

THE FUTURE OF FAMILY

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INTRODUCTION

The State organizes society into families. By legitimating certain family forms, the State distributes legal protections and obligations, enables economic and proprietary structures of power, and expresses a vision of morality.¹ Throughout an individual's life, family may provide social and emotional support, purpose, and motivation.² Outside the home, family improves and reinforces community by stabilizing government and lessening individual susceptibility to public indoctrination.³ Family serves these purposes across generations while preserving culture, language, and religion.⁴

More than other Western nations, the United States predicates family formation—and therefore societal organization—on marriage.⁵

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¹ See Naomi Cahn, *The New Kinship*, 100 *GEO. L.J.* 367, 381 (2012).

The law is . . . integrally involved in constructing families by defining who can marry whom (from same-sex couples to sixteen-year-olds), assigning parenthood and identifying the father and mother, determining who can make decisions on behalf of a child, establishing when parental rights can and should be terminated, as well as by providing legal protections for the privacy of relationships defined as families, protections for family members based on their status, and a structure to allocate decision making with respect to the parent, child, and state.

Id. (footnotes omitted).

² See Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 *YALE L. J.* 1236, 1238 (2010) (explaining that families are institutions in which individuals form meaningful relationships and find support).

³ See *id.* at 1238 (arguing that families make totalitarianism less likely because “[i]ndividuals with strong family ties are more likely to be capable of critical reflection about organized political institutions; individuals who are family members before they are citizens are less susceptible to organized public indoctrination.”).

⁴ However, the functions of family are historically dependent. See, e.g., CHRISTOPHER LASCH, *HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED* xix (1977) (claiming that family provides “a haven in private life, in personal relations” and “the last refuge of love and decency” but that “[d]omestic life . . . seems increasingly incapable of providing these comforts”).

⁵ See generally ANDREW J. CHERLIN, *THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY* 115 (2009).

Americans are fixated on marriage; adult Americans marry, divorce, and remarry at younger ages and exponentially higher rates than any other Western nation.⁶ Divorce, a possible symptom of American individualism,⁷ is just as bona fide an American tradition, and rates of divorce in the United States have always been higher than rates in other Western nations.⁸ Habitual marriage and divorce create a society of competition both within families—as each family must continuously reconcile individual interests or fracture and reform—and between the country's values.

While it is much easier and more common to enter and end marriage in the United States,⁹ for a significant minority of the nation, entering marriage and potentially leaving it remain off limits. Now, as throughout American history, the State's recognition of family is an instrument of oppression, implicating and frequently subjugating both individual liberty and group-level equality interests. In the past, the State restricted women's pursuit of liberty and blocked gender equality because, according to the Supreme Court of the United States, “[t]he constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.”¹⁰ The State has leveraged family to manu-

Marriage [in the United States] would not, however, disappear in the early twenty-first century. Indeed, it would remain the most highly valued way of living one's family life, even though people spent less time actually being married than in the past. It would enjoy a resurgence of support as both the defenders of “traditional” marriage and the advocates of same-sex marriage battled over how to define it. Marriage would be greatly changed in nature but still identifiable as a central part of American family life. And it would continue to have a more prominent role in the United States than in many other Western countries.

Id.

⁶ *See id.* at 15-19 (detailing empirical comparisons of the United States and other Western nations in the mid-1990s and concluding that “[w]hat all these statistics mean is that family life in the United States involves more transitions than anywhere else,” including more marriage, divorce, new partners, and cohabitation with children). This process recommences much sooner after divorce in the United States than it does in other countries. *Id.* at 15.

⁷ *See generally id.* at 4 (arguing that Americans are so prone to marriage and divorce due to the competing values of marriage and individualism).

⁸ *Id.* (“In fact, the United States has one of the highest levels of both marriage and divorce of any Western nation, and these rates appear to have been higher than in most other Western countries since the early days of the nation.”).

⁹ *Id.* at 3 (observing that “in no other Western country is the waiting period for a no-fault divorce so short”).

¹⁰ *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (upholding a state's denial of a married woman's license to practice law because “[t]he harmony, not to say identity, of interest and views

facture rigid gender boundaries, facilitate rape, and subsume women's legal identities.¹¹ At other times, courts have employed family as a mechanism for social control by limiting property interests to discourage extramarital sex and denying legal pathways to inheritance based on the non-marital status of children.¹² In the context of slavery, family signaled the dominance of whites over blacks as slaveholders commandeered slaves' liberty to form their most intimate relationships.¹³ Anti-miscegenation laws restricted the creation of family to foster racial purity and maintain unequal conditions between races, and, out of distaste for white women giving birth to non-white babies, legislators constrained adults' autonomy to enter sexual relationships by prohibiting interracial fornication.¹⁴ Today, international human rights entities have recognized the founding of a family as a fundamental right, and the barriers faced by most American sexual minorities¹⁵ in

which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband").

¹¹ See NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (QUEER IDEAS)* 12-13 (2009) (describing feminists' critiques of marriage and explaining the law of coverture, the marital rape exception, and marriage's regulation of gender).

¹² See, e.g., *Labine v. Vincent*, 401 U.S. 532, 538 (1971) (finding that the interests of non-marital children are "illicit and beyond the recognition of the law").

¹³ See DOROTHY E. ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 28 (1997) (discussing slaveholders' financial stake in male slaves' marital choices and their intervention in slaves' procreation within a State that did not recognize marriages between slaves).

¹⁴ See *id.* at 268 (asserting that an overarching purpose of American law was to keep "the white bloodline free from Black contamination" and that laws prohibiting interracial fornication and miscegenation ensured that white women would give birth to the offspring of their white husbands).

¹⁵ This Article uses the words 'queer' and 'sexual minority' to denote individuals who do not identify with widespread legal and social notions of heterosexuality. Heterosexuality is used in its contemporary meaning of an intimate relationship between a biologically and socially identified man and woman—although the term was first used to identify "mental hermaphrodites" and the so-called mental disorder of being attracted to both men and women. See James G. Kiernan, *Responsibility in Sexual Perversion*, 3 CHICAGO MED. REC. 185, 198 n.30 (1892). This Article avoids the language of gay and straight because sexuality and sexual identity exist on continua. See ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* 639 (1948) ("The living world is a continuum in each and every one of its aspects. The sooner we learn this concerning human sexual behavior the sooner we shall reach a sound understanding of the reality of sex."). For a more in-depth analysis of sub-categorizations of non-heterosexuals, see generally Elizabeth M. Glazer, *Sexual Reorientation*, 100 GEO. L.J. 997 (2012) (describing bisexual erasure in modern legal developments, examining the importance of definition and language for enhancing rights, and introducing terminology such as "general orientation" and "specific orientation" to describe bisexuals).

pursuit of State recognition of their familial bonds are powerful manifestations of group-wide subordination.¹⁶

Modern advancements in queer¹⁷ rights, however, suggest a new kind of family that gives individuals the power to organize themselves within society.¹⁸ Opponents of enhancing queer rights contend that an expanded recognition of family would reconceive the “traditional” family,¹⁹ which this Article defines as the marriage of one man and one woman followed by cohabitation with their mutually and exclusively conceived offspring. As former U.S. Senator Rick Santorum put it, the traditional family is “a family constituted by a mother and a father who have committed themselves to each other in lifelong marriage, together with their children.”²⁰ Santorum further explained that “[t]his is ‘traditional,’ but the reason it is a traditional relationship is because it is fundamentally *natural*.”²¹ This Article disagrees with

¹⁶ See Stuart Bridge, *Marriage and divorce: the regulation of intimacy*, in FAMILY LAW: ISSUES, DEBATES, POLICY 9 (Jonathan Herring ed., 2001) (acknowledging that the European Convention on Human Rights guaranteed the right to found a family and that English courts should expect challenges to the country’s domestic legislation on marriage).

