

THE JUDICIAL CLOSET AND THE LEGISLATIVE ALTAR

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Introduction

In the United States, the judiciary has traditionally protected minority groups deemed unjustly disadvantaged by the ordinary democratic process. One interpretation of this function is that the courts must distinguish between political “abjects” and political “subjects.” A political “abject” is an individual so deprived of her fundamental humanity that she cannot participate in civic discourse.¹ A political “subject” is an individual who may be unpopular or on the losing side of many debates, but who nonetheless can take part in the great democratic conversation.

An analogy may illuminate. A colleague once opined that legitimate and illegitimate uses existed for anti-depressant medications. Sometimes, he said, individuals could fall into depressions so deep they were no longer, in terms of their functionality, “persons.” Anti-depressants could move such individuals back into personhood; he endorsed such uses. In contrast, individuals could fall into depressions that made them incapable of feeling pleasure, but which still permitted them to function. In such

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¹ I borrow the term from Julia Kristeva. JULIA KRISTEVA, *POWERS OF HORROR: AN ESSAY ON ABJECTION* (1982). My use of the term is not identical to hers. The relevant similarity is that the “abject” is neither “subject” nor “object,” but the locus of disgust that must be repressed to bring either “subject” or “object” into being. As such, the abject cannot, by definition, be a participant in civilized discourse.

instances, he maintained, the use of anti-depressants was illegitimate, as such individuals should use other resources.

I am not endorsing my colleague's view of apt uses of anti-depressants. Rather, I invoke his distinction between the line that sets apart a "non-person" and a "person" and the line that sets apart a "depressed person" from a "non-depressed person." The first line distinguishes between "object" and "subject," while the second distinguishes between the politically disempowered subject and the politically empowered subject.

To carry the analogy, judicial protection of a group is the strong medicine of the anti-depressant. And here I would endorse the salience of the distinctions. Judicial review should be used to protect objects but not politically disadvantaged subjects. Political objects are absolved of the usual democratic obligation of persuasion because their peers have excluded them from the *demos*. Once an individual is raised from abjection, she is remitted to the ordinary rules of engagement. After all, in a democracy, minorities are expected to lose.

For many decades, the United States Supreme Court has struggled to articulate the standard under which it should protect powerless groups in terms resonant with the distinction above. However, it has consistently failed to articulate a coherent standard for when a group may be considered worthy of judicial solicitude. Relatedly, it has also failed to adhere to any standard it has articulated. This does not mean the Court should not intervene on behalf of minorities. It does, however, suggest the Court can only do so in an *ad hoc* manner. The determination will be based on a *gestalt* rather than on an analysis.

The necessarily free-form nature of the Court's anointment of a protected group has consequences for both the Court and the group. From the Court's perspective, it means the Court should not pretend to have a unifying theory of abjection. From the group's perspective, it means the group should make its own *gestalt* assessments about its position in society. Once it has risen from abjection, it should rely less on the Court and more on the ordinary political processes.

In Part I, I give a partial demonstration that the Court cannot find a coherent standard through which abjects can be identified.² I focus on the Court's canonical 1938 statement that the judiciary may be entitled to review state action burdening "discrete and insular" minorities more aggressively.³ I then describe law professor Bruce Ackerman's trenchant 1985 critique of this formulation, which contends that "anonymous and diffuse" minorities might have less political power than "discrete and insular" ones.⁴ Under that critique, the Court should perhaps invert the *Carolene* formulation. But even the briefest inter-group comparison between African-Americans and gays in the United States demonstrates that the "anonymous and diffuse" formulation is also a non-starter. There is no standard formulation of abjection.

In Part II, I make the same point through an inter-temporal comparison, observing that as gays have moved out of abjection in the United States, the significance of our "anonymity" and "diffuseness" has changed. Once clearly a net liability, these attributes are now arguably a net benefit. The changing social significance of anonymity and

² Space precludes a more complete demonstration. Nonetheless, I hope this exemplary showing will suggest the ease with which a more exhaustive one could be made.

³ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

⁴ Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

diffuseness both reflects and reinforces the increasing political power of gays. Gays are now freshly made subjects in the United States: The question arises of what this means for gay-rights advocacy.

In Part III, I argue that gays must switch the emphasis of our advocacy from courts to legislatures. Reliance on the judiciary may sometimes remain appropriate. In some parts of the United States, gays are still abject, and there, as in other countries, it may be that only courts may be able to protect gays. However, in some segments of the United States, gays are fully capable of speaking on our own behalf. In these situations, we forgo the ordinary democratic processes at our peril. To make this point, I contrast first-generation “closet” litigation about the right to sexual intimacy with second-generation “altar” litigation about the freedom to marry.

