THE PROPER ROLE OF MORALITY IN STATE POLICIES ON SEXUAL ORIENTATION AND INTIMATE RELATIONSHIPS

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I. INTRODUCTION

It seems that questions of morality are never far removed from gay rights disputes. Many opponents of lesbian, gay, bisexual, and transgender rights ("LGBT rights") claim it is proper for the State to take morality into account when setting public policy in matters related to sexual orientation and intimate relationships.[1] In contrast, many supporters of LGBT rights contend it is improper for the State to consider morality when setting public policy in these areas.[2]

I have suggested elsewhere that the LGBT rights movement should explicitly incorporate notions of morality when articulating reasons for ending the State's unequal treatment of LGBT people.[3] I have also written that the State cannot, as a practical matter, remain morally neutral in deciding which intimate relationships merit legal recognition.[4] In this

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1. *See infra,* notes 16, 24–27, 61 and accompanying text.

2. *See infra,* notes 17–18, 23, 28 and accompanying text.

3. *See generally* CARLOS A. BALL, THE MORALITY OF GAY RIGHTS: AN EXPLORATION IN POLITICAL PHILOSOPHY (2003) [hereinafter BALL, THE MORALITY OF GAY RIGHTS]; Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism,* 85 GEO. L.J. 1871 (1997).

4. *See* Carlos A. Ball, *Against Neutrality in the Legal Recognition of Intimate Relationships,* 9 GEO. J. GENDER & L. 321, 332–34 (2008) [hereinafter Ball, *Against*

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Essay, I explore the related question of when may the State set policies based in part on moral judgments related to sexual orientation and intimate relationships. I argue that the State may do so when (1) it is expanding—rather than restricting—rights and benefits; (2) the moral considerations at issue have empirical support; and (3) those considerations are consistent with our nation's constitutional values.

In Part II, I discuss some of the historical reasons why the LGBT rights movement has shied away from relying on moral argumentation to help achieve its political and legal goals. In Part III, I explore the impact of *Lawrence v. Texas*[5] on the appropriate relationship between morality and legal regulation. In doing so, I explain that *Lawrence* prohibits the government from relying on morality to justify laws that target particular classes of individuals for differential treatment or that interfere with protected liberty interests. As such, *Lawrence* does not question the government's authority to rely on moral considerations to justify an expansion—as opposed to a restriction—of rights and benefits. In Part IV, I use the example of same-sex marriage to explain why the State, when it relies on moral considerations to set policy, should do so only when there is empirical support for its positions. Finally, in Part V, I argue that it is proper for the State to rely on moral considerations in setting policies related to sexual orientation and intimate relationship when those considerations are grounded in constitutional values.

Almost fifty years ago, Professor Louis Henkin wrote that "[t]he relation of law to morals has been a favored preoccupation of legal philosophers for a thousand years."[6] Scholarly interest in the intersection of law and morality has continued unabated since then.[7] The purpose of this Essay, however, is not to make jurisprudential or philosophical claims about the proper relationship between law and morality in general. Instead, my goal here is the more modest one of trying to delineate when the State, in the specific context of laws and regulations related to sexual orientation and intimate relationships, may appropriately—by which I mean both constitutionally and as a matter of common sense—take into account moral considerations in setting public policy. Although some of what I say here may apply to other issues and concerns, I limit my discussion to sexuality issues.

Neutrality]. A slightly different version of the same essay can be found in MORAL ARGUMENT, RELIGION, AND SAME-SEX MARRIAGE: ADVANCING THE PUBLIC GOOD 75 (Gordon A. Babst, Emily R. Gill & Jason A. Pierceson, eds., 2009).

5. 539 U.S. 558 (2003).

6. Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 402 (1963).

7. *See, e.g.*, ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY (1993); MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW (1988); RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY (1999).

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II.
THE RELUCTANCE OF LGBT RIGHTS ADVOCATES TO ADVANCE MORAL ARGUMENTS

In the 1960s, the pioneer gay rights activist Frank Kameny coined the phrase "Gay is Good," a slogan that was used frequently by gay rights proponents in the years before and after the Stonewall riots.[8] The slogan was meant to respond, in an admittedly pithy fashion, to the widely held view that being gay was shameful or debasing,[9] in the same way that the phrase "Black is Beautiful" was meant to undermine the view that African Americans should feel negatively about their skin color.[10] That the particular slogan "Gay is Good" ceased to be used after a while is not surprising[11]—most slogans, whether political or commercial, have a short shelf life. What is perhaps more surprising is that, since then, the LGBT rights movement has not more frequently promoted the message behind the slogan: that being gay is not just something to be endured or tolerated but that it is also something to be embraced as morally good.

In this part of the Essay, I identify two reasons that help explain the LGBT rights movement's traditional reluctance to defend the moral goodness of homosexuality in public policy debates on gay rights. The first is the movement's historical focus on privacy and the right to be left alone. The second is the success of the Christian Right in setting the terms of the moral debates involving LGBT rights issues.

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8. *See* William N. Eskridge, Jr., *The Marriage Cases—Reversing the Burden of Inertia in a Pluralist Constitutional* Democracy, 97 CAL. L. REV. 1785, 1802 (2009) (noting that activists in the 1960s, including "gay-is-good activist Frank Kameny," used the slogan to advance gay causes); Will O'Bryan, *Gay is Good: How Frank Kameny Changed the Face of America*, METROWEEKLY, Oct. 5, 2006, http://www.metroweekly.com/feature/?ak=2341 (stating that Kameny "coined the phrase 'Gay is Good' in 1968, when the distance between homosexuality and shame was a very short trip"). On the Stonewall riots, see generally MARTIN DUBERMAN, STONEWALL (1993).

9. *See* Nancy J. Knauer, *LGBT Elder Law: Toward Equity in Aging*, 32 HARV. J. L. & GENDER 1, 20 (2009) ("LGBT individuals who came of age in the post-Stonewall years had the benefit of a very public counter-narrative [to the idea that homosexuality was a mental disorder] that stated 'Gay Is Good.' No matter how marginalized and reviled the gay liberation movement might have been in certain quarters, it existed as a public symbol of pride and openness." (citations omitted)).

10. Craig J. Konnoth, *Created in Its Image: The Race Analogy, Gay Identity, and Gay Litigation in the 1950s-1970s*, 119 YALE L.J. 316, 347–48 (2009) ("Kameny . . . invent[ed] slogans such as 'Gay is Good' in deliberate counterpoint to 'Black is Beautiful.'"). On the "Black is Beautiful" slogan and how it impacted African Americans, see Claud Anderson & Rue L. Cromwell, *"Black is Beautiful" and the Color Preferences of African American Youth*, 46 J. NEGRO EDUC. 76 (1977).

11. *Cf.* Matt Foreman, *Gay is Good*, 32 NOVA L. REV. 557, 564 (2008) (noting that the activism behind the idea that "gay is good" was "eclips[ed] . . . early on" in the history of the gay rights movement).

