WHY DISCRIMINATION AGAINST LESBIANS AND GAY MEN IS SEX DISCRIMINATION

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Most efforts to secure constitutional protection for lesbians and gay men against discrimination have unsuccessfully employed privacy and suspect classification arguments. In this Article, Professor Koppelman approaches the issue from a novel

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This Article is dedicated to my sister, Kitty.
and strategically appealing perspective: that discrimination against lesbians and gay men is sex discrimination which a state may not practice without showing a sufficiently important state interest. Focusing on Hawaii’s recent breakthrough case, Baehr v. Lewin, the author argues that the Hawaii Supreme Court correctly employed formal equal protection analysis to invalidate that state’s prohibition of same-sex marriage. Professor Koppelman then expands his analysis by examining the reasons why a sex-based classification should trigger heightened scrutiny. He argues that laws that discriminate against lesbians and gay men reinforce the hierarchy of males over females, an evil the equal protection clause has been explicitly used to combat. In both his formal and substantive arguments, the author draws on the reasoning in analogous cases that invalidated miscegenation laws. Professor Koppelman concludes that the only interests the state can advance to justify laws that discriminate against gays are either trivial or impermissible. Such laws therefore cannot satisfy heightened scrutiny and are unconstitutional.

INTRODUCTION

The principal arguments for lesbian and gay rights are quite old. The privacy argument, that an individual has a right to do what she likes with her body so long as she doesn’t harm others, and the oppressed class argument, that lesbians and gay men have suffered persecution and discrimination in much the same way blacks have, both have been made for centuries, and these are the arguments one most

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1 For the sake of brevity, I shall sometimes refer simply to “homosexuals” or “gays,” but when I do this I mean to describe persons of both sexes who engage in or desire to engage in sexual relations with persons of the same sex. Except in those few passages where I discuss the question whether exclusively homosexual orientation is immutable, the term includes bisexuals, who are typically stigmatized indiscriminately with those whose orientation is exclusively homosexual. This Article has nothing to say about what “really” constitutes gay identity. My inquiry is focused rather on the false, unjustifiably stigmatizing meanings that have attached to gay identity. I follow Janet Halley’s formulation:

In this Article I use the terms “homosexuality” and “homosexual”—and more tendentiously, the terms “heterosexuality” and “heterosexual”—without any implication that they accurately describe any persons living or dead. As I try to use them here, these terms describe rhetorical categories that have real, material importance notwithstanding their failure to provide adequate descriptions of any one of us.


This Article also does not address the value of marriage as an institution. The question whether a state may discriminate in a particular way when it distributes something is logically and morally distinct from the question whether the state ought to distribute that at all.

2 See David F. Greenberg, The Construction of Homosexuality 347-56, 404-411 (1988). For example, a character in a play written in France around 1739 claims that homosexual inclination is benign because formed at birth, see id. at 350, and a defendant in a 1726
often encounters. But there is a third argument, one that was first
developed at about the same time as the emergence of radical femi-
nism in the 1970s, and which, though it is less familiar than the other
two, may turn out to be the most insightful and persuasive of the
three. This is the argument that in contemporary American society,
discrimination against lesbians and gay men reinforces the hierarchy
of males over females and thus is wrong because it oppresses women.

Both the privacy and oppressed class arguments face a common
difficulty: neither takes account of any reason for the oppression of
lesbians and gay men. Each of the arguments implicitly holds that
there is no good reason for laws that discriminate against homosexu-
als. The privacy argument presupposes that there is no valid societal
interest that justifies interference with (at least this kind of) sexual
freedom—that homosexual sex acts are of legitimate concern only to
the consenting adults who participate in them—and the oppressed
class argument presupposes that discrimination on the basis of sexual
orientation or behavior is as arbitrary and unfair as discrimination on
the basis of race. In other words, each argument requires its pro-
ponent to carry the heavy burden of proving a negative: that no good
reason exists for discriminating against lesbians and gay men. If an
argument were available that shifted the burden of proof to the state
to justify discrimination against lesbians and gays, this might be a
more strategically promising alternative for gay rights advocates. The
sex discrimination argument, I argue, has this strength.

The importance of identifying the reasons for discrimination
against lesbians and gay men may be illustrated by one of the key
disagreements between the majority and the dissenters in Bowers v.
Hardwick, in which the Supreme Court upheld the constitutionality
of a sodomy law against a challenge based on the right to privacy. The

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London trial for attempted sodomy declared “I think there is no crime in making what use
I please of my own body,” id. at 351. The view that gays are a specially oppressed class was
propounded as early as the fourth century A.D., in which a character in a dialogue
described gay people as “strangers cut off in a foreign land.” John Boswell, Christianity,
Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning
of the Christian Era to the Fourteenth Century 86 n.126, 127(1980).

