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 Direct
Fax

September 13, 2016

VIA E-MAIL

ICANN Board of Directors
c/o Mr. Steve Crocker, Chair
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

**Re: Expert Opinion of Prof. William N. Eskridge, Jr., in Support of dotgay's
Community Priority Application**

Dear Chairman Crocker and Members of the ICANN Board:

We are writing on behalf of our client, dotgay LLC (“dotgay”), to submit an independent expert opinion of Professor William N. Eskridge Jr., the John A. Garver Professor of Jurisprudence at the Yale Law School, to the ICANN Board (“Board”) with the goal to assist the Board in evaluating dotgay’s reconsideration request (16-3) on September 15, 2016.¹ Prof. Eskridge is a world renowned expert both in legal interpretation and in sexuality, gender, and the law, and was recently ranked as one of the ten most-cited legal scholars in American history. Prof. Eskridge’s independent expert report explains, step-by-step, fundamental errors in the EIU’s reasons for denying dotgay’s community status.

Pursuant to the Independent Review Panel’s recent findings in *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004 (July 29, 2016) (“Dot Registry Declaration”), which was accepted by the Board by way of its Resolutions 2016.08.09.11 and 2016.08.09.13 on August 9, 2016, it is imperative that the Board carefully reviews and considers Prof. Eskridge’s expert report prior to deciding dotgay’s reconsideration request (16-3).

First, the Board Governance Committee’s (“BGC”) June 26, 2016, recommendation to the Board to deny dotgay’s reconsideration request (16-3) was

¹ Expert Report of Professor William N. Eskridge Jr., dated September 12, 2016, Exhibit 1

premised on a standard that was subsequently rejected by the Dot Registry Declaration. Specifically, the BGC rejected dotgay's request for reconsideration because dotgay did not "identify any misapplication of policy or procedure by the EIU that materially or adversely affected [dotgay], and does not identify any action by the Board that has been taken without consideration of material information or on reliance upon false or inaccurate information." The Dot Registry Declaration, however, rejected this standard for reconsideration and held that "in performing its duties of Reconsideration, the BGC must determine whether the CPE (in this case the EIU) and ICANN staff respected the principles of fairness, transparency, avoiding conflict of interest, and non-discrimination as set out in the ICANN Articles, Bylaws and AGB."² At no point in dotgay's recourse to ICANN's accountability processes from 2014 to date has the Board scrutinized the CPE Report for consistency with the principles of fairness, transparency and non-discrimination; as Prof. Eskridge's Report demonstrates, the CPE Report would fail even the most lenient examination.

Second, the BGC's June 26, 2016 Recommendation improperly declined to consider dotgay's May 15, 2016, presentation and written summary of arguments because "the Presentation focused on the merits of the Second CPE Report." According to the Dot Registry Declaration, "the contractual use of the EIU as the agent of ICANN does not vitiate the requirement to comply with ICANN's Articles and Bylaws, or the Board's duty to determine whether ICANN staff and the EIU complied with these obligations."³ The BGC's failure to recognize its responsibility to ensure the EIU's compliance with these principles infected its decision to exclude from consideration whether the EIU had in fact been correct in its application of the Articles, Bylaws and AGB. This is troubling because, as explained by Prof. Eskridge in his report, the EIU failed to comply with ICANN's Articles and Bylaws.

Specifically, Prof. Eskridge explains that the EIU made three fundamental errors in determining that dotgay did not meet the nexus requirement between the applied-for string (.GAY) and the LGBTQIA community: (1) interpretive errors by misreading the explicit criteria laid out in ICANN's Applicant Guidebook ("AGB") and ignoring ICANN's mission and core values; (2) errors of inconsistency and discrimination by failure of the EIU to follow its own guidelines and its discriminatory application to dotgay's application

² *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration, p. 34 (29 July 2016).

³ *Id.* at p.34.

when compared with other applications; and (3) errors of fact, namely, a misstatement of important empirical evidence and a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities. Prof. Eskridge's report, after discussing EIU's egregious reasoning behind rejecting dotgay's application, concludes that the EIU "engaged in a reasoning process that remains somehow mysterious to me but can certainly be said to reflect an incomplete understanding of the EIU's own Guidelines, of the requirements of the Applicant Guidebook, and of the history of the gay community, in all of its diverse rainbow glory."

Finally, as dotgay has amply demonstrated in its submissions to the ICANN Board, it is entitled to the full two points in relation to community endorsement,⁴ since it has the support of the International Lesbian, Gay, Bisexual, Transgender and Intersex Association (ILGA) – a global human rights organization focused on the gay community with member organizations in 125 countries.

Accordingly, pursuant to the Board's obligation to exercise due diligence, due care, and independent judgment in reaching reconsideration decisions, we sincerely hope that the Board: (1) will review and agree with Prof. Eskridge's independent expert opinion that the EIU's evaluation of dotgay's community priority application was flawed, and (2) grant dotgay's community priority application without any further delay.

Sincerely,



Arif Hyder Ali
Partner, Co-Chair of International Arbitration Group

⁴ See dotgay letter to ICANN Board of Directors (September 8, 2016) pp. 5-9. See also dotgay presentation to the Board Governance Committee (May 17, 2016) pp. 7-9 and Statement of Renato Sabbadini (May 17, 2016).

EXPERT REPORT

TABLE OF CONTENTS

I. EXECUTIVE SUMMARY

II. QUALIFICATIONS OF THE EXPERT

III. BACKGROUND AND GOVERNING RULES

A. DOTGAY'S APPLICATION

B. THE GOVERNING RULES: ICANN'S BYLAWS AND ITS APPLICANT GUIDEBOOK

C. THE ICANN REQUIREMENTS FOR MEETING THE NEXUS BETWEEN THE APPLIED-FOR STRING AND THE COMMUNITY

D. THE CPE REPORT'S REASONS FOR DENYING DOTGAY ANY POINTS FOR THE COMMUNITY-NEXUS REQUIREMENT (CRITERION #2)

IV. FUNDAMENTAL ERRORS IN THE CPE REPORT'S REASONING

A. THE CPE REPORT MISREAD ICANN'S APPLICANT GUIDEBOOK AND IGNORED ITS BYLAWS

1. THE CPE REPORT SUBSTANTIALLY IGNORED THE PRIMARY TEST: IS THE PROPOSED STRING A "WELL KNOWN SHORT-FORM OR ABBREVIATION OF THE COMMUNITY"?

2. THE CPE REPORT CREATED AN "UNDER-REACH" CRITERION NOT FOUND IN OR SUPPORTED BY THE APPLICANT GUIDEBOOK AND APPLIED THE NOVEL CRITERION TO CREATE A LIBERUM VETO INCONSISTENT WITH ICANN'S RULES AND BYLAWS

3. THE CPE REPORT IGNORED AND IS INCONSISTENT WITH ICANN'S BYLAWS

B. THE CPE REPORT IS INCONSISTENT WITH THE EIU'S OWN GUIDELINES AND PREVIOUS REPORTS AND THEREFORE VIOLATES ICANN'S DUTY OF NON-DISCRIMINATION

1. THE CPE REPORT IS INCONSISTENT WITH THE EIU'S OWN GUIDELINES

2. THE CPE REPORT IS INCONSISTENT WITH THE EIU'S PREVIOUS REPORTS

C. THE CPE REPORT IGNORED IMPORTANT HISTORICAL AND EMPIRICAL EVIDENCE THAT STRONGLY SUPPORTS DOTGAY'S APPLICATION

- 1. FROM STONEWALL TO MADRID: “GAY” AS AN UMBRELLA TERM FOR SEXUAL AND GENDER NONCONFORMISTS, AS WELL AS A TERM FOR HOMOSEXUAL MEN**
- 2. “GAY” IS AN UMBRELLA TERM FOR THE COMMUNITY THAT INCLUDES TRANSGENDER, INTERSEX, AND “ALLIED” PERSONS**

V. CONCLUSION AND SIGNATURE

APPENDICES

**APPENDIX 1. CURRICULUM VITAE OF WILLIAM N. ESKRIDGE JR., JOHN A. GARVER
PROFESSOR OF JURISPRUDENCE, YALE LAW SCHOOL**

**APPENDIX 2. SURVEY METHODOLOGIES FOLLOWED FOR EACH FIGURE DEPICTED IN THE
EXPERT REPORT**

I. EXECUTIVE SUMMARY

Dotgay LLC filed a community-based generic Top-Level Domain (gTLD) application for the string “.gay”, under procedures and standards established by the Internet Corporation for Assigned Names and Numbers (ICANN). A Community Priority Evaluation (CPE) Report, authored by the Economist Intelligence Unit (EIU) recommended that the application be denied; the major reason was that dotgay did not meet the nexus requirement between the applied-for string (“.gay”) and the community of people who do not conform to traditional norms of sexuality and gender. The CPE Report is fundamentally erroneous. The Report’s fundamental errors fall into three different groups: (i) **interpretive errors**, namely, misreading the explicit criteria laid out in ICANN’s Applicant Guidebook and ignoring ICANN’s mission and core values; (ii) **errors of inconsistency and discrimination**, namely, failure of the EIU to follow its own guidelines and its discriminatory application to dotgay’s application when compared with other applications; and (iii) **errors of fact**, namely, a misstatement of the empirical evidence and a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities in the United States. In short, the CPE Report and its recommendations should be rejected, and dotgay should be awarded full credit (4 of 4 points) for establishing the nexus of its string with the community.

II. QUALIFICATIONS OF THE EXPERT

1. I, the undersigned Professor William N. Eskridge Jr., the John A. Garver Professor of Jurisprudence at the Yale Law School, have been retained as an expert by dotgay LLC, to provide an independent legal opinion on the validity of the ICANN Community Priority

Evaluation (CPE) Report prepared by the Economist Intelligence Unit (EIU), evaluating dotgay's community-based application ID 1-1713-23699 for the proposed generic Top-Level Domain (gTLD) string ".gay".

2. I offer myself as an expert both in legal interpretation and in sexuality, gender, and the law. In both areas, I have published field-establishing casebooks,¹ leading monographs,² and dozens of law review articles (most of them cited in my curriculum vitae, which is Appendix 1 to this Expert Report). According to recent empirical rankings of law review citations, I am among the ten most-cited legal scholars in American history.³
3. My expert opinion is based on the: (i) background and relevant facts presented herein; (ii) study of ICANN's gTLD Applicant Guidebook (AGB), especially Module 4.2.3, "Criterion #2: Nexus Between Proposed String and Community"; (iii) the history of the terminology in dispute, especially the term "gay" and its applicability to the community of sexual and

¹ William N. Eskridge Jr. & Philip Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* (West 1988, now in its fifth edition); William N. Eskridge Jr. & Nan D. Hunter, *Sexuality, Gender, and the Law* (Foundation 1997, now in its third edition, with the fourth edition out next year). See generally Richard A. Posner, Book Review, 74 Va. L. Rev. 1867 (1988) (reviewing the Eskridge and Frickey casebook and declaring it the best set of materials, "by far," ever published in the field of legislation and suggesting that it would "alter the law school curriculum").

² For interpretation, consult William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* (Foundation 2016), and *Dynamic Statutory Interpretation* (Harvard 1994), as well as William N. Eskridge Jr., *A Republic of Statutes: The New American Constitution* (Yale 2010) (with John Ferejohn). For sexuality, gender, and the law, see William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* (Harvard 1999), and *Dishonorable Passions: Sodomy Law in America, 1861-2003* (Viking 2008), and *Gay Marriage: For Better or For Worse? What We Have Learned from the Evidence* (Oxford 2006) (co-authored with Darren Spedale).

³ According to the 2013 Hein-Online study, I was the sixth most-cited scholar in American history. See <https://help.heinonline.org/2013/11/most-cited-authors-2013-edition/> (viewed September 8, 2016).

gender nonconformists and their allies; and (iv) standard practices and empirical analyses to determine popular understanding of relevant terms.

III. BACKGROUND

A. DOTGAY'S APPLICATION

4. Dotgay LLC filed a community-based generic Top-Level Domain (gTLD) application for the string “.gay”, under procedures established by the Internet Corporation for Assigned Names and Numbers (ICANN).

B. THE GOVERNING RULES: ICANN'S BYLAWS AND ITS APPLICANT GUIDEBOOK

5. The governing legal materials include ICANN's Bylaws and its Applicant Guidebook. The Bylaws establish ICANN's mission “to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems.” ICANN Bylaws, Art. I, § 1. One of ICANN's “Core Values” is “[s]eeking and supporting broad informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.” ICANN Bylaws, Art. I, § 2(4).
6. Moreover, ICANN “shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.” ICANN Bylaws, Art. II, § 3 (“Non-Discriminatory Treatment”). And ICANN “and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.” ICANN Bylaws, Art. III, § 1.

