the rise of a politics of preservation by traditionalists seeking to counter gay people's politics of recognition. Eskridge also shows how modern antigay discourse has become sedimented, as arguments are layered on top of (but never displace) each other. Evaluating the various forms no promo homo arguments can take, he maintains that the most obvious versions are not plausible, and that the most plausible are not constitutional. This archaeology of no promo homo discourse has interesting ramifications for constitutional theory and doctrine. Among them, as Eskridge concludes, is the way in which the channeling function of law not only changes group rhetoric, but also group identity, and helps the state "manage" polarizing culture clashes.

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INTRODUCTION

Antigay discourse has shifted in the last generation. For most of the twentieth century, laws or social norms stigmatizing gay people

were justified on the ground that gay people do disgusting things or are diseased or predatory. Intolerance of bad people and their bad acts was the rationale. Since the 1960s, these justifications have been supplemented with arguments that progay changes in law or norms would encourage homosexuality or homosexual conduct.¹ The slogan is “no promotion of homosexuality.” In slang, *no promo homo*.

The logical structure of the standard no promo homo argument against the state’s adopting a progay policy, x (or in favor of retaining an antigay policy, y), is as follows:

The Standard Argument

1. If the state adopts policy x (abandons policy y), it would be endorsing and promoting homosexuality or homosexual conduct.
2. The state ought to endorse and promote good lives and good conduct and ought not to endorse and promote less good lives and conduct.
3. Homosexuality and homosexual conduct are not as good as heterosexuality and heterosexual conduct.

Therefore, policy x should not be adopted (policy y should be retained).

This kind of argument became salient once gay, lesbian, bisexual, and transgendered (GLBT) people started making some headway in reducing state antigay policies. Part I of this Article shows how the identity discourse of GLBT people’s politics of recognition has engendered an opposing identity discourse by traditional family values (TFV) people. No promo homo is the characteristic rhetoric of their politics of preservation.

Thus, no promo homo arguments have become the main objections to gay demands for repeal of consensual sodomy prohibitions and bars to same-sex marriage and for enactment of laws prohibiting discrimination on the basis of sexual orientation (Part II). Such arguments were also the discreet subtext of the Supreme Court’s decisions in *Bowers v. Hardwick*,² where the critical fifth vote came from a Justice swayed by no promo homo concerns,³ and *Romer v. Evans*,⁴

¹ See, e.g., Pope John Paul II, Letter to Families, ¶ 17, in 23 *Origins* 637, 651 (1994) (explaining that trends favoring acceptance of same-sex marriage “represent a serious threat to the future of the family and of society itself”); Richard A. Posner, *Sex and Reason* 311 (1992) (“[P]ermitt[ing] homosexual marriage would be widely interpreted as placing a stamp of approval on homosexuality.”); John M. Finnis, Law, Morality, and “Sexual Orientation,” 69 *Notre Dame L. Rev.* 1049, 1052 (1994) (disapproving “promotion of forms of life . . . as a valid or acceptable alternative to” heterosexual marriage).

² 478 U.S. 186 (1986) (upholding state criminalization of consensual “homosexual sodomy” against due process attack).

³ See *infra* notes 64-65 and accompanying text.

⁴ 517 U.S. 620 (1996) (invalidating state constitutional rule barring lesbians, gay men, and bisexuals from broad array of state protections).

where the Court majority ignored no promo homo arguments made in defense of an antigay initiative.⁵

TFV opposition has been unable to prevent the enactment of dozens of antidiscrimination laws, but once the state started protecting GLBT people, no promo homo arguments morphed. On the one hand, private TFV groups started making them in order to avoid the application of antidiscrimination laws to their associations (Part III). The privatized variation of the standard no promo homo argument looks like this:

The Privatized Argument

1. If the state applies antidiscrimination policy x to require a group to include openly gay people in its activities, the state is forcing the group to endorse or promote homosexuality or homosexual conduct.
2. The state ought not force private groups to endorse or promote ideas or conduct with which they fundamentally disagree.
3. TFV groups fundamentally disagree with the idea that homosexuality and homosexual conduct ought to be promoted.

Therefore, antidiscrimination policy x should not be applied to TFV groups.

In *Boy Scouts of America v. Dale*,⁶ the Court explicitly accepted this form of the no promo homo argument.

On the other hand, as old antigay state policies started falling, TFV groups pressed the state to create new policies reasserting the community's preference for heterosexuality (Part IV). These new policies were justified by a more affirmative variation of the standard argument:

The Affirmative Argument

1. If the state fails to adopt new policy z disapproving of homosexuality or penalizing "homosexuals," it might be viewed as endorsing and promoting homosexuality or homosexual conduct.
2. The state ought to endorse and promote good lives and good conduct and ought not to endorse and promote less good lives and conduct.
3. Homosexuality and homosexual conduct are not as good as heterosexuality and heterosexual conduct.

Therefore, the state should adopt new policy z.

⁵ See Petitioner's Brief at 13, *Evans* (No. 94-1039) (defending antigay initiative on ground that sexual orientation antidiscrimination laws draw enforcement resources away from worthier groups and invade liberty of traditionalists).

⁶ 120 S. Ct. 2446 (2000) (ruling that state cannot apply public accommodations antidiscrimination law to require Boy Scouts to retain openly gay scoutmaster).

The first four Parts of this Article develop an archaeology of no promo homo arguments and policies.⁷ In Part V, I suggest that the foregoing history has resulted in a triple sedimentation of discourse. Antigay discourse itself has changed, with social republican arguments superseding medical arguments, which earlier had superseded natural law arguments. But the old arguments do not disappear; they remain as foundational layers over which new arguments intellectually sediment. A second kind of sedimentation has occurred, whereby each form of argument has generated constitutional versions, again cumulative and layered rather than competitive and displacing. For example, natural law advocates now claim that gay equality violates TFV people's right not to associate, or not to allow their children to associate, with GLBT people. Finally, each kind of argument can be made directly ("Homosexuality is unnatural or predatory"), or can be made indirectly, in the no promo homo mode ("Heterosexuality is great, and its institution of the family [etc.] will be undermined if homosexuality is promoted."). What emerges from my analysis is certainly a complicated story about antigay rhetoric, but a story powerfully illustrating the perseverance of old forms even in modern circumstances and the overall constitutionalization of discourse in this country.

Another idea developed in the first half of this Article is that no promo homo is a smart way of making antigay claims. Opposition to sodomy law repeal on the ground that it would "promote homosexuality" appeals to people with different reasons for being nervous about gay people—the anxious parent as well as the religious fundamentalist. Moreover, the no promo homo argument is consequentialist and therefore less confrontational: "It's not that we hate homosexuals, but rather that we fear the consequences of their special rights." Part VI of this paper carefully examines these consequentialist claims.

Shifting public policy in a progay direction will typically have no discernible effect on sodomy rates and the incidence of homosexuality in our society. No promo homo arguments and their antigay policies thus can be sustained most easily *either* as a signal of status denigration for GLBT people *or* as a state effort to closet variant gender and sexuality from the public culture. This analytic has serious ramifications for antigay rhetoric. Potentially, it deprives such arguments of some of their appeal to moderates and exposes the no promo homo position as essentially resting on more abrasive claims, namely, that

⁷ For scholarship enriching our understanding of other kinds of antigay rhetoric, see generally Didi Herman, *The Antigay Agenda: Orthodox Vision and the Christian Right* (1997); Nan D. Hunter, *Identity, Speech, and Equality*, 79 Va. L. Rev. 1695 (1993); Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 Harv. C.R.-C.L. L. Rev. 283 (1994).

GLBT people should be second-class citizens and that the state should encourage them to closet their identities in the public culture.

These abrasive claims raise constitutional red flags under *Evans* and the First Amendment. Although judicial review of antigay policies is context-dependent, Part VII develops a doctrinal model for understanding the Supreme Court's stance at the turn of the millennium. Today, no promo homo justifications for sodomy laws and state refusals to charter gay organizations cannot save such policies from constitutional infirmity, but similar arguments successfully can support federal and state same-sex marriage bars and the federal exclusion of GLBT people from the armed forces. Moreover, the model shows why a privatized version of the no promo homo argument successfully can invoke the First Amendment to protect TFV associations such as the Boy Scouts from compliance with state antidiscrimination laws.

This doctrinal model is dynamic because it gives strong weight to social norms, which have changed and are changing in this country. Thus, the model's conclusions are different from those that could have been made thirty years ago and are different from those that would exist in a polity that is more accepting of sexual and gender variation, as Canada is. Another source of the model's dynamism is federalism. State courts in relatively gay-friendly jurisdictions, such as Vermont, have freedom to be more gay-protective than the model predicts. Their stance on equality can support progay changes in other states and, ultimately, nationwide.

The Article continues with generalizations about constitutional theory and practice that are suggested by the archaeology of no promo homo. Part VIII makes some descriptive generalizations. When there is a social consensus denigrating a minority, judges will do little or nothing to help the minority, but their creation of rights in other contexts often will have spillover effects that indirectly empower or encourage disfavored minorities. The gaylegal experience suggests that if a minority is able to assert itself politically and destabilize social consensus against it, the courts not only will sweep away some historic discriminations against the minority, but also will have the capacity to press social norms toward tolerance or even acceptance of the minority group over time. Once the group has achieved a critical mass of social acceptability, it is in the interests of the political system for the judiciary to police status denigrations and censorship campaigns against the group. This descriptive account of the relationship between social movements and the law illuminates the evolution of American constitutional norms regarding state treatment of religious and racial minorities and women, as well as gender and sexual minorities. Finally, gay experience suggests ways in which the American de-

ployment of judicial review exercises a powerful *channeling* effect on preservationist as well as progressive rhetoric. Just as equal protection doctrine presses GLBT people and other minority groups toward assimilative rhetoric, so it presses traditionalists toward less confrontational oppositionist rhetoric—and away from rhetoric directly denigrating gay people on the basis of pure status or unjustified stereotypes. In this way, judicial review has a domesticating effect on political discourse generally and a dampening effect on “culture wars” specifically.

Part IX makes one final normative point, inspired by conversations I had with Professor Vicki Schultz about this Article. A chief threat of no promo arguments and policies is that they will make falsification of stereotypes and amelioration of prejudice unjustifiably hard. A key objection to apartheid regimes of all sorts—from race-based physical segregation to the psychic apartheid of the closet—is that they create conditions where false stereotypes and bitter prejudice will flourish. By separating blacks from whites and by forcing gay people into closets, the law makes it impossible for either minority to refute stereotypes associated with it or to soften prejudices harbored against its members. A key justification for antidiscrimination laws is that they can educate the majority through a politics of presence. The presence of people of color in positions of authority and of openly gay teachers in the classroom slowly undermines ignorant beliefs and creates opportunities for mutually useful cooperation. This phenomenon illustrates the mutual relationship between law and society that is a recurring theme of this paper.

I

NO PROMO HOMO AND STATUS: THE POLITICS OF PROTECTION, RECOGNITION, AND PRESERVATION

Legal realism suggests that law is part of a larger socio-political process and not just the mechanical application of rules to facts. Indeed, not only does law change in response to shifts in social power and values, but it also helps shape social power and norms by prefiguring preferences, prejudices, and interests.⁸ Recent realist historians who study social movements have developed elaborate accounts of the contingency of law as a forum for struggle. That is, law both reflects mainstream norms and prejudices and contains within it norms

⁸ See generally Robert W. Gordon, *Critical Legal Histories*, 36 *Stan. L. Rev.* 57 (1984); Robert W. Gordon, *The Past as Authority and as Social Critic: Stabilizing and Destabilizing Functions of History in Legal Argument*, in *The Historic Turn in the Human Sciences* 339 (Terrence J. McDonald ed., 1996) [hereinafter Gordon, *Past as Authority*].

to which minorities can lay claim and procedures to challenge the status quo.⁹ This sophisticated form of realist history is a productive way of exploring the interrelationship between law and identity politics.¹⁰

As it did with race, law's stigma helped create homosexuality as a totalizing and naturalized identity trait, yet then contributed to the normative and descriptive destabilization of that trait as a regulatory category. In this and other ways, legal history of homosexuality reveals how law's contribution to identity can be both dynamic and sedimentary.¹¹ "Homosexuality" and "the homosexual" did not exist as regulatory or even semantic categories before the turn of the nineteenth century.¹² Sodomy, the "crime against nature," was a legal concern long before homosexuality was.¹³ Although sodomy was a serious crime from the beginning of American history, people were rarely prosecuted for it until after the Civil War, when subcultures of cross-dressing men and women-affiliated women appeared in large cities.¹⁴ Historians link the public alarm against these people with the larger revulsion of society against women who violated gender norms by having their own careers and against men who sexually molested children.¹⁵ Fresh laws were adopted to address these concerns, includ-

⁹ See generally E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* 258-69 (1975); Gordon, *Past as Authority*, supra note 8; Hendrick Hartog, *The Constitution of Aspiration and the "Rights that Belong to Us All,"* in *The Constitution and American Life* 353 (David Thelen ed., 1988); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 *Minn. L. Rev.* 265 (1978).

¹⁰ For some early analyses, see generally Ian Haney López, *White by Law: The Legal Construction of Race* 1-36 (1996); Joseph Vining, *Legal Identity: The Coming of Age of Public Law* (1978); Cheryl I. Harris, *Whiteness as Property*, 106 *Harv. L. Rev.* 1707 (1993); Martha Minow, *Identities*, 3 *Yale J.L. & Human.* 97 (1991); Gerald Torres & Kathryn Milun, *Translating Yonnonidio by Precedent and Evidence: The Mashpee Indian Case*, 1990 *Duke L.J.* 625.

¹¹ The gaylegal history in this Part is adapted from William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* 13-137 (1999); see also *Creating a Place for Ourselves: Lesbian, Gay, and Bisexual Community Histories* (Breet Beemyn ed., 1997); Lillian Faderman, *Odd Girls and Twilight Lovers: A History of Lesbian Life in Twentieth-Century America* (1991); Jonathan Ned Katz, *The Invention of Heterosexuality* (1995).

¹² See Lillian Faderman, *The Morbidification of Love Between Women by 19th-Century Sexologists*, 4 *J. Homosexuality* 73 (1978); David M. Halperin, *Sex Before Sexuality*, in *Hidden from History: Reclaiming the Gay and Lesbian Past* 37-39, 482 nn.1-2 (Martin Bauml Duberman et al. eds., 1989).

¹³ See Eskridge, supra note 11, at 157-64.

¹⁴ See *id.* at 24-26, 157-64, app. C1.

¹⁵ See Carroll Smith-Rosenberg, *Disorderly Conduct: Visions of Gender in Victorian America*, 167-81, 245-96 (1985) (arguing that creation of "sexual inversion" as way of thinking about women who love women corresponded with women's increasing economic and social independence from men); see also Philip Jenkins, *Moral Panic: Changing Concepts of the Child Molester in Modern America* 20-48 (1998) (noting heightened concern over child molestation from 1880s onward); Angus McLaren, *The Trials of Masculinity: Policing Sexual Boundaries 1870-1930*, at 13-36, 207-31 (1997) (arguing that general crisis of masculinity drove need for legal line-drawing to demonize gender-inverted people).

ing obscenity laws to suppress birth control information, cross-dressing laws to prevent women from appropriating male attire, solicitation and lewd vagrancy laws to suppress female prostitutes, and indecent liberty and delinquency laws to protect minors from sexual abuse.¹⁶ Although not their original targets, male sodomites were arrested under these statutes.¹⁷ Their arrests generated accounts in the purple press and medical journals. Their reported cases then became the raw material for doctors in this country as well as Europe to create a new category of people: gender and sexual “inverts” or “degenerates.”¹⁸

Between 1921 and 1945, homosexuality, a turn-of-the-century medical category, was recognized increasingly as an important identity trait by legal actors. Although the homosexual was technically just someone whose Freudian sexual preference was for someone of the same sex, legal actors operated on him (and increasingly her) as an object of multiple scorn: a presumptive sodomite performing illegal sex acts, a gender invert believed to be biologically degenerate and a threat to the health of the body politic, and a sexual psychopath who could not control his Freudian id and therefore threatened law and order.¹⁹ From World War II onwards, law focused on homosexuality as a totalizing identity. The regulatory state not only policed but increasingly sought to flush out the homosexual through toilet stakeouts, decoy operations, and witch hunts.²⁰ The state also sought to expunge homosexuality from the public culture through censorship, terrorizing raids and surveillance, and license revocations.²¹

The evolution of legal focus—from unnatural sodomy to gender inversion to sexual psychopathy—restructured the nature of perceived social problems, and of deviant identity, within relatively short periods of time. The sinful sodomite was a different legal object than the degenerate invert or the psychopathic homosexual. The continual restructuring was not radical, however, because the dynamism was a *sedimented* one: Each new identity was linked up with other societal

¹⁶ For discussion and cites to such statutes, see Eskridge, *supra* note 11, at 26-34.

¹⁷ See generally George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940* (1994).

¹⁸ The most systematic work of the sexologists drew upon legal as well as medical case histories to make generalizations about sexual inversion and deviance. See Havelock Ellis, *Sexual Inversion* 201-03 (3d ed. 1915); Richard von Krafft-Ebing, *Psychopathia Sexualis, With Especial Reference to the Antipathic Sexual Instinct: A Medico-Forensic Study* 333-411 (Franklin S. Klaf trans., Bell Publ'g Co. 1965) (1886); G. Frank Lydston, *Sexual Perversion, Satyriasis and Nymphomania*, 61 *Med. & Surgical Rep.* 253, 254 (1889), excerpted in Jonathan Ned Katz, *Gay/Lesbian Almanac* 213 (1983).

¹⁹ See Eskridge, *supra* note 11, at 34-43.

²⁰ See *id.* at 60-74.

²¹ See *id.* at 43-52, 60-82; William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961*, 24 *Fla. St. U. L. Rev.* 703 (1997).

concerns and formed a layer over, rather than displaced, the old identity.²² The sodomite and the invert and the psychopath are part of what many Americans understand today as the lesbian or gay man. Law has been one mechanism for preserving the bottom layers of the identity, for connecting old concerns with new ones, and for presenting each new identity as if it always had existed as a natural regulatory category.

Conversely, law creates opportunities for identity politics. Legal stigma not only is a mechanism for thrusting an unwanted identity upon its objects but also can be the focal point for resistance, when like-situated objects perceive that they are being treated similarly and unfairly and start thinking and acting in concert. This recognition can engender three different kinds of politics—all represented in gaylegal history. The first is a *politics of protection*, whereby members of a minority group struggle to protect themselves against law's intrusion into their lives or communities. Most twentieth century gaylegal history was marked by resistance by gay people and their advocacy groups to state witch hunts, censorship, bar license revocations, and police harassment.²³ The First Amendment and the Due Process Clause were constitutional instruments deployed, with varying success, to shield gender and sexual variants from state penalties and harassment.²⁴ The famous Stonewall riots reflected the group identity and anger engendered by state persecution and triggered the engagement of an increasing number of GLBT people in more confrontational politics.²⁵ Ironically, the rights of expression, association, and publication created during the Warren Court protected the identity-forming politics of gender and sexual rebels unleashed by Stonewall.

These newly mobilized GLBT people and groups not only insisted that antigay legal penalties be nullified or repealed, but also lobbied for laws prohibiting private as well as public discrimination on the basis of sexual orientation.²⁶ As Nancy Fraser has said, this aspi-

²² My use of the term sedimentation is similar to that appearing in Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. Pa. L. Rev. 1 (1998).

²³ See John D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States 1940-1970*, at 40-53 (1983).

²⁴ See 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, 828-909 (1997) (discussing Due Process Clause and First Amendment, respectively).

²⁵ In June 1969, patrons of the Stonewall Inn, a gay and drag bar, fought back when the New York City police raided the premises. Several nights of mild rioting and protests followed. "Stonewall" is generally viewed as the beginning of a mass gay rights movement. For an account from the point of view of contemporaries and some early gay rights leaders, see Martin Duberman, *Stonewall* (1993).

²⁶ See Eskridge, *supra* note 11, at 125-41, 205-38, app. B2.

ration classically represents a *politics of recognition*, whereby the minority group seeks to change social and legal norms privileging majority status and devaluing the minority.²⁷ Once gay rights became a serious politics of recognition, the Equal Protection Clause became a source of constitutional inspiration and litigation. A politics of recognition, however, is not zero-sum, for it requires a redistribution of legal entitlements in favor of people traditionally subject to legal disadvantage.²⁸

Not surprisingly, then, the progay politics of recognition begat a countermovement by TFV people for whom gay rights were threatening. Once openly GLBT people emerged in the public culture, many fundamentalist Christians made Leviticus 20:13 and Romans 1:26-27 central to their faith.²⁹ Biblical eschatology refocused on homosexual license as a major threat to civilization and morality.³⁰ For some literally, for others figuratively, Satan was homosexualized, and the never-married Christ was homophobicized. Opposition to gay rights thus has become a kind of identity politics for religious fundamentalists and others who fear progay changes in public law as corrosive of their republican vision for America. They view sexual orientation antidiscrimination laws as infringing on their family values and their rights as parents, coworkers, and landlords not to associate with lesbians, bisexuals, or gay men. Theirs is what I call a *politics of preservation*.³¹

The politics of preservation emphasizes the positive family values of the traditionalist group as well as no promo homo arguments. At their core, such arguments recognize that progay shifts in the law redistribute rights away from straight people, including "nice" TFV people as well as "nasty" bigots, and in favor of GLBT people, including "nasty" in-your-face queers as well as "nice" respectable gays. Progay

²⁷ Nancy Fraser, *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition* 13-23 (1997); see also Richard L. Abel, *Speaking Respect, Respecting Speech* passim (1998); J.M. Balkin, *The Constitution of Status*, 106 *Yale L.J.* 2313, 2321-32 (1997).

²⁸ According to the analytic developed by Wesley Hohfeld, a right held by person A entails a corresponding duty on the part of person B. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *Yale L.J.* 16, 30-32 (1913). Under the common law, for example, landlord A has a right to exclude lesbian couple B and B', who have a duty to leave the premises upon the landlord's request. Laws prohibiting sexual orientation discrimination in leasing reverse the entitlements, so that B and B' have a right to stay and A has a duty to lease them the flat.

²⁹ Leviticus 20:13 declares a man lying with a man to be an "abomination." Romans 1:26-27 condemns as "shameful" and "against nature" the passionate relations between women and between men.

³⁰ See Herman, *supra* note 7, at 28-32, 47-48, 61-63 (noting that *Christianity Today* was concerned with sexual promiscuity of all sorts before 1969 but focused on predatory homosexuality with increasing alarm only after 1969).

³¹ The idea is inspired by Joseph R. Gusfield, *Symbolic Crusade: Status Politics and the American Temperance Movement* (2d ed. 1986).

shifts in the law also raise the social status of gay people (even if from outlaws to mere undesirables) and thereby “promote” gay people as a group. At their most fundamental level, no *promo homo* arguments can be—and, I shall argue, must be—understood as rhetoric justifying the traditionally degraded social and legal status of GLBT people. The interplay between a politics of recognition and a politics of preservation involves the relative social status of both TFV and GLBT people more than the ideological conflict between family values (which most gay people aspire to) and sexual liberty (which a great many traditionalists secretly enjoy or about which they lustfully obsess).

II

THE ORIGINS OF NO PROMO HOMO DISCOURSE: SEDIMENTARY JUSTIFICATIONS FOR PRESERVING AN ANTIGAY STATUS QUO

The history of public debate about sodomy repeal, same-sex marriage, and antidiscrimination laws shows how justifications for identity-policing rules can be sedimentary, synthesizing old-fashioned as well as modern rationales, and nonpreservationist, changing or even facilitating the abandonment of traditionalist identities.³² The original justifications for antigay policies rested in *religious natural law* traditions: Sodomy is sinful and sodomites abominations. As religion-based arguments became disfavored in public discourse, they were supplemented—but not replaced—by *medical utilitarian* ones: Sexual and gender inverts are diseased and predatory. When the medical establishment voiced doubts about that antigay position, *social republican* arguments were added: Homosexuals disrupt families and children’s sexual development. No *promo homo* incorporates all three traditions into a single all-purpose argument. Thus, no *promo homo* not only “modernizes” antigay discourse, but also allows modern tropes to mingle with ancient ones.

³² In many ways, the gaylegal experience illustrates Reva Siegel’s theories about social change. Generalizing from her archaeology of law’s stance toward wife-beating and wives’ right to earnings, Siegel maintains that when traditionalist rules come under fire their justifications are “modernized” and that modernized justifications can enhance their “capacity to legitimate social inequalities.” Reva B. Siegel, “The Rule of Love”: Wife Beating as Prerogative and Privacy, 105 *Yale L.J.* 2117, 2119-20 (1996) [hereinafter Siegel, Rule of Love]; see also Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives’ Rights to Earnings, 1860-1930*, 82 *Geo. L.J.* 2127 (1994). No *promo homo* discourse illustrates Siegel’s thesis, for it is a modernized form of justification, but also suggests that her thesis is too pessimistic: Modernization of justification does not necessarily rescue unjust entitlements.

No promo homo arguments will not save traditional antigay policies, however.³³ Modernized justifications neither necessarily nor ordinarily preserve those entitlements, both because they change the nature of the entitlement under cover of stability, and because they wane in persuasive power in an environment where the subordinated group is politically active and can associate its demands with tropes appealing to mainstream culture.

A. *Sedimented Justifications for Sodomy Laws: The Failure of Modernized Discourse*

Sodomy laws were both unimpeachable and unmentionable under the natural law thinking of the colonial and early national period.³⁴ This was probably the reason Jeremy Bentham failed to publish his 1785 essay *On Paederasty*.³⁵ Bentham stipulated that sodomy disgusted him but argued that overall social utility (the greatest good for the greatest number) was not served by sodomy laws. Because such laws deprived consenting adults of activities that were congenitally pleasurable to them, created opportunities for false accusations and extortion, and encouraged unproductive prejudices, their overall social costs greatly exceeded their benefits.³⁶ Bentham's follower John Stuart Mill developed this kind of utilitarian thinking into his libertarian philosophy, which presumes that the state should leave people alone unless they are hurting others, but even Mill left sodomy publicly unmentionable.³⁷

It took a hundred years for Bentham-like arguments against sodomy laws to be published in English. Turn-of-the-century sexologists Richard von Krafft-Ebing (in translation) and Havelock Ellis systematically developed the concept of homosexuality as a gender inversion and a sexual deviation for English-speaking audiences.³⁸ Although they viewed inverts or homosexuals as physically or psychically "pathological," both advocated the repeal of consensual sodomy laws for Benthamite reasons: Such laws penalized people for conduct that was

³³ This is at odds with the pessimistic strain of Siegel's argument. See *supra* note 32.