¹⁷ See *supra* note 15.

¹⁸ This reorganization would not wholly eradicate all distressing elements of the State’s regulation of family, but it is a necessary step to improve society’s response to the complexities of contemporary familial bonds. See Froma Walsh, *The New Normal: Diversity and Complexity in 21st-Century Families*, in NORMAL FAMILY PROCESSES: GROWING DIVERSITY AND COMPLEXITY 3, 3 (4th ed., 2011) (“As families have become increasingly varied over a lengthening life course, our conceptions of normality must be examined and our very definition of ‘family’ must be expanded to encompass a broad spectrum and fluid reshaping of relational and households patterns.”).

¹⁹ See, e.g., *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 930 (N.D. Cal.), *stay denied*, 702 F. Supp. 2d 1132 (N.D. Cal. 2010), *stay granted*, 2010 WL 3212786 (9th Cir. Aug. 16, 2010), *motion to vacate stay denied*, 639 F.3d 1153 (9th Cir. 2011) (summarizing the argument proponents made in favor of a ballot measure defining marriage as between one man and one woman and reiterating that it “protects our children from being taught in public schools that ‘same-sex marriage’ is the same as traditional marriage”); George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 603 (1999) (claiming that “validation of same-sex marriages would eviscerate society’s endorsement of traditional marriage”); see also CNN Wire Staff, *Rights group: Ugandan lawmaker revives anti-gay bill*, CNN.COM (Feb. 8, 2012), http://articles.cnn.com/2012-02-08/africa/world_africa_uganda-anti-gay-bill_1_anti-homosexuality-bill-david-bahati-anti-gay-bill?_s=PM:AFRICA (quoting a Ugandan lawmaker pushing legislation to make same-sex sexual activity punishable by death because “[t]his is a piece of legislation that is needed in this country to protect the traditional family”).

²⁰ RICK SANTORUM, *IT TAKES A FAMILY: CONSERVATISM AND THE COMMON GOOD* 28 (2005). But see WILLIAM N. ESKRIDGE JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 1015 (2d ed., 2005) (noting that marriage and blood relationships remain important to families but have given way to choice).

²¹ SANTORUM, *supra* note 20, at 28. Thus, according to Santorum, the liberal vision of society as one of “‘individuals’—not men and women and children” is false because “[t]he prom-

Santorum's assessment of the cause of traditional family roles and instead contemplates gender as a social institution while invoking the man-woman binary as a matter of rhetoric.²² But the opposition has something right; enhanced queer rights will erase the traditional family by rewriting its legal and social dimensions, resulting in laws and policies that track more closely with familial bonds outside a heteronormative, man-woman binary.²³ Sexual minorities are not the only threat to the traditional family—"radical feminists succeeded in undermining the traditional family and convincing women that professional accomplishments are the key to happiness"²⁴—but this Article proposes that sexual minorities are the greatest current threat to the traditional family.

Although past legal scholars typically wrote about sexual minority rights in terms of what these rights could mean for the non-heterosexual subjects of reform,²⁵ recent scholarship has turned to the broader conceptual implications of new civil rights and—because of the Equal Protection Clause's waning vitality—recast the Due Process Clause of the Fourteenth Amendment as the necessary mechanism for minority groups to attain equality.²⁶ This Article explores the ramifi-

ise of the natural law is that we will be happiest, and freest, when we follow the law built into our nature as men and women," and "nature is nature, and the freedom to choose against the natural law is not really freedom at all." *Id.* at 28-29.

²² See generally Patricia Yancey Martin, *Gender As Social Institution*, 82 SOC. FORCES 1249 (2004) (discussing gender as a social institution).

²³ See Karen E. Lovaas & Mercilee M. Jenkins, *Introduction: Setting the Stage*, in *SEXUALITIES & COMMUNICATION IN EVERYDAY LIFE: A READER* 8 (Karen Lovaas & Mercilee M. Jenkins eds., 2006) (defining heteronormativity as the beliefs and practices that privilege heterosexuality and "a useful term for expressing the ways in which heterosexuality has become more than one of a number of modes of expressing one's sexuality; it exposes heterosexuality as a social institution that sanctions heterosexuality as the only 'normal,' 'natural' expression of sexuality" and the only sexual orientation "to need no explanation").

²⁴ SANTORUM, *supra* note 20, at 95-96.

²⁵ See generally Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551 (1993) (tracing the history of queer rights in the United States and observing that prior to *Bowers v. Hardwick*, the rights of sexual minorities were omitted from constitutional law classes while subsequent coverage discussed queer rights in terms of sexual minorities' equal protection and due process claims). Outside the rights context, the broader academic community has long examined the impact of queers on society. See, e.g., KATH WESTON, *FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP* 1-2 (1991) (exploring the significance of extending the concept of family for sexual minorities and, as a cultural anthropologist engaged in field research, examining whether sexual minorities will affect "kinship relations and social relations in the United States as a whole").

²⁶ See generally Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748 (2011) (arguing that "[t]he Court's commitment to civil rights has not been pressed out, but

cations of enhanced queer rights outside the lives of sexual minorities, examining how civil rights advancements stand to dismantle exclusionary notions affecting all families. In light of the rapid growth of familial creation in the context of donated embryos, ova, and sperm, this Article demonstrates how queer liberation²⁷ could spark advancements for donor-conceived family communities, which are familial groups that have connected on the basis of donated reproductive materials.²⁸ In so doing, this Article argues that social progress has too often fallen to the limitations of a normatively appealing conceptualization of family—one that has unfairly benefited the heterosexual majority and which courts must now redefine for the sake of universally shared liberty interests.

This Article contemplates the potential of American society to inject individualism into family beyond the potential to divorce. Part I highlights dignity as the historical and contemporary link between the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment. Part II explains that liberty-as-dignity is a promising mechanism for the attainment of queer rights because, by promoting the rights of all individuals rather than focusing on the differential treatment of minority groups, advocates for queer rights can employ liberty-as-dignity to leverage shared values while avoiding various criticisms of equality-based arguments. Part III harnesses donor-conceived family communities to delineate the contemporary boundaries of the law of family formation and assert that current legal

rather over to collateral doctrines” and claiming that the Supreme Court of the United States has moved from group-based equality claims to individual liberty claims).