I. The Necessarily *Ad Hoc* Discernment of Abjection

The Equal Protection Clause of the Fourteenth Amendment is the primary residence of the equality principle in the United States Constitution.⁵ Under its equal protection jurisprudence, the United States Supreme Court has extended judicial solicitude to five classifications— race,⁶ national origin,⁷ alienage,⁸ sex,⁹ and non-marital

⁵ U.S. CONST. amend. XIV.

⁶ *Loving v. Virginia*, 388 U.S. 1 (1967).

⁷ *Oyama v. California*, 332 U.S. 633 (1948) (subjecting a land-transfer statute that discriminated on the basis of national origin to heightened scrutiny). The application of heightened scrutiny to national origin-based classifications dates back to *Korematsu v. United States*, 323 U.S. 214 (1944) (subjecting legislation excluding individuals of Japanese ancestry from the U.S. West Coast to the “most rigid” scrutiny).

⁸ *Graham v. Richardson*, 403 U.S. 365 (1971) (subjecting legislation that conditioned welfare benefits on citizenship to heightened scrutiny). The strict scrutiny granted to alienage is subject to two qualifications. First, this level of scrutiny does not apply to federal uses of the alienage classification. *See, e.g., Matthews v. Diaz*, 426 U.S. 67 (1976) (holding that, because of the Constitution’s grant of authority to Congress over issues of alienage, Congressional use of the alienage classification draws only rational-basis review). Second, even with respect to state uses of the alienage classification, strict scrutiny does not apply when core governmental functions are at issue. *See, e.g., Foley v. Connelie*, 435 U.S. 291 (1978).

parentage.¹⁰ The Court has articulated more than one test for what makes these classifications worthy of so-called “heightened scrutiny.” The fountainhead for all such review, however, is the standard articulated in Footnote 4 of *United States v. Carolene Products*.

A. “*Carolene Products*”

Like *Marbury v. Madison*, *United States v. Carolene Products* is a “masterwork of indirection.”¹¹ The Court had just been chastened for overzealous judicial activism, and badly needed to engage in a show of obeisance to the political branches of government. Justice Harlan Fiske Stone’s majority opinion seemingly does so, deferring to Congressional legislation that regulated adulterated milk in the text of the opinion. Yet the opinion buries a timebomb in Footnote 4, which would become the most famous footnote in Constitutional Law.

In that footnote, Justice Stone makes several reservations about instances that might call for more aggressive review, including the following:

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: *whether prejudice against discrete and insular minorities may be a special*

⁹ *Craig v. Boren*, 429 U.S. 190 (1976) (subjecting gender-based discrimination in statutes regulating the sale of alcohol to intermediate scrutiny).

¹⁰ *Trimble v. Gordon*, 430 U.S. 762 (1977) (subjecting to heightened scrutiny a statute that permitted children born in wedlock, but not children born out of wedlock, to inherit from their intestate fathers).

¹¹ ROBERT MCCLOSKEY, *THE AMERICAN SUPREME COURT* 40 (1960).

*condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.*¹²

The influence of the footnote cannot be overstated. John Hart Ely's celebrated theory of political process failure¹³ was but one of many scholarly efforts that flowed out of this note.¹⁴ More to the point, the footnote has influenced the Court. Constitutional scholar Gerald Gunther attributed the tiered structure of judicial review under the Equal Protection Clause to this note's "pervasive influence."¹⁵ The idea of the "discrete and insular" minority has become a mantra to describe groups that deserve the court's concern.¹⁶

B. "Beyond *Carolene Products*"

In 1985,¹⁷ Bruce Ackerman forcefully critiqued the *Carolene Products* formulation. In his essay, Ackerman maintains that the "discrete and insular" minority formulation is a poor proxy for a group deserving judicial solicitude. To the contrary, Ackerman contends, "anonymous and diffuse" minorities may be more worthy of the Court's concern.

¹² *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (emphasis added).

¹³ JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

¹⁴ *See, e.g.*, Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1978).

¹⁵ GERALD GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 542 (10th ed. 1980).

¹⁶ *See, e.g.*, Milner Ball, *Judicial Protection of Politically Powerless Minorities*, 59 IOWA L. REV. 1059 (1974).

¹⁷ Ackerman, *supra* note ____.

Ackerman understands a minority to be “discrete,” “when its members are marked out in ways that make it relatively easy for others to identify them.”¹⁸ Drawing on Albert Hirschman’s *Exit, Voice, and Loyalty*,¹⁹ Ackerman points out that when groups are burdened, they generally entertain two options: exercising voice against the discrimination or exiting the group. For members of “discrete” groups, however, exit is generally impossible: “If you are a black in America today, you know there is no way you can avoid the impact of the larger public’s views about the significance of blackness.”²⁰ In contrast, members of an anonymous group can exit the group by passing: “As a member of an anonymous group, each homosexual can seek to minimize the personal harm due to prejudice by keeping his or her sexual preference a tightly held secret.”²¹ The availability of exit lessens the necessity of voice, meaning gays will be less likely to fight discrimination.