3 See, e.g., Amazon Expedition: A Lesbian Feminist Anthology (Phyllis Birkby et al.
eds., 1973); Ti-Grace Atkinson, Amazon Odyssey (1974); For Lesbians Only: A Separatist
Anthology (Sarah L. Hoagland & Julia Penelope eds., 1988); Jill Johnston, Lesbian Nation:
The Feminist Solution (1973); Anne Koedt, Lesbianism and Feminism, in Radical Femi-
nism 246 (1973); Anne Koedt et al., Radicalessians, “The Woman Identified Woman,” in
Radical Feminism 240 (1973). See generally Alice Echols, Daring to Be Bad: Radical
Feminism in America, 1967-1975, at 210-41 (1989); Toby Marotta, The Politics of Homosex-

4 I do not mean to imply that these arguments are unpersuasive, but only that this
burden is an obstacle to their acceptance by courts.

5 478 U.S. 186 (1986).
Justices disagreed about whether the sodomy prohibition was more like the incest prohibition, or whether it was more like the miscege-
nation prohibition, which the Court had invalidated in Loving v. Vir-
ginia.6 None of the opinions turned on the analogy, but their differing
views with respect to it reveal much about their deeper disagreement.
In the majority opinion, Justice White stressed the analogy with the
incest taboo, which he evidently regarded as an ancient prohibition,
the reasons for which are not clear, but which appears somehow so
necessary to the functioning of civilized society that it should not be
disturbed. Seeing no plausible distinction between the two prohibi-
tions and assuming that it would be plainly unacceptable to invalidate
the incest prohibition, the Court concluded that the sodomy prohibi-
tion must similarly be sustained.7

Both dissenting opinions, on the other hand, stressed the analogy
between sodomy laws and miscegenation laws. Justice Blackmun ar-
Aргued that Loving revealed the fallacy of the argument “that either the
length of time a majority has held its convictions or the passions with
which it defends them can withdraw legislation from this Court’s scruti-
tiny.” In a footnote, he added that “The parallel between Loving and
this case is almost uncanny”: both of the challenged laws had religious
justifications; both were similar to laws on the books when the four-
teenth amendment was ratified; and in both instances, many states still
maintained similar laws at the time the case was decided.9

Yet the Court held, not only that the invidious racism of Virginia’s
law violated the Equal Protection Clause . . . but also that the law
deprived the Lovings of due process by denying them the “freedom
of choice to marry” that had “long been recognized as one of the
vital personal rights essential to the orderly pursuit of happiness by
free men.”10

Justice Stevens, also in dissent, observed that “neither history nor tra-
dition could save a law prohibiting miscegenation from constitutional
attack.”11

6 388 U.S. 1 (1967).
7 See Hardwick, 478 U.S. at 195-96:
[I]f respondent’s submission is limited to the voluntary sexual conduct between con-
senting adults, it would be difficult, except by fiat, to limit the claimed right to homo-
sexual conduct while leaving exposed to prosecution adultery, incest, and other
sexual crimes even though they are committed in the home. We are unwilling to
start down that road.
8 Id. at 210 (Blackmun, J., dissenting).
9 Id. at 210 n.5.
10 Id. at 211 n.5 (quoting Loving, 388 U.S. at 12).
11 Id. at 216 (Stevens, J., dissenting). In a footnote, he added: “Interestingly, miscege-
nation was once treated as a crime similar to sodomy. See Hawley & McGregor, The
Both dissenters’ analogies to Loving are underdeveloped. The gravamen of Loving’s objection to the miscegenation prohibition was that it was “designed to maintain White Supremacy.”\textsuperscript{12} The Hardwick dissenters did not show that the sodomy prohibition had a similarly illicit purpose. Unless the passion with which the taboo is held can be accounted for, neither the privacy nor the oppressed group argument can be fully satisfactory. To repeat, both arguments, as applied to homosexuals or anyone else, implicitly rest on the idea that persons are suffering discrimination on the basis of irrelevant or bad reasons. Neither argument is sustainable unless the reasons for the disadvantage can be examined and shown to be insufficient or (as in Loving) positively pernicious. Absent such a showing, the analogy with incest has not been rebutted. The sex discrimination argument fills this gap. It identifies the reasons for the prohibition and shows why those reasons are not permissible justifications for discrimination against lesbians and gay men.

