NeJaime and Siegel, JJ.,
concurring.

Today the Court holds that laws banning same-sex marriage are a form of caste or class legislation that violates the Equal Protection Clause. The Court recognizes the right of same-sex couples to marry under the suspect classification and fundamental rights strands of our equal protection case law. We join the majority opinion holding that equal protection guarantees the right of same-sex couples to marry.

We write separately to show an additional and important constitutional ground for the right of same-sex couples to marry in the Fourteenth Amendment's Due Process Clause. Due process historically has played a critical role in protecting intimate and family relations—both marital and nonmarital—of persons who do not conform to majority mores. By focusing on the relationship between equal protection and due process, we show why this case, as well as the Court's modern substantive due process decisions, properly fall within the *Carolene Products* tradition of judicial oversight over the democratic process.

I.

From biblical times to the present, people have formed households and intimate relationships in multiple ways. In the centuries since this country's founding, marriage has continuously evolved. *See* Hendrik Hartog, Man & Wife in America (2000) (documenting shifts in legal understandings of marriage over the course of this nation's history); *see also* Brief for Historians of Marriage et al. as *Amici Curiae* (same). Many have lived in common law marriage and in intergenerational and single-headed households. *See* Nancy F. Cott, Public Vows 30–37 (2000) (doc-

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umenting the historical prevalence of informal marriage in American life); Steven Ruggles, *The Transformation of American Family Structure,* 99 Am. Historical Rev. 103, 124 (1994) (explaining common incidence of intergenerational families); Patricia A. Gongla & Edward H. Thompson Jr., *Single-Parent Families, in* Handbook of Marriage and the Family 397, 397 (Marvin B. Sussman & Suzanne K. Steinmetz eds., 1987) (noting the rise of single-parent families beginning in the late twentieth century). There is not now, nor has there been, one "natural" family.

Over time, as citizens make decisions about their intimate and family lives, they may shape the community's understandings of how to live together and care for one another. The majority can preserve its norms by law and impose limits on the individual. But there are circumstances in which the Constitution imposes limits on the majority. *See Griswold v. Connecticut,* 381 U.S. 479, 485–86 (1965) (striking down law criminalizing the use of contraception and observing that to "allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives . . . is repulsive to the notions of privacy surrounding the marriage relationship"). As we explained in *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992) and reiterated in *Lawrence v. Texas,* 539 U.S. 558 (2003), "These matters, involving the most intimate and personal choices a person may make in a lifetime, [are] central to personal dignity and autonomy[.] . . . Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Casey,* 505 U.S. at 851; *Lawrence,* 539 U.S. at 574 (quoting *Casey*).

Considerations of fundamental fairness link our equal protection and due process decisions limiting the lawmaking powers of the majority.[1] A concern to protect an individual's dignity and her freedom to break from traditionally prescribed roles shapes contemporary cases enforcing the Constitution's liberty and equality guarantees. As we will discuss in more detail, this concern is more acute when the Court protects the liberties of those who have faced historical barriers to representation in the political process. *See infra* Part B.2; *cf. Lawrence,* 539 U.S. at 575 ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject

homosexual persons to discrimination both in the public and in the private spheres.").

A.

Our cases often speak about the liberty that the Due Process Clause guarantees in the language of privacy, but due process protects the individual's decision to form and maintain relationships as well as to avoid them. Cases that deny government control over reproduction leave to the individual choices about whether and when to become a parent. *Cf. Griswold v. Connecticut,* 381 U.S. 479, 496–97 (1965) (Goldberg, J., concurring) ("Surely the Government, absent a showing of a compelling subordinating state interest, could not decree that all husbands and wives must be sterilized after two children have been born to them."). And when individuals forge family bonds, government may be required to respect the relationship, even when it diverges from customarily sanctioned forms. *See Caban v. Mohammed,* 441 U.S. 380, 394 (1979) ("The facts of this case illustrate the harshness of classifying unwed fathers as being invariably less qualified and entitled than mothers to exercise a concerned judgment as to the fate of their children."). In *Moore v. City of East Cleveland,* 431 U.S. 494 (1977), when we struck down a zoning ordinance that prohibited households made up of certain extended family members, we made clear that "the Constitution prevents [the government] from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns." *Id.* at 506.