7. ICANN's Applicant Guidebook sets forth procedures and standards for applications, including applications for community-based applications such as dotgay's application. See AGB, Module 4.2. There are four community priority evaluation criteria: definition of the relevant "community," nexus between the proposed string and the community, registration policies, and community endorsement. Each criterion carries with it a possible score of 4 points, for a potential total of 16 points. To secure approval, the applicant must achieve a score of 14 of 16 points. The CPE Panel of EIU awarded dotgay a score of 10 of 16 points, including a score of 0 of 4 points for Criterion #2, the nexus requirement that will be the focus of this Expert Report.

C. THE ICANN REQUIREMENTS FOR MEETING THE NEXUS BETWEEN THE APPLIED-FOR STRING AND THE COMMUNITY

8. Module 4.2.3 of the ICANN AGB sets forth four criteria for scoring community-based applications, such as dotgay's application. Dotgay's petition lost 4 of 4 possible points on Criterion #2, and I shall focus on that criterion, "Nexus Between Proposed String and Community (0-4 Points)." More particularly, I shall focus on the nexus requirement, which is responsible for 3 of the 4 points. (A uniqueness requirement accounts for the other point; it was automatically lost when the EIU Panel awarded 0 of 3 points for the nexus requirement.)
9. An application merits **3 points** for the nexus requirement if "[t]he string matches the name of the community **or** is a well-known short-form or abbreviation of the community." AGB, 4-12 (emphasis added). "Name" of the community means "the established name by which the community is commonly known by others." AGB, 4-13. "[F]or a score of 3, the essential

aspect is that the applied-for string is commonly known by others as the identification/name of the community.” AGB, 4-13.

10. An application merits **2 points** if the “[s]tring identifies the community, but does not qualify for a score of 3.” AGB, 4-12. “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, 4-13. “As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context.” AGB, 4-13.

11. An application merits **1 point** (in addition to the 2 or 3 above) if it demonstrates that there is a nexus between string and community and, further, that “[s]tring had no other significant meaning beyond identifying the community described in the application.” AGB, 4-13.

D. THE CPE REPORT’S REASONS FOR DENYING DOTGAY ANY POINTS FOR THE COMMUNITY-NEXUS REQUIREMENT

12. In the CPE Report of October 8, 2015, the EIU Panel awarded dotgay 0 out of 4 possible points for Criterion #2, including 0 out of 3 possible points for the nexus requirement. CPE Report, 4-6. Because dotgay secured 10 points from the remaining Criteria and needed 14 points for approval, Criterion #2 was the critical reason for its shortfall. If dotgay had secured all 4 points for Criterion #2, its application would have been approved.

13. Recall that an application merits **3 points** if “[t]he string matches the name of the community **or** is a well-known short-form or abbreviation of the community.” AGB, 4-12. The CPE Report dismissed this possibility: “The string does not identify or match the name of the community as defined in the application, nor is it a well known short-form or abbreviation of the community.” CPE Report, 5.

14. The CPE Report does not identify precisely what evidence the EIU Panel relied on to conclude that “gay” is not a “well known short-form or abbreviation of the community” defined in dotgay’s application, but it does read into the explicit requirement (“well known short-form or abbreviation of the community”) an implicit requirement that the string **also** “identify” the community and its members. This implicit requirement is taken from the Applicant Guidebook’s explanation for a partial nexus score. Recall that an application merits **2 points** if the “[s]tring identifies the community, but does not qualify for a score of 3.” AGB, 4-12. It is not clear to me what legal reasoning or prior practice the EIU Panel relied on to import the “identify” requirement (used in the 2-point evaluation) into the 3-point evaluation.

15. “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, 4-13. The CPE Report rephrased the ICANN definition to require that the applied-for string “must ‘closely describe the community or the community members’, i.e., the applied-for string is what ‘the typical community member would naturally be called.’ ” CPE Report, 5. Based upon this narrowing revision of the ICANN criterion, the CPE Report “determined that more than a small part of the applicant’s defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus.” CPE Report, 5. Specifically, the EIU Panel “determined that the applied-for string does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals. According to the Panel’s own review of the language used in the media as well as by organizations that work within the community described by the applicant, transgender,

intersex, and ally individuals are not likely to consider ‘gay’ to be their ‘most common’ descriptor, as the applicant claims.” CPE Report, 5-6.

16. The Report did not identify the methodology the EIU followed to support these sweeping empirical statements. Instead, the Report asserted that “a comprehensive survey of the media’s language in this field is not feasible,” CPE Report, 5 note 10, and that “a survey of all LGBTQIA organizations globally would be impossible.” CPE Report, 5 note 12.
17. Dotgay’s application relied on the common use of “gay” as an umbrella term for the community of sexual and gender nonconformists. Thus, homosexual men and women, transgender and intersex persons, and their allies all march in “gay pride” parades, support “gay rights,” and follow the “gay media.” The CPE Report conceded this point (CPE Report, 7) but nevertheless claimed that “gay” is “most commonly used to refer to both men and women who identify as homosexual, and not necessarily to others.” CPE Report, 6. Citing two articles (one in *Time* and the other in *Vanity Fair*), the Report found that there are “many similar transgender stories in the media where ‘gay’ is not used to identify the subject.” CPE Report, 6-7 and note 14.
18. The CPE Report also conceded that “gay” is used in the media much “more frequently than terms such as ‘LGBT’ or ‘LGBTQIA’ in reference to both individuals and communities.” CPE Report, 7. Nonetheless, the EIU Panel asserted that there is no evidence that “when ‘gay’ is used in these articles it is used to identify transgender, intersex, and/or ally individuals or communities.” CPE Report, 7. The EIU Panel’s “own review of the news media” (footnote: the Panel said that “a comprehensive survey of the media’s language is not feasible”) found that “gay” is “more common than terms such as ‘LGBT’ or ‘LGBTQIA’, these terms are now more widely used than ever.” CPE Report, 7 and note 19.

19. The CPE Report conceded that many organizations representing sexual and gender minorities submitted letters supporting the idea that “gay” is a term describing the community. But the EIU Panel found significant that some of these same organizations have revised their names to list various subgroups, usually through the acronym LGBT and its ever-expanding variations. CPE Report, 8.
20. Based upon this reasoning, the CPE Report awarded 0 of 3 points for nexus between the applied for string and the community. As there was no nexus, the CPE Report awarded 0 of 1 point for uniqueness. CPE Report, 8.

IV. FUNDAMENTAL ERRORS IN THE CPE REPORT’S REASONING

21. The CPE Report compiled by the EIU Panel is fundamentally incorrect in its approach to the nexus criterion and in its evaluation of the evidence of community nexus. The fundamental errors fall into three different groups: (i) **interpretive errors**, namely, misreading the explicit criteria laid out in ICANN’s Applicant Guidebook and ignoring ICANN’s mission and core values; (ii) **errors of inconsistency and discrimination**, namely, failure of the EIU to follow its own guidelines for applying Criterion #2 and its discriminatory application to dotgay’s application when compared with other applications; and (iii) **errors of fact**, namely, a misstatement of the empirical evidence (supplied in abundance below) and a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities in the world.

A. THE CPE REPORT MISREAD ICANN’S APPLICANT GUIDEBOOK AND IGNORED ITS BYLAWS

22. Recall the requirements ICANN has set forth, explicitly, for the nexus requirement in its Applicant Guidebook: An application merits **3 points** if “[t]he string matches the name of the community **or** is a well-known short-form or abbreviation of the community.” AGB, 4-12 (emphasis added). “Name” of the community means “the established name by which the community is commonly known by others.” AGB, 4-13. “[F]or a score of 3, the essential aspect is that the applied-for string is commonly known by others as the identification/name of the community.”
23. An application merits **2 points** if the “[s]tring identifies the community, but does not qualify for a score of 3.” AGB, 4-12. “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, 4-13. “As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context.” AGB, 4-13.
24. As a matter of standard legal interpretation, one must focus on the ordinary meaning of the legal text, as understood in the context of the principles and purposes of the legal document.⁴ As a matter of ordinary meaning, and therefore proper legal interpretation, the CPE Report made three separate but interrelated mistakes.

1. The CPE Report Substantially Ignored The Primary Test: Is the Proposed String a “well known short-form or abbreviation of the community”?

⁴ The proposition in text is explained and defended in Aharon Barak, *Purposive Interpretation in Law* (2005); William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* (2016); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 37–38 (2012); Brian G. Slocum, *Ordinary Meaning: A Theory of the Most Fundamental Principle of Legal Interpretation* (2015).

25. To begin with, a major problem is that the EIU Panel systematically ignored the Applicant Guidebook's focus on whether the proposed string (".gay") is "a well known short-form or abbreviation of **the community**" (3 points) or "closely describes **the community**" (2 points) (emphasis added in both quotations). Notice the precise language, especially the language I have set **in bold**. The proposed string does not have to be "**the only** well known short-form or abbreviation of the community" and does not have to be "**the only term that** closely describes the community" (bold type for language I am adding for contrast). More important, the primary focus is "the community," not just "community members" (who are an alternative focus for the 2-point score).

26. The overall community is sexual and gender nonconformists. This is a community that shares a history of state persecution and private discrimination and violence because its members do not conform to the widely embraced natural law norm that God created men and women as opposite and complementary sexes, whose biological and moral destiny is to engage in procreative sex within a marriage. "Gay" is a "well known short-form or abbreviation of the community" (the requirement for 3 points) and also "closely describes the community" (the requirement for 2 points). There is no requirement that "gay" must be the only umbrella term for the community or even that it be the most popular term—but in fact "gay" remains the most popular term in common parlance, as illustrated by the empirical use depicted in Figure 1 below. Figure 1 not only establishes that "gay" has been a popular word for more than a century, but also demonstrates that once "gay rights" became ascendant in the 1990s, the term's dominance increased and consolidated.

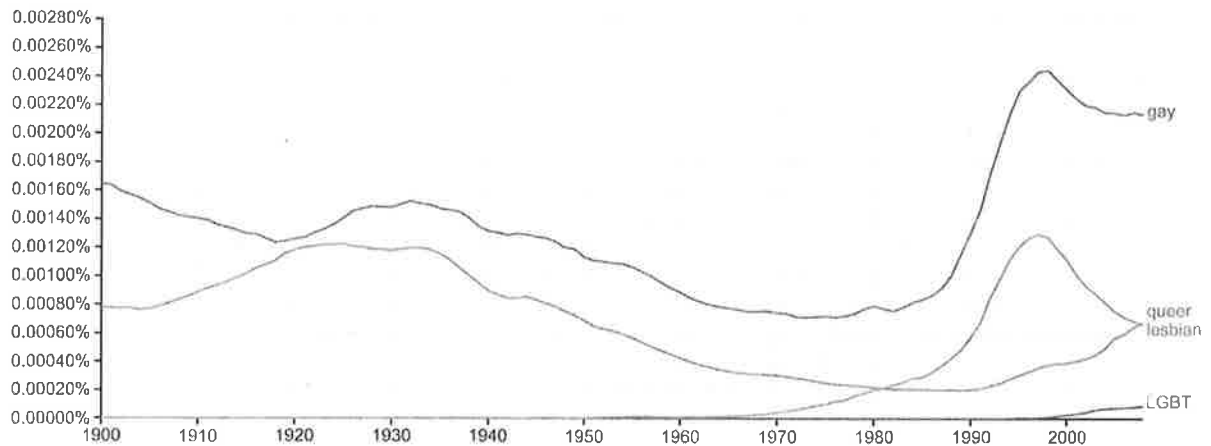


Figure 1. A Comparison of the Frequency of “Gay” “Queer” “Lesbian” and “LGBT” in the English corpus of books published in the United States from 1900 to 2008

2. The CPE Report Created an “Under-Reach” Criterion Not Found in or Supported by the Applicant Guidebook and Applied the Novel Criterion to create a Liberum Veto Inconsistent with ICANN’s Rules and Bylaws

27. In another major departure from ICANN’s Applicant Guidebook and its Bylaws, the EIU Panel introduced a **Liberum Veto** (Latin for “free veto”) into ICANN’s nexus criteria. In the seventeenth and eighteenth-century Polish-Lithuanian Commonwealth, any single legislator could stop legislation that enjoyed overwhelming majority support, a practice that paralyzed the Commonwealth’s ability to adopt needed laws and probably contributed to its dismantlement at the hands of Prussia, Austria, and Russia in the latter half of the eighteenth century. The CPE Report created a similar Liberum Veto, by importing a requirement that the applied-for string (“.gay”) can be vetoed if it “does not sufficiently identify **some**

members of the applicant’s defined community, in particular transgender, intersex, and ally individuals.” CPE Report, 5 (emphasis added).