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A. Negative Liberty vs. Positive Recognition

The LGBT rights movement, in confronting rampant discrimination and harassment aimed at LGBT people because of how and whom they love, has traditionally placed great importance on the need to protect the privacy interests of sexual minorities.[12] The focus in this regard has been on negative liberty, a concept that demands, in the context of sexuality, that individuals be left alone to make decisions related to sexual intimacy without state coercion or interference.[13]

This emphasis on negative liberty was apparent in the movement's organized efforts, starting in the 1970s, to rid society of sodomy laws.[14] That campaign generally stressed the harm caused by governmental interference with personal and intimate decisions rather than the positive goods that might arise from the exercise of those decisions. What the movement emphasized, in other words, was that individuals should be free to make decisions related to sexual intimacy rather than the substantive content of those decisions. The crucial normative point was not that the choices made by LGBT individuals in matters of sexuality were necessarily good or valuable; instead, the focus was on the inappropriateness of the government making these types of decisions *for* individuals.[15]

In contrast, many supporters of robust governmental regulation of individuals' sexual choices relied on morality to support the continued regulation of sodomy.[16] Faced with repeated moral objections to same-sex sexual conduct, LGBT rights supporters understandably argued, in response, that the State should not take into account moral considerations when regulating matters related to sexuality.[17] For that reason, LGBT

12. *See* BALL, THE MORALITY OF GAY RIGHTS, *supra* note 3, at 2–4 (discussing the early LGBT rights movement's focus on avoiding harassment by the State through the advancement of privacy arguments). *See also* WILLIAM N. ESKRIDGE JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861–2003, 154–55 (2008) (discussing the use of constitutional challenges based on privacy to end police harassment of gay men in Dallas in the 1960s).

13. The difference between the concept of negative liberty, which requires that the government not interfere with certain choices made by individuals, and positive liberty, which requires that the government affirmatively make available certain conditions so that freedom can flourish, was famously explored by the British philosopher Isaiah Berlin. ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118 (1969).

14. *See* ESKRIDGE, *supra* note 12, at 184–93, 218–25.

15. *See* BALL, THE MORALITY OF GAY RIGHTS , *supra* note 3, at 2 (stating that early LGBT rights activists believed the "best way" to accomplish the goal of reducing state-promoted oppression "was by convincing society that the state should not interfere with the private and intimate lives of individuals").

16. *See* ESKRIDGE, *supra* note 12, at 215–19 (noting the role of some religious conservatives in objecting to reform of sodomy statutes).

17. During the 1980s, gay rights supporters repeatedly argued that the scope and application of a constitutional right to privacy should be determined independently of the public's views regarding the morality of same-sex intimacy. *See, e.g.*, RICHARD D. MOHR,

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rights supporters sought to separate the sphere of legal regulation from that of morality in the campaign to eliminate sodomy laws.[18]

In the 1990s, however, the LGBT rights movement began transitioning from a focus on the need for the State to leave individuals alone in sexuality matters to the need for the State to affirmatively recognize and protect the intimate and familial relationships of LGBT individuals.[19] This was a crucial shift because the movement's main request of the State up to that point—namely, that it tolerate the intimacy choices of LGBT people—was now insufficient to attain the movement's new goals. The demand that the State offer same-sex couples the opportunity to marry, for example, required the government to do more than simply respect the negative liberty of LGBT people. Rather than asking the State to refrain from regulating matters related to sexuality and intimate relations (as was the case with the effort to rid society of sodomy laws), the movement now demanded governmental recognition (and therefore, to some extent, regulation) of same-sex relationships.[20]

As I have suggested elsewhere, it is difficult to argue for the legal recognition of intimate and familial relationships (of any kind) while at the same time demanding that the State remain morally neutral on the

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GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW 97 (1988) ("It makes no difference here whether the behavior itself is socially approved or not."); DAVID A.J. RICHARDS, SEX, DRUGS, DEATH, AND THE LAW: AN ESSAY ON HUMAN RIGHTS AND OVERCRIMINALIZATION 44 (1982) (describing as "objectionable" the "popular argument for preserving moral standards" in constitutional principles and instead arguing that the Constitution "rests on the idea that moral rights of individuals cannot be violated, notwithstanding majoritarian sentiments to the contrary").

The justification for a right to privacy in matters of sexual intimacy had been captured famously by the authors of the Wolfenden Committee Report ("Report") issued in 1957. THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION (American ed., Stein & Day, 1963) (1957). That Report recommended to the British Parliament that same-sex sodomy be decriminalized. *Id.* at ¶ 62. In support of their recommendation, the Report's authors noted that "[u]nless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business." *Id.* at ¶ 61. The Report made clear that it did not intend "to condone or encourage private immorality;" rather, it argued that "to emphasize the personal and private nature of moral or immoral conduct is to emphasize the personal and private responsibility of the individual for his own actions." *Id.*

18. *See* BALL, THE MORALITY OF GAY RIGHTS, *supra* note 3, at 3 (describing arguments raised by the side challenging sodomy statute in *Bowers v. Hardwick*, 479 U.S. 186 (1986)).

19. *Id.* at 2–4. David Chambers notes that in the early days of the gay rights movement, gay activists "focused largely on reducing harassment of gay people by the police." David L. Chambers, *Couples: Marriage, Civil Union, and Domestic Partnership*, *in* CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS 281, 282 (John D'Emilio, William B. Turner & Arvashi Vaid eds., 2000). He adds that if activists at that time had sought to "open up the institution of marriage[,] [it] would have required a . . . radically restructured view of gay people—a view of us as morally worthy." *Id.* at 282–83.

20. BALL, THE MORALITY OF GAY RIGHTS, *supra* note 3, at 2–3.

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goodness and value of those relationships.[21] Indeed, debates about whether the State should recognize LGBT relationships expose two clashing values-based understandings of intimate relationships and sexuality and the corresponding obligations imposed on the government. The fundamental issue in those debates has not been whether the State should remain neutral. Instead, the crux of the disagreement has been whether the State should side with the social conservatives who argue that only heterosexual sexual relationships and intimacy are morally acceptable (and that therefore the State should, for example, limit marriage to different-sex couples) or, alternatively, whether the State should side with those who believe that same-sex relationships and intimacy are as good and valuable as heterosexual ones (and that therefore the State should, for example, provide LGBT individuals with the opportunity to marry individuals of their choice). Whatever policy decisions the government makes in this area (e.g., whether it recognizes same-sex marriage or not), it has to take sides in the disputes regarding whether same-sex relationships are morally equivalent to different-sex ones.[22]

The fact that the movement can no longer expect the State to be morally neutral has not generally made gay rights supporters more comfortable with the idea of trying to affect state action through the deployment of explicitly moral arguments.[23] This unease is the result not only of the normative underpinnings of the privacy-based arguments that played an important role in the movement's early days but also, as explained in the next section, of the aggressive and effective ways in which many social conservatives have injected their understandings of morality and values into LGBT rights debates.