²⁷ This article employs queer liberation to reference liberty for sexual minorities beyond assimilation into heterosexual society. See generally Michael Warner, *Introduction*, in *FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* vii, vii (Michael Warner ed., 1993) (explaining that the left’s traditions of social and political theory have failed to ask what queers want and instead “posited and naturalized a heterosexual society”).

²⁸ See Cahn, *supra* note 1, at 368-69 (claiming that approximately one million families have been created over the last half-century through egg and sperm donation and that legal doctrine has failed to keep pace with the needs of donor-conceived family communities). This Article employs the term donation even though so-called donors are typically compensated. For an analysis of the terms donor and vendor, see Bonnie Steinbock, *Payment for Egg Donation and Surrogacy*, 71 *MOUNT SINAI J. MED.* 255, 255-56 (2004) (describing the discrepancy between the view that the term donor is oxymoronic when referring to compensated gamete providers and the argument that donor is the correct label because these individuals are simply being compensated for time, risk, and inconvenience). Like Steinbock, this Article uses the term donation due to its common usage. *Id.* at 256 (remarking that she employs the term donation “not because I want to prejudge the question of whether payment is for the product or compensation, still less to prejudge the question of moral acceptability, but simply because it is accepted usage”).

standards fail to meet the needs of this swiftly growing subpopulation. Donor-conceived family communities signify the potential trajectory of family redefinition if queer rights continue to advance, showcasing why queer liberation's potential to redefine family is vital beyond the lives of sexual minorities. Finally, Part IV argues that liberty-as-dignity connects rights across society and, by moving all communities away from the traditional family, a queer redefinition of family would unleash personal agency in the legal construction of citizens' familial lives.

I. LIBERTY-AS-DIGNITY

The Fourteenth Amendment promises citizenship to “[a]ll persons born or naturalized in the United States.”²⁹ The United States adopted the amendment to ensure minorities' participation in society, and the Supreme Court has applied the guarantees of equal treatment and equal liberty to remedy group-level subordination for more than a century.³⁰ Despite the bold language of the Declaration of Independence that “all men are created equal,”³¹ and a pronouncement in the 1950s that the Due Process Clause of the Fifth Amendment contains an equality principle,³² the judiciary did not recognize a general guar-

²⁹ U.S. CONST. amend. XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id. See also *Slaughter-House Cases*, 83 U.S. 36, 112-13 (1872) (Bradley, J., dissenting) (“A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen If a man be denied full equality before the law, he is denied one of the essential rights of citizenship as a citizen of the United States.”).

³⁰ See Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 U.C.L.A. L. REV. 99, 101-02 (2007) (claiming that a review of the last century's due process jurisprudence reveals that anti-subordination is the driving force of the Fourteenth Amendment and that “the Fourteenth Amendment's core principle [is] equal citizenship, which gives every citizen a right to be treated as a respected and responsible participant in community public life.”).

³¹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

³² See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (recognizing that while the Fifth Amendment does not contain an equal protection clause, due process and equal protection, “both stemming from our American ideal of fairness, are not mutually exclusive” and “discrimination may be so unjustifiable as to be violative of due process”).

antee of equality in the Constitution of the United States until after passage of the Fourteenth Amendment.³³ Liberty may have slightly deeper roots in the American tradition than equality both in terms of the Constitution and national history,³⁴ but the liberty-based claims of the Due Process Clause and the group-based equality claims of the Equal Protection Clause have been interlocked by the Court in what Professor Laurence H. Tribe has termed “a legal double helix.”³⁵ The Court has often relied on the Equal Protection Clause to overturn statutes when liberty interests were also at stake.³⁶ Similarly, the Court has leveraged the Due Process Clause to further equality, and this comingling of due process and equal protection has allowed the Court to assess a concern that both links and transcends liberty and equality: the protection of dignity.³⁷

Dignity is a tricky concept, especially in American jurisprudence. Dignity has a long history in the law and among political philosophers with a legacy of exploration by luminaries such as Cicero,³⁸ Emmanuel Kant,³⁹ Thomas Paine,⁴⁰ and Alexander Hamilton.⁴¹ In the United States, all levels of the state and federal judiciary have invoked dignity

³³ See GEOFFREY R. STONE ET. AL., CONSTITUTIONAL LAW 441 (6th ed. 2009).

³⁴ See U.S. CONST. pmb. (“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”). See also Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. Rev. 1491, 1494-95 (2002) (remarking that viewed historically, liberty has at least as strong a pedigree in the United States as equality).

³⁵ See Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1897-98 (2004) (asserting that a careful attendance to court’s rulings under substantive due process reveal a narrative “in which due process and equal protection, far from having separate missions entailing different inquires, are profoundly interlocked in a legal double helix.”).

³⁶ See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (striking down an Oklahoma law allowing the forced sterilization of criminals on Equal Protection Clause grounds although the Court also recognized reproduction as a basic civil right).

³⁷ See Yoshino, *supra* note 26, at 749 (arguing that “dignity” is a long overdue term linking liberty and equality and that the Court has not abided by the distinction between liberty and equality).

³⁸ See CICERO, DE OFFICIIS I 30 (William McCartney ed. & trans., Edinburgh 1798) (44).

³⁹ See IMMANUEL KANT, GRUNDLEGUNG ZUR METAPHYSIK DER SITTEN 434 (Akademie Ausgabe Bd. IV, 1911 (1785)).

⁴⁰ See THOMAS PAINE, RIGHTS OF MAN 41 (Gregory Claeys ed., Hackett Pubs. 1992) (1791).

⁴¹ See THE FEDERALIST NO. 1, at 27-31 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

in varying contexts, including constitutional theory, speech law, intellectual property law, and even entertainment law,⁴² and the Court has used dignity to denote institutional status, personal integrity, collective virtue, equality, and liberty.⁴³ Accordingly, dignity is best understood as multidimensional and situational; it is a word without one core meaning but rather different meanings in different contexts.⁴⁴ When applied to equality, the Court has used dignity to characterize the unconstitutional experiences of minorities that arise from differential treatment.⁴⁵ Applied to liberty, dignity has indicated respect for an individual's capacity to make decisions in furtherance of personal identity as well as respect for those decisions once they are made.⁴⁶

The Court has associated dignity with increasingly expansive liberty rights. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁴⁷ the Court identified the constitutionally protected liberty interest at stake during a challenge to Pennsylvania's Abortion Control Act as one "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity," which included "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."⁴⁸ More recently, in *Sternberg v. Carhart*,⁴⁹ the Court ruled that a statute criminalizing forms of late-term abortion was unconstitutional and emphasized the importance of "equal liberty" in concluding that "a law that forbids abortion would condemn many American women to lives that lack dignity, depriving them of equal liberty."⁵⁰ The Court's

⁴² See Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 66, 70 (2011) (explaining that "[j]urists at all levels—state, federal, trial, and appellate—are referencing the right to dignity" and that courts' references to human dignity have arisen in various contexts, ranging from "constitutional theory, to criminal law, free speech law, intellectual property law, and to entertainment law.").

⁴³ For a thorough assessment of the Court's use of dignity, see generally Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169 (2011).

