

Marriage This Term: On Liberty and the "New Equal Protection"

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Citation to Publisher Eyer, Katie R. (2012). Marriage This Term: On Liberty and the "New Equal Protection". *UCLA Law Review Discourse* 60, 2-14. <https://www.uclalawreview.org/marriage-this-term-on-liberty-and-the-%e2%80%9cnew-equal-protection%e2%80%9d/>.

Citation to *this* Version: Eyer, Katie R. (2012). Marriage This Term: On Liberty and the "New Equal Protection". *UCLA Law Review Discourse* 60, 2-14. Retrieved from <http://dx.doi.org/doi:10.7282/T3S75KW7>.

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Marriage This Term: On Liberty and the “New Equal Protection”

Katie R. Eyer



ABSTRACT

The story of equal protection’s demise is a familiar one. It has been decades since any new group has been afforded heightened scrutiny. Even for established protected groups, retrenchment in applicable standards has devitalized meaningful equal protection coverage. As a result, scholars such as Kenji Yoshino have contended that we are at “the end of equality doctrine as we have known it”—that we are, in effect, in a post-equal protection era. In this new era, there are minimal opportunities for securing protections under the Equal Protection Clause, and the liberty protections of the Due Process Clause have superseded equality as the primary engine of constitutional change. Yoshino names this new era the “new equal protection” and suggests that subordinated groups focus their efforts on liberty—rather than equality—in seeking civil rights protections.

This Essay suggests that reports of equal protection’s demise—and of liberty’s ascendancy—may be premature. Using the LGB marriage rights movement as a focal point—and in particular the six cases pending certiorari review at the Supreme Court this term—this Essay explores the possibility that full equal protection inclusion for new groups remains plausible, and that, indeed, the LGB rights movement may be on the cusp of securing such inclusion. The Essay discusses the implications of this possibility for Yoshino’s framework and, in particular, the strategic risks that may attach to relying on liberty-based arguments for a group that is on the cusp of achieving formal equality.

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Many thanks to Serena Mayeri for helpful conversations about this topic, and to Hunter Hayes, Kristen Johnson, Deanna Maxfield, Stan Molever, and the rest of the *UCLA Law Review* staff for their editorial suggestions.

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INTRODUCTION

The Supreme Court's upcoming term has the potential to radically transform the family rights of same-sex couples. An unprecedented six cases relating to same-sex marriage rights are currently pending certiorari review.¹ If—as is widely expected—the Court takes up one or more of these cases, it will inject itself for the first time into the marriage rights debates that have captured national attention since the early 1990s. Although the Court could (and most likely will) resolve each of the pending cases without deciding whether state prohibitions on same-sex marriage are categorically unconstitutional, any pronouncement it makes will set the trajectory for future litigation and determine the near-term fate of the marriage rights movement.

The import of this term's pending marriage cases also, however, extends far beyond the lesbian, gay, and bisexual (LGB) rights movement or its marriage aims. In recent years, a number of scholars, including prominently Kenji Yoshino, have argued that we are at “the end of equality doctrine as we have known it”—that we are, in effect, in a post-equal protection era.² In this new era, the liberty pro-

