What *Obergefell v. Hodges* Should Have Said (Jack Balkin ed. *forthcoming* 2018).
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Concurring Opinion

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 constitutional basis for the right of same-sex couples to marry in the Fourteenth Amendment's Due Process Clause. Understanding how the concerns of our liberty and equality decisions intersect strengthens constitutional protection for the families of same-sex couples whose right to marry we recognize today.

Where equal protection guards against demeaning exclusions, due process requires government to respect intimate relationships. These relationships include, but are not limited to the commitments adults make to one another in marriage. Due process protects same-sex couples' access to marriage but on terms that do not elevate marriage over all other forms of relationship. Even with access to marriage, same-sex couples may find that government continues to frustrate their efforts to form families with children. Due process protects not only the spousal but also the parental elements of the marriage relationship.

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) (documenting 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"). Due process "afford[s] constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

The Constitution limits the majority in regulating decisions about intimate and family life because of the importance of these decisions to the individual. As we explained in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and reiterated in *Lawrence*, "[t]hese 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 the individual's dignity and her freedom to break from traditionally prescribed roles shapes contemporary cases enforcing the Constitution's liberty and equality guarantees. This concern is more acute when the Court protects the liberties of those who have faced historic barriers to representation in the political process. *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 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

[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.").

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 not only 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), but also require the state to *recognize* parent-child relationships—to respect bonds of caring developed outside marriage, even in relationships 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 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*, 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 to it 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." 388 U.S. 1, 12 (1967).

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 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

[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).

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 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

We recognize that this Court's due process line of cases has been the subject of fierce criticism. Citing our decision in *Lochner v. New York*, 198 U.S. 45 (1905), critics have objected that constitutional protection of liberty is "unenumerated," and 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 an appreciation of the deep ties between the Court's modern due process and equal protection decisions.

(1)

Constitutional protection for liberty *is* enumerated, explicitly articulated in the Due Process Clauses of the Fifth and Fourteenth Amendments. Over the course of our history, 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 anti-slavery 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. Yet even the Justices who dissented in *Lochner* 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* that survived *Lochner*'s overruling. In the twentieth century, this Court has invoked the liberty protected by due process to prohibit the federal government from segregating citizens by race. *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). Many liberties Americans expect the Constitution to protect—freedom of speech and religion, for example—are protected by the Fourteenth Amendment's Due Process Clause against state, and not merely federal, infringement. *See 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 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").

(2)

Disputes about the liberty due process protects have led many to question the Court's role in restraining legislatures from regulating in the public interest.

Americans have invoked *Lochner* to attack this 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*). Concern about the competence of courts to interpret due process led to our decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), in which we interpreted due process to allow government to criminalize intimate sexual relations without judicially enforceable constitutional limitation. *See id*. at 190 (rejecting the due process claim against anti-sodomy laws, stressing "the limits of the Court's role in carrying out its constitutional mandate").

[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").

But these objections were not shared by all Americans, many of whom continued 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. 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.").

In repudiating *Lochner* in *United States v. Carolene Products*, a due process case that accorded laws regulating "ordinary commercial transactions" the presumption of constitutionality, 304 U.S. 144, 152 (1938), we 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.

Repudiating our decision in *Lochner* does not require us to condemn all of due process law. The Court was wrong in *Lochner*, not because it protected liberty against arbitrary deprivation, but because of the particular understanding of liberty the Court protected against regulation in the public interest. The labor-protective law the Court struck down in *Lochner* differs from laws that criminalize abortion or prohibit same-sex couples from marrying. *Lochner* invalidated a law that protected the weaker parties in the bargaining process. Our modern due process cases have invalidated laws that punish individuals who fail to conform to traditional roles—laws that Americans challenged as denying their dignity and equality.[4]

In the Court's modern due process cases, 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

[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* focused on privacy grounds in rejecting the constitutional challenge to Georgia's anti-sodomy law, there was widespread understanding at the time of how 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.").

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 (1987); 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." 304 U.S. at 152 n.4.

C

Our willingness to protect conduct historically 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." 505 U.S. 833, 856 (1992). 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 (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.

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 individuals, 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. On this understanding, we join the majority in full. 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 interests in marriage also inform our reasoning about equality.

In its current form, equal protection doctrine 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 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* 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 as discriminations based on sex." Majority Opinion, at 8. 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, at 4. Our colleagues in dissent contend that is it obvious that laws barring same-sex marriage do not classify on the basis of sexual orientation. Girgis, J., & George, J., dissenting, at 1; Harrison, J., dissenting, at 2.