28. Where did this Liberum Veto come from? It was not taken from the Applicant Guidebook’s explicit instructions for the nexus requirement, AGB, 4-12, nor was it taken from the Guidebook’s Definitions of “Name” or “Identify,” AGB 4-13. Yet the EIU Panel quoted the Applicant Guidebook for its statement of the governing test for the nexus requirement. Let me walk through the process by which the EIU Panel introduced this mistake.

29. According to the Applicant Guidebook, “Identify,” a key term in the 2-point test, means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, 4-13. The CPE Report recast this Guidebook criterion to require that the applied-for string “must [1] ‘closely describe the community or the community members’, i.e., the applied-for string is what [2] ‘the typical community member would naturally be called.’ ” CPE Report, 5 (quoting the AGB). Notice that the first part [1] of the CPE Report’s requirement is taken from the Guidebook’s nexus requirement and the second part [2] is quoted from an illustration of **one** example where the Guidebook’s criterion would be satisfied. Just as the EIU Panel all but ignored the Applicant Guidebook’s focus on “the community” and refocused only on “members of the community,” so the Panel ignored the Applicant Guidebook’s focus on an **objective** view of the community and refocused only on **subjective** usages by some members of the community. And it took subjective usages pretty far by creating a Liberum Veto.

30. Moreover, the EIU Panel’s Liberum Veto is contrary to the explicit requirement of the Applicant Guidebook. Recall that the Guidebook defines “Identify” to mean that “the applied-for string closely describes the community or the community members, **without over-reaching substantially beyond the community.**” AGB, 4-13 (emphasis added). Thus, the Guidebook is concerned with applied-for strings that are much broader than the community defined in the application, like this:

ICANN AGB Concern: Applied-For String > Community Defined in Application

But that’s not the concern identified by the EIU Panel’s Liberum Veto analysis, which claims that the applied-for string (“gay”) “under-reaches” substantially short of the whole community. The Panel’s “under-reaching” concern flips the “over-reaching” concern of the Applicant Guidebook. The Panel’s worry that the applied-for string is much narrower than the community defined in the application, looks like this:

EIU Panel Concern: Applied-For String < Community Defined in Application

31. Although I shall document how the EIU Panel is mistaken in its application of its “under-reaching” analysis, note that this analysis and the Liberum Veto are errors by the EIU Panel and are contrary to the ordinary meaning of ICANN’s Applicant Guidebook. The “under-reaching” analysis and the Liberum Veto are also inconsistent with the CPE Guidelines, Version 2.0, prepared by the EIU itself. See EIU, CPE Guidelines, 7-8 (Version 2.0), analyzed below.

3. The CPE Report Ignored and Is Inconsistent with ICANN's Bylaws

32. Overall, the CPE Report was oblivious to the purposes of the project of assigning names and to ICANN's mission and core values. Like dotgay, the EIU Panel fully agreed that there is a coherent, substantial, and longstanding community of sexual and gender nonconformists who would benefit from a community-based domain on the Internet. A core value for ICANN is to support "broad, informed participation reflecting the * * * cultural diversity of the Internet." ICANN Bylaws, Art. I, § 2(4). A core value in interpretation is to apply directives like those in the nexus requirement with an eye on the overall purposes and principles underlying the enterprise.
33. There can be no serious dispute that there is a strong and dynamic community of gender and sexual minorities, that the members of the community would benefit from a cluster of related websites, and that dotgay is a community-based group with a rational plan to develop these websites in a manner that will greatly benefit the public. And the string dotgay proposes—.gay—is ideally suited for these purposes.
34. If I asked you to look for data and stories about the suicides of gender and sexual minorities (a big problem in the world), "suicide.gay" (one of the community-operated websites proposed in the application) would be the first thing most people would think of. Even most politically correct observers (such as the author of this Expert Report) would think "suicide.gay" before they would think "suicide.lgbt" or "suicide.lgbtqia." See Figure 1, above. Indeed, many educated people (including the author of this Expert Report) cannot easily remember the correct order of the letters in the latter string ("lgbtqia"). Does a

Liberum Veto make sense, in light of these purposes? No, it does not, especially in light of the alternative strings (such as “lgbtqia”). Figure 2, below, is a dramatic illustration of this point: “gay suicide” is a common locution; the search of books published between 1950 and 2008 does not register significant usage for “LGBT suicide” or “LGBTQIA suicide.”

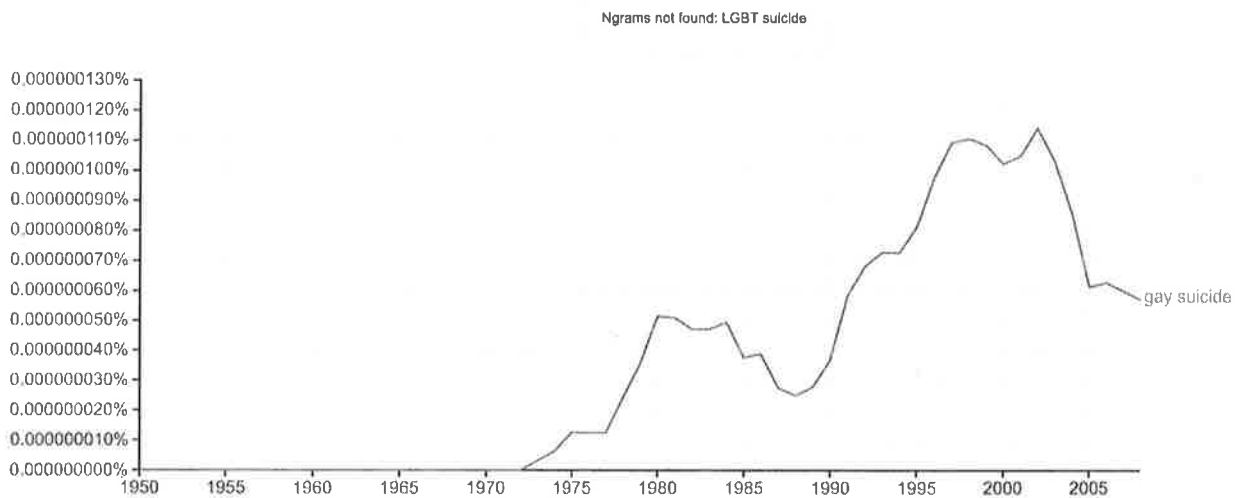


Figure 2. A Comparison of the Frequency of “Gay Suicide” compared to “LGBT Suicide” in the Corpus of Books published between 1950 and 2008

35. Not least important, recall that “non-discriminatory treatment” is a fundamental principle identified in ICANN’s Bylaws. As I shall now show, the EIU has arbitrarily created an “under-reaching” test or requirement, without any notice in its own guidelines. Needless to say, other EIU Panel evaluations have ignored that criterion in cases where it is much more obviously relevant. Moreover, even if the Applicant Guidebook included an “under-reaching” test in its nexus requirement, the EIU Panel here has applied it in a most draconian

manner, namely, creating a Liberum Veto wielded apparently just for the purposes of this recommendation, at least when one compares its use here and in other cases. Consider the next set of errors.

B. THE CPE REPORT IS INCONSISTENT WITH THE EIU'S OWN GUIDELINES AND PREVIOUS REPORTS AND THEREFORE VIOLATES ICANN'S DUTY OF NON-DISCRIMINATION

1. The CPE Report Is Inconsistent with the EIU's Own Guidelines

36. Recall that the Applicant Guidebook awards the applicant 2 of 3 nexus points if the applied-for string “identifies” the community but does not qualify for a score of 3. I believe dotgay properly qualified for a score of 3, but the CPE Report combined in a confusing way (and apparently contrary to the precise terms of the Applicant Guidebook) the requirements for full (3 point) and partial (2 point) scores. For both, the EIU Panel focused on whether the application “identified” the community.
37. “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, 4-13. The CPE Report rephrased the ICANN criterion to require that the applied-for string “must ‘closely describe the community or the community members’, i.e., the applied-for string is what ‘the typical community member would naturally be called.’ ” CPE Report, 5.
38. Based upon this revision of the ICANN criterion, the CPE Report “determined that more than a small part of the applicant’s defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus.” CPE Report, 5. Specifically, the EIU Panel “determined that the applied-for string does not sufficiently identify some members of the

applicant’s defined community, in particular transgender, intersex, and ally individuals.”
CPE Report, 5-6.

39. As I concluded above, the EIU Panel has imported a new “under-reaching” test into the nexus analysis—contrary to the Applicant Guidebook’s concern only with “over-reaching.” Indeed, this CPE Report’s unauthorized test is also directly inconsistent with the EIU’s own published CPE Guidelines, Version 2.0. In its discussion of Criterion #2 (Nexus), the EIU’s Guidelines quote the Applicant Guidebook’s definition of “Identify,” with the “over-reaching language. Then, the EIU announces its own “Evaluation Guidelines” for this term, including this:

“Over-reaching substantially” means that the string indicates a **wider** geographic or thematic remit than the community has.

EIU, CPE Guidelines, Version 2.0, at 7 (emphasis added). The EIU’s Guidelines do not suggest that the inquiry should be whether the string indicates a “**narrower** geographic or thematic remit than the community has” (emphasis for my substitution).

40. The EIU Guidelines also discuss inquiries that panels might make, including these two that I consider most relevant:

Does the string identify a wider or related community of which the applicant is a part, but is not specific to the applicant’s community?

Does the string capture a wider geographic/thematic remit than the community has?

EIU, CPE Guidelines, Version 2.0, at 8 (emphasis in original).

41. Given these Guidelines, one would not expect “under-reaching” decisions, even when an application clearly presents those concerns. An excellent example is the CPE Report for Application 1-901-9391 (July 29, 2014), which evaluated the community-based application for the string “.Osaka”. “Members of the community are defined as those who are within the Osaka geographical area as well as those who self-identify as having a tie to Osaka, or the culture of Osaka.” Osaka CPE Report, 2. In a nonexclusive list, the applicant identified as members of the community “Entities, including natural persons who have a legitimate purpose in addressing the community.” Osaka CPE Report, 2.
42. The applied-for string (“.Osaka”) would seem to be one that very substantially “under-reaches” the community as defined by the applicant. Apply to this application the same fussy analysis that the EIU Panel applied to the dotgay application. Many people who live in Osaka probably self-identify as “Japanese” rather than “Osakans.” Many of the people who are in Osaka are visitors who do not identify with that city. Others are residents of particular neighborhoods, with which they identify more closely. *Liberum Veto?*
43. Consider a specific example. Chūō-ku is one of 23 wards in Osaka; it contains the heart of the financial district and is a popular tourist destination. Many a businessperson, or tourist (this is a popular AirBnB location), or even resident might say, “I am only interested in Chūō-ku! The rest of Osaka has no interest for me.” If a fair number of people feel this way, “more than a small part of the applicant’s defined community is not identified by the applied-for string,” Dotgay CPE Report, 5, if one were following the logic of the EIU Panel evaluating dotgay’s application.

44. I must say that this kind of Libero Vetu evidence would be supremely silly under the criteria laid out by ICANN in its Application Guidebook (or by the EIU in its CPE Guidelines), but there is a close parallel between this analysis for “.Osaka” and that posed by the EIU Panel for “.gay.” Simply substitute “transgender” for “Chūō-ku” in the foregoing analysis, and you have the EIU Panel’s evaluation in the Dotgay CPE Report.

45. By its broad definition of the community, including “[e]ntities, including natural persons who have a legitimate purpose in addressing the community,” the “.Osaka” applicant is screaming “under-reach.” Or at least suggesting some inquiry on the part of its EIU Panel. Yet the EIU Panel for the “.Osaka” application simply concluded that the string “matches the name of the community” and awarded the applicant 3 of 3 points for nexus. Osaka CPE Report, 4. “The string name matches the name of the geographical and political area around which the community is based.” Osaka CPE Report, 4. Yes, but the applicant defined the community much, much more broadly, to include anybody or any entity with a connection to Osaka. The EIU Panel simply did not apply an “under-reach” analysis or consider a Libero Vetu in the Osaka case, because those criteria were not in the Applicant Guidebook or even in the EIU’s CPE Guidelines. And, it almost goes without saying, the EIU Panel’s analysis for the dotgay application is strongly inconsistent with the EIU Panel’s lenient analysis for the Osaka application.