The sex discrimination argument has recently taken on a new relevance. In May 1993, the Hawaii Supreme Court held in Baehr v. Lewin\textsuperscript{13} that a law restricting marriage to opposite-sex couples came within the scope of the prohibition on sex discrimination in the equal protection clause of the state constitution. Baehr may well turn out to be the most important gay rights decision since Hardwick: because many states accord full faith and credit to marriages recognized by other states, even if these marriages are not permitted in the domicile state,\textsuperscript{14} a favorable decision for same-sex marriage in Hawaii could

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Criminal Law, at 287 (discussing crime of sodomy); id., at 288 (discussing crime of miscegenation.).” Hardwick, 478 U.S. at 216 n.9. (Stevens, J., dissenting).

This appears to be an overreading of the text cited, John G. Hawley & Malcolm McGregor, The Criminal Law (3d ed. 1899). The authors evidently regarded the two crimes as similar only in the uninteresting sense that both were nonviolent sexual crimes. They were described in a chapter with the misleading title “Bigamy,” which described in turn bigamy, adultery, lascivious cohabitation, seduction, incest, sodomy, miscegenation, abortion, and nuisances (this last included, perhaps, because the enumerated examples included indecent exposure and exhibition of obscene pictures). See J. Hawley & M. McGregor, supra, at 270-94.

\textsuperscript{12} Loving, 388 U.S. at 11.

\textsuperscript{13} 852 P.2d 44 (Haw. 1993).

\textsuperscript{14} Some states, on the other hand, refuse to accord full faith and credit to marriages contracted in other states when these evade limitations on marriage in the domicile state or violate a strong public policy of the domicile state. Because there is tremendous variation among the states as to when recognition will be granted, it is hard to predict what the effect of legalized gay marriage in one state would be in many of the others. See generally Homer H. Clark Jr., Law of Domestic Relations in the United States 85-88 (2d ed., student ed. 1988); Joseph W. Hovermill, A Conflict of Laws and Morals: The Choice of Law Implications of Hawaii’s Recognition of Same-Sex Marriages, 53 Md. L. Rev. 450 (1994); Jennifer G. Brown, Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage, 68 S. Cal. L. Rev. (forthcoming Jan. 1995).
mean that such marriages contracted there would be recognized by many other states. But the decision is a landmark for another reason as well. *Baehr* appears to be the first judicial opinion in the United States to hold that discrimination against same-sex couples is sex discrimination. The claim will seem odd and even tortured to some. Nevertheless, it offers a fuller and more satisfying analysis of the gay rights issue than the alternatives.

Both the privacy and the oppressed class arguments point to serious injustices that deserve to be remedied, but they capture only part of the picture. A satisfactory account of the stigmatization of homosexuality would “record and respond to the question, ‘In whose lives is homo/heterosexual definition an issue of continuing centrality and difficulty?’”15 The answer “only gays” is psychologically and sociologically shallow. The case for gay rights is a powerful one for reasons that go well beyond the interests of lesbians and gay men themselves. The effort to end discrimination against gays should be understood as a necessary part of the larger effort to end the inequality of the sexes.16

In this Article, I argue that the taboo against homosexuality is not entirely irrational, but serves a function, and that that function is similar to the function served by the taboo against miscegenation. Both taboos police the boundary that separates the dominant from the dominated in a social hierarchy that rests on a condition of birth. In the same way that the prohibition of miscegenation preserved the polarities of race on which white supremacy rested, the prohibition of homosexuality preserves the polarities of gender on which rests the subordination of women.

One might have attacked miscegenation laws by asserting the right to privacy, or by arguing that such laws impermissibly “legislate

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16 This argument has aroused concern insofar as it “conveys the unfortunate suggestion that [the prohibition of homosexuality is] important only insofar as it bears upon the relations between men and women, or upon women’s rights to the control of her body. . . . By collapsing questions of sexuality into the ‘more important’ realms of gender, homosexuality is allowed salience insofar as it seems assimilable to heterosexuality, insofar as same-sex relations are taken to be no different from cross-sex ones . . . .” Jonathan Goldberg, Sodometries: Renaissance Texts, Modern Sexualities 14–15 (1992); see also Kenneth L. Schneier, Avoiding the Personal Pronoun: The Rhetoric of Display and Camouflage in the Law of Sexual Orientation, 46 Rutgers L. Rev. 1313, 1388–89 (1994) (criticizing *Baehr* on this basis). See generally Cheshire Calhoun, Separating Lesbian Theory from Feminist Theory, 104 Ethics 558 (1994). The point of the present argument is, however, not “to seek to hierarchize oppressions,” J. Goldberg, supra, at 14, but to map the ways in which they are related.
morality,” or by claiming that “miscegenosexuals”\textsuperscript{17} are a special group, born into that class and unable to change their preferences, who therefore do not deserve the social and legal disadvantages that have traditionally been heaped upon them. Whatever varying degrees of validity these arguments have, they all miss a crucial dimension of miscegenation laws which the Supreme Court recognized in 1967: such laws are “measures designed to maintain White Supremacy.”\textsuperscript{18} My claim is that the notion that discrimination against gays involves only the rights of gays is similarly shallow. It fails to recognize that the stigmatization of gays in contemporary American society functions as part of a larger system of social control based on gender.