Relatedly, Ackerman describes four advantages of “insularity.” First, insularity “breed[s] sentiments of group solidarity.”²² Second, insularity safeguards a group from free riders, given that “news travels fast along the grapevine in an insular community.”²³ Third, insularity lowers organizational costs, because the group can “avail itself of the communications channels already established by the

¹⁸ *Id.* at 728-31. Ackerman acknowledges that the *Carolene* Court may not have meant corporeal visibility when it referred to “discreteness.” *Id.* at 728-29. While this may be a stretch, it is not a long one. The Supreme Court has referred to the “high visibility of the sex characteristic,” *Frontiero v. Richardson*, 411 U.S. 677, 686 (1976) (plurality opinion), as a reason why women might be particularly vulnerable. It has also observed that the fact that non-martial parentage does not carry an “obvious badge,” *Mathews v. Lucas*, 427 U.S. 495, 506 (1976), may mitigate the vulnerability of that status.

¹⁹ ALBERT HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970).

²⁰ Ackerman, *supra* note ___, at 730.

²¹ *Id.*

²² *Id.* at 725.

²³ *Id.*

group's churches, businesses, or labor unions."²⁴ Finally, in an electoral system based on geographical jurisdictions, insularity gets individuals elected.²⁵

C. Beyond "*Beyond Carolene Products*"

While Ackerman's critique might make Jacques Derrida proud, we could ask if it is too easy a shot. If Ackerman's analysis remains correct, the Court should shield gays more than African Americans. But that would be controversial.

Writing in 1993, shortly after a large march on Washington D.C. by gay-rights activists, Henry Louis Gates, Jr., described how some African Americans angrily resist the comparison of gay rights to African-American civil rights.²⁶ As one Reverend Dennis G. Kuby wrote in the *New York Times* on the day after the march: "It is a misappropriation for members of the gay leadership to identify the April 25 march on Washington with the Rev. Martin Luther King Jr.'s 1963 mobilization."²⁷ Kuby's piece continues: "Gays are not subject to water hoses or police dogs, denied access to lunch counters or prevented from voting."²⁸ On the contrary, "most gays are perceived as well educated, socially mobile and financially comfortable."²⁹ Kuby, then, would adhere more closely to Stone's formulation than Ackerman's. After all, it is the "discreteness" of African Americans that permits whites to keep them from voting; their "insularity" that allows intergenerational poverty to endure among them.

²⁴ *Id.* at 726.

²⁵ *Id.*

²⁶ Henry Louis Gates, Jr., *Blacklash? African Americans Object to Gay Rights-Civil Rights Analogy*, THE NEW YORKER, May 17, 1993, at 42.

²⁷ *Id.* (quoting Reverend Dennis G. Kuby, *Letter to the Editor*, N.Y. TIMES, April 25, 1993, at E16).

²⁸ *Id.*

²⁹ *Id.*

Like Ackerman, Gates's article resists giving African-Americans special status as abjects in the United States. But unlike parts of Ackerman's article, Gates's intervention holds that the forms of abjection are so plural as to make any pat formulation of abjection impossible. On the one hand, Gates contends, "since gays, like women, seem to be evenly distributed among classes and races, the compounding effect of transgenerational poverty, which is the largest factor in the relative deprivation of black America, simply doesn't apply."³⁰ On the other hand, Gates argues that "in many ways contemporary homophobia is more virulent than contemporary racism," observing that "one in four gay men has been physically assaulted as a result of perceived sexual orientation; about fifty percent have been threatened with violence."³¹ Gates's ultimate position is that "trying to establish a pecking order of oppression is generally a waste of time."³²

Moving back to constitutional doctrine, Justice Lewis Powell once defended his colleague Justice Stone in similar terms. He observed that Stone probably did not intend his "discrete and insular" formulation to be a categorical one.

I am reasonably confident that Stone himself would have had little patience with the suggestion that footnote 4 provided some neat formula for constitutional adjudication. It was far more his character to deal with legal questions in all their complexity and their inconvenient detail. Dr. Mason has recorded Stone's impatience with an opinion written by Justice Holmes, then almost ninety years of age and nearing retirement. Holmes's analysis, Stone said, read brilliantly, the problem was that it had omitted the most difficult facts and the most troublesome arguments.³³

³⁰ *Id.* at 43.

³¹ *Id.* at 43-44.

³² *Id.* at 43.

³³ Lewis F. Powell Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1092 (1982).