2. The CPE Report Is Inconsistent with the EIU’s Own Previous Reports

46. Dotgay’s application may not have been the first time the EIU has performed a nexus analysis suggesting an “under-reach” of an applied-for string, compared with the identified

community. But even prior cases that might be read to suggest the possibility of such analysis did not apply it with the ferocity the EIU Panel applied it to the dotgay application. In particular, the analysis never reached the point of creating a *Liberum Veto*.

47. An earlier CPE Report for Application 1-1032-95136 (June 11, 2014), evaluated whether “.hotel” should be approved as a top-level domain. The EIU Panel may have performed a kind of “under-reach” analysis—but it was nothing as critical as that which it performed for dotgay’s application, even though the “.hotel” name was a much more dramatic illustration of “under-reach.”

48. The applicant wanted a domain that would serve the “global Hotel Community.” It defined its community in this way: “A hotel is an establishment with services and additional facilities where accommodation and in most cases meals are available.” Hotel CPE Report, 2. The CPE Report awarded the applicant 15 out of 16 points, including 2 of 3 points for the nexus requirement and 1 of 1 point for the uniqueness requirement.

49. In the discussion of the nexus requirement, the EIU Panel observed that “the community also includes some entities that are related to hotels, such as hotel marketing associations that represent hotels and hotel chains and which may not be automatically associated with the gTLD. However, these entities are considered to comprise only a small part of the community.” Hotel CPE Report, 4. This is a stunning understatement. The applicant’s broad definition of “hotel” would logically sweep into the “community” resorts, many spas, bed and breakfasts, the sleeping cars on the Venice-Simplon Orient Express, some cabins in national parks, and perhaps Air BnB (the home-sharing service). Is the Orient Express’s

sleeping car a “hotel”? There is an actual Orient Express Hotel in Istanbul, Turkey (a big building with lots of luxury rooms), but I am not aware that the private company running the current Orient Express train would consider its sleeping cars to be “hotel” rooms. Indeed, the company might be alarmed at the possibility, given special regulations governing hotels in the countries through which the Orient Express travels.

50. The EIU’s “under-reach” analysis of the Hotel application was perfunctory at best. A fourth-grade student would have been able to come up with more examples where the applied-for string (“.hotel”) did not match the community defined in the application. Contrast the Panel’s tolerant analysis in the Hotel application with its hyper-critical analysis of dotgay’s application. The contrast becomes even more striking, indeed shocking, when you also consider the dotgay CPE Report’s vague allusions to evidence and its few concrete examples, as well as the easily available empirical evidence included in the current Expert Report (reported below).

51. Another example of an EIU Panel’s forgiving analysis is that contained in the CPE Report for Application 1-1309-81322 (July 22, 2015), for “.spa”. The EIU Panel awarded the applicant 14 of 16 points, including 4 of 4 points for nexus and uniqueness. Like the “.hotel” applicant, the “.spa” applicant has more significant problems of “under-reach” than dotgay’s application has.

52. The “.spa” applicant defined the community to include “Spa operators, professionals, and practitioners; Spa associations and their members around the world; and Spa products and services manufacturers and distributors.” Spa CPE Report, 2. The EIU Panel awarded the

applicant 4 of 4 points based upon a finding that these three kinds of persons and entities “align closely with spa services.” Spa CPE Report, 5. If I were a manufacturer of lotions, salts, hair products, facial scrubs and exfoliants, as well as dozens of other products that are used in spas and thousands of other establishments and sold in stores, I would not self-identify with “spa” and would not think “.spa” if I were interested in exfoliants and facial scrubs. As before, the EIU Panel did not look very deeply into this “alignment” concern, and awarded the spa applicant 3 of 3 points for nexus.

C. THE CPE REPORT IGNORED IMPORTANT HISTORICAL AND EMPIRICAL EVIDENCE THAT STRONGLY SUPPORTS DOTGAY’S APPLICATION

53. Assume, contrary to any sound analysis, that the CPE Report correctly stated the Applicant Guidebook’s requirements for Criterion #2 (community nexus and uniqueness). Even under the EIU Panel’s excessively restrictive understanding of ICANN’s requirements, dotgay’s application would merit 4 of 4 points, based upon a sound understanding of the history of the gay community and based upon empirical evidence of language actually used in the media and in normal parlance in the last century.

54. Recall that the EIU Panel “determined that more than a small part of the applicant’s defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus.” CPE Report, 5. Specifically, the EIU Panel “determined that the applied-for string does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals. According to the Panel’s own review of the language used in the media as well as by organizations that work within the community

described by the applicant, transgender, intersex, and ally individuals are not likely to consider ‘gay’ to be their ‘most common’ descriptor, as the applicant claims.” CPE Report, 5-6.

55. The CPE Report makes no effort to situate dotgay’s claims within the larger history of sexual and gender minorities in history or in the world today. Nor does it identify the methodology the EIU Panel followed to support these sweeping empirical statements. The remainder of this Expert Report will attempt to do that. The analyses contained in Appendix 2 will explain the methodology my research team and I followed for each of the Figures used below.

1. From Stonewall to Madrid: “Gay” as an Umbrella Term for Sexual and Gender Minorities, as Well as a Term for Homosexual Men

56. In the late nineteenth and early twentieth centuries, sexual and gender nonconformists were pathologized in western culture and law as “degenerates,” “moral perverts,” “intersexuals,” and “inverts,” as well as “homosexuals.”⁵ European sexologists, led by Richard von Krafft-Ebing, the author of *Psychopathia Sexualis* (1886), theorized that a new population of “inverts” and “perverts” departed from “natural” (male/female) gender roles and (procreative) sexual practices. As freaks of nature, these people reflected a “degeneration” from natural forms.⁶

⁵ E.g., Havelock Ellis, *Sexual Inversion* (3d ed. 1915); William Lee Howard, *The Perverts* (1901), and *Effeminate Men and Masculine Women*, 71 N.Y. Med. J. 686-87 (1900); see generally William N. Eskridge Jr., *Dishonorable Passions: Sodomy Laws in America, 1861-2003*, at 39-49 (2008); Jonathan Ned Katz, *Gay/Lesbian Almanac: A New Documentary* 213 et al. (1983).

⁶ Krafft-Ebing and the other European sexologists are discussed in Eskridge, *Dishonorable Passions*, 46-49.

57. Even the “inverts” themselves used these terms, as illustrated by Earl Lind’s *Autobiography of an Androgyne* (1918) and *The Female Impersonators* (1922). Lind’s was the first-person account of an underground New York City society of people he describes as “bisexuals,” “inverts,” “female impersonators,” “sodomites,” “androgynes,” “fairies,” “hermaphroditoi,” and so forth. What these social outcasts and legal outlaws had in common is that they did not follow “nature’s” binary gender roles (biological, masculine man marries biological, feminine woman) and procreative sexual practices that were socially expected in this country. See also Edward Carpenter, *The Intermediate Sex: A Study of Some Transitional Types of Men and Women* (1908); Xavier Mayne (a/k/a Edward Stevenson), *The Intersexes: A History of Simulsexualism as a Problem in Social Life* (1908). Notice that, both socially and theoretically, what put all these people in the same class was that they did not conform to standard gender roles and procreation-based sexual practices.
58. Most of these terms were at least somewhat derogatory, as was “homosexual,” a German term imported into the English language in the 1890s. Some members of this outlaw community in Europe and North America resisted the pathologizing terms and came up with their own language. In Germany, Karl Ulrichs, a homosexual man, dubbed his tribe “urnings,” and Magnus Hirschfeld described “transvestites” with sympathy. At first in America and subsequently in the rest of the world, the most popular term to emerge was “gay,” a word traditionally meaning happy and joyful. Sexual and gender minorities appropriated this “happy” word as a description of their own amorphous subculture.
59. An early literary example is Gertrude Stein’s *Miss Furr and Miss Skeene* (1922, but written more than a decade earlier). The author depicts a female couple living together in an unconventional household that did not conform to gender and sexual expectations that a

woman would “naturally” marry and live with a man/husband and raise the children they created through marital intercourse. In 1922, almost no one would have dared represent, in print, Miss Furr and Miss Skeene as a lesbian couple or as a couple where one woman passed or posed as a man. (Such an explicit book would have been subject to immediate censorship.) Instead, Gertrude Stein described the women thus:

“They were quite regularly gay there, Helen Furr and Georgine Skeen, they were regularly gay there where they were gay. To be regularly gay was to do every day the gay thing that they did every day. To be regularly gay was to end every day at the same time after they had been regularly gay.”

If they were not completely baffled, most readers in the 1920s would have assumed the traditional reading of “gay,” used here in a distinctively repetitive manner. Denizens of the subculture of sexual and gender outlaws would have guessed that there was more to the relationship than a joint lease—but they would not have known whether the women were sexual partners, whether one of them played the “man’s role,” or even whether they were even two women, and not a woman and a man passing as a woman, or even what Earl Lind had called an “androgynous” or “hermaphrodite.”

60. Gertrude Stein’s story illustrates how “gay” could, as early as 1922, have three layers of meaning: (1) happy or merry, (2) homosexual, and/or (3) not conforming to traditional gender or sexual norms. (As the twentieth century progressed, meaning (1) has been almost completely eclipsed by meanings (2) and (3).) There was in this early, closeted era a “camp” feature to this toggling among three different meanings, as different audiences could draw different meanings, and audiences “in the know” could find delight in the ambiguity.

61. An early example from popular culture might be helpful. In the hit cinematic comedy *Bringing Up Baby* (1938), Cary Grant's character sends his clothes to the cleaners and dresses up in Katherine Hepburn's feather-trimmed frilly robe. When a shocked observer asks why the handsome leading man is thus attired, Grant apparently ad-libbed, "Because I just went gay all of a sudden!" Audiences found the line highly amusing. Ordinary people, and presumably the censors (who in the 1930s were supposed to veto movies depicting homosexuality), liked the handsome matinee idol's "carefree" attitude about donning female attire. Cross-dress for success! Hollywood insiders and people in the underground gay community appreciated the hint of sexual as well as gender transgression. Cross-gender attire and behavior (gender "inversion," to use the older term) were associated with homosexuality. And Cary Grant's inner circle would have been shocked and titillated that this actor, who lived for twelve years with fellow heart-throb Randolph Scott, a bromance rumored to be sexual, would have cracked open his own closet door with this line.⁷

62. In the mid-twentieth century, "gay" gained currency as both a specific term for homosexual men in particular **and** as an umbrella term for the larger subculture where homosexual men were most prominent but were joined by lesbians, butch "dykes," drag queens, bisexuals, sexual and gender rebels, and their allies. "Queer" is another term that had this quality, but it never gained the wide currency and acceptance that "gay" did. See Figure 1, above. Indeed, in many countries, "queer" to this day carries more negative connotations than "gay," which continues to make "queer" a less attractive generic term.

⁷ For a provocative analysis of the bromance, see Michael Musto, *Cary Grant and Randolph Scott: A Love Story*, Village Voice, Sept. 9, 2010.

63. A defining moment in gay history came when gay people rioted for several nights in June 1969, responding to routine police harassment at New York City's Stonewall Inn. As historian David Carter says in his classic account of the riots, a motley assortment of sexual rebels, gender-benders, and their allies sparked the "Gay Revolution."⁸ Sympathetic accounts of the Stonewall riots mobilized the popular term "gay" to mean **both** the homosexual men **and** the community of sexual and gender minorities who participated in the "Gay Revolution." For example, Carter's account reports that this "Gay Revolution" began when a "butch dyke" punched a police officer in the Stonewall, which triggered a series of fights, a police siege of the bar, and several nights of protests and riots. Many and perhaps most of the fighters, protesters, and rioters were homosexual or bisexual men, but Carter insists that "special credit must be given to gay homeless youths, to transgendered men, and to the lesbian who fought the police. * * * A common theme links those who resisted first and fought the hardest, and that is gender transgression."⁹

64. Take the Stonewall Inn itself. It was a seedy establishment in the West Village of Manhattan that contemporary accounts almost universally described as a "gay bar." The patrons of the gay bar included homosexual and bisexual men who were insisting they be called "gay" and not the disapproved Greek terms ("homosexual" and "bisexual") that had been devised by the doctors. Many of the people in the "gay bar" were not homosexual men, but were lesbians,

⁸ David Carter, *Stonewall: The Riots That Sparked the Gay Revolution* (2010).