⁴⁴ See *id.* at 186-89 (proposing a new understanding of dignity using philosopher Ludwig Wittgenstein's context-driven approach to understanding language).

⁴⁵ See *id.* at 203-05 (examining the Court's equal protection cases since the 1940s and concluding that "the Court relied on equality as dignity to direct attention to the nature of the harm that marginalized individuals or groups experience as the result of differential treatment").

⁴⁶ See *id.* at 208-12 (explaining that liberty-as-dignity calls for respect for individual choice and for individuals due to their capacity to choose).

⁴⁷ 505 U.S. 833 (1992) (plurality opinion).

⁴⁸ *Id.* at 851.

⁴⁹ 530 U.S. 914 (2000).

⁵⁰ *Id.* at 920-22.

decision in *Lawrence v. Texas*⁵¹ further expanded the limits of liberty-as-dignity.⁵² While famously invalidating Texas's anti-sodomy statute on substantive due process grounds, the Court explained that the Constitution protects "choices central to personal dignity and autonomy," reiterating the "mystery of life" passage in *Casey* and concluding that sexual minorities may "retain their dignity as free persons" when forming relationships in their private lives because "liberty protected by the Constitution allows homosexual persons the right to make this choice."⁵³ Thus, the Court now administers substantive due process, which had once protected only those rights represented throughout history,⁵⁴ so that "persons in every generation can invoke its principles in their own search for greater freedom."⁵⁵

By using dignity as a pathway linking liberty and equality, the Court has transcended various restraints on equality jurisprudence to address group-level subjugation. The Court has narrowed the reach of the Equal Protection Clause over the last few decades by restricting the variety of classes it protects, lessening the scope of constitutional safeguards for protected classes, and extinguishing the power of Congress to execute the Equal Protection Clause through civil rights legislation potentially permissible under Section Five⁵⁶ of the Fourteenth Amendment.⁵⁷ Simultaneously, the Court has eschewed equality claims, such as those made in the context of abortion, while protecting dignity through individual liberty.⁵⁸ This shift has allowed the Court to sidestep concerns about the incessantly fracturing, ever-diversifying

⁵¹ 539 U.S. 558 (2003).

⁵² See Henry, *supra* note 43, at 210-12 (discussing the dignity implications of *Casey* and the potential interpretation of *Lawrence* to strengthen liberty-as-dignity).

⁵³ *Lawrence*, 539 U.S. at 567, 573-74.

⁵⁴ See generally Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988).

⁵⁵ *Lawrence*, 539 U.S. at 579.

⁵⁶ Section Five allows Congress to promote civil rights through passing legislation by giving Congress "power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

⁵⁷ See Yoshino, *supra* note 26, at 755-73 (analyzing how the Court has restricted equality guarantees over the past decades when "it has limited the number of formally protected classifications, it has curtailed its solicitude for classes within already protected classifications, and it has restricted Congress's power to enact antidiscrimination legislation").

⁵⁸ See *id.* at 781-83 (discussing how the Court has afforded some protection for women's access to abortion under liberty-based claims while ignoring the implications of abortion as a matter of equality).

markers of identity through which equality-based claims are made.⁵⁹ Moreover, the relocation of equality in constitutional liberty has shielded the judiciary from the accusation that legal intervention in equal protection matters is no longer necessary in light of what some consider a racially aware, gender-conscious political system.⁶⁰

II. THE PROTECTION OF DIGNITY ADVANCES QUEER LIBERTY AND EQUALITY

The shift from historically mediated liberty interests and particularized group-based equality claims toward expansive dignity rights presents an important opportunity for sexual minorities. Queer liberation no longer hinges on being equal to heterosexuals but rather emanates from universally applicable claims of individual worth outside the territory of gender and race.⁶¹ These liberty-grounded dignity claims are universally personalized and evoke international human rights in place of American identity politics.⁶² Liberty-grounded dignity claims circumvent the rhetoric of “special rights,” asking not for courts to carve out exceptions for sexual minorities but instead to make decisions that reflect the rights of every individual.⁶³ Especially significant for minorities within sexual minorities, liberty is not a matter of essentializing facets of a group’s identity and therefore does not institutionalize stereotypes true for some, but not all, non-heterosexuals.⁶⁴

⁵⁹ See *id.* at 747-48 (asserting that pluralism anxiety due to the sheer variety of groups of people in the United States has led the Court to deny protection to new groups, betray the protection it has provided other groups, and restrict Congress’ ability to pass civil rights legislation).

⁶⁰ See Stephen M. Griffin, *Judicial Supremacy and Equal Protection in a Democracy of Rights*, 4 U. PA. J. CONST. L. 281, 283 (2002) (arguing against strict scrutiny in equal protection controversies in light of political protections for minorities).

⁶¹ See Yoshino, *supra* note 26, at 793 (emphasizing the difference between arguments in favor of marriage equality and the right to gay marriage and distinguishing the assertion that “[g]ays should have the right to marry because straights have the right to marry and gays are equal to straights” from “[a]ll adults should have the right to marry the person they love”).

⁶² See *id.* at 794 (explaining that liberty claims are more persuasive because they reach a higher level of generality and evoke human rights, which is particularly appealing to the libertarian impulses of some conservatives).

⁶³ See *id.* (arguing that equality claims are more likely to sound like “special rights” arguments associated with group-based civil rights and that liberty claims more successfully foster empathy).

⁶⁴ See *id.* at 795 (explaining that an “advantage of liberty-based dignity analysis is that it is less likely to essentialize identity” and thus responds to “[s]uch ‘left critiques of the left’ [that]

Even beyond *Lawrence*, courts have used dignity to advance the rights of sexual minorities. For example, in 2008, the Supreme Court of California cited dignity while justifying the expansion of marriage to California's non-heterosexuals.⁶⁵ With *In re Marriage Cases*, the court explained that even though California's state constitution did not enumerate an express right to dignity, the constitution promised basic substantive legal rights associated with marriage and guaranteed that an individual could "establish—with the person with whom the individual has chosen to share his or her life—an officially recognized and protected family . . . entitled to the same respect and dignity accorded a union traditionally designated as marriage."⁶⁶ The court continued that essential to this right to establish a State-recognized family was the "right to have their family relationship accorded dignity and respect equal to that accorded other officially recognized families."⁶⁷ Particularly significant to the court was protecting human dignity through advancing queer liberty and equality, reasoning that "reserving the historic designation of 'marriage' exclusively for opposite-sex couples poses at least a serious risk of denying the family relationship of same-sex couples such equal dignity and respect."⁶⁸

Moving forward, advocates for sexual minorities could harness dignity to break down existing anti-marriage and anti-adoption laws and cultivate more inclusive civil rights legislation in Congress. Modern due process disassembles state impediments to same-sex family formation because, with *Lawrence* as clear precedent, dignity-based liberty interests deserve protection from the State's attempts to control personal relationships.⁶⁹ Similarly, any limitations that the Court could place on pro-queer rights legislation passed under Section Five of the Fourteenth Amendment would be weakened by judicial recog-

argue that when the courts protect a trait as part of a group's identity, they strengthen the very stereotypes they mean to disestablish.").