If this is so, then the question of whether homosexuality is genetically caused or immutable, which has been the object of excited debate and intense scientific investigation in recent years,\textsuperscript{19} is altogether irrelevant to the constitutional status of laws that discriminate against lesbians and gay men. To repeat, when we assess the constitutionality of laws that discriminate against interracial couples, we do not ask whether sexual desire for a person of a different race is biologically caused or whether it can be “cured.” The very question is weird, racist, and insulting. Its answer, if there is one, clearly has no constitutional significance. The same should be true of laws that discriminate against lesbians and gay men. Even if some persons who are attracted to persons of the same sex could choose heterosexual partners—and there are bisexuals, for whom the immutability argument is no help—the state has no legitimate interest in influencing that choice. The point is likely to be unfamiliar to many readers, who may find it hard to grasp. For this reason, I shall trace in considerable detail the argument for the unconstitutionality of miscegenation laws. Once the reader understands this argument, the parallel argument against laws that discriminate against lesbians and gay men may be easier to follow.

This Article will argue that \textit{Baehr} was correctly decided and that on remand the trial court should hold the challenged statute unconstitutional. Part I will present the legal argument for holding that discrimination against gays is sex discrimination. Part IA reviews the opinions in \textit{Baehr}, with special attention to the debate between the judges over the sex discrimination argument. Part IB shows why discrimination against gays must, as a purely analytic matter, be recog-

\begin{footnotesize}
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\item[\textsuperscript{17}] This wonderfully awful neologism was invented by Samuel Marcosson. See Samuel A. Marcosson, Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII, 81 Geo. L.J. 1, 6 (1992).
\item[\textsuperscript{18}] \textit{Loving v. Virginia}, 388 U.S. 1, 11 (1967).
\item[\textsuperscript{19}] See generally Halley, Sexual Orientation and the Politics of Biology, supra note 1.
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nized as sex discrimination. Part I.C argues that laws that expressly treat members of same-sex couples differently from members of opposite-sex couples cannot survive even the intermediate level of scrutiny that the U.S. Supreme Court applies to sex-based classifications. A fortiori, therefore, they cannot survive the strict scrutiny that the Hawaii constitution requires for such classifications.

The argument of Part I is doctrinally complete, but it will be unsatisfying to some readers, because existing sex discrimination doctrine does not require the claimant to show that the sex-based classification that she or he is challenging is, in fact, part of the structure of gender hierarchy that the prohibition of sex discrimination is intended to remedy. That showing must be made if the sex discrimination argument on behalf of lesbians and gay men is to be persuasive. Part II undertakes this task. In order to elucidate the complex connection between the homosexuality taboo and sexism, I develop an analogy with the miscegenation taboo, which had a similarly complex but intimate connection with racism. Part II.A shows how the miscegenation taboo functioned to maintain white supremacy. Part II.B then shows how the prohibition of homosexuality similarly functions to maintain the hierarchy of males over females. Part II.C offers evidence that reinforces the analogy between the two taboos: it shows how both, despite their adherents' protestations to the contrary, are fundamentally concerned with identity, and specifically with the identities of socially superior castes, rather than with conduct.

Finally, Part III returns to the issues facing the trial court and, ultimately, the Hawaii Supreme Court. It examines the state's interests—most interestingly, the state's interest in promoting morality—in order to discern whether these interests are sufficiently compelling to justify the challenged sex discrimination. The interest in promoting morality cannot sustain the statute, I conclude, because the morality that the state seeks to uphold is tightly bound up with the precise evil that the prohibition against sex discrimination seeks to end.

I
A Judicial Argument

A. The Opinions in Baehr v. Lewin

*Baehr v. Lewin*\(^{20}\) was at first a split decision. The plurality opinion, written by Justice Levinson and joined by Acting Chief Justice Moon, held that a statute denying same-sex couples the right to marry is subject to strict scrutiny under the equal protection clause of Ha-

\(^{20}\) 852 P.2d 44 (Haw. 1993).
waii's constitution, and remanded for trial on the question whether the state has a compelling justification for the exclusion. Intermediate Court of Appeals Chief Judge Burns\textsuperscript{21} concurred on different grounds. Intermediate Court of Appeals Judge Heen dissented, in an opinion agreed to by Justice Hayashi, a retired justice who sat by designation but whose appointment expired before the opinions in \textit{Baehr} were filed. The result when the decision was handed down May 5, 1993 was therefore a 2-1-1 (or, if Hayashi is counted, 2-1-2) split, which left unclear the trial court's task on remand because of the peculiar reasoning of Burns's concurrence. On May 17, the State filed a motion for reconsideration or clarification. On May 27, the court, now reconstituted by the appointment of Justice Nakayama in place of Justice Hayashi, issued a clarification, agreed to by all but Burns and Heen, ordering that the trial be conducted "consistently with the plurality opinion,"\textsuperscript{22} which then effectively became the opinion of the court.