The Constitution's protection for liberty involves more than the right to be left alone. Our due process decisions prohibit laws that criminalize sexual conduct (*see, e.g., Lawrence,* 539 U.S. 558) and interfere with parental decision-making (*see, e.g., Troxel v. Granville,* 530 U.S. 57 (2000)); in certain cases, due process decisions go further and impose affirmative obligations on the state to *recognize* parent-child relationships—to respect bonds of caring developed outside marriage, even in relationships that the law historically deemed "illegitimate." *See, e.g., Stanley v. Illinois,* 405 U.S. 645 (1972) (striking down state law that denied parental recognition to an unmarried father who lived with his four children until

their mother's death and holding that the father was entitled to a hearing on his fitness as a parent before those children could become wards of the state). *See also Lehr v. Robertson,* 463 U.S. 248, 261 (1983) (recognizing that "[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' his interest in personal contact with his child acquires substantial protection under the Due Process Clause" but denying claim of unmarried father who failed to forge requisite relationship) (quoting *Caban,* 441 U.S. at 392). These decisions have served as the foundation for recent state court decisions recognizing parent-child relationships in nonmarital families formed by different-sex and same-sex couples.[2]

Like protections for liberty in parenthood, protections for liberty in marriage may include claims to state recognition. Though interracial relationships were once widely condemned, one by one states came to recognize such relationships as worthy of respect and recognition. *See, e.g., Perez v. Sharpe,* 198 P.2d 17 (Cal. 1948). In *Loving v. Virginia,* 388 U.S. 1 (1967), this Court struck down a ban on interracial marriage as violating not only equal protection but also due process, thereby recognizing that the law not only impermissibly discriminated on the basis of race but also deprived the couples subjected of a protected liberty. We observed, "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving,* 388 U.S. at 12.

Just as we once recognized claims of interracial couples seeking to enter the institution of marriage, so too does the Constitution respect the claim of same-sex couples to marry. Our decision in *Loving* reminds us of the special role courts can play in protecting the liberties of minorities. Same-sex intimacy historically has been stigmatized, and the very idea of same-sex marriage was unspeakable in the not-so-distant past. *Cf. United States v. Windsor,* 133 S. Ct. 2675, 2689 (2013) ("It seems fair to conclude that until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage."). State governments fired employees who engaged in a private same-sex wedding, with the sanction of the federal

courts. *See Shahar v. Bowers,* 114 F.3d 1097 (11th Cir. 1997). Yet as debate continued, many have come to appreciate and respect relationships of support and care in same-sex households—an understanding that courts helped enable. *See, e.g., Goodridge v. Dep't of Public Health,* 798 N.E.2d 941 (Mass. 2003).

Today's decision holding that same-sex couples have an equal right to marry rests on the understanding that persons in same-sex relationships form family bonds worthy of the respect, recognition, and support we accord persons in different-sex relationships. This understanding has implications for our understanding of the liberty that due process protects. Our due process cases provide the individual rights to legal recognition of certain important family relations such as parentage and marriage. These rights extend to lesbian, gay, and bisexual individuals. The Constitution recognizes that same-sex couples have liberty interests in family formation and recognition, as do different-sex couples. Following the example of *Loving,* we would protect the interest of same-sex couples in marrying under due process as well as equal protection. The liberty interests of lesbian, gay, and bisexual individuals in marriage—just like their liberty interests in sex, reproduction, and parenting—are central to full citizenship.

B.

This Court's due process line of cases has been the subject of fierce criticism, often reduced to a single epithet: *Lochner!* With equal frequency, critics object that constitutional protection of liberty is "unenumerated!" With regularity, critics object that courts protecting liberty have no proper warrant in second-guessing the judgment of democratic bodies regulating in the public interest. *See Bowers v. Hardwick,* 478 U.S. 186, 194–95 (1986) ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."). We address each of these objections in turn. Doing so leads to a better understanding of the reasons for judicial oversight in this area, rooted in the deep ties between the Court's modern due process and equal protection decisions.

1.

Constitutional protection for liberty *is* enumerated. The Constitution's protection for liberty is explicitly articulated in the Due Process Clauses of the Fifth and Fourteenth Amendments—no more or less enumerated than constitutional protection for equal protection.