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1. Petition for a Writ of Certiorari, Bipartisan Legal Advisory Grp. of the U.S. House of Representatives v. Gill, No. 12-13 (U.S. June 29, 2012), 2012 WL 2586935; Petition for a Writ of Certiorari, U.S. Dep't of Health and Human Servs. v. Massachusetts, No. 12-15 (U.S. July 3, 2012), 2012 WL 2586937; Conditional Cross-Petition for a Writ of Certiorari, Massachusetts v. U.S. Dep't of Health and Human Servs., No. 12-97 (U.S. July 20, 2012), 2012 WL 3027167; Petition for a Writ of Certiorari Before Judgment, Office of Pers. Mgmt. v. Golinski, No. 12-16 (U.S. July 3, 2012), 2012 WL 2586938; Petition for Writ of Certiorari, Brewer v. Diaz, No. 12-23 (U.S. July 2, 2012), 2012 WL 2645111; Petition for a Writ of Certiorari, Hollingsworth v. Perry, No. 12-144 (U.S. July 3, 2012), 2012 WL 3109489; Petition for Writ of Certiorari Before Judgment, Windsor v. United States, No. 12-63 (U.S. July 16, 2012), 2012 WL 2904038; Petition for a Writ of Certiorari Before Judgment, United States v. Windsor, No. 12-307 (U.S. Sept. 11, 2012), 2012 WL 3991414; Petition for Writ of Certiorari Before Judgment, Pedersen v. Office of Pers. Mgmt., No. 12-231 (U.S. Aug. 21, 2012), 2012 WL 3613467; Petition for a Writ of Certiorari Before Judgment, Office of Pers. Mgmt. v. Pedersen, No. 12-302 (U.S. Sept. 11, 2012), 2012 WL 3991479. Although ten certiorari petitions have been filed raising marriage issues before the Court, several of these petitions are simply different parties' requests for review of a single lower-court decision. In calculating the total count of cases pending before the Court, I have counted as a single “case” all petitions arising from a single decision below.
 2. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748 (2011); see also Jack M. Balkin & Reva B. Siegel, *Remembering How to Do Equality*, in THE CONSTITUTION IN 2020, at 93, 95 (Jack M. Balkin & Reva B. Siegel, eds., 2009) (concluding that “the Court's equality doctrines now betray the Fourteenth Amendment's great promises” but providing suggestions for how those doctrines might be revitalized in decades to come); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1130–46 (1997) (describing the ways that contemporary equal protection doctrine has been divested of mean-

tections of the Due Process Clause have superseded equality as the primary engine of constitutional change for subordinated groups.³ Normatively, Yoshino suggests that this “new equal protection” may be a good thing, insofar as it universalizes claims for rights and assuages the balkanizing effects of identity politics.⁴ Prescriptively, Yoshino suggests that subordinated groups should frame their claims in liberty- rather than equality-based terms in cases in which both alternatives are available to them.⁵

The marriage claims pending at the Court put these empirical and normative assertions to the test. Doctrinally, LGB marriage claims are quintessential examples of the type of dual-possibility claims that Yoshino envisions: There are doctrinally respectable arguments to be made for marriage equality under both the Equal Protection and Due Process clauses.⁶ And yet, as they have come up to the Court, only one of the six pending cases places any significant emphasis on due process (i.e., liberty-based) claims.⁷ Instead, the arguments pending before the Court overwhelmingly focus on strictly equal protection-based arguments: that classifications targeting lesbians and gay men should be afforded heightened scrutiny, or that, alternatively, the restrictions at issue are so lacking in justification as to fail rational basis review.⁸

What does this mean for Yoshino’s “new equal protection”? Until the Court takes up and decides one or more of the pending cases, it is impossible to know. A rejection of LGB litigants’ equal protection claims would validate Yoshino’s contention that there is little possibility of new groups securing robust equal protection rights and retrospectively suggest the correctness of Yoshino’s prescriptive recom-

ingful protections while creating a justificatory structure for continued race- and gender-based inequality).

3. Yoshino, *supra* note 2, at 748–50; *see also* KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 187–88 (2006).
4. Yoshino, *supra* note 2, at 792–95. Balkanization refers here to the divisive effects that identity politics can have on cohesive social identity. For an excellent exposition of the concept of balkanization in relation to equality concerns, as well as the doctrinal significance of certain Supreme Court Justices’ concerns regarding balkanization, see Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011).
5. Yoshino, *supra* note 2, at 792.
6. *Loving v. Virginia*, 388 U.S. 1 (1967) (recognizing a constitutionally based “freedom to marry” and striking down restrictions on interracial marriage on both equal protection and due process grounds).
7. *See supra* sources cited in note 1; *cf.* Brief in Response of Nancy Gill et al. at 33 n.14, Bipartisan Legal Advisory Grp. of the U.S. House of Representatives v. Gill, Nos. 12-13 & 12-15 (U.S. Aug. 2, 2012), 2012 WL 3158877 (raising the liberty issue but only in a footnote). *But cf.* Brief in Opposition at 31–33, *Hollingsworth v. Perry*, No. 12-144 (U.S. Aug. 24, 2012), 2012 WL 3683450 (substantially briefing the liberty issue).
8. *See* sources cited *supra* note 7.

mendations. Alternatively, a favorable equal protection ruling—and particularly one validating heightened scrutiny for sexual orientation–based distinctions—would profoundly upend the perspective Yoshino has articulated in his recent work.