The plaintiffs were one male couple and two female couples who had applied for marriage licenses and had been denied them on the grounds that the applicant couples were of the same sex. Their suit against the State for injunctive and declaratory relief was dismissed in the trial court, and they appealed to the state supreme court. Judge Levinson's opinion rejected the plaintiffs' claim that exclusion of same-sex couples violated the right to privacy expressly guaranteed by the Hawaii constitution\textsuperscript{23} but held for the first time that the equal protection clause of the state constitution\textsuperscript{24} requires that sex discriminatory laws be subjected to strict scrutiny, which invalidates them unless they are necessary to further a compelling state interest.\textsuperscript{25} Levinson held that the statute's plain language\textsuperscript{26} imposed a sex-based classifica-

\textsuperscript{21} Chief Judge Burns sat in place of Chief Justice Lum, who recused himself from the case. Similarly, Judge Heen sat in place of Justice Klein, who had been the trial judge in the case and who also recused himself.

\textsuperscript{22} \textit{Baehr}, 852 P.2d at 74.


\textsuperscript{24} Haw. Const. art. I, § 5 ("No person shall . . . be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.").

\textsuperscript{25} Earlier decisions had left unclear whether the state constitution required strict or "intermediate" scrutiny of sex-based classifications. See \textit{Baehr}, 852 P.2d at 63-67.

\textsuperscript{26} The original statute, Haw. Rev. Stat. § 572-1 (1985), has since been amended by the state legislature of Hawaii, which wished thus to indicate its disapproval of the \textit{Baehr} decision. See \textit{Act} of June 22, 1994, § 1, 1994 Haw. Sess. Laws 217. The new provisions of the statute are in boldface and the deleted provisions are struck out:

\textit{Requisites of valid marriage contract. In order to make valid the marriage contract, which shall be only between a man and a woman, it shall be necessary that:}

\textit{(1) The respective parties do not stand in relation to each other of ancestor and descendant of any degree whatsoever, brother and sister of the half as well as to the}
tion, because it "restricts the marital relation to a male and a female."\textsuperscript{27}

The plurality rejected the reasoning adopted by courts of other states, which had held that marriage by definition could only be entered into by persons of different sexes.\textsuperscript{28} Those courts' holdings, Levinson argued, were inconsistent with \textit{Loving v. Virginia},\textsuperscript{29} which had invalidated a state law prohibiting interracial marriages that had also defined marriages restrictively.\textsuperscript{30} The \textit{Baehr} plurality therefore concluded that the statute would be presumed to be unconstitutional unless the state could show "that (a) the statute's sex-based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgments of the applicant couples' constitutional rights."\textsuperscript{31}

Judge Burns's concurrence asserted that "the Hawaii constitution's reference to 'sex' includes all aspects of each person's 'sex' that are "biologically fated.""\textsuperscript{32} Citing newspaper articles reporting evidence that homosexuality may have a genetic basis, Burns claimed that this evidence was relevant to the outcome of the case:

\textit{whole blood, uncle and niece, aunt and nephew, whether the relationship is legitimate or illegitimate;}

(2) Each of the parties at the time of contracting the marriage is at least sixteen years of age; provided that with the written approval of the family court of the circuit court within which the minor resides, it shall be lawful for a person under the age of sixteen years, but in no event under the age of fifteen years, to marry, subject to section 572-2 [relating to consent of parent or guardian];

(3) The \textit{man} does not at the time have any lawful \textit{wife} living and that the \textit{woman} does not at the time have any lawful \textit{husband} living;

(4) Consent of neither party to the marriage has been obtained by force, duress, or fraud;

(5) Neither of the parties is a person afflicted with any loathsome disease concealed from, and unknown to, the other party;

(6) It shall in no case be lawful for any person to marry in the State without \textit{The man and woman to be married in the State shall have duly obtained a license for that purpose duly-obtained from the agent appointed to grant marriage licenses; and}

(7) The marriage ceremony be performed in the State by a person or society with a valid license to solemnize marriages and the \textit{man and woman} to be married and the person performing the marriage ceremony be all physically present at the same place and time for the marriage ceremony.

\textit{Id. The italicized passages were emphasized by the plurality in Baehr. See Baehr, 852 P.2d at 48-49 n.1.}

\textsuperscript{27} \textit{Baehr}, 852 P.2d at 60.