⁶⁵ *In re Marriage Cases*, 183 P.3d 384, 399 (2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5.

⁶⁶ *In re Marriage Cases*, 183 P.3d at 399 (emphasis omitted).

⁶⁷ *Id.* at 400.

⁶⁸ *Id.*

⁶⁹ See Tribe, *supra* note 35, at 1935 (claiming at stake in *Lawrence* was the assertion that the State may control a personal relationship and the case shows "that once a 'severe intrusion' into a protected 'freedom of association' is established, not even a neutral rule of general applicability narrowly protecting an otherwise weighty state interest . . . can save the state's usurpation of the association's autonomy from condemnation as an infringement of substantive due process.").

dition that—whether heterosexual or non-heterosexual—human beings have value-forming and value-transmitting relationships within the ambit of due process.⁷⁰ Thus, legislation that ensures same-sex marriage, guarantees inclusive and responsive health services, expands workplace benefits, facilitates parenthood, and otherwise advances the liberty of non-heterosexuals is more attainable and sustainable in the Court’s continuing embrace of dignity.

III. DONOR-CONCEIVED FAMILY COMMUNITIES AND THE END OF TRADITION

Sexual minorities are not the only beneficiaries of equality through liberty-as-dignity. Donor-conceived family communities have much to gain from a broader legal recognition of individuals’ shared intimacies.⁷¹ By using liberty-as-dignity to advance their own equality, queer liberation has the power to rewrite legal tropes for all families within society and, in the case of donor-conceived family communities, expand the law to accommodate new and evolving familial structures.

A. *The Unmet Legal Needs of Donor-conceived Family Communities*

Advancements in assisted reproductive technology and increased access to third-party sperm, ova, and embryos have galvanized family formation for non-heterosexual, infertile, and other nontraditional parents.⁷² These advancements have fostered “donor-conceived families,” which are families that employ donor materials to create new members.⁷³ In addition, as assisted reproductive technology has facilitated birth for an increasing number of children, more individuals

⁷⁰ See *id.* (explaining that Justice Kennedy’s majority opinion in *Lawrence* suggested “the globally unifying theme of shielding from state control *value-forming* and *value-transmitting* relationships”) (emphasis added).

⁷¹ See Cahn, *supra* note 1, at 405 (explaining that “explicit regulation that helps develop donor-conceived family communities can help families, and family law, constructively realize their goals of promoting intimacy” and that “[t]he law’s silence about these families provides space for only limited contact”).

⁷² See *id.* at 374 (observing that reproductive technology has enhanced family formation outside the context of two heterosexual parents).

⁷³ See *id.* at 369 (defining “donor-conceived families” as those “using third-party gametes [to create] a new family member and [form] ties between partners”).

have sought out others with whom they share extra-familial ties; looking beyond their immediate milieu, these individuals have formed “donor-conceived family communities.”⁷⁴ Originating from the uterus or gametes of the same third-party donor,⁷⁵ these communities defy traditional notions of family because they share emotional bonds and often biology but not households or any legal obligations or privileges.⁷⁶

As with other non-traditional routes of family formation, the donation of embryos, sperm, and ova is a phenomenon of pronounced controversy. Donation in an assisted reproduction framework, while banned in others countries, is probably within the realm of constitutionally protected privacy interests.⁷⁷ Although legal, donation is frequently viewed as undesirable, immoral, and irresponsible because it introduces third parties into the unity of marriage, contributes to the incidence of unwed pregnant mothers as well as motherless and fatherless children, and implies that parenthood is a duty so evanescent that it can be transferred from one individual to the next.⁷⁸ Crit-

⁷⁴ See *id.* at 368-69 (examining the growing number of individuals who form donor-conceived family communities).

⁷⁵ In vitro fertilization might utilize the patients' own gametes.

⁷⁶ See *id.* at 369 (describing the emotional ties shared within “donor-conceived family communities” and explaining that they do not share households or dependencies).

⁷⁷ See Steinbock, *supra* note 28, at 256 (“In Germany, Norway, Sweden, and Japan, the use of donor eggs is illegal. It is unlikely that egg donation could be banned in the United States, because such a ban would probably violate the constitutional right to privacy.”). The Supreme Court of the United States has located a constitutional right to privacy in various decisions relating to procreative autonomy. See, e.g., *Roe v. Wade*, 410 U.S. 113, 153-54 (1973) (recognizing a qualified right to abortion based in the constitutional right to privacy that the Court had previously acknowledged in a long history of cases); *Eisenstadt v. Baird*, 405 U.S. 438, 454-55 (1972) (recognizing that unmarried individuals' decisions whether to use contraception fell within their constitutionally protected privacy interests); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (recognizing that married individuals' decisions whether to use contraception fell within their constitutionally protected privacy interests); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (describing marriage and procreation as “fundamental to the very existence and survival of the race” and a statute delimiting procreation through sterilization as involving “one of the basic civil rights of man”). See generally Lainie M. C. Dillon, Comment, *Conundrums with Penumbra: The Right to Privacy Encompasses Non-Gamete Providers Who Create Preembryos with the Intent to Become Parents*, 78 WASH. L. REV. 625, 628-33 (2003) (examining the Court's progressive recognition of privacy in constitutional cases and arguing that the right to privacy protects intimate decisions relating to procreation).

⁷⁸ See Steinbock, *supra* note 28, at 256-57 (distinguishing between morality and legality and describing various critiques of egg donation).

ics also argue that donation commodifies the family by reducing reproduction to a series of marketplace transactions.⁷⁹

These arguments coincide with enormous challenges that donor-conceived family communities must face before they can even begin to form. State laws typically attempt to allocate parental rights to those individuals with the intent to rear the child, but these laws are not uniform concerning the legal responsibility of providers of embryos, sperm, and ova to resulting offspring.⁸⁰ Simultaneously, contractually and culturally mediated secrecy impedes offspring in most attempts to seek out their kin.⁸¹ Even when offspring could access this information, centralized registries, as in the case of adoption, do not exist.⁸²

Donor-conceived family communities face numerous other barriers to State legitimization of their relationships. Courts have insisted that children have one set of two parents—the biological mother and biological father as defaults—who possess all parental rights and responsibilities.⁸³ Despite an ongoing insistence that biological correlates define family,⁸⁴ the Court has questioned whether it is the biological connection itself the law values or rather “the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family.”⁸⁵ Regardless, children have had considerably less legal power than their

⁷⁹ See *id.* at 263-64 (elucidating arguments that donation threatens the family by introducing destructive market forces into the familial sphere).

⁸⁰ See Cahn, *supra* note 1, at 387 (explaining that states have attempted to allocate parental rights to the intending parents but that “there is no universal answer to the question of the legal relationship between donor and offspring”).

⁸¹ See *id.* at 391 (describing the multiple layers of secrecy involved in assisted reproductive technology).

⁸² See *id.* at 392 (pointing out that unlike adoption, states do not maintain central registries for donor-conceived offspring).