In the case of ascertaining abjection, the “difficult facts” and “troublesome arguments” are legion. To name but one critical problem, a group must have a staggering amount of political power before it will even register on the Court’s radar as a politically powerless group.³⁴ It will therefore be impossible to find any “neat formulation” that will capture the groups worthy of judicial protection. The discernment of abjection is necessary, but it is also necessarily a *gestalt* assessment.

In recent years, the Court may be recognizing this point by eschewing standards altogether. The Court has ceased to protect groups with the protection (called heightened scrutiny) associated with *Carolene*.³⁵ Instead, it has protected individuals with disabilities³⁶ and gays³⁷ under the so-called “rational basis with bite” analysis. Read against precedent, this standard makes no sense—“rational basis” has been so deferential in its ordinary operation³⁸ that “rational basis with bite” seems almost a contradiction in terms.

Yet the virtue of rational basis with bite is its lack of pretention to be anything other than what it is—an *ad hoc* determination of which groups in the United States deserve the concern of the courts. In a sense, we can understand

³⁴ I thank Reva Siegel for this point.

³⁵ See GUNTHER, *supra* note ___, at 542 (noting the association between *Carolene* and the tiered levels of scrutiny under the equal protection jurisprudence).

³⁶ *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985).

³⁷ *Romer v. Evans*, 517 U.S. 620 (1996).

³⁸ See, e.g., *Williamson v. Lee Optical*, 348 U.S. 483, 487 (1955) (upholding an Oklahoma statute that made distinctions between ophthalmologists and optometrists on the one hand and opticians on the other by hypothesizing rationales that the state legislatures “might have” or “may have” had in enacting the statute); *Railway Express Agency v. New York*, 336 U.S. 106, 110 (1949) (upholding a New York City statute by imagining rationales for it and stating that “[i]t would take a degree of omniscience which we lack to say” such a rationale was not the reason local authorities enacted the regulation).

“rational basis with bite” to be the Court’s accession to the idea that there is no formula for abjection. It may be that gays in the United States may need to come to the same recognition.

II. From Abject To Subject

In a 1999 assessment, Dudley Clendinen and Adam Nagourney stated that “it seems likely that the movement for gay identity and gay rights has come further and faster, in terms of change, than any other that has gone before it in this nation.”³⁹ I agree that the progression of gay rights has been both fast and non-linear. For instance, the *Encyclopedia of Associations* shows that the number of organizations devoted to LGBT causes has exploded in recent decades. In 1970, there were no gay or lesbian associations listed; in 1980, there were fourteen; in 1990, there were 234; and in 2000, there were 327.⁴⁰

I believe a tipping point occurred in the United States somewhere in the late 1990s. This tipping point has set apart two generations of gay rights. In the first, the “anonymous and diffuse” character of gays was a net liability to our political mobilization. In the second generation, however, the “anonymous and diffuse” character of gays has become a net benefit.

A. The Gay Abject: Diffuseness and Anonymity as a Liability

³⁹ DUDLEY CLENDINEN & ADAM NAGOURNEY, OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA 13 (1999).

⁴⁰ 1 ENCYCLOPEDIA OF ASSOCIATIONS: NATIONAL ORGANIZATIONS OF THE UNITED STATES (Margaret Fisk ed., 6th ed. 1970); 1 ENCYCLOPEDIA OF ASSOCIATIONS: NATIONAL ORGANIZATIONS OF THE U.S. (Nancy Yakes & Denise Akey eds., 14th ed. 1980); 1 ENCYCLOPEDIA OF ASSOCIATIONS: NATIONAL ORGANIZATIONS OF THE U.S. (Deborah M. Burek ed., 25th ed. 1990); 1 ENCYCLOPEDIA OF ASSOCIATIONS: NATIONAL ORGANIZATIONS OF THE U.S. (Tara E. Sheets ed., 36th ed. 2000).

It is obviously impossible to provide a history of United States gay-rights movement here, so I proceed instead by underscoring what a true account of gays Ackerman's analysis seemed at the time of its 1985 publication and long thereafter. With respect to the "exit/voice" problem, my own work extended Ackerman's analysis to argue that the problem of gay political organization was a classic collective action problem in which individual decisions to "pass" as straight sapped the political strength of the community.⁴¹ It was a prisoner's dilemma in which the cell of each prisoner was the closet of each gay person. This predicament animated the activist wish that all gay people would turn blue one day,⁴² rendering us less "anonymous" and more "discrete."