As set out below, I think the second result is most likely. For while there are robust reasons to believe—as Yoshino claims—that the Court has turned at least partially away from equality claims, there is an alternative story to be told: that no identity-based social movement (IBSM)⁹ has achieved the type of societal transformation required for full equal protection inclusion in recent decades.¹⁰ In the case of the LGB rights movement, there are strong signs that the movement has finally “arrived,”¹¹ rendering it plausible for the first time that the Court may extend full equal protection coverage.¹² Moreover, there are reasons to believe that Yoshino’s suggested focus (on liberty arguments) might actually be counterproductive for groups that have reached this equal protection tipping point. In short, the marriage cases provide a unique proving ground for the “new equal protection” and its underlying prescriptive aims.

I. SOCIAL MOVEMENTS AND THE “OLD” EQUAL PROTECTION

Yoshino’s work on constitutional equality tells a discouraging story regarding contemporary prospects for traditional equal protection claims. The Court, Yoshino suggests, is weary of identity politics and anxious about the proliferation of groups seeking protections.¹³ As a result, the Court has turned away from equal protection, declining to recognize new groups for protection and placing limits on existing equal protection doctrine.¹⁴ Collectively, he contends that these developments mark the end of traditional equal protection doctrine: We are at “the end of equality doctrine as we have known it.”¹⁵ More optimistically, he makes the case that this does not mean the end of protections for subordinated groups. Rather,

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9. This helpful term, drawn from Bill Eskridge’s work, refers to social movements whose primary objective is securing equality and/or liberty protections for a specified identity-based group (such as sex, race, LGBT status, or disability). See William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 423–25 (2001) (explaining and describing the concept of an IBSM).
 10. Yoshino’s temporal focus—and thus my own—is on the period beginning in the mid to late 1970s (and continuing to date), during which new IBSMs have struggled to achieve Equal Protection inclusion comparable to that achieved by prior IBSMs. Yoshino, *supra* note 2, at 757.
 11. Katie R. Eyer, Essay, *Have We Arrived Yet? LGBT Rights and the Limits of Formal Equality*, 19 LAW & SEXUALITY 159, 160 (2010).
 12. See *infra* notes 30–34 and accompanying text.
 13. See Yoshino, *supra* note 2, at 755–76.
 14. *Id.*
 15. *Id.* at 748.

the Court's commitment to civil rights has reappeared in the form of an enhanced solicitude for liberty-based claims.¹⁶

Parts of this story are difficult to take issue with. There is no doubt that the country (and the Court with it) has soured on identity politics¹⁷, and that the Court, as an institution, has become more reluctant to embrace new equal protection rights.¹⁸ Moreover, there is little reason to doubt that pluralism anxiety has played a role in this turn (although here Yoshino's exclusive focus seems overstated).¹⁹ And Yoshino's fundamental empirical observation—that contemporary social movements have failed to secure full equal protection coverage—is indisputable.²⁰

But in the case of the LGB rights movement—the social movement that forms the primary inspiration for much of Yoshino's work—there is an equally plausible story to be told about the Court's doctrinal approach. As Bill Eskridge has documented, for many social movements, initial efforts to harness constitutional law by necessity take the form of a “politics of protection”—that is, claims to protect the “life, liberty, and property” of their members.²¹ And in this initial

16. *Id.* at 748, 776; *see also* YOSHINO, *supra* note 3, at 187–88.

17. *See, e.g.*, David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1070 (1999) (noting that the general public “has in many respects grown tired of civil rights era rhetoric”); Jonathan Goldberg-Hiller & Neal Milner, *Rights as Excess: Understanding the Politics of Special Rights*, 28 LAW & SOC. INQUIRY 1075, 1076 (2003) (noting the “decline of civil rights” as evidenced by political referenda restricting civil rights across an array of contexts). *See generally* NANCY MACLEAN, FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE 225–61 (2006) (describing the shift in the conservative movement's anti-civil rights rhetoric during the 1970s toward a rhetoric of fairness and reverse discrimination which resulted in much more widespread public embrace of the conservative movement's anti-civil rights objectives).