B. *The Impact of the Christian Right*

The 1980s saw a political awakening of fundamentalist Christians and other religious and social conservatives through the work of organizations such as the Moral Majority and the Christian Coalition.[24] For these groups, the growing visibility of gay people in society—along with, for example, the wider availability of abortion—was a deeply troubling manifestation of

21. Ball, *Against Neutrality*, *supra* note 4, at 332–34.

22. *Id.*

23. As Rebecca Zietlow has pointed out, it may seem "strange to talk about moral values in conjunction with rights of belonging in today's political climate, with the Defense of Marriage Act and constitutional amendments prohibiting gay marriage at the top of the political agenda. Indeed, the instinctive response of most [progressives] today is that moral values are in opposition to rights of belonging, not in conjunction with them." Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945, 1006 (2005).

24. *See, e.g.*, JOHN GALLAGHER & CHRIS BULL, PERFECT ENEMIES: THE RELIGIOUS RIGHT, THE GAY MOVEMENT, AND THE POLITICS OF THE 1990S 21–25, 34–38 (1996).

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the liberalization of sexual norms and practices that had taken place in the United States since the 1960s.[25] During this time, conservative activists successfully gained political traction by arguing that governmental policies in matters such as gay rights and abortion no longer reflected the moral views of a majority of Americans.[26]

By the 1990s, conservatives had so successfully set the moral terms of the policy debates over LGBT rights that morality and values became closely associated with *opposition* to those rights.[27] In response to this political reality, LGBT rights supporters generally eschewed considerations of morality in framing their arguments and instead relied on seemingly more neutral values such as equality and liberty.[28]

At first blush, it may seem that the Supreme Court's decision in *Lawrence v. Texas*, which held that public morality was an insufficient

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25. *See* Nancy J. Knauer, *The Recognition of Same-Sex Relationships, Comparative Institutional Analysis, Contested Social Goals, and Strategic Institutional Choice*, 28 U. HAW. L. REV. 23, 54 (2005) (observing that the traditional values movement can be traced to the founding of "politically active conservative evangelical organizations in the late 1970s" and stating that the movement "considers homosexuality, along with abortion, no-fault divorce, and the separation of church and state, as symptomatic of a general decline in morals that threatens the health of the nation" (internal citations omitted)); Serena Mayeri, *A New E.R.A. or a New ERA? Amendment Advocacy and the Reconstitution of Feminism*, 103 NW. U. L. REV. 1223, 1235 (2009) (noting that in the early 1980s conservative activists resisted the expansion of women's rights, while "paint[ing] their opponents as radicals bent on destroying the traditional family, forcing women into military service, providing abortion on demand, and promoting homosexuality" (internal citation omitted)). *See also* GALLAGHER & BULL, *supra* note 24, at xii (noting that many in the religious right are "concerned, with reason, about the torn moral fabric of the nation . . . [and that many] see gay rights as the embodiment of everything they deplore about modern life").

26. For a discussion of the growing political influence and values of Christian fundamentalist groups like the Moral Majority and the Christian Coalition during the late 1970s and 1980s, see, e.g., NOAH FELDMAN, DIVIDED BY GOD 192–94 (2005).

27. *See* GALLAGHER & BULL, *supra* note 24, at xiii ("The way religious conservatives view the phrase *family values* in the political arena, virtue has become a partisan commodity. They have managed to shape the debate over gay rights and have in many ways defined the gay community, however falsely" Social conservative groups to this day continue to question the morality of same-sex sexuality. The Family Research Council (FRC), for example, explains on its web page that:

> [T]he full expression of human sexuality is within the bonds of marriage between one man and one woman. Upholding this standard of sexual behavior would help to reverse many of the destructive aspects of the sexual revolution, including sexually transmitted disease rates of epidemic proportion, high out-of-wedlock birth rates, adultery, and homosexuality.
>
> . . . .
>
> FRC does not consider homosexuality, bi-sexuality, and transgenderism as acceptable alternative lifestyles or sexual "preferences"; they are unhealthy and destructive to individual persons, families, and society.

Human Sexuality, FAMILY RESEARCH COUNCIL, http://www.frc.org/human-sexuality (last visited May 18, 2011).

28. BALL, THE MORALITY OF GAY RIGHTS, *supra* note 3, at 2–5. In Part V, I question the notion that the values of equality and liberty, at least as codified in the Constitution, are morally neutral. *See infra* notes 76–83.

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justification for sodomy laws, supports the notion that morality considerations must be kept separate from sexuality-related public policies.[29] As I argue in the next section, however, it is important to distinguish between the State's constitutionally impermissible use (after *Lawrence*) of morality to restrict the rights of individuals in matters related to sexual relationships and conduct and the State's permissible reliance on morality to expand those rights.

III.
THE ROLE OF MORALITY IN THE AFTERMATH OF *LAWRENCE V. TEXAS*

The skepticism that LGBT rights supporters traditionally have had toward incorporating notions of morality into the governmental regulation of relationships and sexual intimacy was in many ways validated in 1986 by the Supreme Court's decision in *Bowers v. Hardwick*.[30] By the time Michael Hardwick was arrested for engaging in consensual oral sex in his home, sodomy laws were almost never enforced in cases involving consensual same-sex sexual conduct in private.[31] Nonetheless, those who defended sodomy laws, including the state of Georgia in *Hardwick*, insisted that society had the right to express its moral disapproval of homosexuality through criminal laws.[32] The *Hardwick* Court readily agreed, holding that morality alone was a sufficient basis upon which to uphold the rationality—and therefore the constitutionality—of a law that, in its view, did not implicate a fundamental right.[33]

Hardwick set up a stark contrast between majoritarian morality on the one hand and LGBT rights on the other, with the Court holding that the former trumped the latter.[34] For litigation purposes, however, it was never necessary for LGBT rights lawyers to argue that morality was *always* an impermissible ground upon which to base governmental policy. Indeed, when the Lambda Legal Defense and Education Fund ("Lambda") challenged the Texas sodomy statute in *Lawrence*, it made clear that it did

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29. 539 U.S. 558 (2003).

30. 478 U.S. 186 (1986).

31. *See* CARLOS A. BALL, FROM THE CLOSET TO THE COURTROOM: FIVE LGBT RIGHTS LAWSUITS THAT HAVE CHANGED OUR NATION 208–09 (2010) (stating that sodomy prosecutions "beginning in the 1970s were largely limited to sexual conduct or solicitation in public places"). *See also* Dale Carpenter, *The Unknown Past of* Lawrence v. Texas, 102 MICH. L. REV. 1464, 1472–75 (2004) (noting that in the 143-year history of sodomy laws in Texas, there are "no publicly recorded court decisions involving the enforcement of the law against consensual sex between adult persons in a private space" but observing the possibility that any such defendants could have plead guilty and "hushed up").

32. Brief of Petitioner at 34–38, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140). The brief also denounced same-sex sodomy as "purely an unnatural means of satisfying an unnatural lust." *Id.* at 27.

33. *Bowers*, 478 U.S. at 196.