\textsuperscript{28} See \textit{Baehr}, 852 P.2d at 61-63 (citing and quoting Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973), and Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App.), review denied, 84 Wash. 2d 1008 (1974)).

\textsuperscript{29} 388 U.S. 1 (1967).

\textsuperscript{30} \textit{Baehr}, 852 P.2d at 62-63.

\textsuperscript{31} Id. at 67.

\textsuperscript{32} Id. at 69 (Burns, J., concurring).
If heterosexuality, homosexuality, bisexuality, and asexuality are “biologically fated” then the word “sex” also includes those differences. Therefore, the questions whether heterosexuality, homosexuality, bisexuality, and asexuality are “biologically fated” are relevant questions of fact which must be determined before the issue presented in this case can be answered. If the answers are yes, then each person’s “sex” includes both the “biologically fated” male-female difference and the “biologically fated” sexual orientation difference, and the Hawaii constitution probably bars the State from discriminating against the sexual orientation difference by permitting opposite-sex Hawaii Civil Law Marriages and not permitting same-sex Hawaii Civil Law Marriages. If the answers are no, then each person’s “sex” does not include the sexual orientation difference, and the Hawaii constitution may permit the State to encourage heterosexuality and discourage homosexuality, bisexuality, and asexuality by permitting opposite-sex Hawaii Civil Law Marriages and not permitting same-sex Hawaii Civil Law Marriages.33

Burns’s reasoning is obscure. The first of the quoted sentences does all of the argument’s work, and it is a non sequitur. He does not explain or justify his peculiar reading of the word “sex,” and it is unclear what he expects the trial court to do on remand. (The question of whether homosexuality has a genetic component is hotly debated among biologists; was this debate to be rehearsed and adjudicated in the trial court? If the consensus among biologists were to change, would the law change?) Moreover, Burns does not explain his refusal to join the plurality opinion.34 The court’s later clarification, in which Nakayama joined Moon and Levinson’s plurality opinion, renders Burns’s approach irrelevant.

33 Id. at 69-70.

34 The plurality opinion argued that:

[I]t is irrelevant, for purposes of the constitutional analysis germane to this case, whether homosexuality constitutes “an immutable trait” because it is immaterial whether the plaintiffs, or any of them, are homosexuals. Specifically, the issue is not material to the equal protection analysis . . . . Its resolution is unnecessary to our ruling that HRS § 572-1, both on its face as applied [sic], denies same-sex couples access to the marital status and its concomitant rights and benefits. Its resolution is also unnecessary to our conclusion that it is the state’s regulation of access to the marital status, on the basis of the applicants’ sex, that gives rise to the question whether the applicant couples have been denied the equal protection of the laws in violation of article I, section 5 of the Hawaii Constitution. . . . And, in particular, it is immaterial to the exercise of “strict scrutiny” review . . . inasmuch as we are unable to perceive any conceivable relevance of the issue to the ultimate conclusion of law—which, in the absence of further evidentiary proceedings, we cannot reach at this time—regarding whether HRS § 572-1 furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights.

Id. at 53 n.14 (citations omitted). Burns does not address this argument.
Judge Heen’s dissent argued that there was no sex discrimination at all, because under the challenged law,

all males and females are treated alike. A male cannot obtain a license to marry another male, and a female cannot obtain a license to marry another female. Neither sex is being granted a right or benefit the other does not have, and neither sex is being denied a right or benefit that the other has.\textsuperscript{35}

This is, in fact, the standard counterargument to the sex discrimination claim, which has been repeated in all of the many cases that have rejected that claim. But should this counterargument be persuasive?

\textbf{B. The Analytic Argument}

Despite Judge Heen’s protestations, discrimination against gays must, as a purely analytic matter, be recognized as a kind of sex discrimination. As a matter of definition, if the same conduct is prohibited or stigmatized when engaged in by a person of one sex, while it is tolerated when engaged in by a person of the other sex, then the party imposing the prohibition or stigma is discriminating on the basis of sex. That is what the Hawaii statute does. That is what happens whenever gays are discriminated against. If a business fires Ricky, or if the state prosecutes him, because of his sexual activities with Fred, while these actions would not be taken against Lucy if she did exactly the same things with Fred, then Ricky is being discriminated against because of his sex. If Lucy is permitted to marry Fred, but Ricky may not marry Fred, then (assuming that Fred would be a desirable spouse for either) Ricky is being discriminated against because of his sex.

The plurality in \textit{Baehr} is almost alone in finding this argument persuasive.\textsuperscript{36} The standard counterargument, presented in \textit{Baehr} by Justice Heen, is the one that has almost always won against the sex discrimination argument.