18. Most strikingly, as Yoshino observes, it has been more than thirty years since the Court last afforded heightened scrutiny to a new classification. *See* Yoshino, *supra* note 2, at 757. For an exposition of other ways in which the Court has expressed hostility toward contemporary expansions (whether legislative or judicial) of equality rights, *see, for example*, Jed Rubenfeld, Essay, *The Anti-antidiscrimination Agenda*, 111 YALE L.J. 1141, 1141–44 (2002).

19. Yoshino persuasively documents a role for pluralism anxiety in the Court's doctrinal retrenchment, drawing our attention to explicit articulations of pluralism anxiety in areas as diverse as affirmative action and religious liberty. *See* Yoshino, *supra* note 2, at 758–59, 764–67. But while pluralism anxiety—and its attendant concerns over the proliferation of groups seeking equality rights—no doubt has played some role in the Court's reluctance to embrace certain kinds of new equal protection rights, other limitations seem much more fruitfully explained in terms of a normative rejection of their conceptual underpinnings. *See, e.g.*, Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701 *passim* (2006) (persuasively arguing that the courts have never embraced a vision of discrimination as encompassing disparate impact and that, as a result, it is unsurprising that disparate impact has struggled doctrinally in both the constitutional and statutory context).

20. *See generally supra* note 18.

21. William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2065 (2002).

stage, the Due Process Clause and the First Amendment take center stage, as the courts—while still unwilling to sanction full equality—are discomforted by the repressive actions of the state.²² It is only in the later stages of social movement development—once the group has gained widespread acceptance as “benign” or at least “tolerable” variation—that robust equal protection coverage becomes plausible.²³

Seen in these terms, *Lawrence v. Texas*²⁴ (Yoshino’s Exhibit A for the Court’s turn toward liberty-based claims) takes on a different cast.²⁵ *Lawrence* is, of course, a core “politics of protection” case, contesting the state’s right to effectively criminalize a subordinated status.²⁶ And while *Lawrence*—as Yoshino argues and as the Court acknowledges—could also have been cast in equal protection terms, there are strong reasons to believe that social norms regarding sexual orientation had not evolved sufficiently to support full equal protection recognition by the Court at that time.²⁷ In Eskridgean terms, *Lawrence* marked the transition from a jurisprudence of repression to a “jurisprudence of tolerance.”²⁸ It did not mark the more radical transition to a jurisprudence of recognition.

Today, the social backdrop looks very different. While only 39 percent of Americans supported same-sex marriage rights at the time that *Lawrence* was decided,²⁹ today a majority of Americans do.³⁰ And an overwhelming majority of contemporary Americans—close to 90 percent—support workplace rights for LGB Americans.³¹ Perhaps most strikingly, in the last two years the executive branch of the federal government has come out definitively in support of LGB

22. *Id.* at 2065, 2192, 2371–74.

23. *Id.* at 2066; see also William N. Eskridge, Jr., *Lawrence’s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1064–69 (2004).

24. 539 U.S. 558 (2003).

25. See generally Yoshino, *supra* note 2, at 776–81 (discussing *Lawrence* as a seminal case in the “new equal protection”).

26. Although the law at issue in *Lawrence* technically criminalized same-sex sexual conduct rather than LGB status, courts had long conflated the two concepts in adjudicating gay rights claims. See Eskridge, *supra* note 23, at 1032–33.

27. See *id.* at 1065–69, 1081, 1086–93; see also *Lawrence*, 539 U.S. at 574–75; Yoshino, *supra* note 2, at 776–77.

28. Eskridge, *supra* note 23, at 1065–69.

29. *Gay and Lesbian Rights*, GALLUP, <http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx> (last visited Oct. 1, 2012).

30. Frank Newport, *For First Time, Majority of Americans Favor Legal Gay Marriage*, GALLUP (May 20, 2011), <http://www.gallup.com/poll/147662/First-Time-Majority-Americans-Favor-Legal-Gay-Marriage.aspx> (finding, in a poll from May 5–8, 2011, that 53 percent of respondents believed that “marriages between same-sex couples should . . . be recognized by the law as valid” while only 45 percent believed that they should not be valid).