34. *Id.*

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not question the government's general authority to account for moral considerations when legislating.[35]

According to Lambda, the constitutional problem with the Texas sodomy statute was not that the state legislature had taken morality into account in enacting a criminal statute; instead, the problem was that the legislature had sought to codify the majority's moral disapproval of a distinct segment of the population when it enacted its most recent version of the state's sodomy law in 1973.[36] That legislative change decriminalized heterosexual sodomy while simultaneously and, for the first time, explicitly criminalizing same-sex sodomy.[37]

To be more specific, the Texas sodomy law, prior to 1973, prohibited everyone from engaging in anal or oral sex. After 1973, the law prohibited *a class of individuals* (i.e., those who had sex with same-sex partners) from engaging in anal or oral sex while allowing others to engage in those same acts with legal impunity. The criminal penalty, in other words, was imposed not because of the particular sexual acts engaged in but because of *who* engaged in them.[38]

By the time the U.S. Supreme Court, thirty years later, struck down sodomy laws on due process grounds in *Lawrence v. Texas*, it had long been established, as a matter of equal protection doctrine, that the government could not impose burdens on, or withhold benefits from, a class of individuals based on moral disapproval. The Court had made this clear several decades earlier when it held, in *Department of Agriculture v. Moreno,* that the government could not prevent "so-called 'hippies' and 'hippie communes'" from participating in the federal food stamp program because it disapproved of their lifestyle.[39] Similarly, and closer to home for LGBT people, the Court held in *Romer v. Evans* that a group of individuals could not be legally disadvantaged through, for example, the withholding of antidiscrimination protection, based on animus or moral disapproval.[40]

Justice Sandra Day O'Connor explained this point in her *Lawrence* concurrence.[41] In that opinion, O'Connor noted that "[m]oral disapproval .

35. Amended Brief of Appellants at 13, Lawrence v. Texas, 41 S.W.3d 349 (Tex. Ct. App. 2001) (Nos. 14-99-00109-CR, 14-99-00109-CR) ("Government may sometimes be permitted to enact generally applicable, non-discriminatory laws regulating acts based on its constituents' moral views concerning those acts.").

36. *Id.* (arguing that "when government prohibits one group of people from engaging in specified behavior when others can freely do so, a 'public morality' justification is wholly impermissible and insufficient").

37. *See* Carpenter, *supra* note 31, at 1471–72 (providing a history of Texas's sodomy statute).

38. *Id.*

39. 413 U.S. 528, 534 (1973).

40. 517 U.S. 620, 632, 635–36 (1996).

41. Lawrence v. Texas, 539 U.S. 558, 582 (2003) (O'Connor, J., concurring in the

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. . , like a bare desire to harm . . . , is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."[42] O'Connor added that "we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons."[43]

Lawrence seemed like an easy case for O'Connor because Texas relied on the need to promote public morality to defend its sodomy law.[44] For O'Connor, the fact that the sodomy statute was almost never enforced in the context of private and consensual sexual acts meant that it "serve[d] more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior."[45] As such, the law impermissibly sought to target gay persons as a class and was therefore unconstitutional.[46]

By refusing to vote to overrule *Hardwick*, however, O'Connor apparently agreed that it was correct in holding that morality is a constitutionally sufficient ground to defend a statute's enactment against a due process challenge (at least when heightened scrutiny is not applied).[47] Yet, it was precisely that holding which the majority in *Lawrence* rejected.[48]

Although the majority decided the case on due process grounds and not on the basis of equal protection, it was concerned, as was Justice O'Connor, with the way in which the Texas statute burdened and stigmatized gay people.[49] In fact, Justice Anthony Kennedy in his majority opinion noted that "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."[50] He added that "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an

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judgment).

42. *Id.* (citing Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) and Romer v. Evans, 517 U.S. 620 (1996)).

43. *Id.*

44. *Id.* ("Texas attempts to justify its law, and the effects of the law, by arguing that the statute satisfies rational basis review because it furthers the legitimate governmental interest of the promotion of morality."). *See also* Brief of Respondent at 42-49, Lawrence v. Texas, 539 U.S. 538 (2003) (No. 02-102) (raising the morality argument).

45. *Lawrence,* 539 U.S. at 583 (O'Connor, J., concurring).

46. *Id.* (O'Connor, J., concurring).

47. *Id.* at 582 (O'Connor, J., concurring).

48. *Id.* at 577–78 (agreeing with Justice John Paul Stevens's *Hardwick* dissent that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.") (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

49. *See id.* at 575–76 (noting that if convicted, defendants could be required to register as sex offenders); *Id.* at 581 (O'Connor, J., concurring) (discussing other consequences of conviction).

50. *Id.* at 575.

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invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[51] Justice Kennedy then proceeded to discuss the consequences of criminal sodomy convictions for gay people, which included not only the stigma that accompanies all criminal convictions, but also the requirement, in some states, that individuals convicted of sodomy offenses register as sex offenders.[52] He also noted the negative impact of such convictions for individuals seeking employment.[53]

In addition to emphasizing the sodomy statute's discriminatory impact on gay people, the majority opinion also focused on its effect on their liberty interest in choosing to pursue sexual relationships and conduct in the privacy of their homes. As the Court put it, sodomy laws "touch[] upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes . . . seek to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals."[54]

Crucially, the *Lawrence* Court did not hold that morality is always an impermissible ground upon which to legislate. Rather, the majority was concerned about the government's reliance on morality to justify laws that target particular classes of individuals for differential treatment or that interfere with a protected liberty interest. While the *Lawrence* Court rejected the notion that moral disapproval of particular conduct can be a legitimate basis upon which to prohibit that conduct,[55] it did not hold that morality can never be the basis for legislation.[56]

The impact of *Lawrence*, when coupled with that of earlier cases such as *Department of Agriculture v. Moreno* and *Romer v. Evans*, on the proper relationship between morality and legislation is that the latter cannot be based on the former when it targets particular classes of individuals or interferes with protected liberty interests. In other words, the State's ability to incorporate notions of morality into legislation is limited by the constitutional rights (such as those of due process and equal

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51. *Id.*

52. *Id.* at 575–76.

53. *Id.* at 576.

54. *Id.* at 567.

55. *Id.* at 577.

56. As Cass Sunstein puts it,

> when the *Lawrence* Court asserts the absence of a "legitimate state interest which can justify its intrusion into the personal and private life of an individual," it is best understood to be saying that the moral claim that underlies the intrusion has become hopelessly anachronistic. And the anachronistic nature of that moral claim has everything to do with the Court's rejection, not of moral claims in general, but of the particular moral claim that underlies criminal prohibitions on same-sex sodomy.

Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage,* 55 SUP. CT. REV. 27, 31 (2003) (quoting *Lawrence*, 539 U.S. at 578).

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protection) of individuals.[57] As a result, the government's authority to rely on morality when legislating is not constitutionally restricted in every instance. Instead, it is limited by specific and cognizable constitutional rights.