⁹ *Id.* at 261; see *id.* at 150-51 (describing the first punch thrown by the "butch dyke," who floored a police officer).

gender-bending “bull dykes” and “drag queens,” gender rebels, bisexual or sexually open youth, and the friends of these gender and sexual nonconformists.¹⁰

65. Early on, Stonewall was hailed as “the birth of the Gay liberation movement.”¹¹ In New York alone, it spawned organizations for “gay rights” that prominently included the Gay Liberation Front, the Gay Activists Alliance, and dozens of other “gay” groups. These groups included “gay” men, but also bisexuals, lesbians, and transgender persons, allies, hangers-on, and “queers” of all sorts. The community of sexual and gender minorities knowingly used the term “gay” in both senses—as a term displacing “homosexual” for sexual orientation and as an umbrella term for the entire community. In San Francisco, Carl Wittman’s *The Gay Manifesto* (1970) made clear that the “gay agenda” was to mobilize gender and sexual nonconformists to resist social as well as state oppression and disapproval. “Closet queens” should “come out” and celebrate their differences.

66. Activists also sought to reclaim the history of their community—what Jonathan Ned Katz, the leading historian, calls “Gay American History.” First published in 1976 and reissued many times since, Katz’s *Gay American History* is populated by a wide range of gay characters, most of whom were not homosexual men. The Americans narrating or described in the pages of *Gay American History* include dozens of Native American *berdaches*, namely, transgender or intersex Native Americans, whom white contemporaries called “hermaphrodites” and “man-women”;¹² poet Walt Whitman, who celebrated “the love of

¹⁰ See *id.* at 67-88 (describing the reopening of the Stonewall in 1967 and the highly diverse gay crowd that it attracted, even though its Mafia owners sought to restrict entry through a doorman).

¹¹ Jonathan Ned Katz, *Gay American History: Lesbians and Gay Men in the U.S.A.* 508 (1976).

¹² *Id.* at 440-69, 479-81, 483-500 (dozens of examples of transgender Indians).

comrades,” which he depicted as male bonding and intimate friendships;¹³ “male harlots,” or prostitutes, on the streets of New York;¹⁴ Murray Hall, a woman who passed as a man and married a woman, as well as dozens of other similar Americans;¹⁵ lesbian or bisexual women such as blues singer Bessie Smith and radical feminist and birth control pioneer Emma Goldman.¹⁶ More recent historical accounts of the diverse community of sexual and gender nonconformists have, like Katz, described their projects in terms such as *Gay L.A.* and *Gay New York*.¹⁷

67. Since the early 1970s, of course, the gay community has evolved, especially as it has successfully challenged most of the explicit state discriminations and violence against sexual and gender minorities. As hundreds of thousands of sexual and gender nonconformists have come out of the closet and have asserted their identities openly in our society, there has been a great deal more specification for different groups within the larger gay community.
68. Early on and widely in the 1970s, many lesbians insisted that public discourse should discuss the common challenges faced by “lesbian and gay” persons. In the 1990s, it was not uncommon for community members to refer to sexual minorities as “LGB” (lesbian, gay, and bisexual) persons, and soon after that the blanket term “LGBT” (lesbian, gay, bisexual, and

¹³ Id. at 509-12 (Whitman).

¹⁴ Id. at 68-73 (male prostitutes, called “harlots” in a contemporary report).

¹⁵ Id. at 317-90 (dozens of women who “passed” as men, many of whom marrying women).

¹⁶ Id. at 118-27 (Smith), 787-97 (Goldman).

¹⁷ Lillian Faderman & Stuart Timmons, *Gay L.A.: A History of Sexual Outlaws, Power Politics, and Lipstick Lesbians* (2006) (excellent account of the increasingly diverse and differentiated population of “Gay Los Angeles”); George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940* (1994) (although an account focusing on the world of men, this book includes within the “gay male world” bisexual men, drag queens, fairies, queers, and other gender-bending men and their allies).

transgender) came into prominence, in order to include transgender persons explicitly. Notwithstanding this level of specification and the laudable impulse to recognize different subcommunities, the term “gay” still captured the larger community. I entitled my first gay rights book *Gaylaw: Challenging the Apartheid of the Closet* (1999). The book described its subject in this way: “Gaylaw is the ongoing history of state rules relating to gender and sexual nonconformity. Its subjects have included the sodomite, the prostitute, the degenerate, the sexual invert, the hermaphrodite, the child molester, the transvestite, the sexual pervert, the homosexual, the sexual deviate, the bisexual, the lesbian and the gay man, and transgendered people.”¹⁸ Although many readers were taken aback that “gaylaw” might mean rights, rather than jail sentences, for sexual and gender nonconformists, no one objected that “gaylaw” and “gay rights” did not include the law and rights relating to transgender and intersex persons, bisexuals, and other sexual or gender nonconformists.

69. In the new millennium, after the publication of *Gaylaw*, the acronym summarizing membership in the gay community has grown longer and more complicated. Sometimes the acronym is LGBTQ, with “queer” added, and intersex persons are often included, to make the acronym LGBTI or LGBTQI. Dotgay’s application describes the community as LGBTQUIA, namely, lesbian, gay, bisexual, transgender, queer, intersex, and allied persons.

70. Has the expanding acronym rendered “gay” obsolete as the commonly understood umbrella term for our community? Not at all. Recall that the requirement for the nexus requirement

¹⁸ William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* 1 (1999). The United States Supreme Court both cited and borrowed language and citations from my law review article that was reproduced as chapter 4 of *Gaylaw* in *Lawrence v. Texas*, 539 U.S. 558, 568-71 (2003). The Court also relied on the brief I wrote for the Cato Institute, which was drawn from *Gaylaw* as well. See *id.* at 567-68. Justice Scalia’s dissenting opinion cited *Gaylaw* so often that he short-formed it “Gaylaw.” See *id.* at 597-98 (dissenting opinion).

between proposed string and community is **not** that the proposed string is the only term for the community, or even that it is the most popular. Instead, the test is whether the proposed string (“.gay”) “is a well-known short-form or abbreviation of the community.” AGB, 4-12.

There are many, many specific examples indicating that it is.

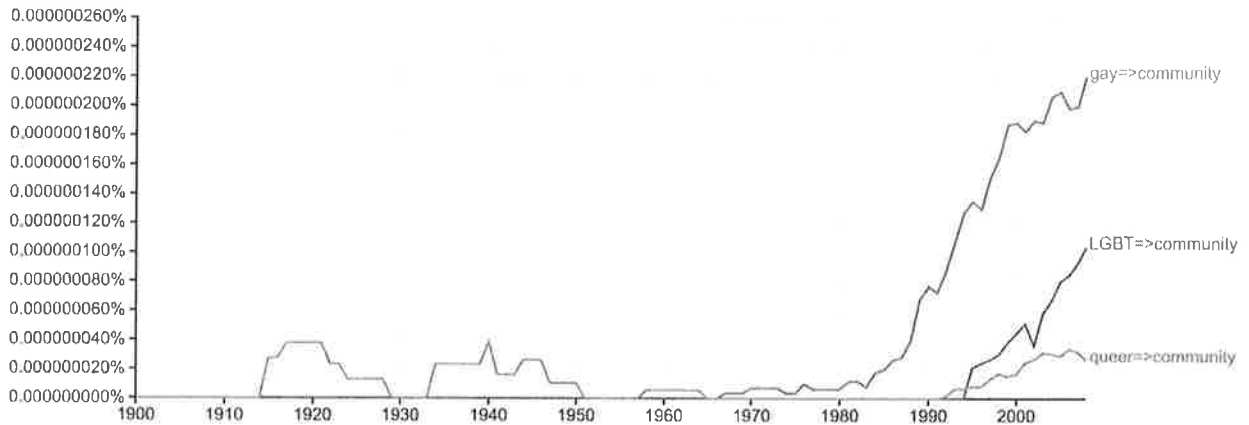


Figure 3. A Depiction of Dependency Relations among “Community” and Modifying Adjectives (“Gay”, “LGBT”, and “Queer”)

71. Figure 3, above, reflects the usage in the searchable Internet of “gay” as modifying “community,” and offers a comparison with other adjectives, such as “queer” and “LGBT” modifying “community.” (As with the other Figures, the methodology for the search is contained in Appendix 2.)

72. There are other corpuses that can be searched, and we have done so to check the reliability of the data in Figure 3. Brigham Young University maintains a Corpus of Contemporary American English (“BYU Corpus”); it contains 520 million words, 20 million each year from 1990 to 2015. The BYU Corpus can be accessed at <http://corpus.byu.edu/coca/> (last viewed

Sept. 9, 2016). The BYU Corpus captures a wide range of usage, as it divides words equally among fiction, newspapers, spoken word, popular magazines, and academic texts. A search of the BYU Corpus confirms the suggestion in Figure 1, above, that “gay” dominates “LGBT” and other acronyms used to describe sexual and gender minorities. Specifically, we had 26,530 hits on the BYU Corpus for “gay,” 673 hits for “LGBT,” 193 hits for “LGBTQ,” and 0 hits for “LGBTQIA.”

73. Does “gay community” generate a comparable number of hits? In our search of the BYU Corpus, we found “gay community” eight times more frequently than “LGBT community.” (“LGBTQIA community” returned no results.) While “LGBT community” is much more popular now than it was ten or even five years ago, the most popular term remains “gay community.” Figure 3A provides an illustration of these results.

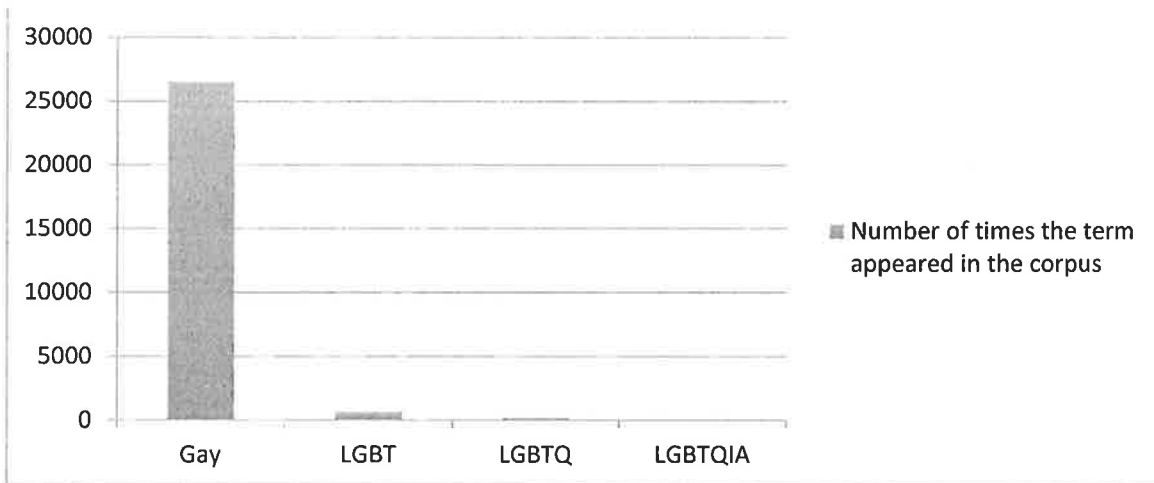


Figure 3A. A Depiction of Dependency Relations found in the BYU Corpus among “Community” and Modifying Adjectives (“Gay”, “LGBT”, “LGBTQ” and “LGBTQIA”)

74. How does this empirical evidence relate to the legal criteria that must be applied to Criterion #2 (Nexus)? Recall that ICANN’s Applicant Guidebook awards 3 of 3 points

for the community-nexus category if the applied-for string is “a **well known** short-form or abbreviation for the community” (emphasis added). Both the specific examples (above and in the following pages) and the empirical analysis establish beyond cavil that “gay” is a “well known short-form or abbreviation for the community.” Indeed, the data would support the proposition that “gay” is the “**best known** short-form or abbreviation for the community” (“best” substituted for “well”). But that is not the burden of the applicant here; dotgay has more than met its burden to show that its applied-for string is “a **well known** short-form or abbreviation for the community” (emphasis added). To confirm this point, consider some current evidence.

75. Bring forward the Stonewall story of violence against sexual and gender minorities to the present: the shootings at Pulse, the “gay bar” in Orlando, Florida in June 2016. My research associates and I read dozens of press and Internet accounts of this unprecedented mass assault by a single person on American soil.¹⁹ Almost all of them described Pulse as a “gay bar,” the situs for the gay community. But, like the Stonewall thirty-seven years earlier, Pulse was a “gay bar” and a “gay community” that included lesbians, bisexual men and women, transgender persons, queer persons, and “allies,” as well as many gay men.

76. Forty-nine “gay people” died as a result of the massacre. They were a diverse group of sexual and gender minorities, and their allies and friends.²⁰ Most of the victims were

¹⁹ We examined accounts by the *New York Times* and *Washington Post*, CNN, BBC, NBC, and NPR.