Gays also suffered from the four debilities that Ackerman associated with insularity (although sometimes the source of the debility was more anonymity than diffuseness). First, the closet created a lack of solidarity, in an even more intense way than Ackerman suggested. Ackerman was concerned that diffuseness would lead to free-riding. For gays, the concern was less that closeted gays would remain quiescent, but that they would actively harm their own. As Eve Sedgwick has observed, "it is entirely within the experience of gay people to find that a homophobic figure in power has, if anything, a disproportionate likelihood of being gay and closeted."⁴³

Second, with respect to social sanctions placed on would-be free riders, gay norms about protecting one's own prevented individuals from outing each other. While this may seem like insularity, rather than diffuseness, I believe it was less the former than

⁴¹ Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 487 (1998).

⁴² LARRY GROSS, CONTESTED CLOSETS 49 (1993) (citing Nancy Walker, *Yanking Them Out*, GAY COMMUNITY NEWS, May 14, 1983, at 5).

⁴³ EVE KOSOFSKY SEDGWICK, THE EPISTEMOLOGY OF THE CLOSET 81 (1992).

the latter. The reason “outing” initiatives like Michelangelo Signorile’s efforts in the early 1990s fizzled was precisely because each individual knew how difficult the coming out process had been for herself, and because each individual knew how hostile the outside world could be to such comings out.⁴⁴ It was our sense of diffuseness, of being dots that had not yet been connected, that ironically kept us from outing our own in a move that must have looked to many external viewers like solidarity.

Third, with respect to political organization, gay groups did not have the reputable political building blocks available to African-Americans: the “churches, businesses, or labor unions”⁴⁵ that Ackerman describes. The paradigm institution where gays gathered was the gay bar, which was hardly a dignified place to meet, as evidenced by its susceptibility to police raids. Writer Judy Grahn’s account of a 1950s raid on the Rendezvous Bar demonstrates the abjection felt by gay individuals in this period:

Another night two policemen came up to the table where I sat with my friend from the service. They shined a flashlight into our eyes and commanded us to stand up or else be arrested. Then they demanded that we say our real names, first and last, several times, as loud as we could. Sweat poured down my ribs as I obeyed. After they left, my friend and I sat with our heads lowered, too ashamed of our weakness to look around or even to look each other in the face. We had no internal defense from the self-loathing our helplessness inspired and no analysis that would help us perceive oppression as oppression and not as a personal taint of character.⁴⁶

⁴⁴ See KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 68 (2006).

⁴⁵ Ackerman, *supra* note ___, at 726.

⁴⁶ Judy Grahn, *An Underground Bar*, in *ANOTHER MOTHER TONGUE: GAY WORDS, GAY WORLDS* 32 (1984).

Ultimately, it would be a gay bar—the Stonewall Inn in Greenwich Village—from which the gay rights movement would erupt in 1969. But gays could certainly not count on respectable public institutions in the way that African-Americans could.

Finally, with respect to electoral influence, gay dispersion over the country prevented us from getting elected. Only in the areas where gays had engaged in defensive separatism, like San Francisco, were openly gay officials elected. Even then, as the recent film *Milk* has documented, such officials were uniquely vulnerable.

B. The Gay Subject: Diffuseness and Insularity as a Strength

So in 1985 and well beyond, Ackerman’s analysis of “anonymous and diffuse” minorities appeared a dead-on rendering of the gay predicament. Yet the United States has since undergone an unimaginable transformation. The “love that dare not speak its name” has become “the love that will not shut up,” as mass media and national politics have become saturated with matters homosexual. And in the brave new world beyond the tipping point, the anonymity and diffuseness of gays seem a net benefit.

Consider, for instance, Reverend Kuby’s statement that gays have never suffered categorical exclusions from certain entitlements like the right to vote. This was because the capacity of gays to pass—our “anonymity”—precluded gatekeeping mechanisms from being used against us. As a result, once it became safer for gay people to come out, we were already situated in the corridors of influence and power in the United States. If it had been known he was gay, Governor James McGreevey would probably not have been elected the chief executive of New Jersey. But in 2004, he could come out openly

after having served “anonymously” in that office for some time.⁴⁷ Although gays have not had the “gay churches,” “gay businesses,” or “gay labor unions,” we have always been part of the equivalent institutions of the dominant group. When the revolution came, our people were in place.

Similarly, the diffuseness of gays meant that every family in America has a gay person in their extended family. Dick Cheney, George W. Bush’s influential and conservative Vice President, has a lesbian daughter. A major turning point in U.S. gay politics was when Cheney stated in the 2000 Vice Presidential debate that same-sex marriage should be left to the states.⁴⁸ By 2004, he connected this stance to his daughter.⁴⁹ In an earlier generation, Mary Cheney would not have come out of the closet, and Dick Cheney would not have had to defend her. But once she was out, he did. The capacity of gay people to get Cheney’s sympathy on this issue flowed from our diffuseness. It would be hard to imagine that Cheney would ever have to defend an insular group to which he did not belong, such a group based on ethnicity or indigency.