⁸³ See *id.* at 402 (explaining the traditional view that parenthood is a unitary bundle of rights shared by two, and only two, individuals) (citing *Abbott v. Abbott*, 130 S. Ct. 1983, 1991 (2010); *Troxel v. Granville*, 530 U.S. 57, 65-67 (2000); *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989); *Johnson v. Calvert*, 851 P.2d 776, 781 n.8 (Cal. 1993)). This insistence could be due in large part to the desire to prevent poverty and children’s reliance on the State. See, e.g., Martha Ertman, *What’s Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 32-33 (2003) (acknowledging that children’s need for financial support is a potential justification “to impose a standard of two-biological parent families for children”).

⁸⁴ See Janet L. Dolgin, *Biological Evaluations: Blood, Genes, and Family*, 41 AKRON L. REV. 347, 348 (2008) (arguing that “even as society has committed itself to autonomous choice in shaping family relationships, it has seemingly become more obsessed with the biological (and especially the genetic) correlates of family”).

⁸⁵ *Michael H.*, 491 U.S. at 123.

parents or the State to make decisions that affect the family, including the ability to recognize their half-siblings.⁸⁶

These barriers leave numerous needs unmet. Formalizing donor-conceived family communities could improve child welfare by reinforcing sibling and familial associational connections, reduce state dependency through expanding the enforceability of support obligations, ease the legal administration of property, empower appropriately situated surrogate decision makers, and legitimate emotionally vital personal bonds.⁸⁷ Mature adults resulting from or receiving donor gametes should, like adoptees and adoptive parents in some states, have access to information about their donor and potential siblings for a better understanding of their predisposition to certain diseases and other negative health outcomes.⁸⁸ Donor-recipient agreements need uniformity, and donor-offspring relationships require clarity to ensure fairness to donors.⁸⁹ Furthermore, donor-conceived family communities should have the infrastructure to form legal bonds if the parties involved so desire because, in the context of serving the best interest of the child, the State's obligation to maximize human capabilities includes respecting the freedom of individuals to make life choices.⁹⁰

B. *Extending Queer Advancements to Donor-conceived Family Communities*

Donor-conceived family communities are the future of family, embodying a new frontier for the law and sparking novel questions about State recognition of families outside the contexts of husband-

⁸⁶ See Cahn, *supra* note 1, at 396 (“The failure to recognize sibling associational rights provides yet another example of the paucity of children’s rights.”).

⁸⁷ See *id.* at 417 (eschewing a laundry list of policy prescriptions but discussing donor-conceived family community members taking family and medical leave for one another, inheriting one another’s property, acting as surrogate decision makers, and serving as legal guardians).

⁸⁸ See *id.* at 413 (arguing that adults should have access to state-created donor registries).

⁸⁹ See *id.* at 416 (exploring the need for legal clarity in the relationship between donors and the families they help create).

⁹⁰ See *id.* at 422-23 (explaining that scholars have emphasized the responsibility to maximize human capabilities and that the capabilities approach underscores “the freedom of individual to achieve the life that they would choose for themselves”) (citing AMARTYA SEN, CHOICE, WELFARE AND MEASUREMENT 30-31 (1982); AMARTYA SEN, DEVELOPMENT AS FREEDOM 144 (First Edition Books 2000) (1999); MARTHA C. NUSSBAUM, *Human Capabilities, Female Human Beings*, in WOMEN, CULTURE, AND DEVELOPMENT A STUDY OF HUMAN CAPABILITES 61, 82-83 (Martha C. Nussbaum & Jonathan Glover eds., 1995)).

wife and parent-child relationships.⁹¹ They generate new questions concerning the most critical characteristics of modern family law because they exist far beyond the reach of the traditional family.⁹² They ask courts to reorient all family around the best interests of the child by bucking the judiciary's tendency to dovetail its recognition of evolving family structures to parents' due process rights.⁹³ Moreover, they sidestep marriage's tendency to reinforce dyadic distributions of rights by defusing archaic but contemporarily significant legal tropes, such as the marital presumption of paternity.⁹⁴

Fortunately, sexual minorities have already begun to erode the concept of the traditional family. Queers are strategically poised to transform family law because custody, visitation, and other family law matters implicate sexual minority status more often than any other form of judicial proceeding.⁹⁵ The ongoing extension of State recognition of families to include socially infertile sexual minorities untethers groups like donor-conceived family communities from numerous legal tropes, with the Minnesota Court of Appeals having provided a clear example in *LaChapelle v. Mitten* when it recognized and honored

⁹¹ *Id.* at 370 (“Recognition of connections between different donor-conceived families does not involve sexual intimacy between adults as in the line of cases culminating in *Lawrence v. Texas*, nor authority within the parent-child relationship as in *Troxel v. Granville*, nor the type of traditional family recognized in *Michael H. v. Gerald D.*, which upheld the marital presumption notwithstanding strong evidence that the husband was not the biological father.”) (citing *Lawrence v. Texas*, 539 U.S. 558, 564, 578-79 (2003); *Troxel v. Granville*, 530 U.S. 57, 70 (2000); *Michael H. v. Gerald D.*, 491 U.S. 110, 115, 131-32 (1989)).

⁹² See Cahn, *supra* note 1, at 370 (explaining that “donor-conceived family communities contest traditional assumptions about the state’s role in family law, the goods that the state should seek to further, and the very definition of family”).

⁹³ For example, in *Troxel v. Granville*, while recognizing that “nationwide enactment of nonparental visitation statutes is assuredly due, in some part, to the States’ recognition of [] changing realities of the American family,” the Supreme Court held that a Washington statute allowing courts to order visitation for any person when visitation would serve the best interest of the child violated the due process rights of a mother after a trial judge ordered visitation for a child’s grandparents in excess of her wishes. *Troxel v. Granville*, 530 U.S. 57, 64, 72-73 (2000).

⁹⁴ See *Michael H. v. Gerald D.*, 491 U.S. 110, 111-12 (1989) (discarding a daughter’s appeal in support of her biological father’s filiation action to establish paternity and visitation and upholding a California statute limiting potential rebuttals of the marital presumption to the husband or wife within the marriage because the biological father and daughter failed to show that either his or her “‘liberty’ interest is one so deeply imbedded within society’s traditions as to be a fundamental right”).