²⁰ For biographies of victims in the Pulse shootings, see <http://www.npr.org/sections/thetwo-way/2016/06/12/481785763/heres-what-we-know-about-the-orlando-shooting-victims> (last viewed 9/2/16).

homosexual or bisexual men enjoying Pulse with their boyfriends or dates. But some of the victims were women, such as Amanda Alvear and Mercedes Flores and Akyra Murray. Others were drag queens and transgender persons such as Anthony Luis Laureanodisla (a/k/a Alanis Laurell). Yet other celebrants were queer “allies” such as Cory James Connell, who was with his girlfriend at Pulse when he was shot, and Brenda McCool, a mother of five and grandmother of eleven, who was with her son when she was shot.

77. Consider, finally, a positive legacy of the Stonewall riots, namely, “gay pride.” For more than 40 years, the New York City gay community has hosted a Pride Parade, remembering the degrading treatment once accorded sexual and gender minorities by the state and by society and asserting pride in ourselves and pride that our country now celebrates sexual and gender diversity. The New York City Pride Parade is highly inclusive and includes marchers and floats from all gender and sexual minorities. Held in the aftermath of the Orlando shootings, the June 2016 New York Pride Parade was the largest ever, and the mainstream media celebrated the event with highlights from what most accounts called “the Gay Pride Parade.”²¹

78. Today, the phenomenon of gay pride celebrations is world-wide. Cities on all continents except Antarctica host these events—from Gay Pride Rio to Gay Pride Week in Berlin to Cape Town Gay Pride to the Big Gay Out in Auckland to Gay Pride Rome to Gay Pride Orgullo Buenos Aires to Gay Pride Tel Aviv to Istanbul Gay Pride to Gay Pride Paris. I am taking these tag names from a website that collects more than 200 “gay pride events”

²¹ E.g., *Highlights from New York’s Gay Pride Parade*, N.Y. Times, June 26, 2016, available at <http://www.nytimes.com/live/gay-pride-parade-nyc-2016/> (viewed Sept. 10, 2016).

all over the world, <https://www.nighttours.com/gaypride/> (viewed Sept. 9, 2016). A review of the websites for the world-wide gay pride events suggests that most are just as inclusive as the New York Gay Pride Parade.

79. There are also international gay pride events. In 2017, it will be World Pride Madrid, celebrating Spain's leadership on issues important to lesbians, gay men, bisexuals, transgender and intersex persons, queers, and allies. Indeed, Madrid's annual pride celebration was voted "best gay event in the world" by the Tripout Gay Travel Awards in 2009 and 2010. When Madrid was chosen for this honor, media accounts routinely referred to the event as "Gay World Pride."²² Gay pride parades and celebrations all over the world illustrate the theme that the media, especially the Internet, often use "gay" **both** as a generic, umbrella term for sexual and gender minorities **and** as a term referring to homosexual men—often in the same article.

2. "Gay" Is an Umbrella Term for the Community That Includes Transgender, Intersex, and "Allied" Persons

80. As illustrated by the accounts of the Orlando "gay bar" and the world-wide "gay pride" events, the term "gay" remains a broad term used to describe **both** the larger community of sexual and gender minorities **and** the smaller community of homosexual men. A simple statistical analysis will illustrate this point. Figure 4, below, reports that "gay people," the generic term, remains the most popular use of the term "gay," with "gay men" and "gay women" also popular, but much less so.

²² E.g., *Madrid to Host World Gay Pride*, Gay Star News, Oct. 12, 2012, available at <http://www.gaystarnews.com/article/madrid-host-2017-world-gay-pride081012/>.

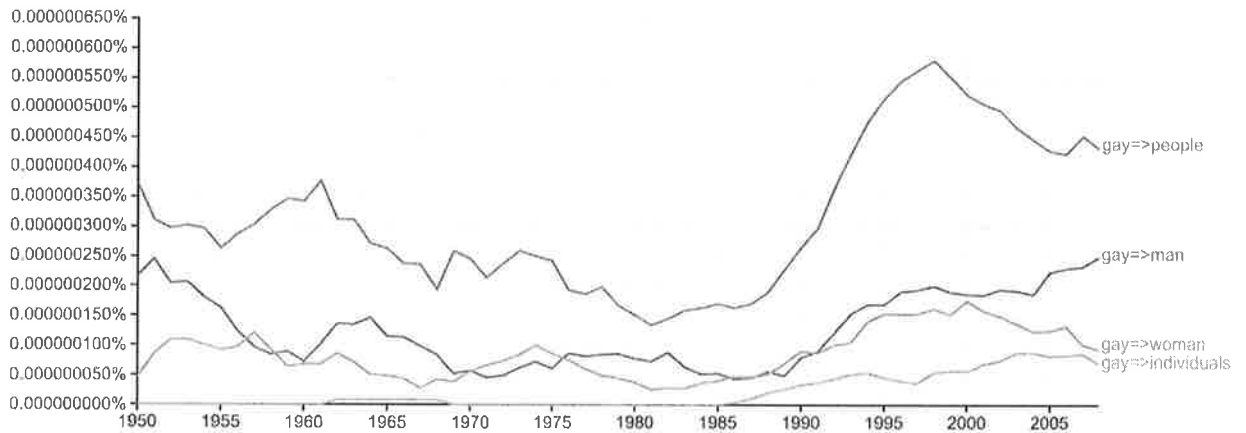


Figure 4. A Depiction of Dependency Relations: Frequency Various Nouns (“People”, “Man”, “Woman”, and “Individuals”) Modified by “Gay”

81. The CPE Report, however, insisted that “gay community” does not include transgender, intersex, and allied persons. The EIU Panel offered no systematic evidence for this proposition, aside from its assertion that its staff did some kind of unspecified, nonreplicable browsing. As I shall show, the EIU Panel did not browse very extensively.
82. To begin with, it is important to understand that the proliferation of letters in the acronyms, describing the gay community by listing more subgroups, is no evidence whatsoever that “gay” does not describe the overall community. Indeed, the CPE Report and this Expert Report are in agreement that the term “gay” has been the only stable term that has described the community of sexual and gender nonconformists over a period of generations. That “gay” has been a longstanding, stable, and widely referenced term

makes it perfect for an Internet domain (".gay") for the community that consists of sexual and gender minorities.

83. Thus, almost all of the CPE Report's examples, such as the renaming of gay institutions to identify subgroups through LGBT specifications, are consistent with dotgay's claim that "gay" is a "well known short-form or abbreviation for the community." The EIU Panel objected that dotgay's analysis "fails to show that when 'gay' is used in these articles it is used to identify transgender, intersexes, and/or other ally individuals or communities." CPE Report, 7. Although I do not believe the EIU Panel fairly characterized dotgay's application and supporting evidence, I can offer some further specific examples and some systematic evidence (with identifiable methodologies).

84. Consider the famous "Gay Games," an international Olympic-style competition run every four years by the Federation of the Gay Games for the benefit of the community of sexual and gender minorities. The stated purpose of the Gay Games is to foster "self-respect of lesbian, gay, bisexual, transgender, and all sexually-fluid or gender-varient individuals (LGBT+) throughout the world."²³ The mission of the Federation is "to promote equality through the organization of the premiere international LGBT and LGBT-friendly sports and cultural event known as the Gay Games."²⁴ Notice how the Federation uses the term "gay" as both a generic, umbrella term ("Gay Games") and as a more particularized term for homosexual men. And notice how the Federation uses the acronyms (mainly,

²³ Federation of Gay Games, *Purpose and Mission Statement*, ¶ 1, <https://gaygames.org/wp/about-the-fgg/about-the-federation/purpose-and-mission-statement-2/> (viewed Sept. 9, 2016).

²⁴ *Id.*, ¶ 2.

LGBT+) to describe the community with specific inclusivity, but still refers to the endeavor with the umbrella term, i.e., “Gay” Games.

85. Most and perhaps all of the people running the Federation of Gay Games are themselves sexual and gender minorities, so their terminology says something about usage within the community. While LGBTQIA individuals self-identify in a variety of ways, and while some of them prefer one of the acronyms when speaking more broadly, they also know “gay” to be a short-form for their community. Very important is the fact that this is even more true of the larger world population. If you asked a typical, well-informed person anywhere in the world to name the Olympic-style competition that welcomes transgender or intersex participants, he or she would be more likely to answer “Gay Games” (or its predecessor, “Gay Olympics”) than “Trans Games” or “Intersex Olympics.”

86. The Gay Games analysis does not stand alone. As the EIU Panel conceded, many lesbian, gay, bisexual, transgender, intersex, queer, and allied people happily celebrate “gay pride” events or engage in “gay rights” advocacy.²⁵ “Gay rights” include the rights of transgender, intersex, and other gay-associated persons. To take a recent example, North Carolina in 2016 adopted a law requiring everyone to use public bathrooms associated with his or her chromosomal sex. Although the law obviously targeted

²⁵ CPE Report, 7; *Gay Pride Calendar*, <http://www.gaypridecalendar.com/> (viewed Sept. 9, 2016) (the website that lists dozens of “pride” parades, operating under a variety of names but all clustered under the generic “gay pride calendar”).

transgender and intersex persons, the mainstream media constantly referenced this as an “anti-gay” measure or as a law that implicated “gay rights.”²⁶

87. In addition to being a unifying term to describe the community’s political and legal activity, the short-form “gay” is also associated with community cultural activities. Bars for sexual and gender nonconformists are routinely called “gay bars.” These bars are frequented not just by gay men and lesbians, but also by transgender individuals, queer folk, and straight allies.²⁷ *Gay Star News* is a prominent international news website for the community of sexual and gender minorities, covering many stories on transgender, intersex, and queer issues.²⁸

88. Recent histories by LGBT+ insiders continue to use “gay” as a generic, umbrella term, while at the same time paying close attention to transgender, intersex, queer, and hard-to-define persons. Consider Lillian Faderman and Stuart Timmons’ account of *Gay L.A.* They conclude their history with a chapter on the twenty-first century, which explores the greater specification and the copious permutations of sexual and gender identity. Raquel Gutierrez, for example, is a gender-bender who does not identify as transgender and has “exhausted [her] identity as a ‘lesbian of color’ * * *. But, as she affirms, there is a

²⁶ E.g., Richard Socarides, *North Carolina and the Gay-Rights Backlash*, *New Yorker*, Mar. 28, 2016; Jonathan M. Katz & Erik Eckhom, *Anti-Gay Laws Bring Backlash in Mississippi, and North Carolina*, *New York Times*, Apr. 5, 2016.

²⁷ Sunnive Brydum, *Meet the Trans Performer Who Narrowly Escaped the Pulse Shooting*, *Advocate*, June 20, 2016, <http://www.advocate.com/transgender/2016/6/20/meet-trans-performer-who-narrowly-escaped-pulse-shooting-video> (viewed Sept. 9, 2016).

²⁸ Greg Hernandez, *Less than One Percent of Characters in Hollywood Movies were LGBTI in 2015*, *Gay Star News*, Sept. 8, 2016, <http://www.gaystarnews.com/article/less-than-1-of-characters-in-hollywood-movies-were-lgbti-in-2015/#gs.AB78vLA> (viewed Sept. 9, 2016).

panoply of identities from which to choose in an expansive **gay L.A.**”²⁹ These authors capture a dichotomy that the EIU Panel missed: Individuals might describe themselves in a variety of increasingly specific ways, yet still be considered part of this larger “gay community.” And recall that the test is **not** whether every member of the community uses that term, but **instead** whether the public would understand the term “gay community” to be a “short-form or abbreviation” for sexual and gender nonconformists.

89. Consider another recent example, James Franco. He is a famous actor who is as coy about his sexual orientation and gender identity as he is friendly and “allied” with the gay community. He is often asked whether he is “gay,” and his characteristic (and current) answer is that, yes, he is “gay,” even though he does not have sex with men and is neither transgender nor intersex.³⁰ In a March 2015 interview with himself, “Gay James Franco” said this: “Well, I like to think that I’m gay in my art and straight in my life. Although, I’m also gay in my life up to the point of intercourse, and then you could say I’m straight.”³¹ James Franco is a friend, an ally, a co-explorer with sexual and gender nonconformists of all sorts. Like Raquel Gutierrez, he is part of a larger “gay community.” Both people illustrate how “gay” can be **both** a popular term referring to sexual orientation and activity **and** a generic, umbrella term referring to a sensibility or a community whose members do not conform to traditional gender and sexual norms.