³⁴ The crime against nature was "a detestable, and abominable sin, amongst christians not to be named." Sir Edward Coke, *The Third Part of the Institutes of the Laws of England* 58-59 (Prof. Books Ltd. 1985) (1644).

³⁵ The manuscript of Jeremy Bentham, *On Paederasty* (written c. 1785, annotated 1816) was discovered by Louis Crompton, who published it in 3 *J. Homosexuality* 389 (1978), 4 *J. Homosexuality* 91 (1978).

³⁶ See Bentham, *supra* note 35, (4 *J. Homosexuality*) 98-100.

³⁷ See John Stuart Mill, *On Liberty* 85-105 (Prometheus Books 1986) (1859) (articulating libertarian presumption and arguing that Mormon polygamy, socially objectionable on feminist grounds, should not be prohibited).

³⁸ See Ellis, *supra* note 18, *passim*; von Krafft-Ebing, *supra* note 18, at 186-257.

not harmful to others, induced harm by facilitating blackmail, and had no effect on the prevalence of either homosexual conduct or homosexuality.³⁹ Homosexuals themselves made the same libertarian and consequentialist arguments for sodomy deregulation.⁴⁰ Not only did the arguments fail to persuade, but English-speaking jurisdictions expanded sodomy laws to include oral sex and adopted new solicitation, cross-dressing, and public lewdness or indecency prohibitions to supplement sodomy laws as means of policing sexual and gender nonconformists.⁴¹

The new regulatory regime was supported, in part, by the argument that homosexuals are not just sinful sodomites, but are also biologically degenerate people who invert natural gender roles. Disgust was phrased in medical as well as religious terms. Other arguments were openly utilitarian, a reversal of Bentham's still-unpublished essay. American doctors maintained that homosexuals are psychopathic (unable to control their sexual impulses) and therefore predatory against children and youths.⁴² The vampire lesbian and the homosexual child molester were tropes in place by World War I and were deployed vigorously before and after World War II to justify state campaigns that not only condemned and penalized homosexuals, but hunted them and medically treated their hypersexualized bodies with electricity, chemicals, and scalpels.⁴³

Yet it was in the midst of the antihomosexual campaign of the McCarthy era that the utilitarian arguments of *On Paederasty* and the libertarian presumption of *On Liberty* gained a modest audience for deregulating sodomy. Doctors such as Alfred Kinsey publicized the utilitarian framework for thinking about sex regulation (rendering the natural law arguments potentially irrelevant) and subjected the predatory homosexual trope to skeptical analysis (potentially neutralizing the primary medical argument).⁴⁴ Reflecting this libertarian approach, sex offender commissions of doctors, lawyers, and academics in New York, New Jersey, Illinois, and California insisted that the rapist and child molester were different objects of regulation than the homosexual; they prominently recommended that the criminal law focus on coercive sex and sex with minors and deregulate consensual

³⁹ See Ellis, *supra* note 18, at 346-55; von Krafft-Ebing, *supra* note 18, at 386-88.

⁴⁰ See, e.g., Xavier Mayne (pseudonym for Edward Irenaeus Prime Stevenson), *The Intersexes: A History of Similiseualism as a Problem in Social Life?* 455-58, 484 (1908).

⁴¹ See Eskridge, *supra* note 11, at 24-37; McLaren, *supra* note 15, at 16-17.

⁴² See Jenkins, *supra* note 15, at 58-74; Estelle Freedman, "Uncontrolled Desires": The Response to the Sexual Psychopath, 1920-1960, 74 *J. Am. Hist.* 83, 104 (1987).

⁴³ See Jonathan Ned Katz, *Gay American History* 129-207 (2d ed. 1992) (reproducing documents describing medical techniques).

⁴⁴ See, e.g., Alfred C. Kinsey et al., *Sexual Behavior in the Human Male* 659-66 (1948).

sodomy that harmed no one.⁴⁵ The American Law Institute's 1955 tentative draft of the sexuality rules of the Model Penal Code followed these commissions and recommended decriminalizing sodomy between consenting adults.⁴⁶

In response to declining support for the predatory homosexual idea among medical experts, antisodomites shifted their arguments once again. After World War II, defenders of sodomy laws emphasized the dynamic and polity-wide effects of doing anything that would remove stigmas against homosexuality. These social republican arguments proved successful; between 1955 and 1969, only one state (Illinois) decriminalized consensual sodomy.⁴⁷

To take an early example of this rhetorical shift, a committee of judges, law enforcement officers, and medical experts advised the Florida legislature regarding sex offense revision in 1964-65.⁴⁸ Their initial meeting saw the medical experts invoke Benthamite arguments in favor of deregulating consensual sodomy: "[T]he homosexual who engages in homosexual activities exclusively with other homosexuals in private presents no harm or danger to society," and sodomy laws were enforced arbitrarily and subjected otherwise law-abiding citizens to blackmail.⁴⁹ In response, a police officer argued that "if we take adult, consenting homosexual relationships out of the criminal category, then we're going to increase our homosexual population in the State of Florida to the point where no child will be safe anywhere, anytime."⁵⁰ Judge John Rudd argued that "to ignore consenting adults in private would certainly be to condone their actions and before long the problem would be out of control."⁵¹ Rudd's statement is exemplary of modern no promo homo argumentation, for it

⁴⁵ See A.R. Magnus, *Society and Sexual Deviation: A Fact-Finding Report of the California Sexual Deviation Research Program*, in California Dep't of Mental Hygiene, *Final Report on California Sexual Deviation Research* 63, 85 (1954) (concluding that current sex laws are "relatively ineffective" at channeling behavior); Report of the Illinois Commission on Sex Offenders 10-11 (1953) (distinguishing nonconforming sexual behavior that "offends morals" from that which is "community threat"); Report on Study of 102 Sex Offenders at Sing Sing Prison 49, 54-57 (1950) (arguing for bill embodying report's conclusion that New York law should focus on violent and child-molesting sex offenders); Paul Tappan, *The Habitual Sex Offender* 17-25 (1953) (making similar points in final report of New Jersey commission).

⁴⁶ See Model Penal Code § 207.5 cmt. 1 (Tentative Draft No. 4, 1955).

⁴⁷ See Criminal Code of 1961, § 35-1, 1961 Ill. Laws 1983, 2044 (repealing Ill. Rev. Stat. ch. 38, 47 (1947)).

⁴⁸ Minutes of Advisory Comm. to Fla. Legis. Investigating Comm., June 29-30, 1964, reprinted in Eskridge, *supra* note 21, app. 6.

⁴⁹ *Id.*, reprinted in Eskridge, *supra* note 21, at 833 (argument of Dr. Stokes).

⁵⁰ *Id.*, reprinted in Eskridge, *supra* note 21, at 833-34 (paraphrasing arguments of Duane Barker).

⁵¹ *Id.*, reprinted in Eskridge, *supra* note 21, at 833.

focused on the signal, an indirect effect, sent by sodomy repeal and worried that the signal would lead to an out-of-control problem, which listeners could construe to mean their own *bêtes noires*—more immoral or sick conduct, more homosexual people, more homosexuality in the public culture, whatever.

The same kind of debate occurred in other states. Unlike the Florida group, which was unable to agree on a sodomy reform recommendation, law reform commissions in other states recommended decriminalization of consensual sodomy as part of a general liberalization, but legislatures refused to act.⁵² Because gay people themselves were overwhelmingly closeted and few were politically active, decriminalization was not even on the agenda of most states. Legislator reluctance to act also reflected the normative power of the status quo: Because the states had criminalized consensual sodomy since colonial times and because every state but Illinois continued to criminalize consensual sodomy, people internalized that norm as natural, and some would have been upset to see it suddenly reversed. Risk-averse legislators saw popular investment in exaggerated terms and were doubly afraid to act, especially in light of the mere possibility that homosexuals would flock to any state perceived as friendly to them. Sodomy reform in Illinois occurred only because of bipartisan agreement not to publicize the legalization of homosexual and other “deviant” behavior.⁵³

Stonewall, and sexual liberation in the 1960s, destabilized the situation. After 1969, consensual sodomy laws no longer could rest on their past laurels, and they dropped like flies in a hailstorm. Eighteen states repealed such laws between 1969 and 1976.⁵⁴ California, in 1975, was the first state to repeal its consensual sodomy law as part of a sex crimes bill.⁵⁵ Representative Willie Brown and Senator George Moscone urged adoption of the bill for the usual libertarian reasons.⁵⁶ The leading opponent of the bill, Senator H.L. Richardson, responded with no *promo homo* arguments. The prohomosexual signal sent by the law, he said, would lead to rampant venereal disease, open the

⁵² See Robert G. Fisher, *The Sex Offender Provisions of the Proposed New Maryland Criminal Code: Should Private, Consenting Adult Homosexual Behavior Be Excluded?*, 30 Md. L. Rev. 91, 104, 108-11 (1970) (discussing proposed reforms in Maryland and New York).

⁵³ See Letter from Dr. Charles Bowman, Professor of Law, University of Illinois (June 15, 1964), cited in Eskridge, *supra* note 21, at 775 & n.436.

⁵⁴ See Eskridge, *supra* note 11, app. A1.

⁵⁵ See Act of May 12, 1975, ch. 71, § 7, 1975 Cal. Stat. 131, 132 (amending sodomy provision of penal code).

⁵⁶ See George Mendenhall, *Sex Bill Passes in Historic Senate Tie-Breaker*, *Advocate*, May 21, 1975, at 4.

courts to expansion of homosexual liberty to include public spaces (beaches, bushes, restrooms), and send impressionable children the message that "homosexuality is okay."⁵⁷

The California debate reflected vital political identity-based energy on both sides of the issue: Gay people invoked Bentham/Mill reasons for deregulation, and an aborning "Christian Right" invoked a variety of reasons for continued regulation. The latter emphasized utilitarian (predatory homosexuals) and republican (sexualized public culture) arguments, but they did not abandon natural law (sinful sodomy) arguments, nor did they just repackage these traditional arguments in more modern terms. Instead, they synthesized the various arguments. No *promo homo* was that synthesis, and it was a smart synthesis.

Consider this contrast. The logical structure of the natural law (or the medical utilitarian) argument for retaining sodomy laws is this:

1. Homosexual sodomy laws condemn and penalize homosexual conduct.
2. The state ought to condemn and penalize unnatural (psychopathic) conduct.
3. Homosexual conduct is unnatural (psychopathic).

Therefore, homosexual sodomy laws should not be repealed.

Compare the logical structure of the standard no *promo homo* argument (outlined in the introduction) as applied to the repeal of sodomy laws:

1. Repeal of homosexual sodomy laws would endorse or promote homosexuality or homosexual conduct.
2. The state ought to endorse and promote good sexual orientations and good sexual conduct over less good orientations and conduct.
3. Homosexuality and homosexual conduct are not as good as heterosexuality and heterosexual conduct.

Therefore, homosexual sodomy laws should not be repealed.

The no *promo homo* argument has several advantages over the natural law or medical argument. Because step three in the no *promo homo* argument is set at a higher level of generality, it can appeal to different conceptions of the good, including utilitarian concerns about the sexuality of children, old-fashioned natural law conceptions of acceptable sex or gender roles, and republican concerns about public culture. Therefore, the no *promo homo* argument not only facilitates coalitions of people with different concerns, but is also more flexible, allowing the coalition to expand as new kinds of concerns are identi-

⁵⁷ See *id.* Senator Richardson later became a Justice on the California Supreme Court.

fied. This mode of argument also can exploit uncertainty: If you're not sure about homosexuals and their supposed behavior, then leave things alone. Don't forget what happened to Pandora when she opened the box! Perhaps most important, the no promo homo argument sounds more tolerant than the natural law argument, a big advantage in political and judicial fora once a fair number of gay people are monitoring, or participating in, the debate. It also has an appeal to Christian theology, a significant consideration for its main audience, which emphasizes love and rejects prejudice and hate. Because so many antigay people are fundamentalist Christians, its tolerant rhetoric is a big plus for no promo forms of argument.

Although states continued to repeal their sodomy laws through the 1970s, the repeal movement slowed, and two states re-regulated sodomy, for no promo homo reasons.⁵⁸ When the "Christian Right" emerged in the late 1970s, no promo homo arguments went national. In 1981, the Moral Majority petitioned the House of Representatives to veto the District of Columbia's attempted repeal of its sodomy, adultery, and fornication laws. Veto supporters stressed moral (bad conduct) and republican (national decline) arguments,⁵⁹ but most members of Congress emphasized the no promo homo approach. The District's repeal would "decriminalize, and thus legitimize" sodomy. "This act, by specifically legalizing unusual sexual practices, would condone them. The moral and ethical traditions of this Nation do not condone acts such as sodomy and adultery."⁶⁰ The House voted 281-119 to veto the District's attempted sodomy repeal.

The wind went out of the sails of legislative sodomy repeal after the House vote. Spurred by successes in New York and Pennsylvania

⁵⁸ After Idaho adopted the Model Penal Code, its legislators learned that homosexuality was being promoted and reenacted its prior code, Act of Mar. 27, 1972, ch. 336, §18-6605, 1972 Idaho Sess. Laws 844, 966-67, lest their state would become a haven for "sex deviates." See Idaho Repeals New Consenting Adults Code, *Advocate*, May 10, 1972, at 3. Arkansas's legislators responded to a similar surprise by recriminalizing only same-sex sodomy. See Act 828, § 1, 1977 Ark. Acts 2118, 2118-19 (codified at Ark. Code Ann. § 5-14-122 (Michie 1997)).

⁵⁹ See, e.g., 127 Cong. Rec. 22,749 (1981) (statement of Rep. Bliley) (arguing that sodomy repeal is inconsistent with "[t]he moral and ethical tradition of this Nation"); *id.* at 22,762-63 (statement of Rep. Philip M. Crane) (reading letter from Washington Archbishop James A. Hickey that argued that D.C. action weakened fabric of society); *id.* at 22,769 (statement of Rep. McKinney) (quoting Washington Post editorial citing Reverend Jerry Falwell, who called new law "perverted").

⁶⁰ *Id.* at 22,766 (statement of Rep. Bliley); accord, *id.* at 22,767 (statement of Rep. Siljander) (asserting that deregulation would "legitimize" immoral sexual practices). But see *id.* at 22,768 (statement of Rep. McKinney) (noting that when 12 churches supported sodomy law reform, they were "not endorsing homosexuality").

state courts,⁶¹ gay rights advocates pressed more aggressively for judicial invalidation under the Supreme Court's right to privacy precedents, but the Court rejected the challenge in *Bowers v. Hardwick*.⁶² The opinion of the Court deferred to presumed antihomosexual "belief" as a rational basis for the law.⁶³ A majority of the Court had originally voted to invalidate the law, but Justice Powell changed his vote. His biographer says the Justice agreed with the libertarian view that sodomy laws unnecessarily penalize conduct that hurts no one else but nonetheless voted to uphold the law,⁶⁴ because invalidating the law "would entangle the Court in a continuing campaign to validate the gay 'lifestyle' in a variety of other contexts."⁶⁵

Ironically, Powell's no promo homo vote, which saved consensual sodomy laws from wholesale invalidation, helped reinvigorate the gay rights movement, which pressed its antisodomy campaign at the state level. Authoritative court decisions in traditionalist states such as Kentucky, Tennessee, Montana, and Georgia (the *Hardwick* state) followed the libertarian approach of the *Hardwick* dissenters to invalidate sodomy laws on state constitutional privacy grounds,⁶⁶ and other jurisdictions have legislatively repealed their laws.⁶⁷ As of March 2000, thirty-one states and the District of Columbia have revoked their consensual sodomy laws.⁶⁸ No promo homo arguments continue to be made in favor of preserving consensual sodomy as a crime, and some states are rebuffing challenges to their laws.⁶⁹

⁶¹ See *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980) (striking down state sodomy law); *Commonwealth v. Bonadio*, 415 A.2d 47 (Pa. 1980) (same).

⁶² 478 U.S. 186 (1986).

⁶³ See *id.* at 196.

⁶⁴ See John C. Jeffries, Jr., Justice Lewis F. Powell, Jr. 522-24 (1994).

⁶⁵ *Id.* at 518. The Justice wondered, "Would there be a conditional requirement that the law allow homosexual adoption or same-sex marriage?" *Id.*

⁶⁶ *Powell v. State*, 510 S.E.2d 18 (Ga. 1998); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992); *Gryczan v. State*, 942 P.2d 112 (Mont. 1997); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996).

⁶⁷ Anti-Sexual Abuse Act of 1994, §501(b), 42 D.C. Reg. 62 (codified as amended at D.C. Code Ann. § 22-4101 (1996)); Act of June 16, 1993, ch. 236, §§ 1-2, 1993 Nev. Stat. 515, 515-16 (codified as amended at Nev. Rev. Stat. §§ 201.190, .195 (2000)); Act of June 5, 1998, ch. 24, § 1, R.I. Pub. Laws 70 (codified as amended at R.I. Gen. Laws § 11-10-1 (Supp. 1999)).

⁶⁸ See Eskridge, *supra* note 11, app. A1 (listing states with and without consensual sodomy laws).

⁶⁹ See, e.g., *State v. Smith*, No. 99-KA-2015, 2000 WL 1036302 (La. July 28, 2000) (upholding state sodomy law); Susan Finch, Therapist Says No One Is Born Gay: He Says He Went Straight, *New Orleans Times-Picayune*, Oct. 31, 1998, at B1, available in Westlaw, 1998 WL 16072548 (reporting Louisiana's justification for sodomy law as promoting individual choice of heterosexual orientation); Bill Roundy, Virginia House OKs Sodomy Bill, *Wash. Blade*, Feb. 18, 2000, at 1 (reporting that legislative opponent of reducing sodomy to

Note the contrast with Reva Siegel's history of wife-beating law, in which modernized justifications assertedly enhanced the legitimacy of traditional entitlements.⁷⁰ Defenders of sodomy laws modernized their justifications by making medical and republican arguments, but the defenses were sedimentary, layering the new arguments onto old natural law ones. Nevertheless, once sodomy laws came under serious attack by politically mobilized gay people and their allies, the modernized and sedimentary justifications were not able to save such laws. Indeed, by defending sodomy laws on the ground that their repeal would promote homosexuality, apologists—from Judge Rudd in 1964 to Justice Powell in 1986—were conceding that such laws actually should not be enforced against adults engaged in consensual private activities. And they generally were not. After 1969, reported cases where gay people were prosecuted for private consensual activity all but dried up.⁷¹ While keeping sodomy laws on the books sent stigmatic legal messages to GLBT people, keeping them on the books without enforcing them sent deceptive signals to traditionalists that the state actually was doing something to stem immorality.

After a period of nonenforcement, the case for keeping such laws on the books further has eroded, and the no promo homo argumentation for sodomy laws is drying up. About the same time as a majority of states revoked their sodomy laws, with Kentucky's judicial abrogation six years after *Hardwick*,⁷² natural law philosopher John Finnis and conservative pragmatist Richard Posner abandoned the no promo homo argument for consensual sodomy laws in the same important publications where they identified the *real* objects of the argument: same-sex marriage, antidiscrimination laws, and other public stamps of approval for homosexuality.⁷³

B. *Same-Sex Marriage Bars and the Creation of New Forms of State Recognition*

While discussion of sodomy law deregulation started early in the century and serious reform efforts began after World War II, the exclusion of same-sex couples from civil marriage was not criticized until the 1950s and not challenged until the 1970s.⁷⁴ The challengers made

misdemeanor warned his colleagues that measure would encourage oral sex in public places).

⁷⁰ See Siegel, *Rule of Love*, supra note 32, at 2120.

⁷¹ See Eskridge, supra note 11, app. C2 (reporting post-1969 plummet in consensual sodomy prosecutions).

⁷² See *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992).

⁷³ See Posner, supra note 1, at 311-12; Finnis, supra note 1, at 1076.

⁷⁴ See William N. Eskridge, Jr., *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment* 42-50 (1996).

libertarian and sometimes egalitarian arguments, which were met by natural law arguments that did not differ much from those that would have been advanced in 1785. State courts in the 1970s and 1980s uniformly accepted the natural law position that only a man and a woman can marry. "The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis."⁷⁵

Blocked on the marriage front, gay people shifted their efforts to seek municipal recognition of their unions as "domestic partnerships." Early efforts were unsuccessful because opponents were able to persuade moderates that domestic partnership "mimic[s] a marriage license."⁷⁶ New York State Senator John R. Kuhl, Jr. voiced a more sophisticated oppositional argument: "Sexual orientation is their choice and I don't think it's our place to force people that might have a moral opposition to it to have to put up with it and condone it."⁷⁷ In several states and cities, popular initiatives sought to head off or revoke domestic partnership policies, based on the idea that they were "special rights" for gay people.⁷⁸ Notwithstanding such opposition, between 1984 and 2000, dozens of cities have adopted such ordinances, including New York City, Chicago, San Francisco, Los Angeles, Atlanta, and Washington, D.C.⁷⁹ Objecting that domestic partnership would constitute a stamp of approval for homosexuality, Congress has legislated since 1992 that the District's law not be funded.⁸⁰

⁷⁵ Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971); accord Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973).

⁷⁶ S.F. Mayor [Feinstein] Says No Gay Marriage, Wash. Blade, Jan. 28, 1983, at 9.

⁷⁷ Kevin Sack, Albany G.O.P. Grappling with Gay Rights, N.Y. Times, Feb. 6, 1993, at 23 (quoting Sen. Kuhl).

⁷⁸ For judicial decisions quoting such initiatives, see Citizens for Responsible Behavior v. Superior Court, 2 Cal. Rptr. 2d 648, 650-51 (Ct. App. 1991) (upholding refusal of Riverside, Cal. to put initiative on ballot); ACLU v. Echohawk, 857 P.2d 626, 627-28 (Idaho 1993) (discussing proposed Idaho legislation denying homosexuals "special rights"); Mabon v. Keisling, 856 P.2d 1023, 1024 (Or. 1993) (modifying ballot initiative for state constitutional amendment denying recognition of minority status for homosexuals).

⁷⁹ See generally Raymond C. O'Brien, Domestic Partnership: Recognition and Responsibility, 32 San Diego L. Rev. 163, 181-85 (1995); Craig A. Bowman & Blake M. Cornish, Note, A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances, 92 Colum. L. Rev. 1164 (1992).

⁸⁰ The Health Care Benefits Extension Act of 1992, Law 9-114, 39 D.C. Reg. 2861 (codified at D.C. Code Ann. §§ 36-1401 to -1403 (1997 & Supp. 2000)), extended a few benefits to registered domestic partners, including same-sex partners. The District of Columbia Appropriations Act, Pub. L. No. 102-382, tit. I, 106 Stat. 1422, 1422 (1992), prohibited funding of the D.C. law. The justification for this defunding in 1992 and subsequent years was to prevent the "devaluation of marriage," 138 Cong. Rec. 27,407 (1992) (statement of Rep. Bliley), and to overturn the District's purported effort "to officially recognize and sanction homosexual unions." 139 Cong. Rec. 17,031 (1993) (statement of Sen. Lott).

Just as domestic partnership ordinances were beginning to achieve the same sort of acceptability sodomy reform had achieved, the Hawaii Supreme Court in *Baehr v. Lewin* ruled that the exclusion of same-sex couples from state-sanctioned marriage was sex discrimination requiring a compelling state justification beyond the natural law arguments.⁸¹ On remand, the state's main defense of the discrimination was a no promo homo argument: The state bar to same-sex marriage was necessary to promote unions which are optimal for rearing children and creating families. The state trial judge rejected the factual premise of this argument and ruled that the state could not bar same-sex marriages.⁸²

Baehr and the Hawaii same-sex marriage litigation transformed public discussion of same-sex unions—reinvigorating both the gay marriage movement and defenses of traditional marriage. Although natural law arguments continued to be emphasized, no promo homo arguments were also vigorously made.⁸³ By June 2000, more than thirty states had adopted statutes prohibiting the recognition of same-sex marriages and, in most cases, making it clear that marriage licenses never could be issued to same-sex couples in their jurisdictions.⁸⁴ Congress ratified these choice of law statutes and legislated against the application of federal law to same-sex couples in the Defense of Marriage Act of 1996 (DOMA).⁸⁵ Although some DOMA supporters relied on natural law arguments, most of the supporters adhered to a no promo homo script. A key House sponsor put it this way, "Should this Congress tell the children of America that it is a matter of indifference whether they establish families with a partner of the opposite sex or cohabit with someone of the same sex?"⁸⁶ A Senate supporter argued, "[W]hen we prefer traditional marriage and

⁸¹ 852 P.2d 44 (Haw. 1993).

⁸² See *Baehr v. Miike*, CIV. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996) rev'd mem., 994 P.2d 566 (Haw. 1999). A similar argument also failed in *Baker v. State*, 744 A.2d 864, 881 (Vt. 1999) (rejecting state's argument that prohibiting same-sex unions promotes responsible procreation).

⁸³ See, e.g., Paul Carrier, *Maine Group Seeks to Ban Gay Wedlock*, *Portland Press Herald*, May 2, 1996, at A1, available in Westlaw, 1996 WL 9654795 (describing Maine's antigay initiative and no promo homo arguments made in favor of it); Robert Salladay, *GOP Fete Rips Gays, Praises Prop 22*, *S.F. Examiner*, Feb. 7, 2000, at A1, available in Westlaw, 2000 WL 6159019 (reporting on Knight Initiative barring recognition of same-sex marriage in California under guise of no promo homo arguments).

⁸⁴ Most of the state laws are referenced and quoted in Andrew Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 *Quinnipiac L. Rev.* 105 app. (1996).

⁸⁵ Pub. L. No. 104-199, 110 Stat. 2419 (codified as amended at 1 U.S.C. § 7 (Supp. IV 1998), 28 U.S.C. § 1738C (Supp. IV 1998)). See generally Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 *Iowa L. Rev.* 1 (1997).