31. *Gay and Lesbian Rights*, *supra* note 29.

equality, taking the position that heightened scrutiny is warranted for classifications that target lesbians and gay men, and (at least tentatively) supporting gay marriage equality.³² Collectively, these developments suggest a major transformation in the minds of a majority of Americans regarding the social meaning of LGB status.

There are increasing signs that—precisely as Eskridge’s model suggests—this social transformation is permitting new doctrinal windows of possibility. After many decades of declining to apply heightened scrutiny to government actions targeting lesbians and gay men, lower courts have in the most recent decade increasingly found heightened scrutiny to be warranted.³³ And, even in cases in which the courts have declined to apply heightened scrutiny, they have typically found anti-LGB discrimination to be irrational.³⁴ In short, there are increasing reasons to believe that the LGB movement has arrived—or is approaching that point—under the “old” equal protection.

The marriage equality movement is arguably emblematic of these changing tides. After decades of bringing cases only under state constitutional law, marriage equality litigants have increasingly brought—and prevailed on—federal equal protection claims.³⁵ Indeed, each of the six cases before the Court this term seeks review of an equal protection *victory* for lesbian and gay couples in the lower courts, a turn of events that a decade ago would have been unthinkable.³⁶ Thus, even in the domain of marriage—the area in which the public has been most resistant to claims of LGB moral equivalency—the last several years have marked a time of profound doctrinal transformation and of increased equal protection possibilities.

If the Court takes up any of the pending marriage cases, this optimistic forecast will be put to the test. A failure on equal protection grounds in the Court

32. Letter From Eric Holder, Jr., Attorney Gen. to the Honorable John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>; *see also* Jackie Calmes & Peter Baker, *Obama Endorses Same-Sex Marriage, Taking Stand on Charged Social Issue*, N.Y. TIMES, May 10, 2012, at A1.

33. *See, e.g.*, Pedersen v. Office of Pers. Mgmt., No. 3:0-CV-1750 (VLB), 2012 WL 3113883, at *35 (D. Conn. July 31, 2012); Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 985–90 (N.D. Cal. 2012); *see also* Varnum v. Brien, 763 N.W.2d 862, 885–96 (Iowa 2009); *cf.* Glenn v. Brumby, 663 F.3d 1312, 1320 (11th Cir. 2011) (affording heightened scrutiny to classifications based on transgender status).

34. *See, e.g.*, Massachusetts v. U.S. Dep’t of Health & Human Servs., 682 F.3d 1, 9–16 (1st Cir. 2012); Perry v. Brown, 671 F.3d 1052, 1086 (9th Cir. 2012); Price-Cornelison v. Brooks, 524 F.3d 1103, 1113–14 (10th Cir. 2008); Scarbrough v. Morgan Cnty. Bd. of Educ., 470 F.3d 250, 260–61 (6th Cir. 2006); Lathrop v. City of St. Cloud, No. 10-2361 (DWF/LIB), 2012 WL 185780, at *7 (D. Minn. Jan. 23, 2012).

35. *See generally* sources cited *supra* note 1.

36. *See supra* note 1 and accompanying text.

would pose an enormous setback for the LGB rights movement and would no doubt halt the growing momentum toward successful equality claims in the lower courts. And success—whether based on rational basis or heightened scrutiny—would have equally profound implications for future equality-based claims.³⁷

LGB rights litigants—who have joined their opponents in urging the Court to grant review—are betting on the latter outcome.³⁸ And if they are right, the “old” equal protection may have some life yet.