For our purposes, therefore, it is important to emphasize the difference between the government's adoption of moral arguments to *deny* rights and benefits to LGBT people, as demanded by many social conservatives, and its embrace of moral arguments, including those that might be made by the LGBT rights movement, to *expand* rights and benefits to sexual minorities. It is precisely when the government relies on moral considerations to deny LGBT people rights to marry or to adopt children, for example, that cases such as *Lawrence* and *Romer* are implicated, because the government in these instances targets a particular group of individuals for differential treatment on the basis of morality.[58]

In contrast, the types of policy reforms advocated by the LGBT rights movement do not implicate those cases because they do not target a particular group. Legislation, for example, that legally recognizes same-sex relationships or that protects the parental rights of LGBT individuals does not violate the constitutional rights of anyone because it does not single out a particular group for differential treatment (or interfere with liberty interests). As a result, it would not be constitutionally impermissible for the government—if it chose to do so—to recognize the intimate and familial relationships of LGBT people based on a moral judgment that those relationships are good and valuable forms of human associations that merit legal support and protection.

All of this means that it is constitutionally impermissible for the State

57. Since *Lawrence*, the issue of morality as a justification for legislation in matters of sexuality and sexual conduct has arisen *inter alia* in the context of assessments of the constitutionality of statutes that prohibit the sale of sexual devices or toys. The Eleventh Circuit has held that the promotion of the State's view of public morality is a valid justification of such laws. *See* Williams v. Morgan, 478 F.3d 1316, 1323 (11th Cir. 2007) (finding the State's interest in sexual morality to be a rational, hence constitutional, basis for a statute prohibiting the commercial distribution of sexual devices). The court's analysis, however, was flawed because it failed to appreciate the extent to which laws that restrict access to sexual devices impact the protected liberty interest of individuals to make decisions about their sexual conduct. As *Lawrence* makes clear, notions of morality cannot serve as a valid justification for a regulation that burdens this interest. *See* Reliable Consultants v. Earle, 517 F.3d 738, 745–46 (5th Cir. 2008) (striking down a Texas statute that criminalized the sale of sexual devices on the ground that "public morality" was insufficient justification to regulate private intimacy).

58. *See* Lofton v. Kearney, 157 F. Supp. 2d 1372, 1382–83 (S.D. Fla. 2001) (rejecting Florida's argument that its interest in legislating public morality was a constitutionally permissible justification for a law prohibiting gay individuals from adopting children), *aff'd on other grounds*, Lofton v. Sec'y of the Dep't of Children & Human Servs., 358 F.3d 804, 819 n.17 (11th Cir. 2004) (declining to address the morality argument because of its finding that the State's interest in "promoting married-couple adoption" provided a rational basis for the law).

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to adopt the types of morality-based positions relied on by many social conservatives to defend restrictions on the rights of LGBT individuals. But the opposite does not hold: the State would not violate the Constitution if it were to adopt pro-LGBT rights morality-based arguments in setting policy.

IV.
MORAL JUDGMENTS AND EMPIRICAL EVIDENCE

In the previous section, I distinguished between two types of morality-based government actions: those that expand rights and benefits and those that restrict them. In this section, I distinguish between two other types of morality-based government actions: those grounded in empirical evidence and those that are not.

One of the possible objections to incorporating moral arguments into public policy determinations is that there is no objective or consistent way to establish which moral positions are "correct" and which are not. The reasoning behind this objection can be summarized through the following question: If individuals, including "moral experts" like philosophers and religious leaders, cannot agree on what is moral, then how can we expect the State to do so?

It would indeed be asking too much for the State to serve as an arbiter of disputed moral questions. But it is not too much to ask that *when the State relies on moral considerations in setting policy, that it do so only when there is empirical support for its positions.*

Some commentators contend that empirical support for morals-based state action is constitutionally required. Professor Suzanne Goldberg, for example, argues that empirical support is necessary because "equal protection and due process guarantees require courts to ensure that moral justifications are not being proffered to cover up impermissible government interests."[59] And the late Peter Cicchino reasoned that "[a] bare assertion of public morality, divorced from any empirical effect on the public welfare, cannot constitute a legitimate government interest for equal protection review."[60]

Although I agree with both of these constitutional claims, I do not here explore the intersection of morals and empirical evidence from a constitutional perspective. Instead, I look at the question from a commonsense perspective, driven by considerations of good government. Even if the State is not constitutionally required to provide empirical

59. Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After* Lawrence v. Texas, 88 MINN. L. REV. 1233, 1304 (2004).

60. Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of "Public Morality" Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?*, 87 GEO. L.J. 139, 142 (1998).

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support for policy judgments that are grounded in moral considerations, it would nonetheless make good policy sense for it to do so.

The issue of same-sex marriage is helpful in explaining this point. Many opponents of same-sex marriage raise moral objections to same-sex relationships and sexuality. In doing so, they warn of a series of harms that would purportedly accompany the recognition of same-sex marriages, including undermining heterosexual marriages and hurting children.[61]

Although opponents of same-sex marriage should be free, of course, to argue what they want in pursuit of their policy goals, it would seem difficult to disagree with the proposition that the State should not embrace moral positions based on allegations of harm to society and individuals unless those allegations are grounded in some empirical support. Otherwise, the State would set policy based on misinformation and misunderstandings.

It turns out that it is relatively easy to question the morality of individuals who engage in forms of sexual intimacy that depart from the norm. It is considerably more difficult, at least in the context of same-sex sexuality, to point to specific evidence of harm. Indeed, opponents of LGBT rights have been unable to establish that anyone has been harmed as a result of the recognition of same-sex marriages in the six jurisdictions that currently permit them.[62] For example, they have not offered proof that the relationships of heterosexual married couples in those jurisdictions have been affected or changed by the recognition of same-sex marriages.[63]

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61. *See* BALL, THE MORALITY OF GAY RIGHTS, *supra* note 3, at 126, 133–135 (discussing arguments by opponents of LGBT rights that same-sex marriage will harm children). According to a Family Research Council pamphlet, "[g]ay marriage threatens the institutions of marriage and the family. Same-sex relationships are not the equivalent of traditional marriage . . . . Gay marriage is not a moral alternative to traditional marriage [and] . . . . [h]omosexuality is rightly viewed as unnatural." FAMILY RESEARCH COUNCIL, THE SLIPPERY SLOPE OF SAME-SEX MARRIAGE 2 (2004), http://downloads.frc.org/EF/EF04C51.pdf. The pamphlet adds that "[h]omosexuals and lesbians are unsuitable role models for children because of their lifestyle." *Id.* at 5.

For its part, the Alliance Defense Fund claims in a pamphlet that "[s]ame-sex 'marriage,' 'civil unions,' or 'domestic partner arrangements' all accomplish one thing: the weakening of traditional marriage and the family. If allowed to continue, the societal costs for children and grandchildren would be profound." ALLIANCE DEFENSE FUND, THE TRUTH ABOUT SAME-SEX "MARRIAGE" 1 (2005), http://www.alliancedefensefund.org/ userdocs/ SameSexMarriage.pdf.

62. Those six jurisdictions are: Connecticut, Massachusetts, New Hampshire, Iowa, Vermont, and Washington D.C. *See* Ian Urbina, *Gay Marriage is Legal in U.S. Capital*, N.Y. TIMES, Mar. 3, 2010, at A20.

63. *See infra* notes 65–70 and accompanying text (discussing absence of evidence of harm introduced by same-sex marriage opponents during the California Proposition 8 trial). Another example of LGBT rights opponents' use of moral claims that lack empirical support involved a 1999 Arkansas regulation prohibiting lesbians and gay men from serving as foster parents. During a trial held in state court to determine the constitutionality of the regulation, several members of the state's Child Welfare Agency Review Board ("the Board") testified to how they had relied on notions of morality to approve the regulation.