⁹⁵ DANIEL R. PINELLO, *GAY RIGHTS AND AMERICAN LAW* 17 (2000) (engaging in an empirical analysis of queer American jurisprudence over the 1980s and 1990s and observing that custody, visitation, adoption, and foster disputes “are the most important in terms of impact on the greatest number of gay litigants”).

three sexual minorities as legal parents.⁹⁶ As the State continuously recognizes queer families' right to recognition, it will need to confront the inevitability of third party involvement in child rearing.⁹⁷ Thus, the State must reassess the power of constitutional rights associated with childrearing within dyadic parent structures and redefine the process for establishing and enforcing parentage.⁹⁸ While one new, untraditional model for family took hold in *LaChapelle*, in which two parents were granted joint custody and a third was given the right to participate in important decision-making,⁹⁹ the future of family is situational and idiosyncratic, anchored in individualized assessments that weigh personal agency and child and personal welfare rather than oppressive notions like biological destiny.¹⁰⁰

Despite the potential for queer families to track closely with dyadic family structures outside the context of conception, queer liberation still serves donor-conceived family communities. Even when queer families conform to heteronormative relationships by forming binary couples and sharing exclusive legal parental rights, these couples are necessarily precluded from the dual-parent biological norm, and they inevitably exemplify the durability of kinship networks.¹⁰¹ In addition, sexual minorities are more likely than heterosexuals to create families through informal agreements with known donors, and these arrangements foster greater familiarity between donor and offspring, often resulting in ongoing donor involvement.¹⁰²

⁹⁶ *LaChapelle v. Mitten*, 607 N.W.2d 151, 168 (Minn. Ct. App. 2000) (affirming a trial court's judgment granting one parent sole physical custody and shared legal custody with another parent and also granting a third parent the right to participate in important decisions affecting the child in a paternity proceeding brought by a sperm donor after the child's mother and her same sex partner severed the donor's visitation with their child).

⁹⁷ See Annette R. Appell, *The Endurance of Biological Connection: Heteronormativity, Same-Sex Parenting and the Lessons of Adoption*, 22 *BYU J. PUB. L.* 289, 322 (2008) (asserting that cases involving queer families demonstrate "problems that arise when family law does not match the lived lives of families").

⁹⁸ See *id.* at 309 (explaining that "even when lesbian and gay couples have children, they still do not neatly fit into that two parent biologically-based norm").

⁹⁹ *LaChapelle*, 607 N.W.2d at 168.

¹⁰⁰ See *infra* notes 106-109 and accompanying text.

¹⁰¹ See Appell, *supra* note 97, at 308 (arguing that "even those lesbian and gay couples who are modeling heteronormativity—binary couples, mutual support, relationships toward children that reflect adult intimate relationship, and even exclusive (legal) parenting—can and do provide example of more complex and less domesticated kinship networks that recognize expansive kin networks").

¹⁰² See *id.* at 309 (observing that "unlike many heterosexual families created through ART, lesbians and gays may be more likely to make informal arrangements with known donors or

Accordingly, sexual minorities have undermined the notion that anonymity is necessary for rearing a third-party's biological offspring, steadily developing and reinforcing a legal infrastructure for State recognition of donor-conceived family communities in the course of their advancement toward equality.¹⁰³

IV. THE FUTURE OF FAMILY

The benefits of queer liberation stretch far beyond donor-conceived family communities because liberty-as-dignity links social advancements across all minority groups. Advocates for sexual minorities are no longer fighting for sexual minorities; they are fighting for the liberty of all people.¹⁰⁴ While this does not mean that different groups do not have varying legal needs that are not uniformly met by queer liberation, it does allow advancements to be more cumulative than those won in group-specific equality cases.¹⁰⁵ This aggregation of rights is particularly important in terms of how queer liberation will broaden the definition of family through reshaping familial structures to better accommodate respect for individuals' decisions. By facilitating important advancements for gender and racial equality, the magnification of personal agency in the future of family is a natural extension of the Fourteenth Amendment's promise of citizenship.

Among queer liberation's most important potential contributions to broader society is its transformation of family. Redefining family to include sexual minorities signals the vulnerability of additional exclusionary categorization schemes and establishes the viability of new family forms in the United States.¹⁰⁶ A new definition of family benefits everyone. State recognition of queer rights would move the country away from thinking about family as an inevitability of nature

surrogates to creates their families" and "the birth parents or donors may be involved with the child on an ongoing basis").

¹⁰³ See *id.* at 302 (describing queer families and asserting that "[t]hese postmodern families and the porousness of their affective, if not legal, family relations are part of a larger set of movements that have challenged adoption's myth of rebirth and mandate of secrecy").

¹⁰⁴ See *supra* notes 58-60 and accompanying text.

¹⁰⁵ See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 439 (6th ed. 2000) ("[T]he government rarely takes a fundamental right away from all persons . . .").

¹⁰⁶ See Glazer, *supra* note 15, at 1024-28 (explaining the importance of examining bisexual visibility based on the opportunity to understand why society employs polarized classification schemes that suppress bisexual desire and excludes those outside the current paradigm for sexual orientation).

or an expression of predetermined divine principles; more than ever, family would be the result of the choices we make as communal entities throughout our lives.¹⁰⁷ This new form of family would hinge on personal agency, carving out communities free from numerous oppressive forces that interfere with self-determination.¹⁰⁸ As a matter of social justice, redefining family is vital in this new era of liberty-as-dignity because the redistribution of family recognition deemphasizes the protection of the most privileged in favor of promoting rights for everyone.¹⁰⁹

State legitimization of queer families would refute deeply ingrained notions about gender as a repository for different rights and responsibilities. Socially constructed men and women could no longer be predefined by their lifelong relativity because men and women could better organize the most fundamental aspects of their lives in exclusivity.¹¹⁰ From a feminist perspective, this shift would defuse heterosexual men's ability to augment their power through subordinating women and non-heterosexuals because heterosexual men would be less likely to sit at the top of patriarchal hierarchies in the home.¹¹¹ The redistribution of gender in the household would help reframe popular understandings of gender by eschewing reductionist thinking about parenthood and revealing gender as vulnerable to intentional change.¹¹² Because gender is an institution through which humans organize their lives as well as society, a new consciousness about the fluidity of gender would tie common values and self-worth to new

¹⁰⁷ See Ertman, *supra* note 83, at 37 (arguing that an effect of new family forms is that "family begins to mean the group that people choose rather than one ordained by nature of a divine authority").

¹⁰⁸ See *id.* (describing the benefits of new family forms, including increased agency).

¹⁰⁹ Cf. Dorothy E. Roberts, *Race and the New Reproduction*, 47 HASTINGS L. J. 935, 949 (1996) ("Our vision of procreative liberty must include the eradication of group oppression, and not just a concern for protecting the reproductive choices of the most privileged.").

¹¹⁰ See Judith Lorber, *Night to His Day*, in RACE, CLASS, AND GENDER IN THE UNITED STATES: AN INTEGRATED STUDY 54, 60 (Paula S. Rothenberg ed., 1994) (defining gender as "a process of creating distinguishable social statuses for the assignment of rights and responsibilities" that individuals construct and maintain through "social interaction throughout their lives").

¹¹¹ See Ertman, *supra* note 83, at 36 (explaining that "the very heart of feminism is a critique of the traditional family, specifically the way that authority rests with men generally and fathers in particular," and asserting that "new families undermine the traditional family, a form that is central to both gender and sexual orientation subordination").