It is equally clear that over the past two centuries, Americans have invoked due process to protect substantive as well as procedural rights. Both those who supported and those who opposed slavery argued that the Fifth Amendment's Due Process Clause limited the power of legislatures to infringe on individual liberty. This understanding of due process is at the center of the Court's notorious decision in *Dred Scott v. Sandford,* 60 U.S. 393, 450–51 (1857), protecting "the right of property of the master in a slave." But abolitionists *also* asserted claims on due process. *See, e.g.,* Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment,* 3 J. of Legal Analysis 165, 177–245 (2011) (extensively documenting antislavery arguments based on the Fifth Amendment's Due Process Clause). The Republican Party Platform of 1860 invoked the Fifth Amendment's Due Process Clause to "deny the authority of Congress, of a Territorial legislature, or of any individuals, to give legal existence to slavery in any Territory of the United States." Republican Platform of 1856, reprinted in J. M. H. Frederick, National Party Platforms of the United States 28 (1896). *See also* Ryan C. Williams, *The One and Only Substantive Due Process Clause,* 120 Yale L.J. 408, 474–75 (2010).

The conviction that due process prevented arbitrary legislative deprivations of course played a role in this Court's decisions restricting the regulation of commerce. But the justices who dissented in *Lochner also* recognized that there were liberties the Constitution protected against deprivation. *See Lochner v. New York,* 198 U.S. 45, 65 (1905) (Harlan, J., dissenting); *id.* at 76 (Holmes, J., dissenting). Justice Holmes joined the unanimous opinion in *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), imposing due process limitations on the power of the state to mandate public schooling for all children.[3]

It is not only *Pierce*'s protection for parental rights that survived *Lochner*'s overruling. The Fourteenth Amendment's Due Process Clause

has long been held to selectively incorporate the Bill of Rights, protecting individuals against their state governments. *See, e.g., Gitlow v. New York,* 268 U.S. 652, 666 (1925); *see also Whitney v. California,* 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (in a case considering whether state law violated the Fourteenth Amendment's Due Process Clause by infringing on free speech rights, observing that "it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure"). And the Fifth Amendment's Due Process Clause has long been held to incorporate the Fourteenth Amendment's Equal Protection Clause, protecting individuals against discrimination by the federal government. *See Bolling v. Sharpe,* 347 U.S. 497, 499 (1954); *see also Adarand Constructors Inc. v. Pena,* 515 U.S. 200, 215–16 (1995) (applying the Fifth Amendment's Due Process Clause to recent forms of race-based state action).

As we have seen, there are centuries of wide-ranging precedent holding that the Due Process Clause applies to substantive as well as procedural matters. And there is no evidence that the nation is interested in abandoning long-standing protections for the liberties that the Fifth and Fourteenth Amendments guarantee.

2.

Critics regularly attack due process rights as "unenumerated rights" and charge that substantive due process is incoherent; but these charges, however often repeated, are little more than slogans. The rights are enumerated, and the critics themselves are committed to many of the substantive understandings of liberty that the Fifth and Fourteenth Amendments protect. The critical question seems to be whether the constitutional questions raised here are of a kind that warrant judicial oversight of democratic deliberation.

The typical answer—*Lochner!*—condemns the Court's due process opinions in *Griswold* and *Roe* as improperly intruding on democratic decision-making. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems,* 47 Ind. L.J. 1, 9–11 (1971) (invoking *Lochner* in criticizing *Griswold*); Brief for the United States as Amicus Curiae in

Support of Appellants at 25, *Thornburgh v. Am. College of Obstetricians & Gynecologists,* 476 U.S. 747 (1986) (No. 84-495), 1985 WL 669620 (invoking *Lochner* and calling for the overruling of *Roe*).

But these objections are not shared by all Americans, many of whom continue to look to the Court to protect liberty. *See Hearings on the Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States before the S. Comm. on the Judiciary,* 100th Cong., vol. 372 (1987), at 6180, 6194 (Report of the Committee on the Judiciary, United States Senate) ("The hearings reaffirmed what many understand to be a core principle upon which this nation was founded: Our Constitution recognizes inalienable rights and is not simply a grant of rights by the majority.").

It is time to recognize explicitly what has implicitly guided the Court in the past half century. Modern substantive due process cases warrant judicial oversight for reasons classically associated with *Carolene Products* principles. The Court's due process decision in *United States v. Carolene Products,* which accorded laws regulating "ordinary commercial transactions" the presumption of constitutionality (304 U.S. 144, 152 (1938)), emphasized that courts would play a continuing and important role in cases involving individual liberties and the rights of minorities disadvantaged in the political process. *Id.* at 152 n.4.