⁸⁶ 142 Cong. Rec. H7491 (daily ed. July 12, 1996) (statement of Rep. Canady).

family in our law, it is not intolerance. Tolerance does not require us to say that all lifestyles are morally equal.”⁸⁷ In 1998, citizens in both Hawaii and Alaska voted overwhelmingly in favor of popular initiatives to amend their state constitutions to allow the legislatures to limit marriage to different-sex couples.⁸⁸

As DOMA illustrates, no promo homo arguments thus far have been much more successful against same-sex marriage than against sodomy repeal. Why is that? I think their success owes little to their modernized rhetorical form and more than a little to their sedimented structure that speaks and appeals to religious fundamentalists, secular moderates, and many Americans who (like Finnis and Posner) are friendly to decriminalizing consensual private sodomy. But no promo homo arguments are just as applicable to sodomy repeal as to recognition of same-sex marriages. Why do today’s TFV people swallow sodomy (sex! promiscuity!) while gagging on marriage (a conservative, civilizing institution) for gay people?

One distinction is pragmatic. Sodomy laws are unappealing to many traditionalists for Benthamite reasons: They are unenforceable and stimulate blackmail. The practical effects of same-sex marriage bars are not so obviously bad. A more important distinction is founded on perceived status. To say that GLBT people are no longer per se criminals is a promotion in their status, but to say that the state will recognize and reward their relationships as marriages is an even greater and, for some people, unacceptable leap in status. Moderate Americans willing to promote gay people from criminals to social misfits (like alcoholics) support sodomy decriminalization but not same-sex marriage. Finally, the idea that marriage must be between one man and one woman is a core part of the belief systems and even the social identities of many Americans.

Recognizing this obstacle, gay rights movements in Europe have procured statutes recognizing “registered partnership”—giving same-sex couples almost all the same rights and obligations as married couples, but under a face-saving pseudonym.⁸⁹ Several months ago, Vermont followed the European approach, creating new same-sex “civil unions” with all the same rights and benefits of marriage, but

⁸⁷ 142 Cong. Rec. S10,114 (daily ed. Sept. 10, 1996) (statement of Sen. Coats).

⁸⁸ See Arthur Leonard, in *Lesbian/Gay Law Notes*, Dec. 1998, at 189, 189-90, available at <<http://www.qrd.org/www/usa/legal/lgl/n/>>.

⁸⁹ See William N. Eskridge, Jr., *Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition*, 31 *McGeorge L. Rev.* 641, 647-48 (2000).

again without the name.⁹⁰ Traditionalists opposed the law on the grounds that it was tantamount to recognizing same-sex marriages and that it would promote homosexuality.⁹¹

C. Antidiscrimination Rules and Antigay Populism

Antidiscrimination laws came to the gaylegal agenda about the same time as did same-sex marriage. In the years after Stonewall, when states were repealing their consensual sodomy laws, local and later state governments started to enact ordinances prohibiting sexual orientation discrimination in the workplace, public accommodations, housing, and education.⁹² These ordinances guaranteeing gay people equal treatment were controversial. Like opponents of sodomy deregulation, opponents of antidiscrimination laws invoked natural law, utilitarian, and republican arguments, increasingly with a no promo homo twist. Arguments made by opponents of the Massachusetts Gay Civil Rights Act between 1973 and 1989 provide the best-documented example.⁹³ The main argument was that the law would promote or encourage homosexuality or homosexual conduct. "The last thing the [legislature] should do is to favor the principle of homosexuality," said one opponent in 1973.⁹⁴ The Roman Catholic bishops opposed the bill in 1988 because its enactment would be viewed "by many people as a step toward legal approval of the homosexual lifestyle."⁹⁵ The promotion of homosexuality was viewed not only as per se bad, but also as a threat to children who would be victimized by predatory homosexuals.⁹⁶ The bill was also characterized as an "attack on the

⁹⁰ Act Relating to Civil Unions, Pub. Act 91, available in Westlaw, 2000 VT LEGIS 91 (to be codified primarily in Vt. Stat. Ann. tits. 15, 18).

⁹¹ See, e.g., Hearings Before the Vermont House Judiciary Comm. (Jan. 11-14, 2000) (statement of Prof. David Coolidge, director of Marriage Law Project), available at <<http://www.leg.state.vt.us/baker/jan11.htm>>.

⁹² For a chronological listing, see Eskridge, *supra* note 11, app. B2.

⁹³ Act of Nov. 15, 1989, ch. 516, 1989 Mass. Acts 796 (codified as amended in Mass. Gen. Laws Ann. ch. 151B, §§ 1, 3-4 (West 1996 & Supp. 2000), and *id.*, ch. 272, §§ 92A, 98 (West 1990 & Supp. 2000)); see also Peter M. Cicchino et al., Comment, Sex, Lies and Civil Rights: A Critical History of the Massachusetts Gay Civil Rights Bill, 26 Harv. C.R.-C.L. L. Rev. 549 (1991) (providing history of debates over Massachusetts antidiscrimination bills).

⁹⁴ State House News Service, Senate, May 7, 1973, at 1 (statement of Sen. Locke), quoted in Cicchino et al., *supra* note 93, at 573 n.127.

⁹⁵ Letter from Gerald D'Avolio, Executive Director, Massachusetts Catholic Conference, to the Committee on Commerce and Labor (Mar. 24, 1988), quoted in Cicchino et al., *supra* note 93, at 594.

⁹⁶ See State House News Service, House, May 1, 1975, at 3-4 (statement of Rep. Connell) ("When a small group becomes a large group, as has happened with homosexuals, it's because of recruiting. These people are predatory, they're after your sons and daughters. We are encouraging lesbians and fags."), quoted in Cicchino et al., *supra* note 93, at 574 n.128.

American family"⁹⁷ and a threat to public health because it would enhance the rate of AIDS infections.⁹⁸ Finally, the legislation would violate the property rights of homeowners and the contract rights of employers and lenders by forcing them to deal with lesbians and gay men.⁹⁹ These arguments delayed the Massachusetts legislation for sixteen years; elsewhere they killed such proposals or forced rhetorical caveats. For example, the Connecticut antidiscrimination law disavows any "promotion of homosexuality."¹⁰⁰

In contrast to debate over sodomy laws, debate over antidiscrimination laws has occurred as much in popular initiatives and referenda as in the legislative process. The first antigay initiative to draw nationwide attention was Anita Bryant's 1977 "Save Our Children" campaign to repeal an antidiscrimination law adopted in Dade County, Florida. Bryant argued that God "condemns the act of homosexuality," the natural law position, which she maintained was undermined by the Dade County ordinance, especially its protection of "homosexual schoolteachers."¹⁰¹ Her big punchline was a no promo homo one: "[P]ublic approval of admitted homosexual teachers could encourage more homosexuality by inducing pupils into looking upon it as an acceptable lifestyle."¹⁰² She also argued that antidiscrimination laws invaded the rights of parents and their children. "[Miami's law will] be infringing upon my rights," Bryant said,

[D]iscriminating against me as a citizen and a mother to teach my children and set examples and to point to others as examples of God's moral code as stated in the Holy Scriptures. Also, you would be discriminating against my children's right to grow up in a healthy decent community¹⁰³

After the initiative was adopted by the voters, Bryant announced:

"We will now carry our fight against similar laws throughout the nation that attempt to legitimize a lifestyle that is both perverse and dangerous to the sanctity of the family, dangerous to our children,

⁹⁷ State House News Service, House, Sept. 23, 1985, at 3 (statement of Rep. Collaro), quoted in Cicchino et al., *supra* note 93, at 574 n.130.

⁹⁸ See Cicchino et al., *supra* note 93, at 574 n.129.

⁹⁹ See *id.* at 573 n.125.

¹⁰⁰ Public Act No. 91-58, § 36, 1991 Conn. Acts 118, 132 (Reg. Sess.) (codified at Conn. Gen. Stat. Ann. § 46a-81r (West 1995)).

¹⁰¹ Anita Bryant, *The Anita Bryant Story: The Survival of Our Nation's Families and the Threat of Militant Homosexuality* 114 (1977); see also Joe Baker, *Anita With the Smiling Cheek*, *Advocate*, Apr. 20, 1977, at 6.

¹⁰² Bryant, *supra* note 101, at 114.

¹⁰³ *Id.* at 16 (quoting from her January 1977 letter to Dade County Board of Commissioners).

dangerous to our freedom of religion and freedom of choice, dangerous to our survival as one nation, under God."¹⁰⁴

Other jurisdictions followed Dade County by repealing their sexual orientation discrimination laws through popular referenda.¹⁰⁵ In 1978, Bryant's allies suffered a setback when California rejected the Briggs Initiative, which would have disqualified from public school employment anyone engaged in "public homosexual conduct," defined as "advocating, soliciting, imposing, encouraging or promoting of private or public homosexual activity directed at, or likely to come to the attention of, schoolchildren and/or other [public school] employees."¹⁰⁶ The initiative was another milestone, because it reflected the first time in public discourse that gay people were identified not just with an act (sodomy) but also with a viewpoint (advocacy).¹⁰⁷ This ambition assured the defeat of the Briggs Initiative, because it threatened straight people given the breadth of its exclusion on grounds of advocacy. Notwithstanding that defeat, antigay initiatives continued to flourish, enjoying an unprecedented 79% success rate between 1977 and 1993.¹⁰⁸

The most famous antigay initiative has been Amendment 2 to Colorado's constitution,¹⁰⁹ which sought to negate protections for gay people in antidiscrimination ordinances adopted by several municipalities. The campaign for the amendment thoughtfully considered its rhetorical options; its leaders stressed utilitarian and republican arguments, as opposed to religious ones. Thus they emphasized that the antidiscrimination ordinances not only gave assertedly overprivileged

¹⁰⁴ Quoted in Joe Baker, *The Message from Miami*, *Advocate*, July 13, 1977, at 6.

¹⁰⁵ For the unsuccessful challenge to the St. Paul, Minnesota referendum, see *St. Paul Citizens for Human Rights v. City Council*, 289 N.W.2d 402 (Minn. 1979) (rejecting constitutional challenge to St. Paul referendum revoking gay rights ordinance).

¹⁰⁶ Proposition 6, § 3(b)(2) (Cal. 1978).

¹⁰⁷ See Hunter, *supra* note 7, at 1702-06.

¹⁰⁸ See Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 *Am. J. Pol. Sci.* 245, 251, 258 (1997) (finding 79% of 38 restrictive antigay initiatives that went to polls from 1977 to 1993 successful); Schacter, *supra* note 7, at 288-90 (giving general survey of antigay initiatives and their rhetoric of justification). For a recent example, the 1998 initiative revoking Maine's antidiscrimination law emphasized both natural law and no promo homo arguments. See Peter Pochna, *Leaflets, Ad Blitz to Mark Days Leading Up to Gay-Rights Vote*, *Me. Sunday Telegram*, Feb. 1, 1998, at 1B (quoting advocate of repeal characterizing antidiscrimination law as "'encourag[ing] a lifestyle in our society and our schools that is not a lifestyle but a deathstyle'"); Steven G. Vegh, *Diocese's Neutrality May Tip Vote Against Gays*, *Me. Sunday Telegram*, Jan. 4, 1998, at 1A (reporting that Catholic Church opposed antigay discrimination but feared particular law would "promot[e] homosexual behavior").

¹⁰⁹ Colo. Const. art. II, § 30b. The amendment is commonly known as "Amendment 2" because of its ballot designation during the referendum in which it was approved. See *Romer v. Evans*, 517 U.S. 620, 623-24 (1995).

homosexuals "special rights" but also invaded the rights and institutions of straight families.¹¹⁰ The most distinguished supporter of the initiative, former Senator William Armstrong, set forth its core message in an open letter to the electorate. If gays achieve "special rights," he argued,

Colorado citizens of all kinds will be deprived of their civil rights. You'll lose your freedom of speech and conscience to object to homosexual behavior. Your church or business may be forced to hire gays. . . . If you are a day care center owner, you will be forced to employ homosexuals and lesbians.¹¹¹

Armstrong's letter represented a more fully worked-out version of the Bryant campaign fifteen years earlier. Its message resonated with many voters. The no promo homo focus of the campaign and its constitutionalized antigay rhetoric were thought by its supporters to have made a difference; the initiative was adopted by a 53.4 to 46.6% margin.¹¹²

The success of Amendment 2 at the polls can be contrasted with the defeat of Oregon's Ballot Measure 9 the same day. Measure 9 would have amended the constitution to prohibit the state from encouraging or promoting "homosexuality, pedophilia, sadism, and masochism" and would have put the state on record as considering homosexuality "abnormal, wrong, unnatural, and perverse."¹¹³ In contrast, Amendment 2's more modest effect was to prohibit or preempt any law or policy "whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination."¹¹⁴ Its sponsors wanted their initiative to be a moderate contrast to Measure 9's open embrace of the natural law position.¹¹⁵ And the kinder, gentler Amendment 2 prevailed with the voters, while the strident, in-your-face Measure 9 lost.

¹¹⁰ For an insider's account of the debate within the Amendment 2 campaign as to what arguments to emphasize, see Stephen Bransford, *Gay Politics vs. Colorado and America: The Inside Story of Amendment 2*, at 36-40 (1994).

¹¹¹ Letter from William L. Armstrong to Colorado Voters, reprinted in Bransford, *supra* note 110, app. C.

¹¹² See Bransford, *supra* note 110, at 1.

¹¹³ Or. Const. art. I, § 41(3) (proposed as Oregon Ballot Measure 9 (1992)), reprinted in Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 Or. L. Rev. 19, 36 n.71 (1993).

¹¹⁴ Colo. Const. art. II, § 30b.

¹¹⁵ See Bransford, *supra* note 110, at 39 (contrasting "two distinct models" of antigay initiatives); see also Colorado for Family Values, *Equal Rights—Not Special Rights! (1992)* (emphasizing, in principal election pamphlet, how "gay rights" would threaten "civil

III PRIVATIZED NO PROMO HOMO ARGUMENTS

No promo homo arguments have been prominent not only in efforts to defeat sexual orientation antidiscrimination laws, but also in efforts by institutions to avoid such laws by claiming the laws required them to endorse or promote homosexuality. The laws require schools, public accommodations, and employers to serve, admit, and hire people without regard to sexual orientation. But some institutions read the presence of openly GLBT people as injecting their unwelcome viewpoint *within* the institution—and even thrusting the gay point of view *onto* the institution. After an unpromising start, privatized no promo homo arguments of the form outlined in the introduction have been successful, because they can be linked to First Amendment protection of free association and speech.

This line of defense was first suggested in cases where public universities argued that they could discriminate against GLBT student expression and association. As Judge Coffin ruled in the leading case, *Gay Students Organization v. Bonner*,¹¹⁶ gay student group activities within public institutions are protected by the First Amendment, which prohibits public discrimination against speech or association on grounds of its content. Judge Coffin found the argument of the University of New Hampshire that its recognition of lesbian and gay organizations would encourage illegal activity, including “deviate” sex acts and “lascivious carriage,” to be too speculative.¹¹⁷ Federal appeals courts followed *Bonner* to reject similar no promo homo arguments by other universities seeking to justify their exclusions of gay and lesbian student groups.¹¹⁸

This version of the no promo homo argument matured in *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*.¹¹⁹ Georgetown refused to recognize lesbian and gay student groups, because recognition would imply the university’s “endorsement” of homosexual conduct.¹²⁰ As a private university, Georgetown was able to invoke the First Amendment as a constitu-

rights” of Coloradans), reprinted in Robert F. Nagel, *Playing Defense*, 6 Wm. & Mary Bill Rts. J. 167 app. A (1997).

¹¹⁶ 509 F.2d 652 (1st Cir. 1974).

¹¹⁷ *Id.* at 662.

¹¹⁸ See, e.g., *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543, 1545 (11th Cir. 1997) (affirming invalidation of Alabama law prohibiting use of public funds or facilities to support any college group that “fosters or promotes a lifestyle or actions prohibited by [Alabama’s] sodomy and sexual misconduct laws” (quoting Ala. Code § 16-1-28 (1995))).

¹¹⁹ 536 A.2d 1 (D.C. 1987).

¹²⁰ See *id.* at 11-14 (quoting University’s various responses to students’ petition and appeal).

tional reason for a court to accept rather than reject its no promo homo stance. Just as the gay students' identity was bound up in their open homosexuality, so Georgetown's identity was bound up in its disapproval of homosexual acts. Neither could be censored by state actors. To avoid such a constitutional infirmity in the statute, the District of Columbia Court of Appeals construed it not to require official school recognition. The court did, however, find that the state could and the statute did require the school to provide equal access to its facilities and services.¹²¹

The Supreme Court tacitly accepted a privatized no promo homo argument in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*.¹²² Like Georgetown, the organizers of Boston's St. Patrick's Day-Evacuation Day parade were ruled by the lower courts not to be state actors. They excluded a GLBT marching group from their parade, in violation of the state public accommodations law, as construed by the state courts. The organizers said bisexuals, lesbians, and gay men were welcome to march in the parade, but not in a unit identified as homosexual. Their rationale for this distinction was the *Georgetown* version of no promo homo: By including a gay group, the parade would, implicitly, be understood as endorsing homosexuality.¹²³ The Supreme Court upheld the defense and invalidated the law, as applied, on First Amendment grounds. Because Justice David Souter's opinion for the Court rested on the proposition that the state could not force a position on the parade organizers, it tacitly accepted the no promo homo argument.¹²⁴

*Boy Scouts of America v. Dale*¹²⁵ involved a state antidiscrimination law that barred the Boy Scouts from expelling an openly gay man and stripping him of his leadership position as assistant scoutmaster. The Boy Scouts' position was that Dale's open homosexuality sent a "message" at odds with the expressive purposes of the Scout Code's emphasis on "moral straightness"¹²⁶ and with the Boy Scouts' desire that it not be understood "to promote homosexual conduct as a legiti-

¹²¹ See *id.* at 21, 30-39.

¹²² 515 U.S. 557 (1995).

¹²³ See *id.* at 574-75 (characterizing parade's objection to idea that gay people "have as much claim to unqualified social acceptance as heterosexuals").

¹²⁴ Compare *id.* at 572-75, with *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (upholding Minnesota law requiring association to admit women, without any recognition that such action would negate sexist messages entailed in all-male business club), and *Board of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537 (1987) (similar).

¹²⁵ 120 S. Ct. 2446 (2000).

¹²⁶ See Petitioners' Brief at 20-22, 28-29, *Dale* (No. 99-699).

mate form of behavior.”¹²⁷ The Court held that the presence of an openly gay assistant scoutmaster would burden the Scouts’ no promo homo stance and that the First Amendment protected the Scouts from that burden.¹²⁸ Four dissenting Justices, including the author of *Hurley*, objected that the Scouts’ message, to which the Court deferred, consisted mostly of assertions by their attorneys and did not reflect a viewpoint important to the mission of the organization.¹²⁹

As more states adopt laws prohibiting discrimination on the basis of sexual orientation, cases like *Dale* will proliferate. By protecting the TFV association’s expressive rights in *Dale*, the Court has invited similar lawsuits to be brought by other “public accommodations,” as the Boy Scouts were held to be,¹³⁰ or even (but less plausibly) by other institutions nervous about having openly gay personnel, volunteers, or employees.

IV

NEWER PUBLIC NO PROMO HOMO POLICIES

Parts II and III have explored the defensive deployment of no promo homo arguments. But this style of argumentation also has been the basis for affirmative state policies. The modern regulatory state taxes and spends money by the bucketload, polices and defends the citizenry, licenses and regulates all manner of activities and groups, and educates the next generation. These are the nuts and bolts of governance, and in all these important areas no promo homo is not just an argument for an old policy, but is invoked increasingly as support for new public laws and policies.

A. *State Refusal to License Organizations Espousing Homosexuality*

In 1963, the first effort of an openly gay educational organization to register under a licensing law generated congressional hearings. One congressman assailed the Mattachine Society of Washington, which had registered as a charitable organization under D.C. law, on the grounds that it was a “group of homosexuals” whose acts “are

¹²⁷ Petitioners’ Reply Brief at *5, *Dale* (No. 99-699), available in Westlaw, 2000 WL 432367.

¹²⁸ See *Dale*, 120 S. Ct. at 2455.

¹²⁹ See *id.* at 2465 (Stevens, J., dissenting).

¹³⁰ State courts have been too expansive in their constructions of “public accommodations.” See *Curran v. Mount Diablo Council of Boy Scouts of Am.*, 952 P.2d 218, 256-57 (Cal. 1998) (Kennard, J., concurring); 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, 2462-63, 2466 (1997). *Dale* and *Hurley* ought to discourage such broad constructions by state courts.

banned under the laws of God, the laws of nature, and are in violation of the laws of man."¹³¹ Such public rhetoric grew scarcer after Stonewall, but state bodies were still reluctant to provide licenses and charters that were routine for other kinds of organizations. For example, the Ohio Secretary of State, with the support of the state supreme court, refused to accept the Greater Cincinnati Gay Society's articles of incorporation on the ground that "the promotion of homosexuality as a valid lifestyle is contrary to the public policy of the state."¹³² Even New York's judiciary initially refused approval of Lambda Legal Defense & Education Fund on no promo homo grounds.¹³³ After the state court of appeals reversed that determination, the appellate division still refused to license Lambda "to promote legal education among homosexuals by recruiting and encouraging potential law students who are homosexuals."¹³⁴ Notwithstanding the lack of neutrality in these kinds of actions and their inconsistency with the First Amendment, some traditionalist states to this day will not easily cough up routine licenses and charters to organizations that they feel "promote" homosexuality in some way.¹³⁵

B. Federal Taxing and Spending Policies

Income tax exemption for educational or charitable institutions is one of the most powerful goodies the government has to offer. Before 1969, lesbian and gay organizations did not even ask for such exemptions. Once they did start asking, the Internal Revenue Service (IRS) balked at allowing exemptions for organizations that openly identified as "gay" *unless* the organizations certified that they did not "promote" homosexuality or agreed that homosexuality is a "diseased pathology."¹³⁶ The IRS even denied an exemption to Pride Foundation

¹³¹ Amending District of Columbia Charitable Solicitation Act: Hearings Before Subcomm. No. 4 of the House Comm. on D.C., 88th Cong. 2 (1963) (reprinting 109 Cong. Rec. A4211 (1963) (statement of Rep. Dowdy)); see also David K. Johnson, "Homosexual Citizens": Washington's Gay Community Confronts the Civil Service, Wash. Hist., Fall/Winter 1994-1995, at 45, 57-58 (discussing participation of Mattachine Society in hearings).

¹³² State ex rel. Grant v. Brown, 313 N.E.2d 847, 848 (Ohio 1974).

¹³³ See *In re Thom*, 337 N.Y.S.2d 588 (App. Div. 1972), rev'd 301 N.E.2d 542 (N.Y. 1973).

¹³⁴ *In re Thom*, 350 N.Y.S.2d 1, 2 (App. Div. 1973) (quoting Lambda's statement of goals).

¹³⁵ See, e.g., A Win in Mississippi: Local Attorney General Cites "Detestable and Abominable Crime," Lambda Update, Winter 1985, at 1, 1 (reporting that Mississippi Attorney General had refused to give charter to Mississippi Gay Alliance because it was likely to encourage violation of sodomy law).

¹³⁶ See, e.g., IRS Grants Tax Exemption to a "Gay" Group; a First, Advocate, Sept. 11, 1974, at 24; George Mendenhall, IRS Denies Exemption to Pride, Calls Activities "Detrimental," Advocate, Nov. 6, 1974, at 27.

because of its "promotion of the alleged normalcy of homosexuality,"¹³⁷ and to the feminist journal *Big Mama Rag* for similar reasons.¹³⁸ The IRS backed away from this policy during the Carter Administration.¹³⁹

After the tax exemption debacle, no promo homo arguments started showing up in federal spending proposals. In 1979, the Senate considered the proposed Family Protection Act, which would have barred federal money from going to any organization presenting "homosexuality" as an "acceptable lifestyle."¹⁴⁰ Congress never adopted that legislation but did enact occasionally more targeted no promo homo funding proposals relating to health spending in particular. In an appropriations measure passed in 1987, Congress included the Helms Amendment prohibiting federal AIDS-education materials from promoting homosexual activities and requiring such materials to "emphasize . . . abstinence from" extramarital activities, including "homosexual sexual activities."¹⁴¹ After much negotiating, funding legislation adopted in 1988 required that AIDS programs not "promote or encourage, directly, . . . sexual activity, homosexual or heterosexual," language that has become statutory boilerplate.¹⁴² In 1990, Congress adopted legislation barring the National Endowment for the Arts from funding art that depicted "sodomasochism, homoeroticism, [or] the sexual exploitation of children" for that fiscal year.¹⁴³ During

¹³⁷ Mendenhall, *supra* note 136, at 27.

¹³⁸ See *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030 (D.C. Cir. 1980) (overturning IRS decision).

¹³⁹ See Rev. Rul. 78-305, 1978-2 C.B. 172 (stating that nonprofit organization formed to educate public about homosexuality in order to foster understanding and tolerance of homosexuals qualifies for tax exemption); see also *IRS Reverses Policy on Tax Exemptions*, *Advocate*, Oct. 5, 1977, at 11.

¹⁴⁰ S. 1808, 96th Cong. § 507 (1979); see also S. 1378, 97th Cong. (1981) (reintroducing similar proposed Family Protection Act). The bill also would have barred the Legal Services Corporation from doing any kind of pro-gay litigation. See S. 1808 § 506. To the same effect was the famous McDonald Amendment, which passed the House in 1977, see 123 Cong. Rec. 20,919-20 (1977), 1980, see 126 Cong. Rec. 19,072-73 (1980), and 1981, see 127 Cong. Rec. 12,950-91 (1981). Representative McDonald defended his proposal: Congress "should not spend a penny of the taxpayers' dollars to support, defend, protect or legitimize the practice or acts of homosexuality or a homosexual 'gay' lifestyle." 126 Cong. Rec. 19,072 (1980).