⁴⁷ Governor McGreevey’s account can be found in JAMES MCGREEVEY, *THE CONFESSION* (2006).

⁴⁸ As then-Secretary Cheney put it:

The fact of the matter is we live in a free society, and freedom means freedom for everybody. We shouldn’t be able to choose and say you get to live free and you don’t. That means people should be free to enter into any kind of relationship they want to enter into. It’s no one’s business in terms of regulating behavior in that regard. The next step then, of course, is the question you ask of whether or not there ought to be some kind of official sanction of the relationships or if they should be treated the same as a traditional marriage. That’s a tougher problem. That’s not a slam dunk. The fact of the matter is that matter is regulated by the states. I think different states are likely to come to different conclusions, and that’s appropriate. I don’t think there should necessarily be a federal policy in this area.

Commission on Presidential Debates, Transcript of 2000 Vice Presidential Debate, available at <http://www.debates.org/pages/trans2000d.html>.

⁴⁹ Robin Toner, *Cheney Stakes out Stance on Gay Marriage*, N.Y. TIMES, Aug. 25, 2004 (“In unusually personal remarks on the issue [of same-sex marriage], delivered at a campaign forum in Davenport, Iowa, the vice president referred to his daughter, Mary, who is a lesbian, saying that he and his wife ‘have a gay daughter, so it’s an issue our family is very familiar with.’”).

At a minimum, then, it would be hard to say that gays will always be abject because we are an “anonymous and diffuse” minority. We are becoming increasingly less abject and our anonymity and diffuseness seem to be, if anything contributing to our advancement. Again, the point is not to find a different formula for abjection, but to understand that such a formula does not exist.

III. From the Judiciary to the Legislature

I believe gays in the United States have yet fully to internalize this insight that we are newly empowered in the post-millennial United States. In the phase of gay abjection, gay activism appropriately focused on the courts. But in our post-millennial phase, it is time for gays to make more active use of the ordinary political process.

Again, I can only sketch the argument here. I distinguish between two overlapping generations of gay-rights litigation—what I call “closet” litigation (focusing on the right to privacy, specifically the right to engage in sexual intimacy in the home) and what I call “altar” litigation (focusing on the freedom to marry). Because I believe that closet litigation crystallized when gays were abjects in the United States, I endorse the use of the courts to secure the right to privacy. But because I believe altar litigation is occurring when gays are moving out of abjection, I argue that more emphasis be placed on legislation in this context.

A. First-Generation “Closet” Litigation

The first generation of gay-rights litigation was centrally about the right to engage in sexual intimacy in the privacy of our own bedrooms without interference by the state.

The infamous U.S. Supreme Court case of this generation was *Bowers v. Hardwick*,⁵⁰ the 1986 case in which the Court held that the Constitution did not protect this particular right to privacy. At the time, twenty-four states and the District of Columbia had sodomy statutes on their books.⁵¹ But perhaps nothing underscores the abjection of gays (and the aptness of Ackerman's contemporaneous formulation of it) than the facts of that brought Michael Hardwick to the Court.

Hardwick was a bartender at a gay bar in Atlanta who became the object of a police vendetta.⁵² One Officer Torick hounded him after he saw Hardwick emerge from the gay bar, and finally arrested Hardwick in his bedroom for performing oral sex on another man. Hardwick was deemed—and understood himself to be—a model plaintiff in part because he had personally overcome the problems of being “anonymous” and “diffuse.” As he put it in an interview with Peter Irons, he was openly gay and had a supportive family.⁵³ As a gay bartender, he had found a safe space in the gay demimonde that would provide him with job security. Moreover, he had a powerful straight ally to

⁵⁰ 478 U.S. 178 (1986).

⁵¹ *Id.* at 193 n.6.

⁵² For an account of this vendetta, see Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431 (1992).

⁵³ As Hardwick put it:

One thing that influenced me was that they'd been trying for five years to get a perfect case. Most of the arrests that are made for sodomy in Atlanta are of people who are having sex outside in public; or an adult and a minor; or two consenting adults, but their families don't know they are gay; or they went through seven years of college to teach and they'd be jeopardizing their teaching position. There's a lot of different reasons why people would not want to go on with it. I was fortunate enough to have a supportive family who knew I was gay. I'm a bartender, so I can always work in a gay bar. And I was arrested in my own house. So I was a perfect test case.

Peter Irons, *An Interview with Michael Hardwick*, in *SEXUAL ORIENTATION AND THE LAW* 152, 155 (William Rubenstein, Carlos Ball, Jane Schacter eds., 2008).

argue his case—Harvard law professor and seasoned Supreme Court advocate Laurence Tribe.