Unlike *Lochner,* the Court's modern substantive due process decisions have many of the characteristics that make judicial oversight of the democratic process appropriate. When the *Lochner* Court struck down the wage-and-hour law protecting employees, it invalidated legislation that sought to *empower* vulnerable parties and *unsettle* dominant power relations in the workplace. By contrast, in our modern substantive due process cases, the Court has struck down laws that *harmed* vulnerable individuals and *entrenched* dominant mores.

Our modern due process cases are *Carolene Products* cases warranting judicial oversight. They are functionally equality cases. Claimants regularly brought equality claims because they were being punished for failing to conform to traditional roles.[4] Whether or not the Court took doctrinal account of the equal protection claims, the claimants' relationship to the political process made judicial oversight critical. *Cf. Lawrence,* 539 U.S. at 575.

From *Griswold* and *Roe* to *Casey* and *Lawrence,* the Court has intervened on behalf of those whose conduct the majority has punished and stigmatized. For decades, federal and state laws criminalized contraception—as well as the exchange of information about it—as obscene. *See* Comstock Act ch. 258, 17 Stat. 598, 599 (1873) (repealed 1909) (prohibiting any person from selling or distributing in U.S. mail articles used "for the prevention of conception, or for causing unlawful abortion" or sending information concerning these practices as "obscene"). A century of criminal law and pervasive public condemnation of abortion drove the widespread practice of abortion underground. *See* James Mohr, Abortion in America: The Origins and Evolution of National Policy (1979). Similarly, far-reaching criminal law and searing public condemnation of homosexuality meant that most gays and lesbians could not publicly identify themselves. *See* William N. Eskridge Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880–1946,* 82 Iowa L. Rev. 1007 (1997); William N. Eskridge Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946–1961,* 24 Fla. St. U. L. Rev. 703 (1997).

The criminal law amplified the stigmatization of prohibited sexual practices and prevented discussion that might lead to reform, even during the decades in which criminal prohibitions were only intermittently enforced. Special forms of rights claiming emerged to manage the stigma associated with discussing abortion and homosexuality. Women organized "speak-outs" about abortion, defying expectations of silence to discuss the compelling reasons why they had decided to end a pregnancy. *See* Reva B. Siegel, Roe*'s Roots: The Women's Rights Claims That Engendered* Roe, 90 B.U. L. Rev. 1875, 1880, 1892–93 (2010) (describing "public speak-out[s]" beginning in 1969). These efforts escalated in the 1980s. *See also* Brief for the Amici Curiae Women Who Have Had Abortions and Friends of Amici Curiae in Support of Appellees, *Webster v. Reprod. Health. Servs.*, 492 U.S. 490 (1989) (No. 88-605); Brief for the Amici Curiae Women Who Have Had Abortions and Friends of Amici Curiae in Support of Appellees, *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists,* 476 U.S. 747 (1986) (No. 84-495). Gays and lesbians organized large-scale "coming out" campaigns and, in the midst of the HIV/AIDS epidemic, demonstrated that "silence = death." *See A Call*

to Action, in Out and Outraged: Non-violent Civil Disobedience at the U.S. Supreme Court, Civil Disobedience Handbook, National March on Washington for Lesbian and Gay Rights 7, 8 (Handbook Committee, National Lesbian and Gay Civil Disobedience Action ed., 1987); Douglas Crimp & Adam Rolston, AIDS Demo Graphics 13–14 (1990).

But if many managed to speak out or to come out, many others remained in the closet, silenced by the stigma associated with abortion and homosexuality. In *Carolene Products,* we recognized a continuing role for the Court in protecting the rights of the individual against the majority. The reasons for "more searching judicial inquiry" are even greater in those cases where "prejudice . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." *Carolene Products,* 304 U.S. at 152 n.4.

C.

Our willingness to protect conduct that has historically been subject to criminal prohibition reflects an evolving understanding of the dignity, humanity, and citizenship status of those whose conduct was once thought reasonable to criminalize. That is why, in rejecting claims on *Lochner,* reaffirming *Roe,* and reversing *Bowers,* the Court emphasized the many ways in which due process guarantees of liberty also promote equality. *See Casey,* 505 U.S. 833 (affirming *Roe*); *Lawrence,* 539 U.S. 558 (reversing *Bowers*).