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In fact, data from Massachusetts—the first state to allow same-sex marriages—show that the rates of marriage and divorce in the four years following the recognition of gay marriages did not change when compared to the rates prior to such recognition.[64]

Of course, the recognition of same-sex marriages has undermined the notion that the rights and benefits that come with marriage should be exclusively heterosexual privileges. But there is no empirical support for the proposition that the expansion of marital rights and benefits to same-sex couples has harmed either the institution of marriage or the relationships of heterosexuals.

The absence of this empirical support was most recently made clear in the federal trial on the constitutionality of Proposition 8, the ballot measure approved by California voters in 2008 prohibiting same-sex marriage. During that trial, critics of gay marriages were given the opportunity to explain the alleged harmful impact of those marriages. It is striking that Proposition 8 proponents, who successfully intervened in the case after state officials refused to defend the measure's constitutionality, called only one witness to discuss the supposed negative impact of same-sex marriage.[65]

That witness, David Blankenhorn, the President of the Institute for American Values, testified on direct examination that it is important that children be raised by their biological parents, and more specifically "by their own natural mother who is married to their own natural father."[66]

One member "testified that, in her opinion, (1) same-sex relationships are wrong, (2) homosexual behavior is a sin, (3) homosexuality violates her biblical convictions, (4) adults who have same-sex orientation should remain celibate and (5) she would not be a proponent of her children spending time with openly gay couples." Dep't of Human Servs. v. Howard, 238 S.W.3d 1, 8 (Ark. 2006). Another member added "that he believed gay relationships are immoral and that he has a moral objection to people being in a household where there is a same-sex relationship going on." *Id.* As the Arkansas Supreme Court concluded in striking down the regulation as unconstitutional, the testimony demonstrated that the regulation was adopted "based upon the Board's views of morality and its bias against homosexuals" rather than "to promote the health, safety, and welfare of foster children." *Id.*

64. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 972 (N.D. Cal. 2010) (citing the Massachusetts study). *See also* Nate Silver, *Divorce Rates Higher in States with Gay Marriage Bans*, FIVETHIRTYEIGHT (Jan. 12, 2010), http://www.fivethirtyeight.com/2010/01/divorce-rates-appear-higher-in-states.html ("Since 2003 . . . the decline in divorce rates has been largely confined to states which have *not* passed a state constitutional ban on gay marriage.").

65. Perry v. Schwarzenegger, 704 F. Supp. 2d at 931 (noting that at the trial, "proponents [of Proposition 8] presented only one witness, David Blankenhorn, to address the government interest in marriage"). The only other witness called by the measure's defenders limited his testimony to the question of the LGBT community's political power. *Id.* at 950–52 (discussing the testimony of Kenneth Miller).

66. Transcript of Proceedings at 2767–68, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal 2010) (No. C-09-2292-VRW), *available at* http://www.afer.org/wp-content/uploads/2010/01/Perry-Vol-11-1-26-10.pdf.

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The witness also opined that the recognition of same-sex marriage would further contribute to what he called the "deinstitutionalization" and "weakening" of marriage, which he believes has been taking place in this country for several decades.[67]

This was essentially the sum total of witness testimony regarding the purported negative impact of gay marriages presented by Proposition 8 supporters. This is an extremely thin empirical reed upon which to deny citizens access to an institution through which our society distributes so many rights and benefits. That this is so became clear when Blankenhorn was cross-examined. During that cross-examination, Blankenhorn admitted he did not know of any studies showing (1) that biological parents are better at raising children than adoptive parents,[68] or (2) that children raised from birth by gay or lesbian couples have worse outcomes than do children raised from birth by two biological parents.[69] Blankenhorn was also unable to point to any empirical evidence showing that recognizing same-sex marriages decreases the marriage rates of different-sex couples or increases their divorce rates.[70]

It is not, however, just the *absence* of evidence of the harm that is (or would be) caused by the recognition of same-sex marriages that is relevant. There is strong empirical evidence, much of it discussed by the plaintiffs' expert witnesses during the Proposition 8 trial, to support the view that same-sex relationships are good and valuable forms of human associations that merit legal recognition and protection. Indeed, based on the evidence presented at the trial, the court made the following finding of fact:

> Same-sex couples are identical to opposite-sex couples in the characteristics relevant to the ability to form successful marital unions. Like opposite-sex couples, same-sex couples have happy, satisfying relationships and form deep emotional bonds and strong commitments to their partners. Standardized measures of relationship satisfaction, relationship adjustment and love do not differ depending on whether a couple is same-sex or opposite-sex.[71]

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67. *Id.* at 2774–75, 2780.

68. *Id.* at 2794.

69. *Id.* at 2797–98.

70. *Id.* at 2807–18. During his testimony, Blankenhorn referred to an article written by the sociologist Norval Glenn in which Glenn purportedly argued that allowing gay people to marry would deinstitutionalize marriage and result in lower marriage rates among opposite-sex couples. *Id.* at 2812–13. Glenn's article, however, does not refer to any empirical evidence supporting the contention that the recognition of same-sex marriages decreases the marriage rates of different-sex couples or increases their divorce rates. *See* Norval D. Glenn, *The Struggle for Same-Sex Marriage*, 41 SOCIETY 25 (2008).

71. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 967 (N.D. Cal. 2010). In support of this finding of fact, the court pointed *inter alia* to trial testimony regarding "research that has compared the quality of same-sex and opposite-sex relationships and the processes that

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In addition, there is considerable evidence that parents who are gay or lesbian do as good of a job raising children—as defined by criteria such as psychological development, peer and family relationships, and academic progress—as do heterosexuals.[72] As the district court judge concluded after hearing extensive testimony on parenting by lesbians and gay men during the Proposition 8 trial, "[c]hildren raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted. The research supporting this conclusion is accepted beyond serious debate in the field of developmental psychology."[73]

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affect those relationships [which] consistently shows 'great similarity across couples, both same-sex and heterosexual.'" *Id.* at 968 (quoting from the testimony of witness Letitia Anne Peplau). It also cited reliable research showing that "a substantial proportion of lesbians and gay men are in relationships, [and] that many of those relationships are long-term." *Id.* (quoting from the testimony of witness Letitia Anne Peplau).

On the characteristics of committed same-sex relationships, and how they compare to committed different-sex ones, see, e.g., John Mordechai Gottman, Robert W. Levenson, James Gross, Barbara L. Frederickson, Kim McCoy, Leah Rosenthal, Anna Ruef & Dan Yoshimoto, *Correlates of Gay and Lesbian Couples' Relationship Satisfaction and Relationship Dissolution*, 45 J. HOMOSEXUALITY 23 (2003); Lawrence A. Kurdek, *Relationship Outcomes and Their Predictors: Longitudinal Evidence from Heterosexual Married, Gay Cohabiting, and Lesbian Cohabiting Couples*, 60 J. MARRIAGE & FAMILY 553 (1998); Letitia Anne Peplau & Adam W. Fingerhut, *The Close Relationships of Lesbians and Gay Men*, 58 ANN. REV. PSYCH. 405 (2007).