Although the Supreme Court dealt gays an enormous blow in ruling against Hardwick, I find nothing to fault in the strategy gay-rights advocates pursued in the case. I do not believe gays should have turned to the legislative process at the time. I do not believe that we should have had an openly gay lawyer argue the case. At that time, in 1986, gays could still fairly be described as abject. This was amply demonstrated in the opinion itself, which stated that Hardwick’s claim was “at best, facetious.”⁵⁴

In 2003, *Bowers* was overruled by the case of *Lawrence v. Texas*.⁵⁵ The tenor of the case could not have been more different. An openly gay lawyer, Paul Smith, argued the case before the Supreme Court. On the day of oral argument, the gallery was filled with a who’s who of openly gay figures from around the country.⁵⁶ During the argument, Chief Justice Rehnquist asked Smith if a decision in his favor would permit gays to be kindergarten teachers. Smith replied that he would need to know why the state would object to gay kindergarten teachers. Justice Antonin Scalia clarified that the state would have an interest in preventing children from being steered into homosexuality. As he made that argument, a ripple of disbelieving laughter swept over the courtroom, causing the bailiffs to rush into the aisles to contain it. That was the moment I knew we would win the case—we were no longer the targets of laughter, but the source of it.

⁵⁴ 478 U.S. 186, 194 (1986).

⁵⁵ 539 U.S. 558 (2003).

⁵⁶ This account draws on YOSHINO, COVERING, *supra* note ___, at 105-06.

Even though I believe gays had passed the “tipping point” by 2003, I do not challenge the decision to litigate *Lawrence*. *Lawrence* had to be litigated because *Bowers* remained good law. No legislative action, short of a federal constitutional amendment, can alter a Supreme Court interpretation of the federal Constitution. Such extreme legislative action was beyond our means. This meant that only an appeal to the Court could wipe *Bowers* off the books.

The victory in *Lawrence* both reflected and reinforced the sense of gay empowerment. The right-to-privacy cases seem to be about preserving the integrity of the closet. However, if that right is secured, it also permits gay people to come out in several ways. In practical terms, the right provides us a place to retreat. In conceptual terms, the right to privacy is ultimately a right of decisional autonomy that will protect the right to come out as well as the right to remain within the closet. Perhaps most of all, in symbolic terms, Justice Kennedy’s opinion spoke in argot of dignity in deciding the case in favor of gays. Gays had finally done what seemed impossible—we had made a dignitary politics out of a culture of shame.

The import of this gay-rights advance was not lost on Justice Scalia. In a furious dissent, he opined that the *Lawrence* decision meant that case finding a federal constitutional right to same-sex marriage could not be far behind.⁵⁷ I believe this is true, at least in the long run. But in the short run, it leaves open the question of how gay-rights advocates should pursue that freedom.

⁵⁷ *Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting).

B. Second-Generation “Altar” Litigation

In arguing that the freedom to marry should rely not just on the courts, but also on legislatures, I wish to focus on a currently pending case that will be resolved by the time our conference convenes this summer—the legal challenge to California’s Proposition 8. Some words of background are in order. Marriage litigation in the United States is proceeding state by state, following a deliberate plan by gay-rights advocates to keep the case away from the United States Supreme Court until a patchwork of states have granted gays the freedom to marry. As of this writing, only two states out of fifty permit same-sex marriage in the United States. The Massachusetts Supreme Court granted the right in 2003,⁵⁸ and the Connecticut Supreme Court granted the right in 2008.⁵⁹

Though crucial, these victories were eclipsed by the Supreme Court of California, which struck down the Golden State’s ban on same-sex marriage on May 15, 2008.⁶⁰ The implications of that decision were staggering: California is among the world’s top ten economies. But the backlash here was swift. California requires only a bare majority of the electorate to amend the state constitution. On November 4, 2008, 52 percent of voters amended the California constitution to reinstate the ban on same-sex marriage. This measure, Proposition 8, states: “Only marriage between a man and a woman is valid or recognized in California.”⁶¹ By the time Prop 8 passed, over 18,000 couples had gotten married in California.

⁵⁸ *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (2003).

⁵⁹ *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (2008).

⁶⁰ *In re Marriage Cases*, 183 P.3d 384 (2008).

⁶¹ This measure is now Article I, Section 7.5 of the California Constitution.

Advocates of same-sex marriage took the issue back to the courts. They made two main arguments.⁶² First, they maintained that the change effectuated by Prop 8 was so momentous that it could not be effectuated by a mere amendment. Under the California Constitution, changes that go to the heart of the Constitution are deemed “revisions” rather than “amendments.”⁶³ Second, they stated that even assuming Prop 8 was validly enacted, the 18,000 couples who had gotten married between November and May should not have those marriage annulled. Oral arguments were heard on March 5, 2009. The Court is required to issue an opinion on this issue in 90 days.