II. ON THE DANGERS OF LIBERTY

But of course Yoshino’s claim—that we have turned away from equal protection and toward liberty—is not only empirical. He also (albeit more weakly) makes the normative argument that a turn away from equal protection and toward due process arguments is desirable.³⁹ Thus, Yoshino frames the Due Process Clause not as a claim of last resort but instead as the claim of choice in cases in which both equality and liberty claims are possible.⁴⁰ Undergirding this normative preference is Yoshino’s belief that liberty claims—with their universal

37. Indeed, a rational basis holding—by rejecting as *irrational* arguments for LGB inequality—would arguably constitute the more radical endorsement of gay equality. The arguments offered by proponents of same-sex marriage restrictions tend to mirror closely the arguments that are made generally for denying LGB equality. *See, e.g., Pederson*, 2012 WL 3113883, at *35–45 (rejecting, *inter alia*, traditional notions of morality, the preservation of scarce governmental resources, and the protection of children as rational bases for DOMA). While in certain of the pending cases it might be possible for the Court to craft a rational basis holding that would avoid addressing those arguments’ rationality globally, in others, a rational basis holding would be virtually impossible to achieve without addressing such arguments’ rationality more broadly. *Compare id.* at *35–48 (rejecting the rationality of a wide array of arguments commonly proffered in favor of LGB inequality in the course of invalidating DOMA), *with Perry v. Brown*, 671 F.3d 1052, 1076–92 (9th Cir. 2012) (invalidating California’s Proposition 8 based on rational basis review but relying on factual and legal arguments that are arguably *sui generis*). Normatively, such a rejection of traditional arguments against LGB equality—by explicitly endorsing the viewpoint that the arguments in favor of differential treatment for lesbians and gay men are so devoid of support as to be irrational—would signal a profound endorsement of LGB equality. While an endorsement of heightened scrutiny for sexual orientation would also signal a profound endorsement of LGB equality (and would likely be more strategically advantageous than a rational basis holding in future litigation), it would not necessarily compel the Court to so thoroughly reject the foundational arguments for lesbian and gay inequality.

38. *See, e.g.*, Brief in Response of Nancy Gill et al., *supra* note 7, at 39; Brief of the Respondent in Support of Petition for Certiorari Before Judgment at 1, 7–8, *Office of Pers. Mgmt. v. Golinski*, No. 12-16 (U.S. July 25, 2012), 2012 WL 3027182.

39. Yoshino, *supra* note 2, at 792–97.

40. *Id.*

application—will do a better job of garnering wide support and of avoiding the polarizing effects of identity politics.⁴¹

Again, it is hard to take issue with certain elements of this account. There is no doubt that the zero-sum perception of identity politics has weakened political support for subordinated groups' legal and political claims.⁴² And, as Yoshino alludes to, political scientists have long shown that crosscutting and inclusive policies tend to remain the most robust over time.⁴³ Moreover, there are reasons to believe that *after* a group has secured formal equality protections, extra-discrimination remedies (claims not framed as classic discrimination claims) may become increasingly important as explicit discrimination declines.⁴⁴

But there are also reasons to believe that an excessive focus on due process and its liberty- or choice-based rubric may be dangerous for groups that are, like the LGB rights movement, on the cusp of achieving equality-based protections. Since *Lawrence*, the basic liberty-based argument that has been made for LGB equality has been as follows: (1) *Lawrence* recognized a constitutionally protected right for LGB individuals to choose a same-sex intimate partner; and (2) government action X, by discriminating against LGB individuals, unconstitutionally burdens, penalizes, or inhibits that choice.⁴⁵

This doctrinal structure—while arguably warranted under existing law—nevertheless creates obvious risks for the LGB rights movement's claims to

41. *Id.*

42. See, e.g., Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game That They Are Now Losing*, 6 PERSP. ON PSYCHOL. SCI. 215 (2011).

43. See Margaret Weir et al., *Epilogue: The Future of Social Policy in the United States: Political Constraints and Possibilities*, in THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES 421, 437 (Margaret Weir et al. eds., 1988) (“[T]he most successful public social policies in the United States have been those that . . . deliver benefits directly to a wide array of citizens [and thus] gain secure support from broad cross-class coalitions”); cf. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (arguing that blacks' interests in achieving racial equality will only be advanced when they align with whites' interests).

44. See generally Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-discrimination Law*, 96 MINN. L. REV. 1275, 1341–60 (2012) (discussing the potential benefits of “extra-discrimination remedies”—remedies that allow a putative victim of discrimination to challenge a potentially discriminatory action without asking the adjudicator to find “discrimination”—including “just cause” claims, Family and Medical Leave Act claims, retaliation claims, and others).