¹⁴¹ Continuing Appropriations Act, Pub. L. No. 100-202, § 514(a), (b)(1), (c), 101 Stat. 1329, 1329-289 (1987); see also *Gay Men's Health Crisis v. Sullivan*, 733 F. Supp. 619, 624 & n.4 (S.D.N.Y. 1989) (citing Helms Amendment in its entirety).

¹⁴² Department of Health and Human Services Appropriations Act, 1989, Pub. L. No. 100-436, tit. II, 102 Stat. 1680, 1692 (1988), followed in, e.g., 42 U.S.C. § 300ff-78 (Supp. IV 1998). For a discussion of the legislative background, see *Gay Men's Health Crisis v. Sullivan*, 792 F. Supp. 278, 288-90 (S.D.N.Y. 1992).

¹⁴³ Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 101-121, § 304(a), 103 Stat. 701, 741 (1989). Like the 1987 AIDS-funding restriction, this was a one-time limitation. Subsequent National Endowment for the Arts funding laws

the Clinton Administration, there have been annual battles over how many no promo homo clauses Congress could tack onto bills providing federal funds to the District of Columbia.¹⁴⁴

C. State Public Education and Spending

The most popular situs for no promo homo policies has been public education. Early statutory codifications of the no promo homo idea, like Oklahoma's law permitting dismissal of teachers who "encourag[ed] or promot[ed] public or private homosexual activity," fell under judicial First Amendment scrutiny,¹⁴⁵ as have no promo homo restrictions on state university funding.¹⁴⁶ Less ambitious policies have not been challenged yet. Some states have laws requiring sex education or AIDS education programs in public schools to emphasize that "homosexual conduct is not an acceptable lifestyle" and is illegal.¹⁴⁷ Other states and presumably many localities have followed

dropped this and relied on the "standards of decency" limit upheld in *NEA v. Finley*, 524 U.S. 569, 572-73 (1998).

¹⁴⁴ For example, on August 6, 1998, the House adopted an amendment banning unmarried (read: gay and lesbian) couples from adopting children in the District. See 144 Cong. Rec. H7399 (daily ed. Aug. 6, 1998). The justification for this amendment was to thwart "those who would seek to legitimize same-sex activity" and to protect children against "the claim by homosexuals that they should be able to adopt." *Id.* at H7343 (statement of Rep. Riggs). On the previous day, the House narrowly defeated an amendment to override the President's executive order barring civil service discrimination against gay people. See 144 Cong. Rec. H7263 (Aug. 5, 1998). Although none of these proposals made it into the final legislation, the Lott Amendment, which bars the District from spending money on its domestic partnership law, did, as it has every fiscal year since 1992. See *supra* note 80.

¹⁴⁵ *National Gay Task Force v. Board of Educ.*, 729 F.2d 1270, 1272-73 (10th Cir. 1984) (quoting Okla. Stat. tit. 70, § 6-103.15 (1982) (repealed 1989)), *aff'd* by an equally divided Court, 470 U.S. 903 (1985).

¹⁴⁶ See, e.g., *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543, 1545, 1549-50 (11th Cir. 1997) (striking down Alabama law prohibiting spending of state funds to support state college organization that "fosters or promotes a lifestyle or actions prohibited by the sodomy or sexual misconduct laws" (quoting Ala. Code § 16-1-28 (1995))).

¹⁴⁷ Health and Safety Code Revision Act, ch. 14, § 36, 1991 Tex. Gen. Laws 42, 63 (1991), codified at Tex. Health & Safety Code Ann. § 85.007(b)(2) (West Supp. 2000); accord Ala. Code § 16-40A-2(c)(8) (1995) (requiring sex education programs to emphasize that homosexuality is both socially unacceptable and criminal offense); Ariz. Rev. Stat. Ann. § 15-716(C) (West Supp. 1999) (no school district may "promote[] a homosexual lifestyle" or "portray[] homosexuality as a positive alternative life-style"); N.C. Gen. Stat. § 115C-81(e1)(3) (1999) (requiring that education concerning sexually transmitted diseases include "the current legal status" of homosexual acts). In 1992, Oregon voters narrowly rejected a ballot initiative that would have required public schools to "recogniz[e] homosexuality, pedophilia, sadism[,] and masochism as abnormal, wrong, unnatural, and perverse and . . . to be discouraged and avoided." Or. Const. art. I, § 41(3) (proposed as Oregon Ballot Measure 9 (1992)), reprinted in Linde, *supra* note 113, at 36 n.71.

the same policy informally or on a school-by-school basis.¹⁴⁸ A milder policy generally followed in state and local regulations is to allow parents to opt their children out of sex education policies.¹⁴⁹ Such opt-out policies are grounded on common law or substantive due process recognition of parental rights to manage their children's upbringing and even education and allow homophobic or sex-negative parents to shield their children from information they feel would be corrupting.

Like the federal government, state and local governments fund programs that are attacked for promoting homosexuality. A citizen complaint about homosexuality in a publicly-funded play stimulated a Cobb County, Georgia resolution condemning homosexuality and "the life styles advocated by the gay community" and eliminating \$110,000 in arts funding from its 1994 budget.¹⁵⁰ Several popular initiatives in the 1990s sought, usually without success, to bar the use of state or municipal monies "directly or indirectly to fund any individual, activity or organization which promotes, encourages, endorses, legitimizes or justifies homosexual conduct."¹⁵¹

D. *Child Custody and Adoption*

GLBT people often parent their own biological and adoptive children, but the state traditionally has denied custody, visitation, and adoption rights to parents open about their variant orientation. Anti-gay presumptions were once justified as a means of punishing the parent for her immoral and criminal lifestyle or to prevent presumed molestation of the child.¹⁵² The former is inconsistent with the best interests of the child standard ordinarily followed in such cases, and the latter is inconsistent with social science evidence disproving the homosexual-molestation myth. In the last quarter-century, states de-

¹⁴⁸ Cf. National Abortion Rights Action League, *Sexuality Education in America: A State-by-State Review* at vi (1995) (noting that only one state, Rhode Island, mandates teaching respect for all persons regardless of sexual orientation).

¹⁴⁹ See, e.g., *Citizens for Parental Rights v. San Mateo County Bd. of Educ.*, 124 Cal. Rptr. 68, 90-91 (Ct. App. 1975) (upholding statutory "excusal" provisions against constitutional challenge); *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 267 (App. Div. 1993) (striking down school program for distributing condoms due to lack of "opt out" provision).

¹⁵⁰ See Peter Applebome, *County's Anti-Gay Move Catches Few by Surprise*, N.Y. Times, Aug. 29, 1993, at 18 (quoting antigay measure in Cobb County, Georgia).

¹⁵¹ *Citizens for Responsible Behavior v. Superior Court*, 2 Cal. Rptr. 2d 648, 651 (Ct. App. 1991) (quoting proposed Riverside, California "Citizens' Ordinance Pertaining to Homosexuality and AIDS"); see also *Mabon v. Keisling*, 856 P.2d 1023, 1024 (Or. 1993) (quoting state ballot proposal forbidding expenditure of public funds "in a manner that has the purpose or effect of promoting or expressing approval of homosexuality").

¹⁵² See generally Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 *Hastings L.J.* 798, 889-97 (1979) (discussing early cases).

nying child-care rights to gay people instead have tended to invoke “the rights of the children of this state, who are intimately affected by the policies of this state . . . to positive nurturing and a healthy environment for their formative years.”¹⁵³ Although some judges still seek to demonize gay parents as bad people, the more up-to-date justification for denying them child-care responsibilities is a role model argument: Nongay parents promote better values for the child.¹⁵⁴ There is also some currency for the unproven belief that children raised by gay parents will themselves become gay—the nightmare scenario for a no promo homo mentality.

E. Law Enforcement

Coming full circle, not only have most states repealed their consensual sodomy laws, but many have heightened penalties for violent crimes committed against people because of their sexual orientation.¹⁵⁵ Typically, proposals for hate crimes legislation to include sexual orientation generate no promo homo arguments against them. Opponents thus argue that laws enhancing punishment because of homophobic motivations are “‘a way of legitimizing homosexual activity. They can’t force the culture to accept their life but they are trying to do it legislatively.’”¹⁵⁶ Although the federal government does not include antigay violence as a hate crime, the Hate Crimes Statistics Act in 1990 included antigay violence as a category for which the FBI is required to collect and report statistics. To mollify critics’ objections that the law would equate racism with antigay attitudes, the bill was amended to stipulate that its data collection and reporting should not be read or used “to promote or encourage homosexuality.”¹⁵⁷

¹⁵³ Ch. 343, § 343:1, 1987 N.H. Laws 379, 380 (stating legislative findings supporting statute prohibiting gay people from adopting and becoming foster parents).

¹⁵⁴ See *Department of Health & Rehabilitative Servs. v. Cox*, 627 So. 2d 1210, 1220 (Fla. Dist. Ct. App. 1993), vacated in part and remanded, 656 So. 2d 902 (Fla. 1995). For a decision invoking an extreme version of the role model argument to say that the child would be “traumatize[d]” by her lesbian mother having visitation rights, see *Ex parte D.W.W. (R.W. v. D.W.W.)*, 717 So. 2d 793, 796 (Ala. 1998).

¹⁵⁵ See Eskridge, *supra* note 11, app. B3 (listing such state statutes).

¹⁵⁶ Sam Fulwood III, *Dissent Blocks Tougher Hate Crime Laws*, L.A. Times, Oct. 14, 1998, at A14 (quoting Traditional Values Coalition official); see also Hate Crimes Statistics Act, Pub. L. No. 101-275, §2(a), 104 Stat. 140, 140-41 (1990), codified as amended at 28 U.S.C. § 534 note (1994) (adding superfluous “findings” stressing importance of “American family values” in statute mandating collection of hate crimes statistics); James B. Jacobs & Kimberly Potter, *Hate Crimes: Criminal Law and Identity Politics 70-71* (1998) (discussing legislative history of Hate Crimes Statistics Act).

¹⁵⁷ Hate Crimes Statistics Act, §2(b), 104 Stat. at 141.

F. *"Don't Ask, Don't Tell" in the Military*

Traditionally, the United States excluded GLBT people from the armed forces on grounds that they were prone to sodomy, degeneracy, or disloyalty.¹⁵⁸ Although all those arguments are still made, the official stance has shifted toward this syllogism: Allowing people with any "propensity" to engage in homosexual activities into the military would encourage homosexual acts and open homosexuality, which would undermine morale and unit cohesion and thereby vitiate the whole purpose of the armed forces.¹⁵⁹ This is a kinder, gentler support for the antigay policy, because it avoids demonizing GLBT people, many of whom have been distinguished soldiers. There is also a supporting discourse of rights: Because of the close quarters required by military training and operations, open homosexuality would violate the privacy rights of soldiers who fear or hate GLBT people.¹⁶⁰

V

THE CONSTITUTIONALIZATION AND TRIPLE SEDIMENTATION OF ANTIGAY DISCOURSE

The foregoing materials help us see not only how pervasive no promo homo reasoning is, but also how this is connected to the constitutionalization as well as legalization of antigay discourse. Throughout the twentieth century, people who were worried about gender and sexual variation turned to the state to regulate it. This was a legalization of homophobic preferences, with the law echoing and refracting religious and medical thinking then central to antigay discourse. During the last third of the century, GLBT people resisted the law's reinforcement of their social stigma, and their resistance included both political activism to change antigay laws and constitutional activism challenging the validity of those laws. The discourse of gay rights, however, was immediately met by a rights counterdiscourse. That is, TFV people have opposed progay legal reforms not only on moral and policy grounds, but also on constitutional grounds. The rights of people frightened of homosexuality to speak out against it, of parents to control the education of their children, of children to be free from the trauma of a lesbian or gay household, of spouses to enjoy the sanctity

¹⁵⁸ See Eskridge, *supra* note 11, at 36-37, 49-52, 67-72.

¹⁵⁹ See 10 U.S.C. § 654(a)(4)-(15) (1994) (summarizing congressional findings supporting "don't ask, don't tell" policy); William N. Eskridge, Jr. & Nan D. Hunter, *Sexuality, Gender, and the Law* 388-403 (1997) (collecting materials on policy).

¹⁶⁰ The new antigay discourse is best exemplified in the testimony of administration witnesses in *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. on Armed Servs.*, 103d Cong. 594-602 (1993) (statements of Gen. H. Norman Schwarzkopf and Col. Frederick C. Peck).

of their institution, and of churches, landlords, employers, soldiers, and organizations like the Boy Scouts not to involve themselves with openly gay persons are just as often heard in antigay churches and political rallies as in the courtroom. This is the *constitutionalization* as well as legalization of antigay discourse.

Conceptually, antigay discourse in the last century exhibits a *triple sedimentation*. (1) Moral and policy rhetoric is sedimented, as social republican arguments have formed a new layer on top of medical ones, which had settled on top of the natural law position. (2) Constitutional arguments have accumulated to supplement each of these three kinds of moral and policy arguments. For example, it was a short step from the medical policy argument that psychopathic homosexuals are a threat to society and its children, to the constitutional argument that children have a right to be reared in a household free of such psychopaths. The social republican argument that GLBT people undermine the social fabric has taken on greater bite in the newer argument that TFV people have a constitutional right not to associate with GLBT people. (3) No promo homo arguments are sedimented on top of all these arguments. One can make policy and rights arguments directly, but the same point can be made indirectly, and less confrontationally, through the no promo homo form of rhetoric. For instance, opponents can maintain that same-sex marriage is a bad idea because gay people are psychologically unable to sustain genuine intimate relationships (a medical policy argument) *or* because it will undermine marriage and the rights of spouses and children (rights-based arguments drawn from the medical model) *or* because the state should promote different-sex marriage as a better environment for interpersonal flourishing (the umbrella no promo homo argument). Table 1 maps the triple sedimentation idea.

The sedimentation of antigay discourse has a connection with the sedimentation of American governance. The bottom layers—natural law and nonlegal arguments—are much more likely to be out in the open in those localities where the audience is most homogeneously traditionalist. The top layers—social republican, constitutional rights, and no promo homo arguments—are more likely to dominate when the audience is diverse and includes many moderates. Thus, such arguments tend to be more popular at the national level than at the state level and at the state level than at the local level. Because of the need to maintain a broader coalition and perhaps also because of the better orchestrated media campaigns at higher levels of American politics, no promo homo arguments will tend to be more common at the national than the state level, and the state than the local level.

TABLE 1
TRIPLE SEDIMENTATION OF ANTIGAY DISCOURSE

Moral or Policy Discourse	Constitutional Rights Version	Umbrella No Promo Homo Version
<p><i>Natural Law:</i> Sodomy is unnatural and morally wrong. Sodomites are abominations.</p>	<p><i>Parental and Spousal Rights:</i> Parents have constitutional rights to rear children according to their traditional value structure; couples have rights to the integrity of their marriages. The state ought not interfere with these relationships by forcing unnatural homosexuality into the family.</p>	<p><i>Promote Family Values:</i> The state should promote family values; it ought to encourage people to form husband-wife marriages and rear their biological children. Special rights for gay people detracts from this essential project.</p>
<p><i>Medical Utilitarian:</i> Homosexuals are diseased (e.g., AIDS) and psychopathic. They pose risks to other people's physical and mental health.</p>	<p><i>Children's Rights:</i> Children, including those who have one gay or lesbian parent, have rights not to be exposed to diseases, lifestyles, and agendas that will harm their physical and mental health.</p>	<p><i>Promote Good Health:</i> The state should promote physical and mental health. Just as the state should help citizens avoid or be cured of alcoholism, so it should help them avoid or be cured of homosexuality or the homosexual lifestyle.</p>
<p><i>Social Republican:</i> Homosexuals upset many normal people and cause social turmoil. Homosexuality undermines the social fabric.</p>	<p><i>Rights Not to Associate:</i> Individuals and groups have a First Amendment right not to associate with gay people and not to have the homosexual agenda thrust upon them by the state.</p>	<p><i>Promote Discretion:</i> The state should encourage gay people to be discreet, for their own good as well as the good of homophobes and of parents anxious over premature inquiries about sexuality by their children.</p>

An example of the federal/state divide is DOMA discourse.¹⁶¹ In states that have adopted laws barring same-sex marriages and recognition of same-sex marriages from other jurisdictions, proponents have openly relied on natural law arguments. Supporters of California's recent Knight Initiative centrally maintained, for example, that heterosexual marriage is rooted in "natural law and biology" because only male-female couples can procreate.¹⁶² Congressional proponents of DOMA—which ratified such state laws and added federal discriminations to them—de-emphasized those kinds of arguments. Instead, DOMA's proponents stressed the risks same-sex marriage posed for

¹⁶¹ See *supra* note 85 and accompanying text.

¹⁶² Steve Schmidt, Prop. 22 Drives a Wedge Among Religious Groups, *San Diego Union-Trib.*, Mar. 4, 2000, at A1 (quoting Roman Catholic leader supporting Knight Initiative). Senator Pete Knight defended his proposal on the ground that it was required not only to preserve the "natural law" definition of marriage, but also to promote "the best possible family unit to raise productive, responsible, citizens." Jenifer Warren, Initiative Divides a Family, *L.A. Times*, Nov. 24, 1999, at A1.

the institution of marriage and spouses' rights and for promoting homosexuality among children.¹⁶³

VI

ANALYSIS OF THE NO PROMO HOMO ARGUMENT: BAD CONSEQUENCES FRONTING FOR SYMBOLIC/ STATUS POLITICS

No promo homo arguments tend to be “face-saving” arguments lowering the rhetorical temperature of a politics of preservation and submerging, even as they secretly exploit, “face-smashing” antigay viewpoints (homosexuals are sinful, diseased, etc.).¹⁶⁴ By making the debate over same-sex marriage or hate crimes more abstract and less personal, no promo homo rhetoric poses less risk of riling and thereby mobilizing GLBT people and enables TFV groups to attract the support of the tolerant but anxious middle ground of the American public. Thus, no promo homo's apparent focus on the *bad consequences* of progay policies seeks to shift attention away from the *status-subordinating* features of antigay policies explained in Part I.

I do not think that no promo homo argumentation successfully can maintain its distance from status-subordinating features of antigay policies. GLBT people are not fooled, and this Part shows the uninitiated how such arguments are connected to pure status arguments. Recall from the introduction the three steps of the no promo homo argument in all its forms. The standard argument and all its analogues rest on claims about (1) causality, (2) state responsibility, and (3) normativity. All three claims are contestable. At this time, the only sustainable consequentialist claim is that gay-tolerant policy will invite more GLBT people to be open about their sexuality. No promo homo arguments therefore seek both status denigration and identity censorship, which for GLBT people are closely linked.

A. *Step One: Truth and Consequences*

What are the consequences of the state's decriminalizing sodomy, recognizing same-sex marriages, or barring sexual orientation and gender discrimination? At this point, empirical studies provisionally suggest that the only likely consequence of changing legal entitlements in a progay direction is (and has been) increased visibility of GLBT people in public culture.

¹⁶³ See *supra* note 82 and accompanying text.

¹⁶⁴ See Gusfield, *supra* note 31, at 184-85 (contrasting “face-smashing” and “face-saving” tropes in politics of preservation); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 *Harv. L. Rev.* 414, 460-62, 475-76 (1999) (similar).

1. *Homosexual Orientation*

The most popular version of the no promo homo argument is that a progay shift in state policy will be a signal to the *wavering adolescent* that homosexuality is okay, and the wavering adolescent might then *choose* homosexuality as her sexual orientation.¹⁶⁵ To evaluate this claim, it is necessary to explore the role of choice and social pressure in the production of a sexual orientation.

There are three groups of theories of what “causes” sexual orientation.¹⁶⁶ One cluster of theories rests upon genetic, hormonal, or other biological processes over which the individual has no control.¹⁶⁷ Under these *determinist* theories, sexual orientation is hard-wired into the individual, just as eye color is. Although determinist theories are grounded in empirical biological testing, they have been subjected to persuasive criticism: Their samples are neither large nor random, and the researchers’ categorizations rely on unreliable evidence of sexual orientation.¹⁶⁸ Some critics concede that determinist theories might be correct in part, for they help explain the surprising persistence of sexual variation along discernible family lines.

A second conceptual group, *quasi-determinist* theories, maintains that sexual orientation is more a developmental psychiatric than a hard-wired biological process. Most famously, Sigmund Freud believed that everyone starts with a bisexual potential, but that the normal developmental process yields an orientation that is heterosexual; if that process is disrupted, then the person might become homosexual.¹⁶⁹ Freud’s theories have been debated vigorously, but some form

¹⁶⁵ See, e.g., Bryant, *supra* note 101, at 114-15.

¹⁶⁶ See Edward Stein, *The Mismeasure of Desire: The Science, Theory, and Ethics of Sexual Orientation* 258-76 (1999) (discussing determinist, quasi-determinist, and voluntarist theories of sexual orientation).

¹⁶⁷ For the main determinist hypotheses about the causes of homosexuality, see Dean Hamer & Peter Copeland, *The Science of Desire: The Search for the Gay Gene and the Biology of Behavior* (1994) (theorizing that homosexuality has genetic basis); Simon LeVay, *The Sexual Brain* 120-21 (1993) (arguing that homosexuality is linked to hypothalamus); Heino F.L. Meyer-Bahlburg et al., *Prenatal Estrogens and the Development of Homosexual Orientation*, 31 *Developmental Psychol.* 12 (1995) (theorizing that homosexuality is linked to prenatal hormones).

¹⁶⁸ See, e.g., Bertram J. Cohler & Robert M. Galatzer-Levy, *The Course of Gay and Lesbian Lives: Social and Psychoanalytic Perspectives* 61-69 (2000); Stein, *supra* note 166; William Byne & Bruce Parsons, *Human Sexual Orientation: The Biologic Theories Reappraised*, 50 *Archives Gen. Psychiatry* 228 (1993); Anne Fausto-Sterling & Evan Balaban, *Genetics and Male Sexual Orientation*, 261 *Science* 1257 (1993) (letter); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 *Stan. L. Rev.* 503 (1994).

¹⁶⁹ See Sigmund Freud, *The Psychogenesis of a Case of Homosexuality in a Woman* (1920), reprinted in 18 *The Standard Edition of the Complete Psychological Works of Sigmund Freud* 147, 157-58, 167-71 (James Strachey trans. & ed., 1955); Sigmund Freud,

of his theories retain respectable scientific defenders.¹⁷⁰ For those skeptical of his Oedipus complex, other developmental theories have been propounded. The most plausible is the concept that childhood gender deviation (sissy boys and tomboys) correlates with adult sexual deviation.¹⁷¹ These theories enjoy preliminary support but are subject to the chicken-and-the-egg problem. Does the gender deviation cause or contribute to the sexual deviation? Or do they both derive from the same biological or developmental roots?

A third set of theories is *voluntarist*, maintaining that human beings are naturally heterosexual and that sexual variance is a chosen rebellion that typically can be reversed.¹⁷² Although this perspective was at one time the governing one in American medicine, it was never rigorously supported by empirical evidence and was discredited after gay professionals questioned its scientific credentials.¹⁷³ Today, this kind of theory is the basis for the "reparative therapy" movement, which promises gay people that they can change their sexual orientation with professional help.¹⁷⁴ Leading reparative therapists have conceded that their therapy rarely purges the patient of all homosexual desires, and there is no hard empirical evidence that it has any long-term effects on any patients.¹⁷⁵ The professional organizations in psychiatry and psychology have disavowed reparative therapy as secta-

Three Essays on the Theory of Sexuality (1905), reprinted in 7 The Standard Edition of the Complete Psychological Works of Sigmund Freud 123, 207-08, 229-43 (James Strachey trans. & ed., 1953).

¹⁷⁰ See, e.g., Kenneth Lewes, *The Psychoanalytic Theory of Male Homosexuality* (1988).

¹⁷¹ See generally Richard Green, *The "Sissy Boy Syndrome" and the Development of Homosexuality* (1987); Daryl J. Bem, *Exotic Becomes Erotic: A Developmental Theory of Sexual Orientation*, 103 *Psychol. Rev.* 320 (1996). But see Cohler & Galatzer-Levy, *supra* note 168, at 122-34 (criticizing Green's and Bem's theories).

¹⁷² Leading texts supporting the idea that homosexuals can be "cured" of their sexual orientation include Joseph Nicolosi, *Reparative Therapy of Male Homosexuality: A New Clinical Approach* (1991); Elaine V. Siegel, *Female Homosexuality: Choice Without Volition: A Psychoanalytic Study* (1988).

¹⁷³ See Ronald Bayer, *Homosexuality and American Psychiatry* (1981) (tracing professional critique and then rejection of idea that homosexuality is mental illness or defect).

¹⁷⁴ See generally National Ass'n for Research & Therapy of Homosexuality, *Toward a Further Understanding of Homosexuality: Collected Papers from the NARTH Annual Conference* (1995) [hereinafter NARTH Conference], available at <<http://www.narth.com/menus/1995papers.html>>.

¹⁷⁵ See Cohler & Galatzer-Levy, *supra* note 168, at 351-59 (reporting concessions by reparative therapists that their methods do not or may not alter underlying desires); Douglas C. Haldeman, *Sexual Orientation Conversion Therapy for Gay Men and Lesbians: A Scientific Examination*, in *Homosexuality: Research Implications for Public Policy* 149, 149-60 (John C. Gonsiorek & James D. Weinrich eds., 1991) (criticizing studies purporting to show that therapy can change gay person's sexual orientation); Timothy F. Murphy, *Redirecting Sexual Orientation: Techniques and Justifications*, 29 *J. Sex Res.* 501 (1992) (reviewing methods of and critiquing justifications for redirection of sexual orientation).

rian rather than scientific and as unethical in its asserted manipulation of patients.¹⁷⁶

Reparative therapists working intensely with willing subjects usually have been unable to purge them of homosexual desires; indirect state signals would have no chance of doing what the therapists cannot. This observation would appear just as applicable to the wavering adolescent as to the adult. Theories of adolescent sexuality do not support the idea that state signals can influence teenage feelings any more than parental signals do. If anything, panicked state responses denying gay rights, such as DOMA, are prone to stir up discussion about homosexuality and perhaps also to arouse adolescent interest in the forbidden fruit. The Victorian and McCarthy eras legislated vigorously against sexual inversion, but with apparently converse effects.