The very understandings that led this Court to accord equality to women (*see United States v. Virginia,* 518 U.S. 515 (1996)) and to gays and lesbians (*see Romer v. Evans,* 517 U.S. 620) shaped our judgments in *Casey* and *Lawrence* about the use of criminal law against women's reproductive choices and against gays and lesbians' sexual conduct.

When we rejected calls to overrule *Roe* in *Casey,* we reaffirmed constitutional protection for women's decisions concerning abortion in terms that repeatedly recognized the sex equality values at stake. We emphasized that equality is at the root of women's reliance interest in continuing protection for the abortion right, reasoning that "the ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive

lives." *Casey,* 505 U.S. at 856. In describing the liberty interest protected, *Casey* explained that the Constitution prohibits the state from criminalizing abortion because the state cannot insist "upon its own vision of the woman's role, however dominant that vision has been in the course of our history and in our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society." *Id.* at 852. *See also Gonzalez v. Carhart,* 127 S. Ct. 1610, 1641 (2007) (Ginsburg, J., dissenting) (explaining that a woman's right to terminate a pregnancy protects "a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature").

When this Court reversed its decision in *Bowers* and struck down a law criminalizing same-sex sex in *Lawrence v. Texas,* we emphasized the ways in which the vindication of liberty can promote the equal standing of a historically excluded group:

> Equality 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. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.

Lawrence, 539 U.S. at 575.

In reaffirming due process protections for liberty in intimate and family life, the Court drew on understandings associated with modern equal protection jurisprudence. It emphasized that government could not use state authority to enforce traditional gender roles, to denigrate gays and lesbians, or to prevent them from participating in public life. In short, we have come to protect certain conduct because of evolving judgments about the dignity of those who engage in it.

II.

In our view, laws banning marriage for same-sex couples violate equal protection as well as due process. In this respect, we join the majority. In what follows, we address certain questions about the equal protection violation that our colleagues raise. As we do so, it will become clear how our understanding of the constitutionally protected liberty interest in marriage also informs our reasoning about equality.

Equal protection doctrine in its current form tends to focus narrowly on questions of classification. Though little noticed, there is an element of judicial discretion in determining whether a law classifies, in cases of gender and race as well as of sexual orientation. We show that bans on same-sex marriage classify on the basis of sexual orientation yet conclude that classification is neither necessary nor sufficient for an equal protection violation.

In determining whether there is an equal protection violation, judges properly focus on a law's social meaning and impact—as the Court did in *Brown v. Board of Education,* 347 U.S. 483 (1954), and in *United States v. Windsor* and does in this case. For this reason, understandings of liberty are relevant to equal protection analysis, as they illuminate the importance of the interest at stake and the harm its deprivation may cause.

We conclude by showing why a ban on same-sex marriage discriminates on the basis of sex as well as sexual orientation.

A.

Why do laws prohibiting same-sex marriage violate equal protection? The opinions of the majority and of our concurring and dissenting colleagues disagree about the grounds on which laws banning same-sex marriage classify. The majority concludes that "it is more appropriate to consider these laws as discriminations based on sexual orientation than to consider them as discriminations based on sex." Majority Opinion. Our colleague in concurrence concludes that "[l]aws banning same-sex marriage classify on the basis of sex more clearly than those laws

discriminate on the basis of sexual orientation." Koppelman, J., concurring. Our colleagues in dissent contend that it is obvious that laws barring same-sex marriage do not classify on the basis of sexual orientation. Girgis, J., & George, J., dissenting; Harrison, J., dissenting.

In our view, laws banning marriage for same-sex couples do *classify* on the basis of sexual orientation as well as sex, but neither is required to find that such laws *discriminate* in violation of the Equal Protection Clause.

It is now widely assumed that laws banning same-sex marriage classify on the basis of sexual orientation. *See, e.g., Latta v. Otter,* 771 F.3d 456, 467–68 (9th Cir. 2014); *Baskin v. Bogan,* 766 F.3d 648, 657 (7th Cir. 2014). They do not classify in the same ways as laws that prevented gays and lesbians from serving openly in the military. But the classification is evident if one understands sexual orientation itself as a relational category. Because sexual orientation involves relationships with others, laws that discriminate between relationships on the basis of the sex of the participants classify based on sexual orientation.