The only court that appears to have considered the question of whether anti-gay discrimination is sex discrimination as a matter of

\textsuperscript{35} Id. at 71 (Heen, J., dissenting). This reasoning is evidently endorsed by the Hawaii legislature, which recently passed a bill stating: “There is simply no class of individuals under [the Hawaii marriage statute] that have been discriminated against in relation to another group of similarly situated individuals. Because all men and all women are treated alike by section 572-1, there is no sex- (i.e., gender-) based classification.” Act of June 22, 1994, § 1, 1994 Haw. Sess. Laws 217.

\textsuperscript{36} My research has discovered only one other case in which a court has been persuaded by it, and that involved a lower state court and has since been de-published. See Engel v. Worthington, 23 Cal. Rptr. 2d 329 (Cal. Ct. App. 1993) (holding that refusal of photographer at high school reunion to publish photograph of same-sex couple violated state civil rights act’s prohibition of sex discrimination), review denied and opinion withdrawn from publication by order of the court, No. S036051, 1994 Cal. LEXIS 558 (Cal. Feb. 3, 1994).
federal constitutional law has, like Heen, denied that a law prohibiting sexual intercourse between persons of the same sex imposes a sex-based classification. In State v. Walsh, the Supreme Court of Missouri reversed a lower court’s declaration that a statute prohibiting “deviate sexual intercourse with another person of the same sex” deprived the defendant of equal protection because “the statute would not be applicable to the defendant if he were a female.”

The State concedes that the statute prohibits men from doing what women may do, namely, engage in sexual activity with men. However, the State argues that it likewise prohibits women from doing something which men can do: engage in sexual activity with women. We believe it applies equally to men and women because it prohibits both classes from engaging in sexual activity with members of their own sex. Thus, there is no denial of equal protection on that basis.

The Missouri court’s argument is essentially that of an 1883 decision, Pace v. Alabama, in which the United States Supreme Court considered for the first time the constitutionality of miscegenation laws. The statute in question in Pace prescribed penalties for interracial sex that were more severe than those imposed for adultery or for-

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37 713 S.W.2d 508 (Mo. 1986) (en banc).
39 Walsh, 713 S.W.2d at 509 (quoting unpublished trial court opinion).
40 Id. at 510. This argument is ubiquitous in the case law. For example, a similar claim was similarly dealt with in DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979), which involved Title VII of the Civil Rights Act of 1964 rather than the equal protection clause of the fourteenth amendment. The plaintiffs, who alleged discrimination in employment on the basis of sexual preference, observed that “if a male employee prefers males as sexual partners, he will be treated differently from a female who prefers male partners,” and concluded that “the employer thus uses different employment criteria for men and women” in violation of the Act. Id. at 331. The court rejected this argument, holding that “whether dealing with men or women the employer is using the same criterion: it will not hire or promote a person who prefers sexual partners of the same sex. Thus this policy does not involve different decisional criteria for the sexes.” Id; see also sources cited in Marcussen, supra note 17, at 1-3.

The sex discrimination argument had been such a uniform loser before Bahr that when that case was litigated, neither the plaintiff nor the amici even bothered to make the argument. See Plaintiffs-Appellants’ Opening Brief, Bahr v. Lewin, 852 P.2d 44 (Haw. 1993) (No. 15689); Amicus Curiae Brief of the American Civil Liberties Union in Support of Plaintiffs-Appellants, Bahr (No. 15689); Brief of Amicus Curiae Lambda Legal Defense and Education Fund, Inc., Bahr (No. 15689). The argument was alluded to in passing by the plaintiff’s reply brief in response to a citation by the State to Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App.), review denied, 84 Wash. 2d 1008 (1974) (discussed in text accompanying notes 60-61 infra). See Plaintiffs-Appellants’ Reply Brief at 3 n.1, Bahr (No. 15689). Nor was the sex discrimination issue raised by the court at oral argument. The majority opinion therefore was a surprise to all the parties. Telephone Interview with Daniel R. Foley, attorney for plaintiffs in Bahr v. Lewin (April 19, 1994).
41 106 U.S. (16 Otto) 583 (1883).
nication between persons of the same race. The Court unanimously rejected the equal protection challenge to the statute, denying that the statute discriminated on the basis of race:

[The section prohibiting interracial sex] prescribes a punishment for an offence which can only be committed where the two sexes are of different races. There is in neither section any discrimination against either race . . . . Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offence designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same.\textsuperscript{42}

The structure of Walsh's reasoning is identical to that of Pace: the Missouri statute "prescribes a punishment for an offence which can only be committed where the two [participants] are of [the same sex]," and it is directed "against the offence designated and not against the person of any particular [sex]."