In light of the scientific rejection of voluntarist theories, however, reparative therapy is re-presenting itself as a quasi-determinist theory. Dr. Jeffrey Satinover, for example, posits that sexual orientation is a combination of hard-wired and environmental influences, with experiences and habit playing a key role.¹⁷⁷ Like the person who becomes an alcoholic through a combination of predisposition and practice, one does not become a homosexual without a combination of predisposition and homosexual experience.¹⁷⁸ Under Satinover's theory, the dispositionally bisexual adolescent can be pressed toward heterosexuality through healing and therapy, and the state can do its part in this process by refusing to "normalize" homosexuality.

Theories like Satinover's ultimately may provide a sounder basis for some no promo homo policies, but they rest upon no sufficient foundation at this point. Unlike most of the other current quasi-determinist theories, Satinover's is not supported by empirical testing reported in a peer-reviewed journal. Moreover, its premise that habit plays a role in determining one's orientation is inconsistent with most scientific thinking on the subject.¹⁷⁹ Most important, Satinover's apparent understanding of the role of the state is implausible.

¹⁷⁶ See David B. Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. Cal. L. Rev. 1297, 1311-12, 1315-20 (1999) (tracing development of professional psychological organizations' positions on homosexuality).

¹⁷⁷ See Jeffrey Satinover, *The Complex Interaction of Genes and Environment: A Model for Homosexuality*, in NARTH Conference, *supra* note 174.

¹⁷⁸ See *id.*

¹⁷⁹ Scientists sharply distinguish between one's sexual orientation and one's practices. For example, a straight person can engage in same-sex intimacy (e.g., gay for pay) without changing his orientation. See, e.g., John Money, *Sin, Sickness, or Status? Homosexual Gender Identity and Psychoneuroendocrinology*, in *Psychological Perspectives on Lesbian and Gay Male Experiences* 131, 133-34 (Linda D. Garnets & Douglas C. Kimmel eds., 1993) [hereinafter *Psychological Perspectives*].

2. Sodomy

Another argument is that progay policies will promote homosexual practices, particularly sodomy. This is a more plausible argument than the first, because engaging in sodomy is a conscious choice. But most progay policies would have little if any effect on this practice. For example, it is not reasonable to suppose that prohibiting sexual orientation discrimination or recognizing gay marriages would induce gay people to engage in more homosexual sodomy. Indeed, same-sex marriage, with its fidelity requirement, is more likely to reduce the amount of homosexual sodomy that goes on in the jurisdiction. Intolerance of gay people by private associations like the Boy Scouts would seem unlikely to affect the incidence of sodomy one way or the other.

On the other hand, laws criminalizing sodomy might discourage people of the same sex from engaging in anal and oral sex. According to the University of Chicago's recent survey of sexual practices, almost eighty percent of Americans have engaged in oral sex, and about a quarter engage in it regularly.¹⁸⁰ The Chicago researchers, however, did not compare the incidence of sodomy in years before and after decriminalization for any jurisdiction, nor do I know of a study that has done so.¹⁸¹ The Kinsey studies of the 1940s found that just a fraction of one percent of the people who had violated serious sex offense laws were ever prosecuted, a phenomenon that deprived sex offense laws of their immediate deterrence effects.¹⁸² More strikingly, Kinsey found that more than one-third of American males and one-eighth of American females had engaged in homosexual conduct to orgasm.¹⁸³ Not only was that a lot of homosexual sodomy, but the percentage of Americans committing it was higher in the Kinsey studies, when sodomy was illegal everywhere and often vigorously enforced, than in the Chicago study,¹⁸⁴ when sodomy was legal in most states and enforced against consensual adult conduct in virtually none. This dramatic contrast is hardly conclusive, in part because of methodological problems with both surveys.¹⁸⁵ Still, the contrast undermines one's intuitive

¹⁸⁰ See Edward O. Laumann et al., *The Social Organization of Sexuality: Sexual Practices in the United States* 98 tbl. 3.6 (1994).

¹⁸¹ Their data do show a high correlation between age and oral sex. Baby Boomers and Gen Xers are more likely to have engaged in it than their elders. See *id.* This does coincide with the formal and informal deregulation of sodomy in the country, but it also coincides with the sexual revolution of the 1960s.

¹⁸² See Alfred C. Kinsey et al., *Sexual Behavior in the Human Female* 17-18 (1953).

¹⁸³ See *id.* at 487-89; Kinsey et al., *supra* note 44, at 623 (male study).

¹⁸⁴ See Laumann et al., *supra* note 180, at 294 (finding that fewer than five percent of American men have engaged in homosexual sex as adults).

¹⁸⁵ The Kinsey studies probably overstated the amount of homosexual and otherwise illegal conduct, because the samples were not random and drew disproportionately from

confidence that there would be more homosexual sodomy if it were legal.

There is reason to think that the amount of homosexual sodomy might have been lower if it had been legal in the 1940s and 1950s. In an urban society with lots of spare time, there may be a relationship between what is sexy and what is taboo; some studies suggest that what we first experience as exotic becomes to us erotic.¹⁸⁶ By drawing lines between acceptable and naughty sexuality, the antigay rules by the state or even by the now-homophobic Boy Scouts may eroticize same-sex intimacy. Relatedly, there is a discursive feature to sexuality in a post-procreative society. Michel Foucault maintained that authoritative interrogation about sexual deviance stimulates multiple discourses that contribute to rather than defeat sexual nonconformity.¹⁸⁷ Hence, the effect of state and institutional discipline is not to repress but to engender multiple sexual discourses and practices. While largely nonfalsifiable, Foucault's theory provides a possible explanation for the sodomy surge after 1945. Allan Bérubé's landmark study of gay and bisexual soldiers in World War II found that many of them were literally unaware of their sexual feelings for people of the same sex until they were interrogated by the homosexuality gendarmerie at induction or warned about predatory homosexuals during basic training.¹⁸⁸

3. *Open Homosexuality*

Although central to exclusion from the armed forces, the least emphasized consequence of shifting legal policy in a progay direction

prisons, gay networks, and the University of Indiana. See Kinsey et al., *supra* note 44, at 623-31 (describing means by which Kinsey sought to check data for nonrepresentativeness); William G. Cochran et al., *Statistical Problems of the Kinsey Reports*, 48 *J. Am. Stat. Ass'n* 673, 675 (1953) (criticizing possible bias in constitution of Kinsey sample). The Chicago studies may have understated the amount of homosexual conduct, because the methodology relied on self-reporting in response to routinized questions. See Laumann et al., *supra* note 180, at 42-71 (detailing sophisticated survey decision, but one grounded ultimately on standardized questionnaire).

¹⁸⁶ See Bem, *supra* note 171, at 323-25 (arguing that children's sexual fantasies are triggered by things they find exotic); David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 *U. Pa. L. Rev.* 111 (1994) (drawing from Foucault's theory of sexuality and arguing that state line-drawing engenders rather than represses sexual desire).

¹⁸⁷ See Michel Foucault, *The History of Sexuality, Volume I: An Introduction* 18-35, 72 (Robert Hurley trans., Vintage Books 1990); see also Vikki Bell, *Interrogating Incest: Feminism, Foucault, and the Law* 14-56 (1993) (discussing connections between Foucault and feminism); Herbert L. Dreyfus & Paul Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* 168-78 (2d ed. 1983) (explaining Foucault's theory).

¹⁸⁸ See Allan Bérubé, *Coming Out Under Fire: The History of Gay Men and Women in World War Two* 22-24, 243-44 (1990).

is the effect on people's willingness to be open about their homosexual orientation. Because being openly GLBT is a matter of conscious choice that state signals might affect over time, this argument strikes me as substantially correct, with several important caveats.

One caveat lies in the paradoxical relationship of private coming out and public policy (step two, treated in the next Section). People often come out in defiance of state policy. Thousands of gay people came out after Stonewall, defying state policies treating gay people like psychopaths. Thousands of gay attorneys (including me) came out after *Bowers v. Hardwick*,¹⁸⁹ defying the Supreme Court's authority to define our place in society. More scoutmasters can be expected to come out after the *Dale* decision. Conversely, state signals do not trump social stigma. If GLBT people were allowed to serve in the armed forces, few would be openly gay because of fears about harassment and violence. In the longer term, however, more GLBT people in the military would come out; state signals can have substantial effect if they contribute to or coincide with changes in private attitudes.

Additionally, some policies are more likely to encourage GLBT people to come out of the closet than others. If the state recognizes same-sex marriages, the couples who opt for the rights of marriage will be ipso facto out, for their presumptively "gay marriage" will be a matter of public record. Antidiscrimination laws should encourage gay people to be more open about their orientations, and there is provisional evidence to this effect.¹⁹⁰ Although there is no hard empirical evidence, it seems sensible that abandoning no promo homo educational policies or adopting gay-friendly ones would encourage more adolescents to be openly gay or bisexual—except in locales where social stigma remained strong. In contrast, repeal of sodomy laws or the military exclusion would yield less coming out than these other progay changes.

Thus, the only likely consequence—but a big one—of shifting policy in a progay direction is encouragement of more *open* homosexuals and more *public* displays of homosexual identity, and therefore of desire and practices imputed to that identity in our sex-obsessed culture. This argument not only works logically but has a persuasive appeal even to people whose status or religious faith is not invested in homophobia. For example, many parents are fearful or resentful of the consequences of public homosexuality for private discourse between them and their children or among children. If kids see two

¹⁸⁹ 478 U.S. 186 (1986).

¹⁹⁰ See James W. Button et al., *Private Lives, Public Conflicts: Battles over Gay Rights in American Communities* 116-35 (1997) (noting survey finding modest but positive perceived effect of sexual orientation antidiscrimination laws).

women marrying one another in a state-sanctioned ceremony, they might ask their parents about how such a marriage can be consummated, or they might engage in their own intramural speculations. For such parents, it is sex negativity (or nervousness about sexual talk) that renders them receptive to no promo homo arguments.

B. Step Two: State Responsibility

Should the state promote superior statuses and conduct over inferior statuses and conduct? Some theories of the state are skeptical, and most theories posit many instances where the state ought not promote its conception of the good. The ensuing analysis of state responsibility reveals this paradox: In order for the public version of the no promo homo argument to work, one must adopt an activist theory of the state that is antithetical to the views otherwise held by the core opponents of gay rights, and that is at odds with TFV groups' own understanding of their public rights, epitomized in the private version of the no promo homo argument.

Liberalism is the dominant theory of state responsibility in this country. Individual liberty is the baseline, and the state's primary role is to create collective goods and prevent people from hurting one another.¹⁹¹ Liberal premises are hospitable to gay people's struggle for the same bedroom privacy and marriage entitlements that straight people enjoy,¹⁹² and are skeptical about the state taking moral positions about what is good for people.¹⁹³ As to most matters, individuals should be able to decide for themselves.

To accept an antigay state policy, the liberal would demand a showing that one's homosexuality or consensual sodomy hurts other people. As a basis for state policy, liberal theory does not credit the argument that open homosexuality is disgusting to some people. The traditional regulatory argument along these lines is that the "homosexual lifestyle" is linked to child molestation, but this asserted third-party effect is a myth. According to neutral empirical studies, girls are three to six times as likely to be sexually molested as boys, and are almost always molested by males.¹⁹⁴ Boys are almost always molested

¹⁹¹ See, e.g., Bruce A. Ackerman, *Social Justice in the Liberal State* 349-78 (1980); John Rawls, *A Theory of Justice* 54-55 (rev. ed. 1999).

¹⁹² See, e.g., Eskridge, *supra* note 74, at 123-82; Richard D. Mohr, *A More Perfect Union: Why Straight America Must Stand Up for Gay Rights* (1994); David A.J. Richards, *Sex, Drugs, Death and the Law: An Essay on Human Rights and Overcriminalization* 29-83 (1982).

¹⁹³ See John Rawls, *Political Liberalism* 4 (1993).

¹⁹⁴ See, e.g., Andrea J. Sedlak & Diane D. Broadhurst, U.S. Dep't of Health & Human Servs., *The Third National Incidence Study of Child Abuse and Neglect* 4-2 to 4-3 (1996); Carole Jenny et al., *Are Children at Risk for Sexual Abuse by Homosexuals?*, 94 *Pediatrics*

by males, as many as 40-50% of whom are involved in a sexual relationship with the boy's mother, and a small minority of whom are openly gay males.¹⁹⁵ Note the irony: Openness about one's minority orientation is strongly correlated with a disinclination to molest children, and the sexual closet created by marriage is a repository of most child abuse in America. These findings suggest that gay, bisexual, and straight women are least likely to assault children in pursuit of their own pleasure, openly gay men unlikely, and straight or closeted gay/bisexual men most likely, and by a huge margin.

More open to public no promo homo arguments (but correlatively less supportive of the privatized argument) is utilitarianism, which favors state promotion of the good when it would help more people than it would hurt. Bentham, the parent of the philosophy, thought its premises hostile to sodomy laws.¹⁹⁶ Should Bentham's skepticism be extended to policies more in vogue today, namely, bars to same-sex marriage, antigay educational programs, and opposition to antidiscrimination laws? Assume it is true that heterosexuality is "better" than homosexuality, the question taken up in the next Section. A simple utilitarian calculus could support this cluster of antigay policies, on the ground that the happiness they bring to a large segment of our society outweighs the distress they cause for the smaller group of gay people.

This is only the beginning of analysis, however, as most utilitarians would be reluctant to rest state policy on opinion polls, without considering relative intensity of costs and benefits.¹⁹⁷ Antigay state policies reliably will discourage GLBT people from coming out of the sexual closet and will encourage them to pass as straight—even to the point of marrying someone of the opposite sex.¹⁹⁸ This polity of the closet makes a portion of our society happier and many parents more secure, but their happiness and security come at large costs to others:

41, 42 (1994); Robert Pierce & Lois Hauck Pierce, *The Sexually Abused Child: A Comparison of Male and Female Victims*, 9 *Child Abuse & Neglect* 191 (1985).

¹⁹⁵ See Jenny et al., *supra* note 194, at 42 (concluding that 74% [37/50] of adult male molesters of boys were engaged in sexual relationship with boys' mothers or other female relatives); Mary J. Spencer & Patricia Dunklee, *Sexual Abuse of Boys*, 78 *Pediatrics* 133, 135-36 (1986) (reporting similar findings).

¹⁹⁶ See *supra* notes 35-36 and accompanying text.

¹⁹⁷ See, e.g., Amartya K. Sen, *Collective Choice and Social Welfare* 78-86 (1970).

¹⁹⁸ See Laud Humphreys, *Tearoom Trade: Impersonal Sex in Public Places* 105 (rev. ed. 1975) (stating that 54% of people having anonymous male sex in public restrooms were married); Samuel S. Janus & Cynthia L. Janus, *The Janus Report on Sexual Behavior* 95 (1993) (stating that 4% of married women have never had sex, often because of husband's homosexuality); Michael W. Ross, *The Married Homosexual Man: A Psychological Study* 1 (1983) (estimating that 10-20% of gay men marry).

- The hundreds of gay and bisexual adolescents who commit suicide each year because antigay signals make them feel rejected and worthless;¹⁹⁹
- The surviving GLBT people who suffer in the closet, without the peer group support psychologists insist is emotionally needed by members of stigmatized groups;²⁰⁰
- The opposite-sex sexual partners of closeted GLBT people who are emotionally devastated when they discover their partners' secret orientation²⁰¹ or who learn they have been exposed unknowingly to HIV or risk of infection;²⁰²
- The children of GLBT people who suffer when a parent's closeted life is revealed to be a charade;²⁰³
- The minors who are molested by closeted gay or bisexual priests, (step)parents, and married men who have no peer outlets for their sexuality;²⁰⁴

¹⁹⁹ Although scientists generally have not found homosexuality to be correlated to biological or mental illness, they have found that gay adolescents are significantly more likely to suffer from emotional distress, to attempt suicide, and to commit suicide. See, e.g., Susan D. Cochran & Vickie M. Mays, *Lifetime Prevalence of Suicide Symptoms and Affective Disorders Among Men Reporting Same-Sex Sexual Partners: Results from NHANES III*, 90 *Am. J. Pub. Health* 573 (2000) (reporting that homosexually experienced men may be more than five times more likely to have attempted suicide than men reporting only opposite-sex partners, and that reports of suicide attempts were clustered among participants aged 17-29); Paul Gibson, *Gay and Lesbian Youth Suicide*, in 3 *Alcohol, Drug Abuse, & Mental Health Admin., U.S. Dep't of Health & Human Servs., Report of the Secretary's Task Force on Youth Suicide* 110 (1989) (reporting that gay youth are two to three times more likely to commit suicide than other young people); Gary Remafedi et al., *The Relationship Between Suicide Risk and Sexual Orientation: Results of a Population-Based Study*, 88 *Am. J. Pub. Health* 57 (1998) (describing random survey of secondary school students that found suicide attempts by 28% of homosexual or bisexual males, 20.5% of homosexual or bisexual females, 14.5% of heterosexual females, and 4.2% of heterosexual males).

²⁰⁰ See Janis S. Bohan, *Psychology and Sexual Orientation: Coming to Terms* 94-104 (1996) (arguing that healthy gay identity requires openness); John C. Gonsiorek & James R. Rudolph, *Homosexual Identity: Coming Out and Other Developmental Events*, in *Homosexuality: Research Implications for Public Policy*, supra note 175, at 161, 162-64 (reviewing literature on positive psychological benefits of coming out); Ilan H. Meyer, *Minority Stress and Mental Health in Gay Men*, 36 *J. Health & Soc. Behav.* 38 (1995) (finding in large-scale survey of gay men that sense of stigma and shame was lowest among "out" gay men).

²⁰¹ See Amity Pierce Buxton, *The Other Side of the Closet: The Coming-Out Crisis for Straight Spouses and Families* 3-24, 39-66, 177-98 (rev. ed. 1994) (relating painful stories of straight spouses stunned by their partners' coming out).

²⁰² See Tom W. Smith, *Adult Sexual Behavior in 1989: Number of Partners, Frequency of Intercourse, and Risk of AIDS*, 23 *Fam. Planning Persp.* 102 (1991) (discussing spread of AIDS in 1989).

²⁰³ See Buxton, supra note 201, at 67-84 (discussing redefinition of marriage that occurs when one partner comes out), 126-27 (describing trauma to children when straight parent uses them to punish lesbian or gay parent).

²⁰⁴ See supra notes 194-95 and accompanying text.

- The people who are physically assaulted because they are perceived to be lesbian or gay.²⁰⁵

The harms of the closet not only are felt by many more people than you might suppose, but are often extraordinary: death and life-shattering experiences. A state charged with promoting overall social utility should think twice before imposing these various harms on a class of its citizens.²⁰⁶

There is a third way of looking at state responsibility, however. Under republican premises, a key role for the state is to be a forum for public deliberation concerning the common good.²⁰⁷ State policies invading citizens' liberty or imposing big costs on them thereby might be justified on *participatory* or *substantive* grounds. The deliberative process—the mobilization of an engaged citizenry, whose public discussion expresses the community's public values—could be worthwhile in and of itself. And exploration of the common good might justify the conclusion that heterosexual intimacy is so intrinsically better than homosexual intimacy that the state should endorse and promote it. Republican theory of this kind could be a powerful defense of antigay initiatives, in which the people themselves debate and vote on the appropriate state policy toward GLBT people.

This version of the state responsibility prong of the no promo homo argument contains a few landmines. Republican theories of the state could justify a wide array of government regulation of economic and personal activities. However, cultural conservatives opposed to equal rights for gay people ought to be particularly wary of this view of the state's role. If you favor state activism to preserve family values by denying GLBT people equal rights, it is harder to oppose state activism subserving equality values through regulation of TFV associations. The republican process that yielded Colorado's antigay Amendment 2 also can yield an antidiscrimination regime that requires the Boy Scouts to retain openly gay scoutmasters.

²⁰⁵ On the pervasiveness of violence against GLBT people and its mental health consequences, see generally Gary David Comstock, *Violence Against Lesbians and Gay Men* (1991); *Hate Crimes: Confronting Violence Against Lesbians and Gay Men* (Gregory M. Herek & Kevin T. Berrill eds., 1992); Gregory M. Herek et al., *Psychological Sequelae of Hate-Crime Victimization Among Lesbian, Gay, and Bisexual Adults*, 67 *J. Consulting & Clinical Psychol.* 945 (1999).

²⁰⁶ For contrasting, but similarly negative, utilitarian analyses of state sodomy laws, bars to same-sex marriage, and the military exclusion, compare Posner, *supra* note 1, at 309-24, with William N. Eskridge, Jr., *A Social Contract Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 *Yale L.J.* 333, 344-59 (1992) (book review).

²⁰⁷ See generally *Deliberative Democracy* (Jon Elster ed., 1998); *Symposium: The Republican Civic Tradition*, 97 *Yale L.J.* 1493 (1988).

More important, leading republican theories insist upon affirmative state action to assure that every kind of citizen can participate on roughly equal terms in public debates. State expression is unrepublican, say these authors, if it suppresses minority voices in the body politic and closes off public dialogue.²⁰⁸ This is the effect of the closet. The state-supported closet chills individual self-expression and political participation by GLBT people and undermines GLBT people's ability to organize politically and to participate in the process as a group protecting its interests.²⁰⁹ Overall, the closet limits the ability of GLBT people to undermine stereotypes by their politics of presence. When the state encourages a minority to remain publicly invisible—"don't ask, don't tell"—it engenders an irresponsible public discourse where the objects of wild factual claims (e.g., homosexuals are child molesters) are inhibited from refuting those claims by the visibility of their lives to moderate observers.

Even worse is state expression that not only degrades a minority group harmful to no one, but also demonizes the group. Demonization of a group of people has strongly unrepublican effects—including prejudice against the group, anger on the part of group members, and wasteful status competition.²¹⁰ At the very least, serious republican theory would insist that no promo homo rhetoric and policy disavow the no longer defensible tropes sedimented at its bottom: the disgusting sodomite, the diseased degenerate, the predatory homosexual. Such theory also ought to insist that the state better had be very certain that the status or life it is promoting really is better than the disfavored status or life.

C. *Step Three: Conceptions of the Good*

The proposition that homosexuality is inferior to heterosexuality, the last step in the no promo homo argument, requires a theory of the good. The conceptions of the good that are most consistent with American public law and norms are surprisingly resistant to this conclusion—especially when one thinks about the good from feminist points of view.

A hedonic conception of the good asks what gives individuals subjective pleasure and fulfillment. A substantial body of literature

²⁰⁸ See, e.g., Philip Pettit, *Republicanism: A Theory of Freedom and Government* (1997); Frank Michelman, *Law's Republic*, 97 *Yale L.J.* 1493 (1988).

²⁰⁹ See *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 595 P.2d 592, 595-96 (Cal. 1979) (describing vast costs of discrimination against gay employees); Eskridge, *supra* note 11, at 57-97 (describing failure of closet to protect privacy, freedom, or integrity of gay individuals).

²¹⁰ See Richard H. McAdams, *Relative Preferences*, 102 *Yale L.J.* 1, 91-103 (1992).

and autobiography suggests that same-sex intimacy, fantasy, and (sexual) partnership provide keen and abiding pleasure for many people that could not be provided by different-sex intimacy, fantasy, and (sexual) partnership.²¹¹ In contrast, much antigay discourse recounts stories of deeply unhappy homosexuals, some of whom are ruined by their condition and others of whom are saved by reparative therapy curing them with heterosexuality.²¹² How can one arbitrate between these starkly different hedonic views?

Theoretically, the contrasting viewpoints could be reconciled by understanding the unhappiness of many GLBT people as a consequence of social and legal persecution rather than of their orientation. Social psychologists investigating different strategies of stigma management by GLBT people and other marginalized peoples have concluded that strategies of denial, passing, or closetry are psychologically destructive; the only psychologically healthy strategy in the long-term is acknowledgment (coming out) to oneself and others and support from GLBT colleagues.²¹³ This line of theory suggests that antigay social and legal norms impose huge hedonic costs on GLBT people. Recall the powerful studies showing the high incidence of attempted suicides by GLBT youth.²¹⁴

Two theoretical perspectives might be weighed against the social psychologists' theory. One is the psychiatric theory that GLBT people are unhappy and suicidal because they are mentally ill, not because they are stigmatized.²¹⁵ The homosexuality-as-mental-illness theory never has been supported by a genuine empirical survey drawn from a random sample of the population, and the more careful studies have found no mental or biological differences between straight and gay samples.²¹⁶ A factually more plausible theory suggests that anti-

²¹¹ See, e.g., *Boys Like Us: Gay Writers Tell Their Coming Out Stories* (Patrick Merla ed., 1996) (surveying autobiographical stories of gay and bisexual men); *The Coming Out Stories* (Susan J. Wolfe & Julia Penelope Stanley eds., 1980) (surveying autobiographical stories of lesbian and bisexual women).

²¹² See, e.g., Irving Bieber et al., *Homosexuality: A Psychoanalytic Study* 317-18 (1962) (stating that homosexuals are intrinsically unhappy unless they are treated for their illness).

²¹³ See Bohan, *supra* note 200, at 95-100, 112-17 (describing leading theories of stigma management and psychological value of coming out); Cohler & Galatzer-Levy, *supra* note 168, at 263-73 (describing stigma theory and survey findings of psychological distress among closeted GLBT people); *Psychological Perspectives*, *supra* note 179, at 185-266 (collecting articles on similar subjects by Carmen de Montefiores, Erik F. Strommen, and Richard R. Troiden).

²¹⁴ See *supra* note 199 and accompanying text.

²¹⁵ See Bieber, *supra* note 212; Charles W. Socarides, *Homosexuality* (1978); Charles W. Socarides, *The Overt Homosexual* (1968).

²¹⁶ The first scientific effort to distinguish gay and straight populations, see Evelyn Hooker, *The Adjustment of the Male Overt Homosexual*, 21 *J. Projective Techniques* 18

gay prejudice provides hedonic satisfaction to homophobes. For many people, homophobic feelings alleviate significant psychological problems, including sexual frustrations and feelings of personal inadequacy.²¹⁷ While not normatively attractive, this theory of prejudices persuasively suggests a hedonic reason why no promo homo arguments remain robust.