Disagreement about whether laws classify is not unique to laws regulating sexual orientation. Sex equality law also features competing approaches to questions of classification. In *Geduldig v. Aiello,* this Court held that, "[w]hile it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification." *Geduldig v. Aiello,* 417 U.S. 484, 496 n.20 (1974). The Court was concerned that laws that regulate on the basis of pregnancy divide the world into pregnant persons and nonpregnant persons. But when the Court applied *Geduldig*'s reasoning to the nation's employment discrimination laws (*see General Electric Co. v. Gilbert,* 429 U.S. 125 (1976)), Congress passed the Pregnancy Discrimination Act of 1978 recognizing that pregnancy-based regulations classify on the basis of sex. *See* Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000(e)(k)). And years later, in upholding Congress's power to enforce equal protection guarantees by enacting the Family and Medical Leave Act in *Nevada Department of Human Resources v. Hibbs,* 538 U.S. 721, 737 (2003), the Court treated laws regulating pregnancy leave as discriminating on the basis of sex.

Questions of judgment are involved in deciding whether a law classifies on the basis of race as well. In cases on affirmative action, where race is one of multiple factors in a public institution's admissions decision, the Court treats the law as a racial classification meriting strict scrutiny. But in the context of suspect apprehension in the criminal law, where race is one of multiple factors in suspect description, courts have not scrutinized government action as a racial classification meriting close judicial review. *Compare Fisher v. Univ. of Tex. at Austin,* 133 S. Ct. 2411 (2013), *with Brown v. City of Oneonta,* 235 F.3d 769, 337–38 (2d Cir. 2000); *see also* Reva B. Siegel, *The Supreme Court 2012 Term, Foreword: Equality Divided,* 127 Harv. L. Rev. 1, 48–50 & n.235 (2013).

This Court has not adopted clear criteria for determining which laws employ group-based classifications for equal protection purposes. The majority opinion demonstrates that in determining whether state action classifies for purposes of equal protection, what is crucial is social understanding of the law.

In fact, a finding of classification is not required to support a finding of impermissible discrimination for equal protection purposes, as our recent decision in *Windsor* demonstrates. *Windsor,* like *Brown v. Board of Education*, does not focus on classification. Instead, it is concerned about laws that bear unequally on groups that face difficulties vindicating their interests through the political process. *See Carolene Products,* 304 U.S. at 152 n.4. Our seminal decision in *Brown* did not focus on classification as the core harm to remedy but instead was concerned with the subordination and stigma that those who were subject to the law experienced. *See Brown,* 347 U.S. at 494 ("To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

This understanding of discrimination guided our reasoning in *Windsor,* where we based our analysis on common understandings about the purpose and the effects of the law. The purpose and effect of the law, as we made clear, was to target the family relationships of lesbian, gay, and bisexual individuals for unfavorable treatment and to single out those family relationships as inferior and not worthy of public respect. *See*

Windsor, 133 S. Ct. at 2693 ("The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."). The injury at issue is not simply invidious or irrational differentiation but exclusion and denigration in respect of a form of family life significant to individuals and their connection to the community.

As in *Windsor,* the laws struck down by the Court today impermissibly discriminate based on sexual orientation. They exclude lesbian, gay, and bisexual individuals from access to important rights and responsibilities, and they deny those individuals full and equal membership in the community.

B.

Not only do the laws challenged in this case unlawfully discriminate on the basis of sexual orientation, but they also discriminate on the basis of sex. By restricting marriage to different-sex couples, the laws seek to preserve a gender-differentiated system of marriage that our precedents have clearly rejected. *See, e.g., Orr v. Orr,* 440 U.S. 268 (1979) (holding unconstitutional a law requiring husbands, but not wives, to pay alimony upon divorce). Just as the state may not discriminate on the basis of sex in determining spousal rights and obligations in marriage, the state may not discriminate on the basis of sex in determining who can marry.