72. *See, e.g.*, Rachel H. Farr, Stephen L. Forssell & Charlotte J. Patterson, *Parenting and Child Development in Adoptive Families: Does Parental Sexual Orientation Matter?*, 14 APPLIED DEV. SCI. 164 (2010) (finding children's adjustment, parenting approaches, parenting stress, and couple relationship adjustment not significantly associated with parental sexual orientation); Nanette Gartrell & Henry Bos, *US National Longitudinal Lesbian Family Study: Psychological Adjustment of 17-Year-Old Adolescents*, 126 PEDIATRICS 28 (2010) (finding adolescents raised since birth by lesbian parents "demonstrate healthy psychological adjustment"); Susan Golombok, *Research on Gay And Lesbian Parenting: An Historical Perspective Across 30 Years*, 3 J. GLBT FAM. STUD. xxi (2007) (finding that after thirty years of research, "what seems to matter for children's psychological well-being is not whether the mother is a lesbian or heterosexual. What really matters appears to be the same for all families—it is the quality of family life"); Michael J. Rosenfeld, *Nontraditional Families and Progress Through School*, 47 DEMOGRAPHY 755 (2010) (finding that children of same-sex couples are "as likely to make normal progress through school as the children of most other family structures"); Fiona Tasker, *Lesbian Mothers, Gay Fathers, and their Children: A Review*, 26 J. DEV. BEHAV. PEDIATRICS 224 (2005) (finding that children of same-sex parents are "just as likely as children with heterosexual parents to show typical" development); Jennifer L. Wainwright & Charlotte J. Patterson, *Peer Relations Among Adolescents with Female Same-Sex Parents*, 44 DEV. PSYCH. 117 (2008) (studying adolescents raised by both same-sex and opposite-sex parents and finding the quality of their peer relations was not associated with family type).

73. *Perry*, 704 F. Supp. 2d at 980. Other courts, after considering the empirical evidence regarding the quality of parenting by lesbians and gay men, have reached similar conclusions. *See, e.g.*, Dep't of Human Servs. v. Howard, 238 S.W.3d 1, 7 (Ark. 2006) (noting that the trial court, after hearing evidence in a case challenging the constitutionality of regulation prohibiting lesbians and gay men from serving as foster parents, concluded that "[t]here is no factual basis for making the statement that the sexual orientation of a parent or foster parent can predict children's adjustment."); Fla. Dep't of Children & Families v. X.X.G., 45 So. 3d 79, 87 (Fla. Dist. Ct. App. 2010) (concluding, after reviewing

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The persuasive empirical evidence regarding the emotional bonds and strong commitments of same-sex couples in long-term relationships, as well as the overwhelming evidence regarding the capability of lesbians and gay men to be good parents, means that the government could justify allowing same-sex couples to marry based on a moral assessment that same-sex relationships are good and valuable forms of human associations. In fact, while the denial of marital rights to same-sex couples based on moral judgments cannot be justified due to the absence of empirical support, the expansion of those rights on moral grounds would be proper because of the existence of a growing body of empirical evidence to support them.

One final point: in contending that the government should only rely on moral positions to set public policy when there is empirical support for those positions, I do not mean to suggest that morality and empiricism must overlap perfectly before the government can legislate based on moral considerations. There will always be gaps between the descriptive world as it exists or as it is understood and moral assessments and interpretations, including those made by legislators and other government actors, of how the world should be. Nonetheless, moral judgments that inform public policies should not be reached and defended entirely in abstract terms, disconnected from evidence of what is actually happening in the world around us.

V.
CONSTITUTIONAL VALUES AS MORAL VALUES

So far, I have argued that it is proper for the State to rely on moral claims when it enacts policies that expand (as opposed to restrict) rights and benefits and as long as there is empirical support for those claims. In this section, I argue that it is also proper for the State to set policy by taking into account moral considerations grounded in constitutional values.

Admittedly, one difficulty in defending the State's incorporation of moral positions when it sets policy is the many possible moral positions that it could embrace.[74] A critic may fairly ask how the government is

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the social science literature on parenting by lesbians and gay men, that "[t]hese reports and studies find that there are no differences in the parenting of homosexuals or the adjustment of their children") (emphasis omitted); Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *17 (Haw. Cir. Ct., Dec. 3, 1996) (after trial in which extensive evidence on parenting by lesbians and gay men was introduced, judge concluded that "[g]ay and lesbian parents and same-sex couples can provide children with a nurturing relationship and a nurturing environment which is conducive to the development of happy, healthy and well-adjusted children").

74. This is the case even when the range of moral choices available to the State has already been limited by the need to rely on moral considerations only when it seeks to

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supposed to choose among (often conflicting) moral positions. One answer is that the government can use the Constitution as a moral polestar of sorts. The Constitution, among other things, represents a codification of the values that we share as a nation. It therefore seems particularly legitimate to rely on those values in setting governmental policy.

Although it may be tempting to think of constitutional values as morally neutral,[75] that is not the case. This is perhaps most obvious in the substantive due process context, in which the Supreme Court has held that the scope of fundamental rights is determined largely through the values that we share as a nation.[76] As a result, when we conclude, as the Court has done, that parents have the due process right to rear their children as they deem best[77] or that individuals have the due process right to decide whether to bear children[78] or with whom to be sexually intimate,[79] we stake

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expand rights and benefits, *see supra* Part III, and when there is empirical support for those considerations, *see supra* Part IV.

75. Process-oriented understandings of the Constitution, such as the one famously articulated by John Hart Ely, frequently view the document in morally neutral terms. As Ely explained,

> contrary to the standard characterization of the Constitution as "an enduring but evolving statement of general values," . . . in fact the selection and accommodation of substantive values is left almost entirely to the political process and instead the document is overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of individual disputes (process writ small), and on the other, with what might capaciously be designated process writ large—with ensuring broad participation in the processes and distributions of government.

JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87 (1980) (footnote omitted). *See also* Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980) (criticizing process-oriented understandings of the Constitution and arguing that the document is imbued with substantive values).

76. The Court has sometimes held that those values must be "deeply rooted in this Nation's history and tradition." Washington v. Glucksberg, 521 U.S. 702, 721 (1997). At other times, the Court has explained that "[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." Lawrence v. Texas, 539 U.S. 558, 572 (2003) (citation omitted). In striking down Texas's sodomy statute, the *Lawrence* Court placed considerable weight on the "*emerging awareness* that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Id.* (emphasis added). But regardless of whether the values in question must be deeply rooted in history, or whether an "emerging recognition" is enough, the important point is that the Court frequently looks to shared values to determine which rights are sufficiently fundamental to be protected by the Due Process Clause. *See* Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 128 (2006) (noting that the due process "theory of historical tradition" limits special constitutional protection to claims that are "deeply rooted" in American history "while the critical question [under the theory of evolving national values] is whether the asserted individual right has broad contemporary support in the national culture").

77. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); Meyer v. Nebraska, 262 U.S. 390, 403 (1923).

78. Roe v. Wade, 410 U.S. 113, 164 (1973); Griswold v. Connecticut, 381 U.S. 479, 481 (1965).

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out particular moral understandings of liberty as codified in the Constitution. As the Court has explained:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[80]

This understanding of liberty recognizes the moral importance of allowing individuals to make decisions about personal and intimate matters—such as those associated with sexuality—without interference by others, including state actors. Given that this is the understanding of liberty that is enshrined in our Constitution, it would be entirely proper for the State to keep it in mind when legislating in matters related to sexual orientation and intimate relationships. The State could, for example, properly decide that it no longer wants to withhold from same-sex couples the many rights and benefits that it distributes through the institution of marriage because it no longer wants to burden individuals based on their choice of life partners.

What is true of liberty is also true of constitutional equality. The latter, like the former, is not a morally neutral value.[81] As Kenneth Karst has pointed out,

> Equality, as an abstraction, may be value-neutral, but the fourteenth amendment is not. The substantive core of the amendment, and of the equal protection clause in particular, is a principle of equal citizenship, which

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79. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

80. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

81. It is sometimes argued that the constitutional value of equality is neutral in ways that the value of liberty is not. *See* William D. Araiza, *Foreign and International Law in Constitutional Gay Rights Litigation: What Claims, What Use, and Whose Law*, 32 WM. MITCHELL L. REV. 455, 457 (2006) (arguing that the Supreme Court's decision in *Lawrence v. Texas* "was aggressive, in that it explicitly went out of its way to rely on a broader and more value-laden grounding—substantive due process, rather than equal protection—to reach its result"); Gerald Gunther, *The Supreme Court—1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 43 (1972) (arguing that because equal protection analysis focuses on means and not ends it avoids the dangers of "dogmatically imposed judicial values"). *See also* Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 985 (1979) (arguing that the Equal Protection Clause "cannot and should not bear a substantive content"). I elsewhere take issue with the notion that judicial review on equality grounds is neutral in ways that judicial review based on due process considerations is not. Carlos A, Ball, *Why Liberty Judicial Review is as Legitimate as Equality Review: The Case of Gay Rights Jurisprudence*, 14 U. PA. J. CONST. L. (forthcoming 2011).

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presumptively guarantees to each individual the right to be treated by the organized society as a respected, responsible, and participating member.[82]

There is a particular component of our constitutional understanding of the value of equality that is highly relevant to many LGBT rights disputes, namely the way in which the Constitution does not permit the government to rely on gender-based stereotypes in setting policy.[83] The basic normative point is that assumptions about what men and women are capable of achieving, or what they are interested in pursuing, are inappropriate considerations upon which to base laws and regulations.[84]

And yet, much of the defense of policies that treat individuals differently on the basis of sexual orientation—from same-sex marriage bans to adoption prohibitions—are grounded in the notion that the abilities and interests of men and women, at least when serving as parents, are sufficiently different that they justify providing legal rights and benefits to heterosexuals that are denied to LGBT people.[85] This type of gender-based reasoning is inconsistent with the equality norms that we share as a country and that are codified in the Constitution.[86]

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82. Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 4 (1977). *See also* Larry Alexander, *Bad Beginnings*, 145 U. PENN. L. REV. 57, 85 (1996) ("One does not abandon correct moral principles to honor the demands of equality. Rather, one must refer to correct moral principles to know what equality demands."); Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 249–50 (1983) ("The ideal [of equality] has [a] substantive content; it is a cluster of substantive values, with moral underpinnings solidly based in a particular society's religious and philosophical traditions.").

83. *See* United States v. Virginia, 518 U.S. 515, 541 (1996) ("State actors controlling gates to opportunity . . . may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.'") (internal citation omitted).

84. *See* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 218 (1994) ("Since it began subjecting sex-based classifications to heightened scrutiny, the Court has *never* upheld a sex-based classification resting in *normative* stereotypes about the proper role of the sexes.") (emphasis in original).

85. *See* Lofton v. Sec'y of the Dep't of Children & Human Servs., 358 F.3d 804, 819 (11th Cir. 2004) ("[T]he state has a legitimate interest in encouraging [an] optimal family structure by seeking to place adoptive children in homes that have both a mother and a father."); Goodridge v. Dep't of Health, 798 N.E.2d 941, 1000 n.29 (Mass. 2003) (Cordy, J., dissenting) (expressing concern that the raising of children by same-sex couples "raises the prospect of children lacking any parent of their own gender"); Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006) ("Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like."); Andersen v. King Cnty., 138 P.3d 963, 1005 (Wash. 2006) (stating that same-sex couples leave children either "necessarily motherless" or "necessarily fatherless" and that "[e]ach of these differences from the optimum mother/father setting for stable family life may offer distinctive disadvantages").

86. For an elaboration of this argument, see Carlos A. Ball, *The Blurring of the Lines: Children and Bans on Interracial Unions and Same-Sex Marriages*, 76 FORDHAM L. REV. 2733, 2765–69 (2008); Carlos A. Ball, *Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference*, 31 CAP. U. L. REV. 691, 724–40 (2003).

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In contrast, the enactment of marriage and adoption laws based on the moral judgment that presumptions about gender should not play a role in the setting of governmental policies would be consistent with our equality-based constitutional values. Permitting same-sex couples to marry and to adopt would apply to family law matters the same principle that the Constitution requires the State to keep in mind when setting policy in areas such as education and employment, that is, that the abilities, traits, and interests of individuals are not dependent on their gender.[87]

In short, it is particularly legitimate for the government to set policies on issues related to sexual orientation and intimate relationships based on moral understandings grounded in constitutional values of liberty and equality. As with moral considerations that call for an expansion of rights and benefits, and as with moral judgments supported by empirical evidence, moral assessments that can be traced to our country's shared constitutional values are a proper ground upon which to set governmental policy on matters related to sexuality.

VI. CONCLUSION

Opponents of LGBT rights have historically relied on morality to argue against the extension of legal protections for LGBT people. This makes it tempting for supporters of gay rights to argue that morality should never play a role in setting governmental policies that impact LGBT individuals. Rather than falling back on this categorical position, I have tried in this Essay to distinguish between appropriate and inappropriate uses of morality to justify state action in matters related to sexual orientation and intimate relationships. I have argued that, as the Supreme Court recognized in *Lawrence v. Texas*,[88] it is improper for the State to use morality as a justification to target LGBT people for differential treatment or to restrict their liberty interests in matters related to sexuality. It is also improper for the State to use moral considerations as bases for regulation when they lack empirical support or are inconsistent with the nation's constitutional values. In contrast, I have claimed that the State may account for moral considerations in matters related to sexual orientation and intimate relationships when it seeks to expand rights and benefits, and when those considerations both have empirical support and are consistent with the nation's constitutional values.

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87. *See, e.g., Virginia*, 518 U.S. at 541–542 (holding that the Constitution does not allow the State to base admissions policies for higher education on generalizations regarding the interests and capabilities of women); Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (plurality opinion) (noting that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group").

88. 539 U.S. 558 (2003).

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