¹¹² See Lorber, *supra* note 110, at 55 (describing how parenting is gendered, children and young adults perform their gender, and the ways in which the social construction of gender are subject to change).

indicators of self, such as motivation and competence, rather than gender-based stereotypes.¹¹³

Dismantling the boundaries of gender helps to unite communities and enhance social power because gender would be less likely to contribute to division within races and ethnicities.¹¹⁴ Beyond the sphere of gender, a more flexible understanding of family would respond to the existing needs of families of color, which frequently transcend the legal boundaries of the traditional family by including extended relatives and identifying as family those with whom they do not share biological ties.¹¹⁵ In this way, communities of color transcend racist ideology tying worth to inherited traits by, for example, accepting as family those not birthed into a household, and legitimating these familial structures defies race as a limitation on individual potential.¹¹⁶ Moreover, like gender, race and ethnicity are social institutions.¹¹⁷ American families have reacted throughout history to economic and legal developments, adapting to meet the disparate needs of different communities and often responding within the lines of race and ethnicity.¹¹⁸ Increased agency in family formation would improve social mobility and access to power among families of color who are still newly benefiting from civil rights legislation and overcoming the economic and educational ramifications of American Apartheid.¹¹⁹ For communities of color, redefining family is vital to embracing new

¹¹³ See *id.* (reflecting on gender as a social institution, claiming that “[o]ne way of choosing people for the different tasks of society is on the basis of their talents, motivations, and competence—their demonstrated achievements” while another “is on the basis of gender, race, ethnicity—asccribed membership in a category of people”).

¹¹⁴ See *id.* at 60 (“As part of a stratification system, gender ranks men above women of the same race and class.”).

¹¹⁵ See Roberts, *supra* note 109, at 941-42 (discussing black families and contending that their familial networks have traditionally transcended the nuclear family).

¹¹⁶ See *id.* (“Blacks by and large are more interested in escaping the constraints of racist ideology by defining themselves apart from inherited traits. They tend to see group membership as a political and cultural affiliation. Their family ties have traditionally reached beyond the bounds of the nuclear family to include extended kin and non-kin relationships.”).

¹¹⁷ See ROBERTA L. COLES, *RACE & FAMILY: A STRUCTURAL APPROACH* 249 (2006) (“Variations in skin tone play a covert but important role in social status.”).

¹¹⁸ See *id.* at 33 (explaining that American families are “fluid and dynamic, they have adapted to a swiftly forming country encountering major social and economic transformations”).

¹¹⁹ See *id.* at 19 (asserting that income and educational factors distribute occupational categories across people of color and that “for many minority families, the relatively recent application of antidiscrimination policies has resulted in this being their first generation of college graduates and/or holders of previously prohibited occupations”).

opportunities and retiring various forms of segregation that have subjugated segments of the United States for centuries.¹²⁰

These contributions to racial and gender equality demonstrate the significance of family redefinition as a valid consequence of the Fourteenth Amendment. The equal citizenship guarantee of the Fourteenth Amendment has gradually destabilized hierarchies in the United States and extended the claim of equal citizenship to an increasing number of subordinated groups and individuals.¹²¹ If queer liberation flows from the promise of equal citizenship, then so should State recognition of new forms of family.¹²² Family will not be whatever an individual wants it to be, but, in the absence of tradition, families will spring from personal agency, shared liberty, and dignity, as well as consideration for child and personal welfare, redefining the nation while enriching an essential element of citizens' lives.

Diversity has consequences. The various social groups surrounding us transform democracy, shape the economy, and strengthen or undermine our health and safety.¹²³ New groups and newly visible groups are constantly increasing, and their presence demands that individuals expand their "sense of we" to facilitate the maximal benefits of heightened diversity.¹²⁴ Enhanced rights for sexual minorities are likely to improve rights for donor-conceived family communities and other groups because the legal advancements and ongoing social

¹²⁰ See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 149 (1993) (explaining that individual traits depend on family and that aspects of family background, "such as wealth and social connections, open the doors of opportunity irrespective of education or motivation").

¹²¹ See William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 *UCLA L. REV.* 1183, 1184-86 (2000) (describing the expansion of rights under the due process clause as destabilizing to hierarchies in the United States and allowing subordinated groups to bring claims of equal citizenship).

¹²² See *supra* notes 95-101 and accompanying text.

¹²³ See Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-First Century*, 30 *SCANDINAVIAN POL. STUD.* 137, 138 (2007) (exploring the implications of social networks on bystanders and their impact on health, economy, and democracy).

¹²⁴ See *id.* at 138-39 (asserting that diversity will increase substantially in all modern societies and that "the central challenge for modern, diversifying societies is to create a new, broader sense of 'we'"). This Paper employs "sense of we" as a proxy for the social categorization and related cognitive mechanisms that shape intergroup biases and in particular how one differentiates the self from others. See John F. Dovidio et al., *Commonality and the Complexity of "We": Social Attitudes and Social Change*, 13 *PERS. & SOC. PSYCHOL. REV.* 3, 4-5 (2009) (explaining that "[s]ocial categorization and associated psychological processes play a critical role in the formation and perpetuation of intergroup biases" and that differentiating between "we's" and "they's" is consequential to individual behavior, social perception, and cognition).

legitimization of sexual minorities should demonstrate that diversity is an asset.¹²⁵ The intense controversy associated with sexual minorities suggests a continuous focus on the group for years to come, and the integration of sexual minority rights into those of heterosexuals is likely to garner unwavering attention.¹²⁶ Thus, if there is truth to the argument that increased diversity has a favorable net-effect on society,¹²⁷ the public should see positive outcomes from queer empowerment that could then be extrapolated to advocacy efforts for legal recognition of other families throughout society.

CONCLUSION

The State has wielded the concept of the traditional family as an oppressive instrument of social control and unjustly granted or denied legal recognitions to different groups within the United States. But for sexual minorities, liberty-as-dignity is a readied mechanism to achieve equality.¹²⁸ Queer liberation would enhance choice in the context of marriage and childrearing, laying the foundation for the legal recognition of donor-conceived family communities and redefining the bonds linking spouses, children, siblings, and parents.¹²⁹ This redefinition would make family a function of personal agency rather than a destination beyond self-determination, and redefinition serves the promise of the Fourteenth Amendment by empowering historically subjugated classes.¹³⁰ Liberty-as-dignity guarantees new choices for all groups, and queer liberation stands to fundamentally alter the boundaries of family and, thus, the organization of the entire nation.

¹²⁵ See Putnam, *supra* note 123, at 140-41 (explaining that an increasingly diverse society is inevitable and “diversity will be a valuable national asset” because immigration and diversity enhance creativity, spur development, and are associated with economic growth).

¹²⁶ See Laurence H. Tribe & Joshua Matz, *The Constitutional Inevitability of Same-Sex Marriage*, 71 MD L. REV. 471, 472 (2012) (explaining that sexual minorities’ “latest string of victories has been won through high-profile, hard-fought legislative battles—a fact that reveals the power of constitutionally grounded principles of liberty, equality, and dignity to resonate far beyond the courthouse door in a dynamic and interactive process of judicial, political, and popular constitutional interpretation and social movement struggle”).

¹²⁷ See generally Putnam, *supra* note 123, at 140-41.

¹²⁸ See *supra* Part II.

¹²⁹ See *supra* Part III.

¹³⁰ See *supra* Part IV.