Those who would use law to restrict marriage to different-sex couples appeal to the state's interest in promoting gender complementarity and dual-gender parenting. *See, e.g.,* Brief for Respondents in No. 14-571, p. 39 ("Men and women are different, and having both a man and a woman as part of the parenting team could reasonably be thought to be a good idea."). These arguments presuppose an interest in gender-based roles that contravenes decades of our equal protection holdings. We have repeatedly rejected laws that are based on or perpetuate the idea that women and men have different abilities, preferences, and desires. *See, e.g., United States v. Virginia,* 518 U.S. 515; *Miss. Univ. for Women v. Hogan,* 458 U.S. 718 (1982); *Frontiero v. Richardson,* 411 U.S.

677 (1973). The laws struck down by the Court today reflect and enforce outmoded gender-based roles in marriage and the family. Therefore, we conclude, the marriage laws challenged in this case are unconstitutional because they inflict impermissible sex, as well as sexual orientation, discrimination.

Notes

1. The principles against caste or class legislation on which the majority's equal protection holding rests also played a significant role in early understandings of due process. *See, e.g., Leeper v. Texas,* 139 U.S. 462, 468 (1891) ("[D]ue process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice."); *see also* Jack M. Balkin, Living Originalism 248 (2011) ("The principle of due process of law required that laws should be impartial and not for the benefit of any particular class.").
2. *See, e.g., D.M.T. v. T.M.H.*, 129 So.3d 320, 339 (Fla. 2013) (relying on *Stanley* and *Lehr* to hold that a state statute violated federal due process guarantees when it precluded legal recognition of the parent-child relationship formed by "an unwed biological mother who, with a committed [same-sex] partner and as part of a loving relationship, planned for the birth of a child and remains committed to supporting and raising her own daughter"); *L.F. v. Breit,* 736 S.E.2d 711, 722 (Va. 2013) (relying on *Lehr* to hold that a state statute violated due process guarantees when its application would deny recognition of "the constitutionally protected relationship [a sperm donor] had begun to establish with his infant child" with the initial consent of the mother).
3. Justice Holmes also joined the Court in *Charles Wolff Packing Company v. Court of Industrial Relations,* 262 U.S. 522, 534 (1923) (striking down Industrial Court Act in part, reasoning that the contractual rights of the employer and employee are "part of the liberty of the individual protected by the guaranty of the due process clause of the Fourteenth Amendment").
4. Although the Court invoked privacy and not equality as the ground for its decision in *Griswold v. Connecticut,* 381 U.S. 479 (1965), invalidating a Connecticut law criminalizing the use of contraceptives, women understood the decision whether to use contraception and thus to control the timing of childbearing as vital to sex equality. *See, e.g.,* Brief for the American Civil Liberties Union and the Connecticut Civil Liberties Union as Amici Curiae 15–16, *Griswold,* 381 U.S. 479 (No. 496) ("[I]n addition to its economic consequences, the ability to regulate child-bearing has been a significant factor in the emancipation of married women. In this respect, effective

means of contraception rank equally with the Nineteenth Amendment in enhancing the opportunities of women who wish to work in industry, business, the arts, and the professions.") (internal quotation marks and citations omitted). Although the Court invoked privacy and not equality as the ground for its decision in *Roe v. Wade,* 410 U.S. 113 (1973), many at the time understood women's right to decide whether to continue a pregnancy as a vital condition of equal citizenship. *See, e.g.,* Motion for Permission to File Brief and Brief Amicus Curiae on Behalf of New Women Lawyers, Women's Health and Abortion Project, Inc., National Abortion Action Coalition 25, *Roe,* 410 U.S. 113 (Nos. 70-18, 70-4) (arguing that "the Georgia and Texas statutes restricting the availability of abortions deny women the equal protection of the laws guaranteed to them by the Fourteenth Amendment"). While the Court in *Bowers v. Hardwick,* 478 U.S. 186 (1986), focused on privacy grounds in rejecting the constitutional challenge to Georgia's antisodomy law, there was widespread understanding at the time of the way criminalization of same-sex sex reflected and authorized discrimination against lesbian and gay people in both public and private spheres. *See, e.g.,* Brief Amicus Curiae for Lesbian Rights Project, Women's Legal Defense Fund, Equal Rights Advocates, Inc., Women's Law Project, and National Women's Law Center 24, *Bowers,* 478 U.S. 186 (No. 85-140) ("Criminalization translates readily into permission to discriminate, to malign, to stigmatize and to multiply the harms already suffered by gay and lesbian persons in this culture, society and legal system.").