Another hedonic claim about gay people is that they are alone and cannot form emotionally satisfying relationships. Social scientists are still in the early stages of testing this idea. The earliest comparative study, by Philip Blumstein and Pepper Schwartz, studied samples of 7397 straight, 1875 gay male, and 1723 lesbian couples.²¹⁸ The researchers found that all three groups of couples derived significant satisfaction from their relationships, with some indication that the lesbian couples derived the greatest satisfaction.²¹⁹ In an eighteen-month follow-up, Blumstein and Schwartz found that more of the married straight couples were still together than were the lesbian or gay male couples.²²⁰ These findings have been replicated by subsequent studies published in leading social science journals—most recently by Lawrence Kurdek's ambitious five-year longitudinal study of 236 married, 66 gay male, and 51 lesbian couples.²²¹ One hypothesis suggested by this literature is that women's hedonic values best can be served by recognizing gay marriages: Many women derive potentially greater satisfaction from relationships with other women, but are more reluctant to enter into or unable to remain in such relationships because of hostile norms.

A broader conception of the good would consider the effects of different behavior on overall social utility. We already have seen how the primary antigay trope (child molestation) is factually unfounded. Indeed, the child molestation charge against GLBT people unproduc-

(1957), found no difference. Hooker's dramatic finding stimulated 25 years of further tests, which are reviewed in John C. Gonsiorek, *The Empirical Basis for the Demise of the Illness Model of Homosexuality*, in *Homosexuality: Research Implications*, supra note 175, at 115; Bernard F. Reiss, *Psychological Tests in Homosexuality*, in *Homosexual Behavior: A Modern Reappraisal* 296 (Judd Marmor ed., 1980). For a recent detailed survey of the literature, see Cohler & Galatzer, supra note 168, at 294-310.

²¹⁷ See Elisabeth Young-Bruehl, *The Anatomy of Prejudices* 340-85 (1996).

²¹⁸ See Philip Blumstein & Pepper Schwartz, *American Couples: Money, Work, Sex* 11-24, 547 (1983); see also Alan P. Bell & Martin S. Weinberg, *Homosexualities: A Study of Diversity Among Men and Women* 219-21 (1978) (stating that close-coupled lesbians and gay men tend to be happiest among homosexual couples).

²¹⁹ See Blumstein & Schwartz, supra note 218, at 202-03 (finding lesbian couples to be most satisfied with relationship's physical intimacy).

²²⁰ See *id.* at 307-08.

²²¹ See Lawrence A. Kurdek, *Relationship Outcomes and Their Predictors: Longitudinal Evidence from Heterosexual Married, Gay Cohabiting, and Lesbian Cohabiting Couples*, 60 *J. Marriage & Fam.* 553 (1998).

tively diverts attention from child abuse of girls by fathers and stepfathers and from other male violence that pervades heterosexual relationships. Between one-tenth and one-third of adult women have been subject to rape or attempted rape by men, usually men they have dated.²²² Many more women have been subjected to other forms of sexual assault or coercion. Female victims of male rape and coercion include wives raped by their husbands.²²³ Rape and partner abuse within same-sex dating and partnerships have been subject to far fewer studies. Preliminary findings suggest that this is a problem for lesbian and gay couples, but with less violence than for straight couples.²²⁴

Many consider heterosexual intercourse superior to other forms of sex because it sometimes can produce offspring. This is not quite the social good it is cracked up to be, from a utilitarian perspective. For one thing, penile-vaginal intercourse is not needed to produce children. Just as many different-sex couples have children through artificial insemination, so do many same-sex couples, especially lesbian ones. Studies consistently have shown that gay people do as good a job as straight people raising these children.²²⁵ For another thing, more children are not necessarily socially useful. Many of the children resulting from heterosexual intercourse are unplanned surprises, the consequences of which are typically borne by the children, who are aborted, abandoned, or reared in inhospitable or overwhelmed households. A world of six billion people may need less penile-vaginal sex. As the president told the intern, it is usually best not to produce babies, and oral sex is a great contraceptive.

The social utilitarian case for the superiority of heterosexuality is surprisingly hard to establish. Indeed, from the perspective of *women's utility*, not only is the case for same-sex intimacy easier to

²²² See Pat Gilmartin, *Rape, Incest, and Child Abuse: Consequences and Recovery* 29-35 (1994) (surveying various studies of rape). Classic studies quantifying the high incidence and seriousness of male-female rape include Diana E.H. Russell, *Sexual Exploitation: Rape, Child Sexual Abuse and Workplace Harassment* (1984); Robin Warshaw, *I Never Called It Rape: The Ms. Report on Recognizing, Fighting, and Surviving Date and Acquaintance Rape* (1988); Mary P. Koss et al., *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students*, 55 *J. Consulting & Clinical Psychol.* 162 (1987).

²²³ See generally Diana E.H. Russell, *Rape in Marriage* (rev. ed. 1990).

²²⁴ See Claire M. Renzetti, *Violence in Lesbian and Gay Relationships*, in *Gender Violence: Interdisciplinary Perspectives* 285 (Laura L. O'Toole & Jessica R. Schiffman eds., 1997) (surveying literature).

²²⁵ See Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 *U. Ill. L. Rev.* 253 (extensively surveying social science studies of lesbian and gay parenting and refuting point-by-point, Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 *U. Ill. L. Rev.* 833 (arguing that homosexual parents are bad for children)).

make than the case for different-sex intimacy, but the whole idea of preferred or compulsory heterosexuality has the effect or design of privileging men.²²⁶ The intolerable levels of nonmutual sexual intercourse in male-female relationships and families, first, have been hidden from view by the law's privileging of (male-female) family privacy and, then, have remained marginal in part because they are considered an inevitable albeit unfortunate by-product of male-female interactions. Although women as well as men defend the superiority of heterosexuality, social and legal norms enforcing it have not served women's utility nearly as well as men's.

Hedonic and social utilitarian considerations are at best indeterminate and therefore lend no clear support to the moral inferiority of homosexuality. The inability of secular morality to support that moral contrast leaves as its best support that branch of natural law which maintains that only penile-vaginal sex within a committed marriage creates a common moral good.²²⁷ The sex must be penile-vaginal, with ejaculation by the male, because that is the form that can lead to pregnancy, the reproduction of humankind; it also must be within the marital relationship because that is a unique form of human commitment. Any other sexual expression is the instrumental deployment of the body worthy only of animals. This kind of natural law thinking is just as critical of procreative sex between unmarried men and women as of homosexual intimacy, and much more critical of contraception and abortion, which this theory considers to be the taking of human life.²²⁸ Yet our social and constitutional norms reject their position as to matters of contraception and abortion, and for privacy reasons that make it hard to distinguish homosexual intimacy. Moreover, some philosophers have maintained that natural law's aspiration that sex should serve a higher common goal than pleasure is satisfied by same-sex intimacy conducing toward a unitive community of friendship and love.²²⁹ Just as the sterile or contracepting straight couple can create a

²²⁶ See, e.g., Mary Becker, *Women, Morality, and Sexual Orientation*, 8 *UCLA Women's L.J.* 165 (1998); Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 *Signs* 631 (1980).

²²⁷ See Robert P. George, *Making Men Moral: Civil Liberties and Public Morality* (1993); 2 Germain Grisez, *The Way of Lord Jesus* 633-80 (1993); Finnis, *supra* note 1, at 1066; Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 *Geo. L.J.* 301, 301-02, 314 (1995).

²²⁸ See, e.g., Grisez, *supra* note 227, at 648-56 (arguing that contraception is just as sinful as sodomy).

²²⁹ See, e.g., Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 *Geo. L.J.* 261 (1995); *Is Homosexual Conduct Wrong? A Philosophical Exchange*, *New Republic*, Nov. 15, 1993, at 12, 13 (statement by Martha Nussbaum); Michael J. Perry, *The Morality of Homosexual Conduct: A Response to John Finnis*, 9 *Notre Dame J.L. Ethics & Pub.*

common good in intercourse, including oral intercourse, so can the lesbian or gay couple.

Most natural law thinkers who insist that oral sex or sex outside of marriage cannot serve humane ends are speaking ultimately from a narrowly religious perspective that cannot be defended to people not sharing those sectarian views. Moreover, this understanding of natural law is male-centered on its face: "The only sexual act considered potentially moral—because *noninstrumental*—routinely results in male emission and orgasm but rarely (if that is all that occurs) in female orgasm. [It is also] the *only* sexual act that routinely results . . . in someone else becoming pregnant and bearing *his* child."²³⁰ This kind of intercourse is not meaningfully noninstrumental without something else—namely, the truly mutual sharing between the partners, whatever their sexes. A feminist natural law, responsive to women's needs, not only emphasizes the mutuality of sexual intercourse itself, but also rejects compulsory heterosexuality that insists mutuality cannot exist without a married man's penis in his wife's vagina.²³¹

VII

JUDICIAL REVIEW OF NO PROMO HOMO POLICIES

The most coherent reading of no promo homo arguments and policies is the status-preserving one developed in Part I: The state should not empower GLBT people by vesting them with new legal rights and should not impose new obligations on TFV or homophobic people. Given the preexisting allotment of fewer rights for GLBT people, this is deployment of state-assured rights and duties to reaffirm the legally inferior status of gay people. This kind of symbolic argument raises red flags under the Equal Protection Clause, whose core principle is to discourage "class legislation."²³² *Evans*, which invalidated Colorado's Amendment 2, exemplifies this principle. Applying rational basis review, the Court found the initiative's "sheer breadth . . . so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the

Pol'y 41 (1995). These arguments are answered in George & Bradley, *supra* note 227, at 314-15.

²³⁰ Becker, *supra* note 226, at 189-90.

²³¹ See *id.* at 191-202 (arguing that compulsory heterosexuality is "autonomy-denying objectification" that undermines women's sexual agency and capacity for enjoyment).

²³² Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 Mich. L. Rev. 245 (1997); see also William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 96-100 (1988) (describing opposition to Fourteenth Amendment based on perception that it would enforce racial equality).

class that it affects.”²³³ Because the initiative was a “status-based” law aimed at a class of citizens, it violated the core equal protection command that “‘a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.’”²³⁴ *Evans* can be read for the proposition that the state cannot adopt laws for the sole purpose of (re)asserting the status of GLBT people as a “pariah class.”²³⁵

On the other hand, the state legitimately can promote or discourage certain statuses. For example, the state engages in campaigns against drug or alcohol abuse. While it cannot imprison constitutionally someone for the status of being a drug addict or alcoholic, the state can deny constitutionally such addicts some rights and benefits, such as state employment or service in the military.²³⁶ Thus, *Evans* also can be read narrowly, to stand only for the proposition that anti-gay laws which are unprecedented, which impose substantial penalties on GLBT people, and whose sweep far exceeds their apparent goal violate the Equal Protection Clause.²³⁷ As to the status denigration of GLBT people by no promo homo arguments and policies, there is play in federal constitutional doctrine, but there is no defensive moral reason for choosing the less gay-friendly reading. In due course, I shall suggest some reasons why the U.S. Supreme Court ought to give *Evans* a relatively broad application.

In any event, because of general antipathies as well as constitutional objections to class legislation, strategists of no promo homo campaigns have supplemented the status-preserving symbolic argument with consequentialist ones. But this has the effect of solving one constitutional uncertainty by raising new ones, for the major consequentialist claims rest on questionable, sometimes wacky, assertions, as I have suggested in the previous part. To take an extreme example, Colorado’s Amendment 2 campaign asserted that the “target” of the homosexual agenda is children—“indoctrinated” in schools to

²³³ *Romer v. Evans*, 517 U.S. 620, 632 (1995).

²³⁴ *Id.* at 634-35 (quoting *United States Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

²³⁵ Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 *Const. Commentary* 257 (1996); accord Akhil Reed Amar, *Attainder and Amendment 2: Romer’s Rightness*, 95 *Mich. L. Rev.* 203 (1996); Louis Michael Seidman, *Romer’s Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 *Sup. Ct. Rev.* 67.

²³⁶ See *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979) (holding that drug addicts can be denied civil service positions); *Steffan v. Perry*, 41 F.3d 677, 691 n.12 (D.C. Cir. 1994) (en banc) (noting in dicta that drug addicts may be excluded from armed services).

²³⁷ See Richard F. Duncan, *The Narrow and Shallow Bite of Romer and the Eminent Rationality of Dual-Gender Marriage: A (Partial) Reponse to Professor Koppelman*, 6 *Wm. & Mary Bill Rts. J.* 147 (1997).

“promot[e] acceptance of homosexuality, bisexuality, lesbianism, and condom use” and molested by predatory homosexuals.²³⁸ Less extreme, but also not empirically supported, is the popular belief that progay legal measures will promote homosexuality among wavering adolescents.²³⁹

The claim that progay changes in the law will promote homosexual sodomy is a conceivable basis for supporting consensual sodomy laws and no promo homo sex education policies. This kind of speculative thinking in the past has satisfied the rational basis test of the Equal Protection Clause, which allows a fair amount of state experimentation and speculation, so long as it does not invoke a suspect classification or abridge fundamental rights like voting.²⁴⁰ On the other hand, a state justification that seeks to reduce the amount of private consensual conduct pleasing to many people raises concerns under state constitutional privacy protections, as well as the federal First Amendment and Equal Protection Clause.²⁴¹ An antigay policy for which consequentialist justifications are way under- or overinclusive faces equal protection problems under *Evans*'s more scrutinizing version of rational basis.²⁴²

The consequentialist claim that works best factually is constitutionally the worst. Antigay policies are usually a rational means to encourage GLBT people to closet their orientations, but this goal is questionable under the First Amendment. If state law is openly premised on a policy of encouraging GLBT people to remain silent and closeted, it amounts to state endorsement of self-censorship and to a state campaign to keep GLBT people marginalized in the political process. This is the kind of censorship that not only seems to violate

²³⁸ See *Coloradans for Family Values*, reprinted in Nagel, *supra* note 115, app. A. The pamphlet asserted, for example, that a 1987 study found “homosexuals” 18 times more likely to engage in sex with minors than heterosexuals. See *id.* Those figures are inconsistent with every study published in the last decade in refereed science or medical journals. See Ball & Pea, *supra* note 225, at 307 n.279 (summarizing and citing leading empirical studies in refereed reviews).

²³⁹ See *supra* Part VI.A.1.

²⁴⁰ See, e.g., *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949) (permitting selective restrictions on advertising on motor vehicles); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911) (permitting certain restrictions on rights of property owners to tap subsurface water source).

²⁴¹ *Bowers v. Hardwick*, 478 U.S. 186 (1986), forecloses federal privacy challenges to general sodomy laws but does not foreclose challenges based on the First Amendment or the Equal Protection Clause. See Eskridge, *supra* note 11, at 174-83, 209-11. Nor does it bar state constitutional challenges. See *Powell v. State*, 510 S.E.2d 18 (Ga. 1993) (invalidating same Georgia sodomy law upheld in *Hardwick*).

²⁴² See *Romer v. Evans*, 517 U.S. 620, 632-33 (1995) (holding that ill fit between breadth of antigay initiative and its justifying reasons compels its invalidation under rational basis equal protection review).

the text of the First Amendment (as it “abridg[es] the freedom of speech”) but also undercuts the three central goals of the First Amendment: individual autonomy, robust political debate, and non-discrimination on the basis of speech’s content or viewpoint.²⁴³ Similar First Amendment points can be made about state application of sexual orientation antidiscrimination laws to TFV people and groups that make a privatized version of no promo homo, as in *Hurley*. There, the Court struck down what it deemed “a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis.”²⁴⁴ That precedent, in turn, provides First Amendment support for a reading of *Evans* whereby encouraging GLBT people to stay in the closet is not a legitimate state interest.

The foregoing is just a broad overview and does not suggest how the next generation of no promo homo cases will be decided. Doctrinally, the constitutional baseline or standard of review makes a big difference. *Hardwick*’s minimal rationality considers antihomosexual sentiment a sufficient state goal, defers to a longstanding antigay status quo, and tolerates a range of state policies that reflect history-based antigay rules. The *Evans* standard of rationality-plus does not consider antigay sentiment a legitimate state goal, is ambiguous about what the status quo should be, and gives a serious look at the means asserted by the state to justify an antigay policy. Heightened scrutiny, such as that applied in *Hurley*, is not deferential to the status quo and requires a compelling state goal narrowly tailored to the policy in question. The standard of scrutiny, in turn, depends on what kinds of interests are implicated in state regulation and whether the Supreme Court ever holds that sexual orientation is a suspect classification like race or a quasi-suspect one like sex.

Most constitutional scholars who have addressed the last issue maintain that sexual orientation classifications ought to trigger some form of heightened scrutiny, because the classifications too often have reflected prejudice rather than serious thinking about policies that are good for society, traditionally have harmed a vulnerable minority in disproportionate and vicious ways, and have been hard for the political process to change without a judicial nudge.²⁴⁵ Such a move would

²⁴³ See 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, 325-30 (1994).

²⁴⁴ See *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 579 (1995).

²⁴⁵ See, e.g., Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 *Harv. L. Rev.* 1 (1977); Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 *Colum. L. Rev.* 1753 (1996); Note, *The Constitutional Status of Sexual Orientation: Homosexuality*

entail a broad reading of *Evans* and a narrow reading or overruling of *Hardwick*. In the meantime, while the Court is hedging its bets, there are plenty of intermediate doctrinal principles that can guide its evaluation of no promo homo policies in the first years of the millennium. This Part sets forth a doctrinal model based on those principles. Under such a model, state criminalization of consensual same-sex sodomy and refusal to charter gay associations are unconstitutional, while state bars to same-sex marriage and exclusions from the armed forces are constitutional—at present. As the qualifier suggests, the doctrinal model is dynamic. The dynamics of constitutional evaluation of no promo homo policies are driven by changing social norms about homosexuality and the outcomes of federalist experiments in gay tolerance.

A. *Provisional Model for Evaluating No Promo Homo Policies*

Policies supported by no promo homo arguments are heterogeneous, and context determines whether those policies can pass constitutional muster. Given the open-textured nature of the constitutional provisions and the precedents, prediction as to antigay policies would seem perilous. But because American constitutional history suggests some broad principles that will inform judicial evaluation of no promo homo policies, prediction is possible in the short term.

1. *The Libertarian Presumption*

The Constitution is a libertarian charter: Its structural features make it harder for the national government to tax us and tell us what to do, the Bill of Rights protects numerous individual freedoms against federal intrusion, and the Due Process Clause protects those and other liberties against state infringement. The Framers meant the document to be libertarian,²⁴⁶ and our constitutional tradition has been more vigorous in protecting individual liberty than in instantiating group equality or transforming public institutions.²⁴⁷ Principles of privacy and association have been internalized in our public culture. In short, policies invading spaces traditionally left to individual choice (private sphere) are much more likely to be invalidated than

as a Suspect Classification, 98 Harv. L. Rev. 1285 (1985). But cf. Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 Stan. L. Rev. 45 (1996) (arguing that rationality-plus may be best standard of review from gay rights perspective).

²⁴⁶ See, e.g., *The Federalist No. 10* (James Madison) (making libertarian defense of Constitution).

²⁴⁷ See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 Harv. L. Rev. 26, 42-56 (1994); see also Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991).

policies protecting third-party rights or situated in state institutional settings (public sphere).

The libertarian presumption has its greatest bite when the state limits a person's freedom because what she does or is offends other people.²⁴⁸ Thus the presumption cuts against laws making it a crime for two adults to engage in consensual sodomy in their home and against state efforts to censor or edit the ideas and viewpoints of private persons and groups. In cases of clashing liberties or tangible third-party effects, the presumption does little more than provide a framework for analysis. State rules against custody by GLBT parents in divorce proceedings involve not only the rights of those parents, but also of the straight parents claiming custody and of the children themselves. In public sector contexts, the libertarian presumption has even lesser valence. In our constitutional tradition, one is assumed to have fewer libertarian claims once one enters public employment, seeks state subsidies, or serves in the armed forces. This feature complicates analysis of state bars to same-sex marriage. Although marriage is usually described as a fundamental due process liberty,²⁴⁹ state *recognition* of marriage is more accurately characterized as a bundle of state-guaranteed rights, obligations, and subsidies accorded the married couple. State laws criminalizing unauthorized relationships would be a direct invasion of personal liberties; laws declining to extend state subsidies to those relationships is less clearly so.

The libertarian presumption suggests not only that no promo homo arguments will be stronger when they are made on behalf of discriminatory private activities and public spending programs, but also that no promo homo fans will direct their energies in those directions. Just as TFV groups substantially have abandoned their defense of consensual sodomy laws and discriminatory state chartering requirements, so we should see them focus more energy into resisting antidiscrimination laws through private no promo homo stances. There will be more cases like *Hurley* and *Dale*. We also should expect TFV groups to press no promo homo arguments in the context of state-controlled institutions—schools, AIDS education, funding for the arts, the military, and so forth.

2. *Symbolic Preference Is Better Than Spiteful Harm*

Motive and harm make a constitutional difference. In our constitutional tradition, state action depriving people of *fundamental* bene-

²⁴⁸ See Mill, *supra* note 37, at 70-86.

²⁴⁹ See, e.g., *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967) (holding that statute prohibiting mixed-race marriage violates Equal Protection and Due Process Clauses).

fits or liberties requires a particularly important justification and a tighter fit between the justificatory policy and the statutory means.²⁵⁰ In contrast, state policies that are just symbolic are either unchallengeable (for lack of standing) or constitutionally passable. What saved the Georgia sodomy law for Justice Powell in *Hardwick* was that no one ever went to jail for engaging in consensual sodomy;²⁵¹ Powell was willing to allow the state to make symbolic gestures, so long as gay men and lesbians were merely disrespected and not greatly harmed. Relatedly, state action cannot be justified by a popular desire to hurt a particular group. This is the core holding of *Evans*, which found Amendment 2 to be a measure inspired by “animus.”²⁵²

Consistent with these constitutional principles, a measure seeking to deprive GLBT people of important benefits or liberties will be more vulnerable than a symbolic one merely reaffirming the status of TFV people and their values. Because the no promo homo rider to the Hate Crime Statistics Act deprives GLBT people of no rights, it is constitutionally harmless, even if one considers it silly or objectionable. The same is probably true of most no promo homo educational and AIDS policies in actual practice.²⁵³ DOMA is constitutionally invulnerable so long as no state recognizes same-sex marriage; only after that happens will it yield tangible, and substantial, harm. Even then, it will benefit from the kinder, gentler no promo rhetoric of its proponents, who emphasized the value of different-sex marriage and the need to protect it, and did not publicly demonize same-sex marriages. The same was true of the administration’s defense of the “don’t ask, don’t tell” policy.

If I am right about these constitutional conventions, one would expect critics of no promo homo policies to focus on their serious and malign effects on GLBT people. Although “don’t ask, don’t tell” is

²⁵⁰ See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (finding fundamental interest in right to marry); *Stanley v. Illinois*, 405 U.S. 645, 649-51 (1972) (finding fundamental interest in relationship with one’s biological children).

²⁵¹ See *Bowers v. Hardwick*, 478 U.S. 186, 197-98 (1986) (Powell, J., concurring).

²⁵² *Romer v. Evans*, 517 U.S. 620, 632 (1995). The Court’s holding was inspired by the overbreadth of Amendment 2 and found further support in the spiteful overstatements in the no promo homo ballot literature. See *supra* note 110 and accompanying text. *Hardwick* can be, and if it is not overruled ought to be, read to be consistent with this idea: The state interest was disapproval of certain acts, not a campaign against a group of people. See *Watkins v. United States Army*, 847 F.2d 1329, 1340 (9th Cir. 1988) (declining to read *Hardwick* to allow state to penalize homosexuals as group), vacated, 875 F.2d 699 (9th Cir. 1989) (en banc).

²⁵³ It is doubtful that most teachers and principals even know about educational no promo homo statutes in states like Texas, Arizona, and Alabama. See *supra* note 147 (citing Texas, Arizona, and Alabama statutes). To the extent that they are aware of and follow such policies, they probably do so by saying nothing about homosexuality or observing only that homosexual sodomy is illegal in their states and disapproved of by most citizens.

unlikely to fail under constitutional scrutiny anytime soon, the case against it would be much stronger if critics could show that it not only contributes to an unproductive closetry among soldiers, but also to gay-bashing, harassment, and murder. One also would expect TFV arguments to shift away from demonizing GLBT people and toward emphasizing the goodness of family values and the symbolic need for the state to reaffirm those values. The rhetorical defense of DOMA was as much pro hetero familia as no promo homo.

3. *Vertical and Horizontal Coherence*

Coherence with other legal authorities has a normative pull on the law.²⁵⁴ A policy is *vertically coherent* if consistent with policies going back in time. *Hardwick*, for instance, emphasized what the Court believed was the long history of state regulation of sodomy between consenting adults, while critics have argued that aggressive use of sodomy laws against people having oral sex in the home is a twentieth-century innovation.²⁵⁵ *Evans*, in contrast, emphasized the novelty of Amendment 2, although its critics argued that the innovation was the local antidiscrimination laws that Amendment 2 superseded.²⁵⁶ The endowment effect suggests that, ceteris paribus, people feel more invested in rules that have long been in place, and so a long history of a particular policy will help protect it against constitutional challenge. This helps explain the robustness of marriage's discrimination against same-sex couples and the military's exclusion of GLBT people, both longstanding policies.

Bars to same-sex marriage are also strengthened because they are *horizontally coherent* with the policies followed in this and other industrialized countries. Just as courts were loathe to strike down sodomy laws in the 1960s, when only one American state had decriminalized these activities, so courts in the new millennium are even more reluctant to impose same-sex marriage so long as there is no American jurisdiction that has done so.²⁵⁷ In contrast, now that

²⁵⁴ See Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 145-50, 1377 (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994); see also Ronald Dworkin, *Law's Empire* 176-228 (1986) (stressing importance of integrity and coherence of law).

²⁵⁵ See Eskridge, *supra* note 11, at 149-73; Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 *Yale L.J.* 1073 (1988).

²⁵⁶ Compare *Evans*, 517 U.S. at 633 (Kennedy, J., majority opinion), with *id.* at 647-53 (Scalia, J., dissenting).