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 for us 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 based on 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." 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 non-pregnant 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' 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*, 133 S.Ct. 2675 (2013), demonstrates. *Windsor*, like *Brown v. Board of Education*, 347 U.S. 483 (1954), 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. 144, 152 n.4 (1938). 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 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*, 133 S.Ct. 2675 (2013), 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 id*. 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 the individual and

her 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 (1996); *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.

Remarks

We concur in the majority's equal protection analysis but offer due process as a separate ground on which to recognize same-sex couples' right to marry. Our due process reasoning departs not only from Professor Balkin's majority opinion but also from Justice Kennedy's opinion for the Court in *Obergefell*. And it answers common objections to substantive due process advanced by Chief Justice Roberts and others dissenting in *Obergefell*.

We write on due process grounds because of our concern that existing equal protection doctrine approaches the question in *Obergefell* in ways that (1) privilege marriage as the framework for relationship recognition and (2) privilege spousal over parental aspects of the marriage relationship. Combining equal protection and due process protections locates the right of same-sex couples to marry along a continuum of protected relationships, including nonmarital and parental relationships.

In these brief remarks, we highlight a few key aspects of our reasoning.

Liberty-Equality and Marriage: The majority's equal protection analysis privileges marriage over other intimate relationships. Our due process analysis, in contrast, situates same-sex couples' right to marry within a broader range of liberty decisions that protect rights to intimate and family relationships. These decisions have been animated in part by recognition of the equal status of those forming relationships that break from traditional norms.

Liberty-Equality and Parenting: Due process protects not only spousal but also parent-child relationships, and such protection is critical to the equal status of families formed by gays and lesbians. Same-sex couples form parent-child relationships in many ways, including through assisted reproductive technologies (ART). Lesbian couples often become parents through sperm donor insemination of one of the women. Less commonly they use *in vitro* fertilization (IVF), so that one woman provides the egg and the other gives birth to the child. Gay male couples often use IVF in gestational surrogacy arrangements with a woman who gives birth to a child genetically related to one member of the couple.

State law continues to frustrate the efforts of many same-sex couples to engage in assisted reproduction and to obtain recognition of the parent-child relationships that result. Equal protection principles, at least as currently understood, may provide little relief when those denied parental recognition are not similarly situated as a matter of reproductive biology to those parents law recognizes. At the same time, due process principles, at least as currently understood, may be inattentive to differences of status and privilege of the participants in these arrangements. Accordingly, legislatures and courts may best address questions of assisted reproduction and parental recognition when guided by both liberty and equality commitments.

Liberty-Equality and the Courts: Our due process analysis responds to arguments commonly asserted against substantive due process. Some claim due process secures negative liberty only. But we show that due process not only prohibits government from interfering with certain intimate relationships; it may require government to recognize certain spousal and parental relationships, as the Court's decisions striking down bans on interracial marriage and requiring

government to recognize parent-child relationships outside of marriage illustrate. Some attack the liberties protected by the Court's due process cases as "unenumerated" rights with no more legitimacy than the Court's infamous decision in *Lochner*. But we show that Americans have long invoked due process to protect substantive as well as procedural rights.

In modern due process cases, from *Griswold* and *Roe* to *Casey* and *Lawrence*, the Court has acted in the tradition of *Carolene Products*, intervening on behalf of those whose conduct the majority has punished and stigmatized.[1] Concerns about majority control over minority practices support judicial review in due process as well as equal protection cases. When law proscribes conduct engaged in by members of groups historically subject to discrimination, stigma may inhibit debate about the justice of the law. These constraints—which some confronted with special forms of rights claiming, such as abortion "speak-outs" and gay and lesbian "coming out" efforts—count as forms of "prejudice that curtail the operation of political processes" within the meaning of *Carolene Products* and thus support a role for courts.

How the Turn to Liberty Might Reorient Equality Analysis: We offer our liberty analysis to strengthen, rather than supplant, equal protection analysis. In its current form, equal protection doctrine tends to focus narrowly on questions of classification, leading to questions about how bans on same-sex marriage classify that have been raised in this case. 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 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. When judges reason about equal protection in antisubordination terms—as the Court did in *Brown v. Board*, *United States v. Windsor*, and in this case—judges focus on a law's social meaning and impact. Here, understandings of liberty are relevant to equal protection reasoning, as they illuminate the importance of the interest at stake and the harm its deprivation may cause.

[1] *Cf.* Jesse H. Choper & Stephen F. Ross, *The Political Process, Equal Protection, and Substantive Due Process* (manuscript at *42-44) (draft on file with authors).