It is dangerous to prognosticate on such issues, especially given that the correctness of my prediction will be verifiable by the time of the conference. Given the posture of the argument, the doctrinal background, and comments of the Justices in the oral argument, however, I believe that advocates of same-sex marriage will lose the first issue and win the second one. Prop 8 will stand, but not be applied retroactively.

Unlike the closet cases, the altar cases leave me wishing urgently for more use of the political process by gay-rights activists. The closet/altar distinction does not map perfectly onto the object/subject distinction. Some marriage cases were litigated by brave plaintiffs,⁶⁴ and some sodomy statutes were repealed by state legislatures⁶⁵ during the

⁶² Brief in *Strauss v. Horton*, available at http://www.ncrlrights.org/site/PageServer?pagename=issue_caseDocket_prop8legalchallenge_About#petitionsandbriefs

⁶³ The analysis of whether an enactment amounts to a constitutional revision or merely an amendment is both quantitative and qualitative in nature. “For example, an enactment which is so extensive in its provisions as to change directly the ‘substantial entirety’ of the Constitution by the deletion or alteration of numerous existing provisions may well constitute a revision thereof. However, even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision also.” *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal.3d 208, 244 (1978).

⁶⁴ See, e.g., *Singer v. Hara*, 522 P.2d 1187 (1974).

period of abjection. But as a broad matter, the closet cases will generally predate the altar cases, because one must come out to get married. Put more metaphorically, the movement from closet to altar roughly maps onto an emergence from the closet onto a broader public stage,⁶⁶ and that, in turn, roughly tracks the shift from abject to subject. This explains why the military, which allows individuals to recant on proven instances of sodomy by saying the instance was an aberration, does not permit a similar exception for individuals who marry or attempt to marry someone of the same sex.⁶⁷ The act of marriage is too public to be recanted.

I have two reservations about the way in which Prop 8 unfolded. The first is that gay-rights advocates were too quiescent in the period between the California Supreme Court decision on May 15, 2008, and Election Day on November 4, 2008. It is true that enormous amounts of money were poured into the “No on 8” grass-roots campaign. But I find it telling that it was only after Prop 8 passed that I began to receive what I consider to be truly effective pieces of advocacy, such as the Courage Campaign video that I will show during the conference. I find it hard to imagine that Prop 8 could have passed if such advocacy had occurred before November 4. And as powerful as I find the video to be, I also must ruefully note that this video, too, is directed at the State Supreme Court, rather than at those seeking to undue Prop 8 with another amendment.

My second reservation about the battle to defeat Prop 8 concerns the claim that Prop 8 should have been filed as a revision rather than as an amendment. To be clear, I

⁶⁵ In 1961, for instance, Illinois became the first state to repeal its sodomy statute by adopting the Model Penal Code.

⁶⁶ I thank Adam Hickey for making the distinction between the closet and the stage.

⁶⁷ See generally 10 U.S.C. section 654.

have never encountered a Constitution that is as flawed as California's appears to be. A constitution that is the third-longest in the world, and which has been amended over 500 times would make John Marshall, at least, turn over in his grave. But I find—though others in the group will doubtless disagree—that the constitutional argument that Prop 8 should have been a revision rather than an amendment to be a loser, given the seriousness of the other things (term limits, tax hikes, and reinstatement of the death penalty) that have been done as amendments. More to the point, the challenge is a public relations disaster, making it seem as if gays, who received the right to marry from the judiciary, then lost it at the ballot box because the measure was seen as judicial overreaching,⁶⁸ are now going back to the judiciary.

The answer here is the kind of material disseminated by the Courage Campaign, but the audience must be the polity at large, or state legislatures, rather than the courts. The answer here is not a lawsuit challenging Prop 8, but another amendment, or revision, to the California Constitution superseding it in 2012.

V. Conclusion

This paper contends that while a group is genuinely unable to make its case to its fellow citizens, the courts are the correct vehicle for redress. It calls this state of being the state of being “abject.” However, once a group moves from being “abjects” to being

⁶⁸ The proponents of Prop 8 emphasized that voters should support it to check stop the judiciary (and the executive) from arrogant subversion of the rights of the people. In the days immediately preceding election day, for instance, proponents released a commercial featuring San Francisco mayor Gavin Newsom, stating: “The door’s wide open now. It’s going to happen, whether you like it or not.”

civil “subjects,” the groups should change the focus of its advocacy (not categorically, but in emphasis) away from the courts and to the political branches of government. Hence the title—when gays were seeking to emerge from the closet, the proper governmental body to hear their appeal was the judiciary. But now that gays are emerging in ever greater numbers from the closet, the appeal must increasingly, in emphasis be toward the legislature. When we emerge blinking from our closets into the light of the *demos*, we assume its obligations as well as its benefits.