²⁵⁷ See *Baker v. State*, 744 A.2d 864 (Vt. 1999) (requiring state to provide lesbian and gay couples with same benefits and obligations as married couples but declining to require same-sex marriage, essentially for pragmatic reasons).

consensual sodomy laws are falling like flies in a hailstorm, horizontal coherence undercuts those laws.²⁵⁸ Antigay discrimination in military service and child custody proceedings find parallels in the formal laws of a diminishing number of other countries,²⁵⁹ but the day-to-day administration of armed forces and social services may preserve exclusionary policies.

Table 2 encapsulates the lessons of the provisional federal constitutional model that I have just outlined.

TABLE 2
CONSTITUTIONAL VULNERABILITY OF SPECIFIC NO PROMO HOMO
POLICIES, USA, 2000

Policy	Libertarian Presumption	Symbolic Preference > Harmful Spite	Vertical & Horizontal Coherence	Constitutional Vulnerability
<i>Antidiscrimination Law Applied to TFV Expressive Association</i>	Cuts against	Weakly cuts for	Cuts against	Vulnerable
<i>Refusal to Charter Gay Association</i>	Cuts against	Weakly cuts against	Horizontal cuts against; vertical cuts for	Vulnerable
<i>Consensual "Homosexual" Sodomy a Crime</i>	Cuts against	Cuts against, weakly so if law unenforced	Horizontal cuts against; vertical cuts for	Vulnerable
<i>Presumption Against Custody by GLBT Parents</i>	Depends on how court views best interests of child	Unclear, often cuts against	Horizontal cuts against; vertical cuts for	Probably vulnerable
<i>Prohibition of Gay Adoptions</i>	Depends on how court views best interests of child	Unclear, often cuts for	Horizontal cuts against; vertical cuts for	Possibly vulnerable
<i>No Promo Homo in Sex Education</i>	Generally cuts for	Unclear, sometimes cuts against	Weakly cuts for	Usually not vulnerable
<i>Don't Ask, Don't Tell Military Policy</i>	Cuts both ways, but generally for	Cuts for	Horizontal cuts against; vertical cuts for	Probably not vulnerable now
<i>Same-Sex Marriage Bar</i>	Cuts both ways, but generally for	Cuts both ways, generally for	Strongly cuts for	Not vulnerable now

²⁵⁸ Compare *Bowers v. Hardwick*, 478 U.S. 186, 192-94 (1986) (declining to strike down Georgia sodomy law when half of states and D.C. still had consensual sodomy laws), with *Powell v. State*, 510 S.E.2d 18, 24 (Ga. 1998) (invalidating same law under state constitution and citing state cases overturning sodomy laws).

²⁵⁹ See, e.g., *Salgueiro da Silva Mouta v. Portugal*, App. No. 33290/96 (Eur. Ct. H.R. Dec. 21, 1999), available in French at <<http://www.dhcour.coe.fr/hudoc/>> (declaring antigay presumptions in child custody proceeding to violate equality guarantees of European Convention of Human Rights); *Lustig-Prean v. United Kingdom*, App. No. 31417/96, 29 Eur. H.R. Rep. 548 (1999) (declaring United Kingdom's exclusion of gay people from armed services to violate privacy and equality guarantees of European Convention on Human Rights).

The model in Table 2 is provisional because it is dynamic. Some of the elements and judgments will change over time. Most obviously, the effect of horizontal coherence varies: A policy coherent with other policies in the same and other jurisdictions today may not be similarly coherent twenty years from now. Less obviously but more importantly, the table is dynamic because it rests upon factual and normative judgments that will be influenced by social norms that vary from period to period. Whether and how intensely third parties feel the effects of openly gay soldiers and married couples depends on social attitudes; the extent to which the liberty of a gay adolescent or a same-sex couple is implicated in state discriminations also can be influenced by surrounding social attitudes. Whether child custody or adoption by GLBT people is in the best interests of the child, given straight parental alternatives, involves both factual and normative judgments as to which prevailing social norms will be informative if not dispositive. Least obviously, the table is dynamic because gay-friendly states will reach different resolutions of these issues than would the Supreme Court. If the Court avoids the issue until it has ripened at the state level, it sometimes will reach different results than it would have reached if it had considered the issue earlier. The next Section will consider these elements of dynamism in greater detail.

B. *No Promo Policies and Shifting Social Norms*

Many of the judgments required in Table 2 will be influenced by social norms. “[J]udges must be more than men, if they can always escape the influence of a strong public opinion of society upon great questions of state policy and human benevolence.”²⁶⁰ Gaylegal history not only illustrates this idea but also suggests a general model of constitutional group rights and social norms. For most of American history, none of the policies in Table 2 would have been constitutionally vulnerable, because the consensus social norm was *malignant sexual variation*: Any variation from the ideal of procreative sex is bad, not just for the people engaged in it, but also for others in the community and for the country. During this period of condemnation, few antigay policies even generated constitutional challenges, and challenges were brushed aside the way Justice White did in *Hardwick*, which was written from the perspective of this period. The reason his opinion generated such bad press was that by 1986 malignant sexual

²⁶⁰ *State v. Post*, 20 N.J.L. 368, 377 (1845) (refusing to follow Massachusetts Chief Judge Shaw in abolishing all remnants of slavery pursuant to state constitution, on ground that social norms in Massachusetts were more antislavery than elsewhere, including New Jersey).

variation was no longer the consensus norm. Table 2 reflects the emerging consensus among academics that the punitive stance of *Hardwick* is a weak precedent.²⁶¹

Thus, in the last generation, national attitudes have shifted in the direction of *tolerable sexual variation*: Some variations from the procreative norm are tolerable, not because they are as good as the norm, but because they do not pose undue harm to third parties and the community, or enough harm to justify the costs of regulation. At the same time, the characteristic form of antigay rhetoric has shifted from absolute to relative disapproval—from homosexuality as a menace to no promo homo. Although many Americans continue to believe that sinful, diseased, predatory homosexuals should be locked up or excluded from civilized society, public discourse seeks the median voter who finds same-sex intimacy icky but views persecution of gay people with distaste. The Supreme Court's post-*Hardwick* decisions reflect this new norm. Justice Souter's opinion in *Hurley* and, to a lesser extent, Chief Justice Rehnquist's opinion in *Dale* respectfully treated the Boston parade and Boy Scouts disputes as clashes of sexual and traditionalist identities and rested the decisions on the idea that the state can force identity discourse on neither group.²⁶² Justice Kennedy's opinion in *Evans* was more generous, stating that lesbian, gay, and bisexual citizens ought to be able to assume they will not be discriminated against in the workplace and in public accommodations.²⁶³ Table 2 reflects the approximate doctrinal consequences for other issues under this regime.

Our neighbors in Canada seem more firmly committed to gay tolerance and have moved toward a third way of understanding these distinctions: *benign sexual variation*.²⁶⁴ In *Vriend v. Alberta*,²⁶⁵ the Canadian Supreme Court ruled that a province's failure to include sexual orientation in its antidiscrimination law violated the equality provision of the Canadian Charter of Rights. In *Attorney General v. M. & H.*²⁶⁶ the Canadian Court ruled that provincial discrimination

²⁶¹ See Earl M. Maltz, *The Prospects for a Revival of Conservative Activism in Constitutional Jurisprudence*, 24 Ga. L. Rev. 629, 645 n.95 (1990) (citing 29 law review articles and comments criticizing *Hardwick*).

²⁶² See *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446, 2458 (2000); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 578-79 (1995).

²⁶³ See *Romer v. Evans*, 517 U.S. 620, 627-32 (1995).

²⁶⁴ This term is from Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *Pleasure and Danger: Exploring Female Sexuality* 267, 278 (Carole S. Vance ed., 2d ed. 1992).

²⁶⁵ [1998] 1 S.C.R. 493.

²⁶⁶ [1999] 2 S.C.R. 3; see also Arthur Leonard, *Lesbian/Gay Law Notes*, Jan. 2000, at 1-2, available at <<http://www.qrd.org/www/usa/legal/fgln/>> (describing this case).

against same-sex couples in their cohabitation laws also violated the equality provisions. Amid much debate and some criticism, the national government has responded by recognizing same-sex unions by the state and vesting them with most of the same rights and duties as different-sex marriages.²⁶⁷ Under this philosophy, some (not all) sexual variations are not just tolerably icky, but are positively fine. For example, even in American culture, oral sex between a consenting woman and man is increasingly acceptable, especially if they are married. While Canadians appreciate the wonderfulness of procreative intercourse, many of them seem to view oral sex as a benign variation even when between two women.

To imagine what American constitutional law would look like if our polity moved toward a norm of benign sexual variation, compare the constitutional effect of our shifting public norms about religion. Early in our history, some colonies, such as Massachusetts Bay, viewed *religious variation* as *malignant*: They had established or favored churches and viewed even slight religious deviations as devilrous.²⁶⁸ The Framers of our Constitution and Bill of Rights acted against the background of an attitudinal shift in the eighteenth century toward *tolerable religious variation*. The First Amendment's Free Exercise and Establishment Clauses, and like provisions in state constitutions, reflected that social norm.²⁶⁹ In the nineteenth century, this constitutional regime was implemented under the social assumption that mainstream Protestantism was the preferred norm.²⁷⁰ Thus, the First Amendment posed no barrier to the national government's persecution of the Mormons, because their recognition of plural marriages was condemned on both natural law (the marriages were "odious") and republican (and an "offense against society") grounds.²⁷¹ Public schools required children to pray mainstream Prot-

²⁶⁷ See Modernization of Benefits and Obligations Act, ch. 12, 23 C. Gaz. pt. III (2000) (Can.).

²⁶⁸ See James H. Hutson, *Religion and the Founding of the American Republic* 3-18 (1998).

²⁶⁹ See generally Arlin M. Adams & Charles J. Emmerich, *A Nation Dedicated to Religious Liberty: The Constitutional Heritage of the Religion Clauses* (1990); Hutson, *supra* note 268, at 49-114; William Lee Miller, *The First Liberty: Religion and the American Republic* (1986); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990).

²⁷⁰ See generally Les Wallace, *The Rhetoric of Anti-Catholicism: The American Protective Association, 1887-1911* (1990). See also John Higham, *Strangers in the Land: Patterns of American Nativism 1860-1925* (2d ed. 1988); *Nativism, Discrimination, and Images of Immigrants* (George E. Pozzetta ed., 1991).

²⁷¹ See *Reynolds v. United States*, 98 U.S. 145, 164-66 (1879); Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. Rev. 1501, 1576-94 (1997) (analyzing polygamy cases).

estant prayers, which was not seen as state promotion of a religion until the 1960s.²⁷² In contrast, Catholic requests for state aid to parochial schools were resisted, at first politically and later constitutionally, on the ground that they would constitute state promotion of the Roman Catholic faith.²⁷³ Note the emergence of no promotion arguments during the period of tolerable religious variation.

Religious faith remains an important part of our culture at the turn of the millennium, but the prevailing social norm is now *benign religious variation*. Religion is no longer a totalizing identity characteristic. Most people, including some of the most devout, accept the legitimacy of each person's choice of faith (within social limits). Recall the fate of the Religious Freedom Restoration Act,²⁷⁴ which prohibited states from burdening religious exercise, even indirectly. In striking down the law, the Supreme Court emphasized the dearth of evidence that religious variation intentionally is penalized today.²⁷⁵ The Court's own Religion Clause jurisprudence reflects a similar trend: As our society has become more secular, religions are treated just like any other associational or ideological group—requiring neither special protection pursuant to the Court's watered-down Free Exercise Clause nor disabled from receiving direct state subsidies by the Court's watered-down Establishment Clause.²⁷⁶

C. Federalism and Ratcheting Up Rights

As the contrast between Canada and the United States makes clear, social norms regarding homosexuality vary from country to country. They also vary from state to state within the United States. State variation encourages the creation of more rights.²⁷⁷ Federalism allows much experimentation in the most rights-friendly states, while

²⁷² See *School Dist. v. Schempp*, 374 U.S. 203 (1963) (holding that Free Exercise Clause bars compelled school prayer); *Engel v. Vitale*, 370 U.S. 421 (1962) (same).

²⁷³ See *Everson v. Board of Educ.*, 330 U.S. 1 (1947). *Everson's* "wall of separation" approach has been superseded by a more assimilationist one in *Mueller v. Allen*, 463 U.S. 388 (1983).

²⁷⁴ Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. 2000bb (1994)).

²⁷⁵ See *City of Boerne v. Flores*, 521 U.S. 507, 530-31 (1997).

²⁷⁶ See Paul W. Kahn, *Changing Conceptions of the Political Status of Religion V-33 to V-34* (n.d.) (unpublished draft, on file with the *New York University Law Review*) (discussing *Employment Div. v. Smith*, 494 U.S. 872 (1990) (serving as example of watered-down Free Exercise Clause), and *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (providing example of watered-down Establishment Clause)); see also Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 *Duke L.J.* 977.

²⁷⁷ See William N. Eskridge, Jr. & John Ferejohn, *Virtual Logrolling: How the Court, Congress, and the States Multiply Rights*, 68 *S. Cal. L. Rev.* 1545 (1995).

setting a baseline that the most rights-skeptical states are required to follow.

At first glance, one would not expect Table 2 to predict the constitutional judgments of courts in Virginia, North Carolina, Arkansas, Alabama, and Mississippi—states with the most strongly antigay public policies and laws.²⁷⁸ Either respectful or fearful of local antigay attitudes, judges in those states would not be expected, on their own, to invalidate rules against child custody by GLBT people. And often such judges will go along with local norms. Yet judges in those states sometimes will find those antigay policies to violate the U.S. Constitution because those judges will consider the probable response of the U.S. Supreme Court, which, in turn, is attentive to national rather than local norms and which would strike down such laws. This Supremacy Clause feature of our federalism not only creates national uniformity of (some) rights but, just as important, makes the U.S. Supreme Court exceedingly cautious about aggressively protecting GLBT minorities which are intensely feared or hated in parts of the country.

In contrast, Table 2 does not predict necessarily the constitutional judgments of courts in gay-tolerant states such as Vermont, Massachusetts, New Jersey, New York, Oregon, and California.²⁷⁹ Respectful of local norms and legal policies either tolerating or relatively accepting of GLBT people, judges in those jurisdictions sometimes will interpret their state constitutions along the lines suggested by the Canadian Supreme Court rather than the U.S. Supreme Court. On issues such as same-sex marriage, gay adoption, and no promo homo educational policies, state supreme courts in progay states will be more skeptical than the U.S. Supreme Court would be. For the best example, gay-tolerant states will be more skeptical of state refusal to provide any form of recognition for same-sex unions. In *Baker v. State*,²⁸⁰ the Vermont Supreme Court ruled the exclusion of same-sex couples from marriage to be an invidious discrimination and insisted that the state either amend the marriage law to include such couples or provide a separate but equal institution such as the registered partnerships offered in Denmark and The Netherlands.²⁸¹ Because this judgment

²⁷⁸ See Eskridge, *supra* note 11, app. B3 (noting antigay public policies followed in all 50 states, D.C., and U.S. territories).

²⁷⁹ See *id.* app. B2 (noting progay policies followed in all 50 states and D.C.).

²⁸⁰ 744 A.2d 864 (Vt. 1999).

²⁸¹ The Vermont legislature followed the court's ruling with a law recognizing same-sex civil unions and according them the same rights and duties as marriage. See Act Relating to Civil Unions, Pub. Act 91, available in Westlaw, 2000 VT LEGIS 91 (to be codified primarily in Vt. Stat. Ann. tits. 15, 18). There has been a popular backlash against the law, but its depth remains unclear as this Article goes to press.

rested on the state constitution and infringes none of the federal constitutional guarantees, it cannot be reviewed by the U.S. Supreme Court, which would be most reluctant to reach the same result under the U.S. Constitution.²⁸²

On issues involving federal constitutional rights, however, such as TFV associations' desire to exclude openly gay members, gay-tolerant states have no greater freedom to maneuver than antigay states do on issues like antigay custody and adoption rules. The *Dale* litigation illustrates this point. Although the New Jersey Supreme Court recognized that the state cannot dictate a tolerant viewpoint to private associations, it was less willing than the U.S. Supreme Court was to accept the Boy Scouts' insistence that the presence of an openly gay assistant scoutmaster imposed an unwanted message onto the Scouts.²⁸³ Because the First Amendment of the U.S. Constitution has been applied to this kind of issue, the U.S. Supreme Court had the last word.

The one-way rights ratchet described here creates dynamic possibilities for constitutional discourse. On the one hand, it provides big incentives for TFV groups not only to continue the constitutionalization of their discourse, but to obtain judicial recognition of as broad a statement of their rights jurisprudence as possible. Ironically, the TFV rights jurisprudence reflected in Table 1 is largely a privacy jurisprudence—not the sexual privacy emphasized by the *Hardwick* dissenters, but instead the privacy rights of parents to control their children's education and rearing, of children to be free of homosexual role models, of associations to exclude GLBT members, and of young soldiers not to have to deal with openly gay comrades in arms. This affords TFV groups incentives not only to litigate aggressively, but also to become more politically active, in order to influence social norms and, most important, the membership of the Supreme Court.

On the other hand, the rights ratchet potentially introduces an even stronger element of progay dynamism in American jurisprudence. In the wake of *Baker* and Vermont's recognition of same-sex civil unions, there will be pressure on other gay-tolerant states to offer similar benefits, either legislatively or through judicial constructions of

²⁸² See Richard A. Posner, *Should There Be Homosexual Marriage? And If So, Who Should Decide?*, 95 Mich. L. Rev. 1578, 1585-86 (1997) (reviewing Eskridge, *supra* note 74).

²⁸³ Compare *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1223-24 (N.J. 1999) (refusing to accept Boy Scouts' litigation claim that expressive goal of their association was to espouse view that homosexuality is immoral), with *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446, 2453 (2000) (accepting Boy Scouts' assertion that it teaches that homosexual conduct is not "morally straight" and should not be "promote[d]").

state constitutions. This will be particularly attractive if the law survives and the state's experience with recognized same-sex unions is favorable: A modest number of lesbian and gay couples will sign up; pleasant tourists will enter and enrich the state; and God will not send the locusts upon the state, nor will the institution of marriage suffer one whit.²⁸⁴ Over time—perhaps a generation or two—enough states may follow this modest step to persuade the U.S. Supreme Court to make it mandatory for the country. And at that point, if not before, DOMA's requirement that federal law discriminate against same-sex couples will be constitutionally vulnerable.²⁸⁵

VIII

GENERALIZING FROM GAYLEGAL HISTORY: A DYNAMIC MODEL OF THE INTERACTION OF JUDICIAL REVIEW, SOCIAL NORMS, AND PRESERVATIONIST POLITICAL DISCOURSE

Consider, finally, some implications that the foregoing analysis has for theories of judicial review. Footnote four of *United States v. Carolene Products Company*²⁸⁶ suggests that legitimacy objections to aggressive judicial review are attenuated when legislatures restrict the operation of the democratic process (paragraph two of the footnote) or penalize minorities because of prejudice against them (paragraph three). The premise of the footnote and the holding of the case was a rejection of aggressive *Lochner*-style judicial review of economic redistributive legislation.²⁸⁷ But in abandoning a role in the politics of economic redistribution, the Court in footnote four was asserting a role in the politics of recognition and status redistribution—and ultimately in the politics of preservation as well.

The best-articulated constitutional theory drawn from *Carolene* is John Hart Ely's representation-reinforcing theory: Judges ought to be referees actively monitoring the political process to assure that everyone has a chance to speak out and organize (paragraph two) and that groups do not gang up systematically on "discrete and insular minori-

²⁸⁴ Cf. Darren Spedale, *Nordic Bliss: The Danish Experience with "Gay Marriage"* (1999) (unpublished draft, on file with the *New York University Law Review*) (finding that divorce rate declined after Denmark recognized same-sex registered partnerships). For an analysis indicating economic gains for the first mover on same-sex marriage, see Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriages*, 68 S. Cal. L. Rev. 745, 747-48 (1995).

²⁸⁵ For arguments along these lines under current conditions, see generally Koppelman, *supra* note 85.

²⁸⁶ 304 U.S. 144, 152 n.4 (1938).

²⁸⁷ See *Lochner v. New York*, 198 U.S. 45 (1905).

ties" (paragraph three).²⁸⁸ Gaylegal experience reflected in this Article's account of no promo homo arguments suggests some of the inadequacies of this widely discussed theory of judicial review. On the one hand, it does not account for the practical limitation social norms place on judicial willingness to be the perfecters of democracy that *Carolene* anticipated. On the other hand, it does not account for the ways in which judicial review can and does affect social norms and pervasively influences political and moral debate in this country.

Gaylegal experience likewise suggests a synthetic model of judicial review. Normatively, *Carolene* sets forth worthy aspirations for judges: the anticensorship role of paragraph two and the antiprejudice role of paragraph three.²⁸⁹ Descriptively, however, social norms theory reveals limits in judges' ability to perform those roles. Even within such limits, though, judges under some circumstances can influence social norms and channel political discourse through cautious deployment of their judicial review powers.

A. *A Model of Social Norms and Judicial Rights Creation*

My most striking—and least surprising—gaylegal caveat to representation-reinforcing theories of judicial review is that judicial independence does not free judges from the force of social norms. Although derived from the experience of GLBT people, this idea can be generalized to think about other equality struggles in American constitutional history. Whenever society believes that the trait defining a "minority" is malignant, the judiciary generally will defer to social "prejudice" against the minority.²⁹⁰ So long as the prevailing social norms in this country were that people of color were subhuman, women existed to bear and raise children, and homosexuals or sodomites were abominations, constitutional as well as statutory law supported the institutions of slavery, the subordination of wives to husbands, and multifarious criminalizations and exclusions for same-

²⁸⁸ See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 102-03 (1980).

²⁸⁹ Paragraph one, which says the judiciary should enforce the Constitution's clear textual directives, was not part of the original footnote; it was added at the suggestion of Chief Justice Hughes. See Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 *Colum. L. Rev.* 1093, 1098 (1982) (relating experience as law clerk who drafted original footnote four to *Carolene Products*).

²⁹⁰ My use of the term "minority" is mindful of Bruce Ackerman, *Beyond Carolene Products*, 98 *Harv. L. Rev.* 713 (1985), who shows how the "discrete and insular minority" trope fails to identify the groups courts ought to protect, such as women. I shall treat women and gay people as "minorities" whether or not they fit the precise *Carolene* formulation, "discrete and insular minority."

sex intimacy.²⁹¹ So long as a minority is truly powerless, the judiciary will not challenge the political process openly. This is what Phil Frickey and I have called the inversion of the *Carolene* standard of courts as political watchdogs.²⁹² But inversion is not the end of the story.

Legal stigma will provide otherwise dissimilar people with a reason to bond together, and legal institutions can give them cover to organize themselves as a socially and politically cohesive group. The abolitionist movement of the nineteenth century was a powerfully moral movement organized in opposition to legalized slavery.²⁹³ The first waves of feminism similarly objected to the legal slavery of wives within the family.²⁹⁴ In the twentieth century, the homophile and then the gay rights movements were not possible absent state rules oppressing otherwise dissimilar people in the same ways.²⁹⁵ So even if the courts did not protect slaves and their sympathizers, wives, and sodomites and homosexuals, law's categories and law's persecution played a significant role in their political mobilization.

A whole range of complicated social, legal, and other factors may conspire to thwart the majority's desire to suppress a marginalized group and, instead, to allow a tiny fraction of its members and their few allies to organize for their common benefit. If the minority shows real resilience and staying power, the social consensus about the trait gradually will shift away from malignant variation and toward a mild form of tolerable variation. Tolerable variation reaffirms but makes explicit the superiority of the majority trait—whiteness, maleness/masculinity, heterosexuality—but accepts that the minority trait—nonwhiteness, femaleness/femininity, homosexuality—needs to be tolerated in ways unthinkable under the old regime. The new regime of tolerable variation is often one of legal segregation. African-Americans lost the shackles of slavery and won legal rights, but their presumed inferiority to the norm was a justification for apartheid upheld

²⁹¹ See, e.g., *Boutilier v. INS*, 387 U.S. 118 (1967) (holding that homosexuals and bisexuals can be excluded from entry to United States because they are "psychopathic" as matter of law); *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding exclusion of women from tavern jobs unless working for husband or father); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (characterizing founding consensus as one where people of color were considered irredeemably inferior and possessed no rights except those white people chose to confer).

²⁹² See Eskridge & Frickey, *supra* note 247, at 53-56.

²⁹³ See generally Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (1975).

²⁹⁴ See Linda K. Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* 3-46 (1998).

²⁹⁵ See generally D'Emilio, *supra* note 23.

in *Plessy v. Ferguson*.²⁹⁶ Women were emancipated from absolute dependence on husbands only to confront legal rules that limited their economic and other opportunities in the public (male) sphere, a development approved in *Bradwell v. State*.²⁹⁷ For GLBT people, the characteristic regulation during this period is not sodomy laws such as the one upheld in *Hardwick*, but rather “don’t ask, don’t tell” policies like the current exclusion from the armed forces—a psychic segregation requiring gay people to perform an ongoing masquerade, an apartheid of the closet.

In contrast to the malignancy regime, where for long periods of time the public culture accepted the legal ostracism of the degraded people, the period of tolerable variation is an unstable period, with considerable contest over legal signals of the minority’s status. The minority insists on greater equality of rights, while traditionalists respond with “no promotion” arguments. The classic no promotion argument is the one that undergirded racial apartheid, namely, the policy against “mixing the races.”²⁹⁸ No promo homo arguments are lineal descendants of no promotion of miscegenation arguments—not only because they are the dominant response of the politics of preservation, but also because both arguments go to the way our culture tries to structure its members’ sexualization.

Carolene paragraph two, suggesting aggressive judicial review when legislatures restrict the political process, is important for the minority group in any transition period from malignant to tolerable variation. Confronting entrenched and often hysterical opposition, the minority needs the First Amendment and other libertarian protections against censorship and organizational disruption from traditionalist agents in the state. Even when “homosexuals” were most despised, judges sometimes would protect their associational and procedural rights, and an aggressive First Amendment was a precondition for the Stonewall revolution in coming out and activism.²⁹⁹ The civil rights

²⁹⁶ 163 U.S. 537 (1896). Both the majority and dissenting Justices agreed that the “white race deems itself to be the dominant race in this country.” *Id.* at 559 (Harlan, J., dissenting).