45. See, e.g., Appellants' Supplemental Brief at 6–8, *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004) (No. 01-16723-DD), available at http://www.aclu.org/files/FilesPDFs/lofton_supl.pdf; Brief of Amicus Curiae Lambda Legal Defense and Education Fund, Inc. in Support of Appellant and Supporting Reversal at 5–25, *Witt v. U.S. Dep't of the Air Force*, 527 F.3d 806 (9th Cir. 2008) (No. 06-35644); cf. Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' and Bipartisan Legal Advisory Group's Motions to Dismiss at 16–18, *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal. 2012) (framing the argument as protecting a right to choose certain “personal relationship[s]”).

equality. “Choice” has long been the language of the *opponents* of LGB equality. (Supporters have typically—albeit not universally—contended for an understanding of sexual orientation as functionally immutable.)⁴⁶ Thus, social science research demonstrates that perceptions of sexual orientation as functionally immutable (or conversely as chosen) strongly correlate with beliefs about LGB equality.⁴⁷ Those who believe sexual orientation is immutable are far more likely to support legal equality for LGB individuals than those who do not.⁴⁸

Moreover, there are reasons to believe that this phenomenon—rather than being simply correlational—in fact reflects a causal relationship between choice and (in)equality. Thus, for example, experiments have shown that a simple manipulation—such as prompting study participants to *think* about choice—significantly reduces support for equality norms across an array of contexts.⁴⁹ Similarly, experimental work has shown that enhancing perceptions of a group’s status as chosen (or controllable) significantly reduces subjects’ willingness to characterize adverse treatment targeted at the group as discrimination.⁵⁰ Thus, the

46. This is not uncontroversial. For perspectives on the negatives of immutability arguments from the perspective of LGB rights, see, for example, Nancy J. Knauer, *Science, Identity, and the Construction of the Gay Political Narrative*, 12 LAW & SEXUALITY 1 (2003), and YOSHINO, *supra* note 3, at 46–49. Normatively, I take no position on these debates. Strategically, as described above, I believe that emphasizing a choice model poses significant risks to the objective of achieving formal equality for LGB Americans.

47. See, e.g., Donald P. Haider-Markel & Mark R. Joslyn, *Beliefs About the Origins of Homosexuality and Support for Gay Rights: An Empirical Test of Attribution Theory*, 72 PUB. OPINION Q. 291, 299–305 (2008); Donald P. Haider-Markel & Mark R. Joslyn, *Attributions and the Regulation of Marriage: Considering the Parallels Between Race and Homosexuality*, 38 POL. SCI. & POL. 233, 236 (2005).

48. See sources cited *supra* note 47.

49. See Krishna Savani et al., *The Unanticipated Interpersonal and Societal Consequences of Choice*, 22 PSYCHOL. SCI. 795, 796 (2011) (documenting that simply thinking about choice in an entirely unrelated context reduced respondents’ support for affirmative action); Krishna Savani & Aneeta Rattan, *A Choice Mind-Set Increases the Acceptance and Maintenance of Wealth Inequality*, 23 PSYCHOL. SCI. 796, 797–802 (2012) (finding that priming participants with choice concepts decreased discomfort with wealth inequality, increased the perception of wealth distribution as the product of individual agency, and reduced support for wealth-redistributive measures); Nicole M. Stephens & Cynthia S. Levine, *Opting Out or Denying Discrimination? How the Framework of Free Choice in American Society Influences Perceptions of Gender Inequality*, 22 PSYCHOL. SCI. 1231, 1234 (2011) (reporting that study participants primed with choice constructs were more likely to endorse the belief “that American society provides equal opportunity and that gender discrimination no longer exists”).

50. See, e.g., Brenda Major & Pamela Sawyer, *Attributions to Discrimination: Antecedents and Consequences*, in HANDBOOK OF PREJUDICE, STEREOTYPING AND DISCRIMINATION 98 (Todd Nelson ed., 2009) (reporting that perception of a status as chosen decreases characterization of adverse treatment as discrimination); see also Bruce Blaine & Zoe Williams, *Belief About the Controllability of Weight and Attributions to Prejudice Among Heavyweight Women*, 51 SEX ROLES 79, 82–83 (2004) (noting the same in the specific context of overweight women).

social science research strongly suggests that choice and equality—far from being mutually reinforcing concepts—are for many Americans perceived as antithetical.