²⁹ Faderman & Timmons, *Gay L.A.*, 354-55 (account of Raquel Gutierrez). The quotation in text is from the book, but with my bold emphasis.

³⁰ *Understanding James Franco*, Rolling Stone, April 7, 2016 (account and quotations in text).

³¹ J. Bryan Lowder, *James Franco Is Gay—Well, At Least Half of Him Is*, Slate, March 16, 2015.

Another example is Miley Cyrus, an announced “pansexual” who has recently been sporting clothes with the slogan “Make America Gay Again.”³²

90. As before, it is useful to see if these examples can be generalized through resort to a larger empirical examination. My research associates and I have run a series of correlations on the corpus of books published between 1950 and 2008, searching for instances where “gay” is not only in the same sentence as “transgender,” but is, more specifically, being used to include “transgender.” Figure 5 reveals our findings. There are virtually no incidences before the 1990s, when transgender became a popular category. Rather than replacing “gay,” as the CPE Report suggested, “transgender” becomes associated with “gay.” Specifically, we found thousands of examples where “gay” was used in a way that included “transgender” or “trans” people.

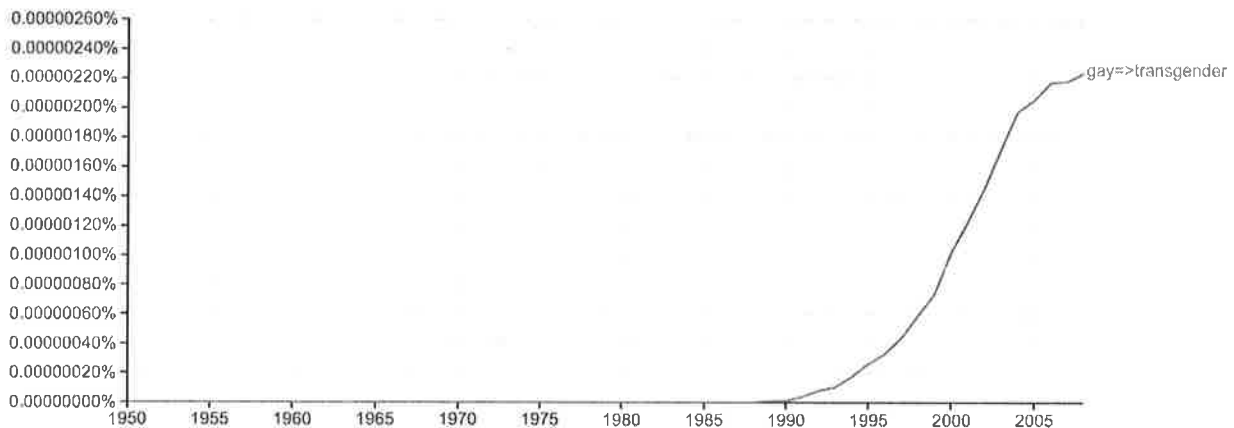


Figure 5. A Depiction of Dependency Relations: Frequency of “Gay” Modifying “Transgender”

³² Joe Williams, *Miley Cyrus Wants to ‘Make America Gay Again,’* Pink News, July, 25, 2016, available at <http://www.pinknews.co.uk/2016/07/25/miley-cyrus-wants-to-make-america-gay-again/> (viewed Sept. 9, 2016).

91. The relationship between the gay community and intersex persons is trickier to establish, because “intersex” is a newer and still-mysterious term, and it is not clear how many acknowledged intersex persons there are in the world. Most discussion of intersexuality in the media involves questions about the phenomenon itself, whereby markers conventionally associated with male and female sexes are mixed in the same individual. Nonetheless, some generalizations can be made. Intersex persons themselves have engaged the gay community to add their letter (“I”) to the expanding acronym—hence the LGBTQIA term used in dotgay’s application. This move, itself, suggests that intersex persons consider themselves part of a larger gay community. Indeed, there are many specific examples of this phenomenon.

92. Some championship-level athletes are or may be intersex individuals. An allegedly intersex runner whose competition as a woman has generated years of controversy, Caster Semenya of South Africa won the gold medal in the women’s 800 meters at the 2016 Rio Olympics—but only after an international panel required the Olympics to include her. Any actual or suspected intersex athlete competing in the Olympics and most other international competitions faces a great deal of scrutiny and controversy. Not so at the Gay Games, which not only welcomes intersex and transgender athletes, but has a “Gender in Sport” policy that creates opportunities for fair competition without stigmatizing gender minorities.³³

93. Common usages of “gay” as an umbrella term have included intersex persons. For example, an informative source of advice on intersex persons can be found in the website,

³³ Federation of Gay Games, “Gender in Sport,” <https://gaygames.org/wp/sport/sports-policiesd/gender/> (viewed Sept. 9, 2016).

Everyone Is Gay.³⁴ The *Gay Star News* is a news source for the broad gay community, and it includes informative articles in intersex persons.³⁵ While there are many intersex-focused websites, *Everyone Is Gay* does reflect the fact that generic gay websites are sources of information about and support for intersex, transgender, and other gender-bending persons.

V. CONCLUSION AND SIGNATURE

94. Return to ICANN’s mission and core values, as expressed in its Bylaws. The Bylaws establish ICANN’s mission “to coordinate, at the overall level, the global Internet’s systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems.” ICANN Bylaws, Art. I, § 1. One of ICANN’s “Core Values” is “[s]eeking and supporting broad informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.” ICANN Bylaws, Art. I, § 2(4).

95. Dotgay’s application for the string “.gay” would seem to fit perfectly within the mission and core values of ICANN. “Gay” is the only generic term for the community of sexual and gender nonconformists that has enjoyed a stable and longstanding core meaning, as reflected in the history surveyed in this Expert Report. Such a “.gay” string would create a readily-identifiable space within the Internet for this community. Not surprisingly,

³⁴ *Intersex Advice*, *Everyone Is Gay*, <http://everyoneisgay.com/tag/intersex/> (viewed Sept. 9, 2016).

³⁵ E.g., Lewis Peters, *This Infographic Will Tell You Everything You Need To Know About Intersex*, *Gay Star News*, Mar. 16, 2016, <http://www.gaystarnews.com/article/intersex-infographic/#gs.OJOcKBg> (viewed Sept. 9, 2016).

ICANN's requirements for community nexus, Criterion #2 in its Applicant Guidebook, are easily met by dotgay's application. Indeed, dotgay's application more than meets the requirements actually laid out in the Applicant Guidebook.

96. Moreover, ICANN "shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition." ICANN Bylaws, Art. II, § 3 ("Non-Discriminatory Treatment"). And ICANN "and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness." ICANN Bylaws, Art. III, § 1.

97. Evaluating dotgay's application, the EIU has not acted in a completely "open and transparent manner," nor has it followed "procedures designed to ensure fairness." To the contrary, the EIU Panel that produced the CPE Report engaged in a reasoning process that remains somewhat mysterious to me but can certainly be said to reflect an incomplete understanding of the EIU's own Guidelines, of the requirements of the Applicant Guidebook, and of the history of the gay community, in all of its diverse rainbow glory.

98. Hence, I urge ICANN to reject the recommendations and analysis of the CPE Report and to grant dotgay's application, for it legitimately deserves at least 14 of 16 points (i.e., including 4 of 4 points for Criterion #2, the community nexus requirement).

Respectfully submitted,

Date, September 13, 2016

A handwritten signature in green ink that reads "William N. Eskridge Jr." The signature is written in a cursive style and is positioned above a horizontal line.

William N. Eskridge Jr.

John A. Garver Professor of Jurisprudence
Yale Law School

APPENDICES

APPENDIX 1

CURRICULUM VITAE OF WILLIAM N. ESKRIDGE JR., JOHN A. GARVER PROFESSOR OF JURISPRUDENCE, YALE LAW SCHOOL

EDUCATION

Davidson College, Bachelor of Arts (History), 1973

Summa cum laude, high departmental honors

Algernon Sydney Sullivan Award

Phi Beta Kappa, Phi Eta Sigma (President), Omicron

Delta Kappa, Delta Sigma Rho-Tau Kappa Alpha
(President)

Harvard University, Master of Arts (History), 1974

Reading ability certified in French, German, Latin

Passed Ph. D. oral examinations (with distinction)

Yale University, Juris Doctor, 1978

The Yale Law Journal, 1976-78

Note & Topics Editor (volume 78), 1977-78

Yale prison services clinic, 1975-78

POSITIONS HELD

John A. Garver Professor of Jurisprudence, Yale Law School, 1998 to present

Deputy Dean, 2001-02

Visiting Professor of Law

NYU, 1993, 2004

Harvard, 1994

Yale, 1995

Stanford, 1995

Toronto, 1999, 2001

Vanderbilt, 2003

Columbia, 2003

Georgetown, 2006, 2012

Scholar in Residence

Columbia, 2005, 2011

Fordham, 2008

Simon A. Guggenheim Fellow, 1995

Professor of Law, Georgetown University

Full Professor, 1990 - 1998

Associate Professor, 1987 - 1990

Assistant Professor of Law, University of Virginia, 1982 - 1987

Attorney, Shea & Gardner, Washington, D.C., 1979 - 1982

Law Clerk, The Honorable Edward Weinfeld, Southern District of New York (U.S.), 1978 - 1979

(SELECTED) PUBLICATIONS

Books

Interpreting Law: A Primer on How to Read Statutes and the Constitution (Foundation 2016)

Statutes, Regulations, and Interpretation: Legislation and Administration in the Republic of Statutes (West 2014) (co-authored with Abbe R. Gluck and Victoria F. Nourse)

A Republic of Statutes: The New American Constitutionalism (Yale 2010) (co-authored with John Ferejohn)

"Dishonorable Passions": Sodomy Law in America, 1861-2003 (Viking 2008)

Gay Marriage: For Better or For Worse? What We Have Learned from the Evidence (Oxford 2006) (co-authored with Darren Spedale)

Equality Practice: Civil Unions and the Future of Gay Rights (Routledge 2002)

Legislation and Statutory Interpretation (Foundation, 1999; 2d ed. 2005) (co-authored with Philip Frickey and Elizabeth Garrett)

Gaylaw: Challenging the Apartheid of the Closet (Harvard 1999)

Constitutional Tragedies and Stupidities (NYU 1998) (co-authored and edited with Sanford Levinson)

Sexuality, Gender, and the Law (Foundation 1997; 2d ed. 2003; abridged ed. 2005; 3d ed. 2011) (co-authored with Nan Hunter)

The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment? (Free Press 1996)

Henry M. Hart Jr. and Albert M. Sacks, **The Legal Process: Basic Materials in the Making and Application of Law** (Foundation 1994) (historical and critical edition of 1958 tentative draft) (co-author and -editor with Philip P. Frickey)

Dynamic Statutory Interpretation (Harvard 1994)

Cases and Materials on Constitutional Law: Themes for the Constitution's Third Century (West Publishing Co. 1993; 2d ed. 1998; 3d ed. 2004, 4th ed. 2009; 5th ed. 2013) (co-authored with Daniel Farber & Philip Frickey and, with fifth edition, Jane Schacter)

Legislation: Statutes and the Creation of Public Policy (West 1987; 2d ed. 1994; 3d ed. 2001; 4th ed. 2007; 5th ed. 2014) (co-authored with Philip Frickey and, after second edition, Elizabeth Garrett; starting with fifth edition, add James Brudney)

A Dance Along the Precipice: The Political and Economic Dimensions of the International Debt Problem (Lexington 1985) (editor and author of one chapter) (also published in Spanish and Portuguese editions)

(Selected) Articles

“The First Marriage Cases, 1970-74,” in *Love Unites Us: Winning the Freedom to Marry in America* 21-27 (Kevin M. Cathcart & Leslie J. Gabel-Brett, eds., 2016)

“Law and the Production of Deceit,” in Austin Sarat ed., *Law and Lies: Deception and Truth-Telling in the American Legal System* 254-312 (2015)

“Original Meaning and Marriage Equality,” 52 *Hous. L. Rev.* 1067 (2015)

“Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011,” 92 *Tex. L. Rev.* 1317 (2014) (with Matthew R. Christiansen)

“Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States,” 93 *B.U.L. Rev.* 275 (2013)

“Expanding *Chevron*’s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes,” 2013 *Wis. L. Rev.* 411

“The New Textualism and Normative Canons,” 113 *Colum. L. Rev.* 531 (2013) (book review)

“Marriage Equality: An Idea Whose Time Is Coming,” 37 *NYU Rev. L. & Soc. Change* 245 (2013)

“Nino’s Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms,” 57 *St. Louis U.L. Rev.* 865 (2012)