²⁹⁷ 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring) (stating that state can exclude women from legal profession, based on “wide difference in the respective spheres and destinies of man and woman,” with men as women’s “protector[s] and defender[s]”).

²⁹⁸ *Pace v. Alabama*, 106 U.S. 583 (1883) (holding that criminalization of different-race cohabitation is not race discrimination); Herbert Hovemkamp, *Social Science and Segregation Before Brown*, 1985 *Duke L.J.* 624 (arguing that fears that integration would promote racial mixing drove apartheid policies).

²⁹⁹ See Eskridge, *supra* note 11, at 145-48; Richard A. Posner, *Ask, Tell*, *New Republic*, Oct. 11, 1999, at 52 (reviewing Eskridge, *supra* note 11).

movement likewise tangibly benefited from First Amendment protections in its campaign against apartheid.³⁰⁰

Carolene paragraph three's aspiration for the judiciary to protect minorities against prejudice-inspired state action has ambiguous force during the early days of a regime of tolerable variation. While the minority's politics of recognition will insist on their rights to laws not reflecting prejudice and unjustified stereotypes, their opponents' politics of preservation will insist that the minority is seeking "special rights" or "promotion"—which they will be, in comparison to the dearth of rights under the previous regime.³⁰¹ The fear of a traditionalist backlash will impel most judges to tread cautiously even during the period of tolerable variation.

If the minority flourishes and gains political ground during the regime of tolerable variation, there emerges the possibility that social norms again will shift—this time from tolerable toward benign variation. Such a transition presents the judiciary with a challenge and also highlights a tension between *Carolene* paragraphs two and three. Should courts deploy the equality principle to sweep away older discriminations against the minority (paragraph three), discriminations which are embedded in traditionalists' identities? How broadly should courts deploy the First Amendment principle to protect traditionalist associations against antidiscrimination laws (paragraph two)? There are risks to the judiciary in how it makes these choices. Judges still fear no promo backlashes and even insubordination from lower courts if they protect the minority group too much. If they protect the minority group too little, they risk their own personal and institutional legitimacy if the minority becomes an accepted part of public culture. The Court did its legitimacy no good in *Dred Scott*, *Bradwell*, and *Hardwick*.

If social norms in a polity do in fact move to a stance of benign variation, then the judiciary will deploy paragraph three in a more sweeping way, invalidating old discriminations based on the trait and rejecting no promo arguments, usually under equal protection strict scrutiny. The key evidence for a shift in public norms regarding racial variation was the abandonment of miscegenation laws outside the South after World War II. The Supreme Court ducked constitutional

³⁰⁰ See, e.g., *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (holding that First Amendment grants right to protest march); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding that First Amendment protects provocative antiapartheid ad); *NAACP v. Alabama*, 357 U.S. 449 (1958) (finding freedom of association for civil rights group).

³⁰¹ See Schacter, *supra* note 7 (noting strong similarity in "special rights" rhetoric by opponents of civil rights for racial minorities in 1960s and for sexual and gender minorities during 1970s).

challenges to such laws for more than a decade, until only seventeen remained. In *Loving v. Virginia*,³⁰² the Court invalidated laws making different-race marriage illegal and decisively rejected the no promotion of racial mixing argument as fundamentally inconsistent with the equal protection (paragraph three) idea that the state could not legislate "White Supremacy."³⁰³ Today, race cases are argued within the paradigm of benign racial variation. For example, critics of affirmative action say that race always must be treated as a suspect classification in order for the Court to lead the country beyond race, while supporters maintain that we cannot get beyond race without more thoroughgoing remedies for past discriminatory policies.³⁰⁴

Something of the same thing has happened in connection with sex variation. Right after feminists gained supermajorities in Congress for the Equal Rights Amendment (ERA), the Supreme Court announced heightened scrutiny for sex-based classifications.³⁰⁵ Although sex-based classifications do not receive the same lethal scrutiny as race-based classifications, the Court generally has invalidated those that denigrate women's abilities and confine women's choices.³⁰⁶ The most difficult line of cases has been the abortion cases. Although the right to choose abortion is grounded in the Due Process Clause, it also has clear equality (paragraph three) features, as the Court has discreetly recognized.³⁰⁷ A clash of social norms has rendered the abortion issue unusually hard: Although the polity accepts the norm of benign sex variation, it views abortion as at best tolerable and not benign. Because of that normative complexity, the Court has accepted no promo arguments to validate bars to state abortion funding and waiting periods.³⁰⁸ A doctrinal payoff of my model of judicial

³⁰² 388 U.S. 1 (1967); accord *McLaughlin v. Florida*, 379 U.S. 184 (1964) (invalidating law criminalizing different-race cohabitation).

³⁰³ *Loving*, 388 U.S. at 11.

³⁰⁴ The spectrum of views regarding affirmative action is aptly demonstrated by the various opinions in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

³⁰⁵ See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (adopting compromise of "intermediate scrutiny" after ratification of Equal Rights Amendment stalled, rather than strict scrutiny advocated in Justice Brennan's plurality opinion in *Frontiero v. Richardson*, 411 U.S. 677, 684-88 (1973)).

³⁰⁶ See *United States v. Virginia*, 518 U.S. 515, 531-34 (1996).

³⁰⁷ See *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992) (joint opinion); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986); see also Anita L. Allen, *The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender, and the Constitution*, 18 *Harv. J.L. & Pub. Pol'y* 419 (1995).

³⁰⁸ See *Casey*, 505 U.S. at 881-87, 899-900 (holding that state may impose waiting periods and prenatal consent requirements before doctor can perform abortion); *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (holding that state may restrict use of public funds and facilities from nontherapeutic abortions); *Maher v. Roe*, 432 U.S. 464 (1977) (holding that state need not pay for poor woman's abortion).

review is that it explains how these decisions can be reconciled with *Roe v. Wade*.³⁰⁹ In a regime of tolerable variation, the state may not flatly prohibit abortions but may adopt policies taking a moral stance against the practice and seeking to persuade women not to exercise their right.

Table 3 reflects the movement of our public culture in the areas of religion, race, sex/gender, and sexuality—with a suggestion that the big constitutional cases largely have followed the evolution of social norms.

TABLE 3
IDENTITY TRAITS, SOCIAL NORMS, AND
CONSTITUTIONAL PROTECTIONS

Identity Trait	Malignant Variation	Tolerable Variation	Benign Variation
Religion	<i>Colonial Era:</i> Established religions and penalties for deviation in colonies such as Massachusetts Bay.	<i>First Amendment:</i> No established religion, but mainstream Protestantism preferred. Deviant religions disfavored (Mormons) or not promoted (Catholics).	<i>20th Century:</i> Religions treated as interchangeable. By end of century, few worries about state suppression of religions (<i>Smith</i>) or subsidies to religious groups (<i>Rosenberger</i>).
Race	<i>Slavery Era:</i> Race deviation disqualifying (<i>Dred Scott</i>).	<i>Apartheid:</i> Races formally equal, functionally segregated. Do not promote or allow racial mixing (<i>Plessy</i> ; <i>Pace</i>).	<i>Post-World War II:</i> Race is not a permissible classification. No promotion arguments rejected (<i>Brown</i> ; <i>Loving</i>). Even remedial preferences questionable if based on race (<i>Adarand</i>).
Sex/Gender	<i>Colonial to Civil War Era:</i> Women have few legal rights apart from their fathers and husbands.	<i>Civil War to World War II:</i> Separate spheres period (<i>Bradwell</i>). Women have some rights (19th Amendment) but should be encouraged to marry and depend on the protection of husbands. Do not promote women outside the home.	<i>1960s onward:</i> Women's liberation and ERA. Sex emerges as a disapproved classification (<i>Craig</i>). Limits on the ability of the state to promote motherhood (<i>Roe</i>)
Sexuality	<i>Colonial through McCarthy Era:</i> Sexual deviation is criminal (<i>Hardwick</i>) or psychopathic (<i>Boutilier</i>).	<i>Post-Stonewall (1969):</i> Gay people have rights (<i>Evans</i>), but state has some latitude to discourage homosexuality. State cannot force private groups to endorse it (<i>Hurley</i> ; <i>Dale</i>).	<i>Canada:</i> Move toward abolishing official sexual orientation-based discriminations (<i>Vriend</i> ; <i>M. and H.</i>). Skeptical of no promo homo arguments (<i>M. and H.</i>)

³⁰⁹ 410 U.S. 113 (1973).

Table 3 should *not* be read for the propositions that public discourses about religion, race, and sexuality have been the same. My claim is that there has been structural similarity in the social norm and constitutional histories of these (and other) identity discourses. The most striking theme is that “no promotion” arguments proliferate in the middle period. During that period the minority’s politics of recognition has questioned whether race/religion/sex/sexual variation is malignant, but an opposing politics of preservation demands reassurance that the preferred social norm remains. Indeed, the waxing of no promo homo arguments is evidence that social norms are changing from malignant to tolerable sexual variation, while the waning of such arguments would be evidence that social norms are shifting from tolerable to benign.

B. Judicial Management of Norm Shifts and Judges as Norm Entrepreneurs: Trial Balloons and a Step-by-Step Approach

The idea that periods of social norm transition pose risks to the judiciary needs elaboration. Institutionally, the Court is weak and needs to be risk-averse in handling explosive political issues, which homosexuality is in a regime of tolerable sexual variation. An inflammatory opinion such as *Hardwick* is the last thing the Court should be issuing during such a period. Better strategies for the Court are to decide cases without using socially denigrating rhetoric, as the Court did in *Hurley*, and to decide cases on narrow grounds, as the Court did in *Evans*. The Court’s undertheorized but contextually sensible opinion in *Evans* was a judicial trial balloon,³¹⁰ an invitation but not an insistence that lower courts and the political process rethink some antigay discriminations. By closeting *Hardwick*, *Evans* not only distanced the Court from a risky precedent without overruling it, but offered lower courts doctrinal cover for either allowing antigay policies (citing *Hardwick*) or overturning them (citing *Evans*). An advantage of trial balloons is that the Court can get feedback from lower courts, commentators, and the political process. This feedback provides the Court with information about current social norms and the attitudes of inferior judges who would have to carry out any stronger signal about gay rights. So informed, the Court then can better decide whether to deflate or inflate the trial balloon. The trial balloon approach would have worked better on the abortion issue than did the

³¹⁰ Given Justice Stone’s practice of using footnotes as “trial balloons,” see Alpheus T. Mason, Harlan Fiske Stone: Pillar of the Law 513 (1956), it is likely that *Carolene’s* footnote four was itself a trial balloon.

Court's broad and oddly-reasoned opinion in *Roe v. Wade*.³¹¹ Whether based on privacy or equality ideas, a narrowly reasoned trial balloon would have muted a lot of the political backlash and harsh rhetoric that still greets the Court every January, when protestors mark the anniversary of *Roe*.

The Vermont Supreme Court's decision in *Baker* was an aggressive trial balloon. The court held that the state's refusal to recognize same-sex unions was unconstitutionally discriminatory but did not insist that the state recognize same-sex marriage.³¹² Instead, the court required the legislature to find a way to end the pervasive discrimination against same-sex couples—by recognizing their unions either as marriages or as a new institution like those created in northern Europe.³¹³ The court may escape condemnation, in part because the local norms in Vermont are more gay-tolerant than those nationally.³¹⁴ Moreover, the court offered a reasoned opinion that made out a good rule of law case for the proposition that the bar was a discrimination, prudently declined to require same-sex marriage and left the choice of remedy to the legislature, and retained jurisdiction to keep pressure on the legislature to do its duty. As an aggressive trial balloon leaving implementation of equality rights to the local political process, the Vermont court was following the U.S. Supreme Court's strategy in *Brown v. Board of Education*,³¹⁵ in which the Court declared racial segregation in public schools unconstitutional, establishing an important principle, but allowed the local political process first cut at choosing a remedy.³¹⁶ In both *Brown* and *Baker*, politically progressive but savvy courts declared ground-breaking great constitutional principles but then protected these principles by deferring to the political process as to actual implementation.

³¹¹ Cf. *Abele v. Markle*, 342 F. Supp. 800, 809 (D. Conn. 1972) (three-judge court) (Newman, J., concurring) (invalidating abortion law because its original rationale—protecting mother's health—is no longer valid).

³¹² See *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999).

³¹³ In some states, popular initiatives to amend the state constitution, which would permit the legislature to forbid explicitly same-sex marriage, have circumvented this issue. See *supra* note 88 and accompanying text.

³¹⁴ Compare *Baker* with *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), which ruled the state bar to same-sex marriage to be sex discrimination under the state constitution. While the case was on remand, the Hawaii voters amended the state constitution to allow the legislature to authorize the discrimination. The Hawaii Supreme Court dismissed the case as moot after the referendum. See *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999) (mem.).

³¹⁵ 347 U.S. 483 (1954).

³¹⁶ Compare *id.* at 495 (announcing unconstitutionality of school segregation but postponing decision on relief), with *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955) (remanding for specific remedy in accordance with principles developed in opinion).

Like *Brown*, *Baker* is more than an exercise in strategic cleverness. While a court's options are limited by social norms, judges also can influence the evolution of those norms. *Baker*, *Brown*, and *Roe* accomplished this in a variety of ways. First, those judicial decisions forced the issues of same-sex unions, school desegregation, and abortion onto the legislative and public agenda and, consistent with *Carolene* paragraph three, reversed the burden of inertia. Before those court decisions, pervasive discriminations against gay people, people of color, and women were protected against political repeal not only by prejudice against those minorities, but also by the difficulties of getting any big changes through the legislative process. Because it is much easier to block new legislation than to obtain it, reform was impossible so long as traditionalists enjoyed any significant support in the legislature and continued to care about the issues intensely (as they did in each case). Although the political process in each state yielded policies that do not satisfy minority groups completely, judicial review did empower those groups by giving them some advantage of bargaining from the stance of a presumptive non-discriminatory status quo.

More than either *Brown* or *Roe*, however, *Baker* framed the issue in ways that facilitated progressive responses within the political process. The opinion for the Vermont Supreme Court reasoned that same-sex relationships entail equality principles that the state ought not ignore. In the public dialogue, the court was pressing the dissonance between general principles Vermonters all accept—equality and tolerance—and a particular instance where those principles were not met—differential state treatment of committed different-sex and same-sex unions. By framing the issue this way, the court invited citizens to do something positive—and the court was especially constructive in its decision to leave the ultimate decision with the political process. But the court was operating as a norm entrepreneur, pushing the political process beyond the policy supported by public opinion and betting that public opinion would follow or acquiesce.

Legal norm entrepreneurs usually should follow an incremental or step-by-step strategy similar to that followed in *Baker* and *Brown*. As Dan Kahan puts it, they are better off proceeding with “gentle nudges” rather than with “hard shoves.”³¹⁷ A “step-by-step” approach is best: The larger the gap between a new legal entitlement and prior social norms, the more likely it will be that people feel social endowments have been taken away and that “no promotion” argu-

³¹⁷ Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. Chi. L. Rev. 607 (2000).

ments will be persuasive.³¹⁸ When the norm entrepreneurs are judges, especially unelected judges, the endowment rift may be felt even more keenly by TFV people and others. *Baker* was more a gentle nudge, but the political process in Vermont treated it as a nudge to do something that will be good for the state as well as for gay people. Not only did Vermont respond to *Baker* by recognizing same-sex civil unions,³¹⁹ but the same Vermont experience illustrates a third way judges can influence social norms. For the first time in American history, openly lesbian and gay couples have been able to enter state-recognized committed unions. The process by which GLBT people will “come out” as couples and will live daily as married or quasi-married couples will itself exert a long-term influence on attitudes about GLBT people generally.

C. *The Channeling Effect of Judicial Review on Identity Politics*

Gaylegal experience suggests how the existence of activist judicial review affects identity politics in general and preservationist arguments in particular. In a period of tolerable variation for the identity trait, the minority group, its traditionalist opponents, and the legislators themselves all realize that their equality or preservationist efforts can be thwarted or at least slowed by the judiciary. Thus, their strategies and rhetoric will anticipate and try to avoid bad judicial responses.³²⁰ For example, in deciding whether to mount an organized challenge to a state sodomy law, gay rights groups will anticipate the range of responses from the judiciary and take action only if there is a reasonable chance of success.³²¹ Given the widespread criticism and judicial rejection of consensual sodomy laws, lawsuits have been filed and are sometimes prevailing even in the South.³²² Likewise, TFV groups will make a gaylegal issue a priority only if there is a reasonable chance of success for their position. If not, they will seek substitutes, namely, other issues which they care about and where they can win. TFV groups substantially have abandoned sodomy laws and

³¹⁸ See Eskridge, *supra* note 74, at 120-22 (arguing that path to same-sex marriage comes through incremental baby steps rather than sweeping reform).

³¹⁹ See *Relating to Civil Unions*, Pub. Act 91, §§ 3-28, available in Westlaw, 2000 VT LEGIS 91 (to be codified primarily in Vt. Stat. Ann. tits. 15, 18).

³²⁰ This is the kind of anticipated response game described in Eskridge & Frickey, *supra* note 247, at 36-39.

³²¹ This process also influences the choice of state versus federal court. Even if *Hardwick* is a wounded precedent, as I think it is, it provides a decisive reason to file suit in state court, because the state high court can follow the rights ratchet and invalidate a consensual sodomy law under its state constitution, without risk of reversal by the Supreme Court.

³²² See, e.g., *Powell v. State*, 510 S.E.2d 18 (Ga. 1998); *Lawrence v. State*, No. 14-99-00109-CR, 2000 WL 729417 (Tex. App. June 8, 2000, n.w.h.).

have hitched their wagons to preserving the same-sex marriage bar, not because that bar is more important to TFV people, but because success in the legislature and in court is much more likely.

Correlatively, the body of constitutional discourse created by the judiciary strongly influences the rhetoric and arguments deployed by both sides of identity issues. *Hardwick*, for example, contributed to the cogency of no promo homo arguments through its disapproving focus on “homosexual sodomy” in dismissing Michael Hardwick’s claim to heightened scrutiny and through its holding that antigay majority “belief” or “sentiments” constituted a rational basis for making consensual “homosexual sodomy” a felony.³²³ Because gay rights lawyers were desperate for arguments to escape the syllogism that the state can discriminate against people who presumptively do things the state can criminalize, *Hardwick* also helped create a receptive gay audience for junk science claims that homosexuality is a product of a gene or a small hypothalamus. *Evans* partially has reversed matters. It has helped quell GLBT interest in genetic theories of sexuality and ought to impel TFV groups to clean up their no promo homo campaigns by abandoning factual inaccuracies and overstatements seeking to denigrate gay people and their lives. By protecting associational rights against antidiscrimination laws, *Hurley* and *Dale* not only reassure TFV groups that their freedoms are not threatened by gay rights, but also encourage them to focus on their own families, churches, and social groups, while tolerating gay people’s own communities and freedoms.

The short of it is that the anticipated-response feature of constitutional litigation has effected a *channeling* of both gay and antigay discourse. From the perspective of mainstream culture, the value of judicial review lies not just in its ability to overturn old policies that are unproductive, but also in its ability to shape the contours of political discourse. Our Supreme Court has constructed individual rights in a way that encourages vigorous debate (*Hurley*) but discourages deployment of that freedom to press the state to adopt policies whose sole goal is group denigration (*Evans*). This is a brilliant move on the part of the Justices, and is probably good for the country. This kind of judicial review suggests that contending groups should not deploy the state as a tool to denigrate one another and are better off in a competition of productivity—demonstrating their respective appeals by forming their own communities or cooperative projects.

The channeling effected by judicial review has possibly important consequences for TFV and GLBT people as well as for the country.

³²³ See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

Contrary to traditional natural law philosophies, most gays believe that same-sex intimacy is a valuable human good and that their differences from straight people are potentially valuable.³²⁴ In making equal protection arguments for gay rights, however, gay-friendly policymakers and lawyers tend to emphasize the sameness of gay and straight people, an assimilationist move that is not always congenial to the way many GLBT people see themselves.³²⁵ Thus, campaigns for same-sex marriage and inclusion of gays in the military not only have suppressed diversity within GLBT communities rhetorically, but may contribute to greater subordination of gay voices already marginalized. This is the downside of assimilation.

Conversely, gay rights litigation also may be hardening the line between gay and straight. In seeking antidiscrimination laws and heightened equal protection scrutiny, gay litigants often insist on either the immutability or the stability of their identifying trait. There is now an elaborate gayocracy in place to make sure that homosexuality remains an important identifying trait. Dividing the world into “homosexuals” and “heterosexuals,” as this progressive discourse tends to do, not only leaves out bisexuals and people who do not know (or do not care about) their Kinsey numbers,³²⁶ but polarizes people into excessively rigid categories. While TFV groups reject the claim of immobile status binarism, they replace it with a dogmatic insistence on one “true” category (heterosexuality) and with broad claims of “lifestyle” addiction. Once the wavering adolescent commits the unmentionable act, he is sucked into the “homosexual lifestyle” of promiscuity, predatoriness, and peculiarity. This is even more untrue to gay—and other nontraditional and uncategorizable—lives. Both sides flatten the range and plasticity of sexuality and gender role. Articles such as the present one undoubtedly contribute to this process as well.

The constitutionalization of gay and antigay rights has contributed to dichotomized statuses in other ways as well. Because being a

³²⁴ See, e.g., Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 *Geo. L.J.* 1871, 1936 (1997); Becker, *supra* note 226, *passim*.

³²⁵ See generally Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage,”* 79 *Va. L. Rev.* 1535 (1993); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”* 108 *Yale L.J.* 485 (1998).

³²⁶ See Robin West, *Sex, Reason, and a Taste for the Absurd*, 81 *Geo. L.J.* 2413, 2433 (1993) (book review) (objecting to fetishization of Kinsey numbers and denying that author has one); Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 *Stan. L. Rev.* 353 (2000) (arguing that bisexuals are erased by much gay rights discourse).

gay citizen requires “coming out” self-identification, being openly gay is both a status and a message or viewpoint.³²⁷ This would be no more than a curiosity were it not for the First Amendment, which has been a sword for GLBT people to resist state efforts to keep them closeted and a shield for TFV people to resist application of antidiscrimination laws to certain of their organizations. The Boy Scouts’ argument in *Dale* was that the presence of an openly gay man as an assistant scoutmaster would undermine the Scouts’ message of “moral straightness” and their desire not to be seen as promoting homosexuality. This is a culture-inspired reading of James Dale’s presence, but it acquired melodramatic importance because it implicated the Scouts’ First Amendment right to define themselves, a right recognized by the Supreme Court in *Dale*. As the identity groups compete to frame the terms of the regime of tolerable sexual variation (How tolerable? And of what?), they are creating overdefined GLBT people.

As well as overdefined TFV people. Like gender-benders and sexual nonconformists, traditionalists have found themselves making arguments that not only slight their core religious or natural law beliefs, but also move them into analytical territory that is perilous for them. To medicalize or constitutionalize their concerns—as lawyers do—risks losing their meaning in the translation, and even altering their own self-understanding over time. For example, the fundamentalist who truly believes that same-sex marriage is contrary to the law of God now finds himself allied with the bigot who says “homosexuals are child molesters,” with the lawyer who says “spouses have a right to defend their marriages against homosexual assault,” and with the politician who says “normal people have a right not to associate with homosexuals and lesbians.” Not only do the latter statements ignore the deep spiritual component of the fundamentalist’s belief system, but the devout person’s association with those secularized arguments may change his or her belief system. My reading of the Gospels suggests that unfactual accusations about gay people and dependence on the state to bolster one’s faith are inconsistent with Jesus’s philosophy of love—and that the importation of these views into Christianity certainly changes and arguably corrupts the philosophy articulated by Jesus. This is a big downside for no promo homo arguments.

The legacies of *Brown* and even *Roe* suggest that the politics of preservation can move beyond these dangers and that common ground can emerge for minorities and traditionalists. A generation ago, traditionalists made racism and sexism central to their religious

³²⁷ See Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 *Harv. C.R.-C.L. L. Rev.* 1 (2000).

belief systems. Once social norms decisively shifted, so did religious beliefs. The same shift can be expected to occur over long periods of time if sexual variation becomes normalized and some states like Vermont recognize same-sex unions or marriages without apocryphal mishap. Admittedly, these are optimistic predictions, but they are predictions that appreciate the substantial representation-reinforcing possibilities of judicial review even from a pragmatic perspective.

IX

STATE RESPONSIBILITY TO ASSURE POSSIBILITIES FOR FALSIFYING STEREOTYPES AND AMELIORATING PREJUDICES

The big challenges for stigmatized minority groups—from Jews and Catholics to people of color to women to GLBT people—are to refute stereotypes about and to ameliorate prejudices against the groups. The most successful strategy entails widespread day-to-day experiences whereby mainstream people cooperate with minority people in productive projects. Stereotypes weaken as people observe nonstereotypical behavior in minorities they come to know, and prejudices weaken as people cooperate with minorities in win-win projects. This is a lengthy social process, which may take generations if not centuries to make headway.

The state cannot, either practically or constitutionally, require people to abandon stereotypes or prejudices, but state policies can contribute to or undermine this social process. Most no promo homo policies undermine this process by signaling state support for the traditional status denigration of GLBT people and by encouraging GLBT people to be closeted. Not only is it no longer acceptable for the state to obstruct gay people's struggle against stereotypes and prejudices, but I would maintain that even liberal conceptions of the state support an affirmative state responsibility to assure GLBT people conditions under which they have a chance to falsify stereotypes and ameliorate prejudice. That is, because the state pervasively contributed to the antigay status quo, with its antigay stereotypes and prejudices, the state has an obligation to support GLBT people's efforts to remedy the situation.

This thesis finds support in *Evans's* dictum that sexual orientation antidiscrimination laws are not "special rights" for homosexuals but are, instead, legitimate state efforts to assure GLBT people the same public space that straight people routinely enjoy. This idea supports not only antidiscrimination laws, but also state recognition of same-sex unions, state protection of GLBT students and workers against

antigay harassment, hate crime laws, and nonbiased or even gay-supportive sex education policies. Although the liberal state should, in my view, tolerate antigay private associations like the newly homophobic Boy Scouts, the state must cease its promotion of GLBT degradation and vigorously work toward assuring GLBT fair conditions within which their lives will falsify stereotypes and undermine prejudice.