But there is an even more direct concern that the choice framing of LGB equality creates. Even if one discounts the social science, equal protection *doctrine* itself favors immutability.⁵¹ Thus, immutability is one of only a small group of factors that the courts take into consideration in determining which groups will be afforded heightened scrutiny.⁵² And while the courts' conception of immutability has never been strict—extending to reach theoretically mutable, but very difficult to change, core identity characteristics—the key inquiry has been framed precisely as whether there is an absence of meaningful choice.⁵³ Indeed, Yoshino himself has written compellingly about the failures of discrimination doctrine—both statutory and constitutional—to protect conduct that is perceived as (or that is actually) alterable.⁵⁴ Thus, framing sexual orientation discrimination as a penalty on choice—even a constitutionally protected choice—may create a profound conflict with attempts to secure group-based protections under traditional equal protection law.

CONCLUSION

Yoshino writes eloquently and passionately about the need—for all of us—to have a legal regime that nurtures our “authentic selves.”⁵⁵ He understands, on a deep level, the limitations of formal equality in achieving that goal.⁵⁶ And he is rightly concerned about the balkanizing effects of an identity politics model: its inability to forge, as Yoshino puts it, a “new broader sense of we.”⁵⁷ It is these very

51. See, e.g., Brief in Response of Nancy Gill et al., *supra* note 7, at 37–38 (discussing the Court's treatment of immutability as a consideration in equal protection doctrine).

52. *Id.*

53. See, e.g., Pederson v. Office of Pers. Mgmt., No. 3:10-CV-1750 (VLB), 2012 WL 3113883, at *23–29 (D. Conn. July 31, 2012) (describing the history of immutability in equal protection doctrine and determining that sexual orientation meets the immutability criteria, based primarily on the fact that the vast majority of gay and lesbian individuals appear to have little or no choice about their sexual orientation).

54. See YOSHINO, *supra* note 3; Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002).

55. See, e.g., YOSHINO, *supra* note 3, at 184–96.

56. See generally Yoshino, *supra* note 54.

57. Yoshino, *supra* note 2, at 792–93 (quoting Robert D. Putnam, E Pluribus Unum: *Diversity and Community in the Twenty-First Century*, 30 SCANDINAVIAN POL. STUD. 137, 139 (2007)) (internal quotation marks omitted). See generally *id.* at 751–54 (discussing diversity's potentially negative and divisive effects on social cohesion).

real concerns—concerns which I share—that have pushed him to look outside traditional equality doctrine and toward liberty claims.⁵⁸

But formal equality—whatever its limitations—remains any subordinated group’s most vital goal. With formal equality comes deterrence: for most, the law’s most valuable protection.⁵⁹ And the moral message that formal equality sends—that the group has crossed the threshold to full constitutional inclusion—shifts the terms of the debate in a way no liberty argument can. Thus, for the LGB rights movement, the answer to the “new equal protection,” is, I think, “perhaps someday” but “not now.”⁶⁰ And for the coming term? A return to the “old” equal protection, to seek its flawed—but irreplaceable—gains.

58. Cf. Eyer, *supra* note 11 (discussing a similar set of concerns to those articulated by Yoshino in his work).

59. For the many who lack the financial, social, or emotional resources to litigate, deterrence will be the only meaningful protection that the law affords. And without a formal rule barring discrimination, there will be little reason for governments, employers, and other entities to avoid discrimination a fortiori.

60. Following an identity group’s transition to formal equality (legislatively and constitutionally), there are often profound limitations in terms of the law’s ability to remediate ongoing instances of discrimination. See generally Eyer, *supra* note 11. Thus, while I continue to believe that formal equality remains a vital precursor to deeper equality work (and thus that groups should avoid strategic moves that might jeopardize the institutionalization of formal equality), once the era of first-generation discrimination claims has passed, a broader receptiveness to diverse tools—including liberty-based claims—may well be important to achieving meaningful equality. *Id.*; Eyer, *supra* note 44.