“Vetogates and American Public Law,” *J.L. Econ. & Org.* (April 2012), available online at <http://jleo.oxfordjournals.org/content/early/2012/04/19/jleo.ews009.abstract>

“Family Law Pluralism: A Guided-Choice Regime of Menus, Default Rules, and Override Rules,” 100 *Geo. L.J.* 1881 (2012)

“Noah’s Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms,” 45 *Ga. L. Rev.* 657 (2011)

“Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?,” 50 *Washburn L.J.* 1 (2010)

“*Chevron* as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases,” 110 *Colum. L. Rev.* 1727 (2010) (with Connor N. Raso)

“The California Proposition 8 Case: What Is a Constitution For,” 98 Calif. L. Rev. 1235 (2010)

“Sexual and Gender Variation in American Public Law: From Malignant to Tolerable to Benign,” 57 UCAL L. Rev. 1333 (2010)

“The California Supreme Court, 2007-2008—Foreword: The Marriage Cases, Reversing the Burden of Inertia in a Pluralist Democracy,” Calif. L. Rev. (2009)

“A Pluralist Theory of Equal Protection,” U. Pa. J. Const’l L. (2009)

“Constitutional Horticulture: Deliberation-Respecting Judicial Review,” 87 Tex. L. Rev. 1273 (2009) (with John Ferejohn)

“Vetogates, Preemption, *Chevron*,” 83 Notre Dame L. Rev. 1441 (2008)

“The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*,” 96 Geo. L.J. 1083 (2008) (co-authored with Lauren Baer) (the Ryan Lecture)

“America’s Statutory ‘Constitution,’” 41 U.C. Davis L. Rev. 1 (2007) (the Barrett Lecture)

“No Frills Textualism,” 119 Harv. L. Rev. 2041 (2006) (book review)

“*Chevron* and Agency Norm Entrepreneurship,” 115 Yale L.J. 2623 (2006) (essay co-authored with Kevin Schwartz)

“Body Politics: *Lawrence v. Texas* and the Constitution of Disgust and Contagion,” 57 Fla. L. Rev. 1011 (2005) (the Dunwoody Lecture)

“Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics,” 114 Yale L.J. 1279 (2005)

“*Lawrence v. Texas* and the Imperative of Comparative Constitutionalism,” 2 Int’l J. Const’l L. 555 (2004)

“*Lawrence*’s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics,” 88 Minn. L. Rev. 1021 (2004)

“Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century,” 100 Mich. L. Rev. 2062 (2002)

“Structuring Lawmaking to Reduce Cognitive Bias: A Critical View,” 87 Cornell L. Rev. 616 (2002)

“Channeling: Identity-Based Social Movements and Public Law,” 150 U. Pa. L. Rev. 419 (2001)

“All About Words: Early Understandings of the ‘Judicial Power’ in Statutory Interpretation, 1776-1806,” 101 Colum. L. Rev. 999 (2001)

“The Relationship Between Obligations and Rights of Citizens,” 69 Fordham L. Rev. 1721 (2001)

“Super-Statutes,” 50 Duke L.J. 1215 (2001) (co-authored with John Ferejohn)

"Equality Practice: Reflections on the Jurisprudence of Civil Unions," 64 Alb. L.J. 853 (2001) (Sobota Lecture)

"January 27, 1961: The Birth of Gaylegal Equality Arguments," 58 NYU Ann. Survey Am. Law 39 (2001)

"No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review," 75 NYU L. Rev. 1327 (2000)

"Destabilizing Due Process and Evolutive Equal Protection," 47 UCLA L. Rev. 1183 (2000)

"Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward Recognizing Gay Unions," 31 McGeo. L.J. 641 (2000)

"The Circumstances of Politics and the Application of Statutes," 100 Colum. L. Rev. 558 (2000)

"Multivocal Prejudices and Homo Equality," 100 Ind. L.J. 558 (1999) (Harris Lecture)

"Norms, Empiricism, and Canons in Statutory Interpretation," 66 U. Chi. L. Rev. 671 (1999)

"*Hardwick* and Historiography," 1999 U. Ill. L. Rev. 631 (Baum Lecture)

"Relationships Between Formalism and Functionalism in Separation of Powers Cases," 22 Harv. J.L. & Pub. Pol'y 21 (1998)

"Should the Supreme Court Read the *Federalist* But Not Statutory Legislative History?," 66 Geo. Wash. L. Rev. 1301 (1998)

"Textualism, the Unknown Ideal," 96 Mich. L. Rev. 1509 (1998) (book review)

"A Jurisprudence of 'Coming Out': Religion, Sexuality, and Liberty/Equality Collisions in Public Law," 106 Yale L.J. 2411 (1997)

"Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961," 24 Fla. St. U.L. Rev. 703 (1997) (Mason Ladd Lecture)

"Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981," 25 Hofstra L. Rev. 817 (1997) (Visiting Scholar in Residence Lecture)

"Willard Hurst, Master of the Legal Process," 1997 Wis. L. Rev. 1181

"From the Sodomite to the Homosexual: American Regulation of Same-Sex Intimacy, 1885-1945," 82 Iowa L. Rev. (1997) (Murray Lecture)

"Steadying the Court's 'Unsteady Path': A Theory of Judicial Enforcement of Federalism," 68 U. So. Cal. L. Rev. 1447 (1995) (co-authored with Jenna Bednar)

"Virtual Logrolling: How the Court, Congress, and the States Multiply Rights," 68 U. So. Cal. L. Rev. 1545 (1995)

"Regulatory Variables and Statutory Interpretation," 73 Wash. U.L.Q. 1103 (1995) (co-authored with Judith Levi)

"Fetch Some Soupmeat," 16 *Cardozo L. Rev.* 2209 (1995)

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"Legislation Scholarship & Pedagogy in the Post-Legal Process Era," 48 U. Pitt. L. Rev. 691 (1987) (co-authored with Philip Frickey)

"*Les Jeux Sont Faits*: Structural Origins of the International Debt Problem," 25 Va. J. Int'l L. 281 (1985)

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"*Dunlop v. Bachowski* & the Limits of Judicial Review under Title IV of the LMRDA," 86 Yale L.J. 885 (1977) (student note)

ENDOWED LECTURES

Henry J. Miller Lecture, Georgia State University College of Law, "Marriage Equality, 1967-2017," September 15, 2016

Frankel Lecture, University of Houston Law Center, "Marriage Equality as a Testing Ground for Original Meaning," November 2014, published as "Marriage Equality and Original Meaning," 52 Hous. L. Rev. 1057 (2015)

Mathew O. Tobriner Memorial Lecture on Constitutional Law, University of California at Hastings, College of Law, "Marriage Equality's Cinderella Moment," September 6, 2013

2012 Distinguished Lecture, Boston University School of Law, "Beyond Backlash: How Constitutional Litigation Has Advanced Marriage Equality in the United States, 1970-2012," November 15, 2012, published as "Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States," 93 B.U.L. Rev. 275 (2013)

Foulston Siefkin Lecture, Washburn University School of Law, March 26, 2010, published as "Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?"

Sibley Lecture at the University of Georgia, School of Law, March 18, 2010, published as "Noah's Curse and Paul's Admonition: What the Civil Rights Cases Can Teach Us about the Clash Between Gay Rights and Religious Liberty"

Centennial Visitor, Public Lecture, Chicago-Kent College of Law, "Administrative Constitutionalism," March 5, 2009

Edward Barrett Lecture at the University of California, Davis, School of Law January 17, 2007, published as "America's Statutory constitution," U.C. Davis L. Rev. (2008).

Ryan Lecture at Georgetown University Law Center, November 4, 2006, published as "The Supreme Court's Deference Continuum, An Empirical Study (from *Chevron* to *Hamdan*)," 86 Geo. L.J. (2008)

Center for Religious Studies at Princeton University, November 2005, "Nordic Bliss: What the American Same-Sex Marriage Debate Can Learn from Scandinavia"

Lockhart Lecture at University of Minnesota School of Law, "Same-Sex Marriage and Equality Practice," October 2005,

Dunwoody Lecture at University of Florida School of Law, March 2005, published as "Body Politics: *Lawrence v. Texas* and the Constitution of Disgust and Contagion," Fla. L. Rev. (2005)

President's Lecture at Davidson College, March 2004, "The Case for Same-Sex Marriage"

Brennan Lecture at Oklahoma City University School of Law, March 2004, "*Lawrence v. Texas* and Constitutional Regime Shifts"

Dean's Diversity Lecture at Vanderbilt University School of Law, February 2000, "Prejudice and Theories of Equal Protection"

Steintrager Lecture at Wake Forest University, February 1999, "Jeremy Bentham and No Promo Homo Arguments"

Adrian C. Harris Lecture at the University of Indiana School of Law, October 1998, published as "Multivocal Prejudices and Homo Equality," *Ind. L.J.* (1999)

Robbins Distinguished Lecture on Political Culture and the Legal Tradition at the University of California at Berkeley School of Law, February 1998, "Implications of Gaylegal History for Current Issues of Sexuality, Gender, and the Law"

Baum Lecture at the University of Illinois School of Law, November 1997, published as "*Hardwick* and Historiography," 1998 *U. Ill. L. Rev.*

Visiting Scholar in Residence Lecture at Hofstra University School of Law, October 1996, published as "Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, *Nomos*, and Citizenship, 1961-1981," 25 *Hofstra L. Rev.* 817 (1997)

Mason Ladd Lecture at Florida State University College of Law, April 1996, published as "Privacy Jurisprudence and the Apartheid of the Closet," 24 *Fla. St. U.L. Rev.* 703 (1997)

Murray Lecture at the University of Iowa, January 1996, published as "From the Sodomite to the Homosexual: American Regulation of Same-Sex Intimacy, 1885-1945," *Iowa Law Review* (1998)

Cutler Lecture at William and Mary School of Law, February 1995, published as "The Many Faces of Sexual Consent," 37 *Wm. & Mary L. Rev.* 47 (1995)

Donley Lectures at West Virginia University School of Law, published as "Public Law from the Bottom Up," 97 *W. Va. L. Rev.* 141 (1994)

Congressional Testimony and Consultation

Senate Comm. on Labor, Pensions, 111th Congress, 1st Sess., *Proposed Employment Non-Discrimination Act of 2009* (Nov. 2009) (written testimony only)

House Comm. on Education & Labor, 111th Congress, 1st Sess., *Proposed Employment Non-Discrimination Act of 2009* (Sept. 2009)

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APPENDIX 2

EXPLANATIONS OF DATA COLLECTION REFLECTED IN THE FIGURES

FIGURE 1. *A Comparison of the Frequency of “Gay” “Queer” “Lesbian” and “LGBT” in the English Corpus of Books published in the United States from 1900 to 2008*

This Figure is a comparison of the frequency of “Gay” “Queer” “Lesbian” and “LGBT” in the English corpus of books published in the United States from 1900 to 2008, available at <https://books.google.com/ngrams>

The X-Axis represents years. The Y-Axis represents the following: Of all the bigrams/unigrams in the sample of books, what percentage of them are “Gay” “Queer” “Lesbian” and “LGBT”?

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

FIGURE 2. A Comparison of the Frequency of “Gay Suicide” compared to “LGBT Suicide” in the English Corpus of Books published in the United States from 1950 to 2008

This Figure is a comparison of the frequency of “gay suicide” and “LGBT suicide” in the English corpus of books published in the United States from 1950 to 2008, available at <https://books.google.com/ngrams>

The X-Axis represents years. The Y-Axis represents the following: Of all the bigrams/uniforms in the sample of books, what percentage of them are “gay suicide” and what percentage of them are “LGBT suicide.”

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

FIGURE 3. A Depiction of Dependency Relations: Frequency of Various Adjectives (“Gay”, “LGBT”, and “Queer”) Modifying “Community”

This Figure is a comparison of how often “community” is modified by “gay” “LGBT” and “queer” in the English corpus of books published in the United States from 1900 to 2008, available at <https://books.google.com/ngrams>

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

FIGURE 4. *A Depiction of Dependency Relations: Frequency Various Nouns (“People”, “Man”, “Woman”, and “Individuals”) Modified by “Gay”*

This figure is a comparison of how often “gay” modifies “people” “man” “woman” and “individuals” in the English corpus of books published in the United States from 1950 to 2008, available at <https://books.google.com/ngrams>

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

FIGURE 5. A Depiction of Dependency Relations: Frequency of “Gay” Modifying “Transgender”

This figure is a comparison of how often “gay” modifies the word “transgender” in the English corpus of books published in the United States from 1950 to 2008, available at <https://books.google.com/ngrams>

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.