But Pace is no longer good law. It was repudiated by the Supreme Court in the next miscegenation case it considered, McLaughlin v. Florida.\textsuperscript{43} In the wake of the unanimous decision condemning segregated public schools in Brown v. Board of Education,\textsuperscript{44} the McLaughlin Court, again unanimously, invalidated a criminal statute prohibiting an unmarried interracial couple from habitually living in and occupying the same room at night. "It is readily apparent," wrote Justice White for the Court, that the statute "treats the interra-

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\textsuperscript{42} Id. at 585. This reasoning probably reflects the original intent of the framers of the fourteenth amendment, who offered similar arguments. Just as proponents of the federal Equal Rights Amendment denied opponents' allegations that sex equality would require legal recognition of gay marriage, see Note, The Legality of Homosexual Marriage, 82 Yale L. J. 573, 583-88 (1973), proponents of the fourteenth amendment denied opponents' allegations that racial equality would require legal recognition of interracial marriage, see Alfred Avins, Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent, 52 Va. L. Rev. 1224 (1966). Thus, even if protection of gays' right to marry is inconsistent with the specific intent of the framers of the fourteenth amendment or of similar provisions in state constitutions, see Act of June 22, 1994, § 1, 1994 Haw. Sess. Laws 217 (attempting to distinguish Baehr from Loving on the grounds that "the Hawaii supreme court in Baehr has interpreted Article I, section 5 in a manner not intended by the framers of Hawaii's Constitution"); see also Singer v. Hara, 522 P.2d 1187, 1193-94 (Wash Ct. App.), review denied, 84 Wash. 2d 1008 (1974) (discussed in text accompanying notes 60-61 infra), this is not a disanology with the miscegenation cases. If the miscegenation cases are not wrongly decided, original intent cannot be dispositive in questions of constitutional interpretation, and constitutional provisions may embody concepts that are broader than the specific conceptions of the original authors. See Ronald Dworkin, Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom 118-47 (1993); Ronald Dworkin, Taking Rights Seriously 131-49 (1977) [hereinafter R. Dworkin, Taking Rights Seriously].

\textsuperscript{43} 379 U.S. 184 (1964).

\textsuperscript{44} 347 U.S. 483 (1954).
cial couple made up of a white person and a Negro differently than it does any other couple.” In response to the state’s reliance on *Pace*, White declared that “*Pace* represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court.” Racial classifications, he concluded, can only be sustained by a compelling state interest. Since the State had failed to establish that the statute served “some overriding statutory purpose requiring the proscription of the specified conduct when engaged in by a white person and a Negro, but not otherwise,” the statute necessarily fell as “an invidious discrimination forbidden by the Equal Protection Clause.”

*McLaughlin* thus stands for the proposition (which should be obvious even without judicial support) that if prohibited conduct is defined by reference to a characteristic, the prohibition is not neutral with reference to that characteristic. Hence, the appropriate rejoinder to arguments like that of the Missouri court might be that if the defendant had been a woman, he could not have been prosecuted for sexual activity with a man. Indeed, the sexes of the participants would appear to be one of the essential elements of the crime that the prosecution must prove. To paraphrase *McLaughlin*, it is readily apparent that the law treats the same-sex couple differently than it does any other couple. “Such a practice does not pass the simple test of whether the evidence shows ‘treatment of a person in a manner which but for that person’s sex would be different.’”

The seeming puzzle of whether a man who has sex with a man is engaging in “the same conduct” as a woman who has sex with a man is an artifact of the observer’s imposition of a category: “homosexual sex.” The *Walsh* court’s confusion rests on its view that the man and the woman are not really engaging in the same conduct: one is en-

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45 *McLaughlin*, 379 U.S. at 188.
46 Id.
47 Id. at 192.
48 Id. at 192-93.
49 Cf. Jones v. Commonwealth, 80 Va. 538, 542 (1885) (“To be a negro is not a crime; to marry a white woman is not a crime; but to be a negro, and being a negro, to marry a white woman is a felony; therefore, it is essential to the crime that the accused shall be a negro—unless he is a negro he is guilty of no offense.”).
51 Richard Posner appears to recognize this point, but he believes that the Constitution permits the imposition of such artificial categories, even when they classify on the basis of sex. It is unclear whether he recognizes the corrosive implications of this position for sex discrimination law. See Richard A. Posner, Sex and Reason 349 (1992).
engaged in "homosexual sex," while the other is engaged in "heterosexual sex." A similar argument could have been made in the miscegenation cases: the same-race couple wasn't "miscegenating," while the mixed-race couple was. Both of these arguments, however, require us to abstract from the actual, physical conduct that is occurring. Cunnilingus, for example, is conduct that both homosexual and heterosexual couples engage in.\textsuperscript{52} The man who is engaged in cunnilingus is doing exactly the same things with exactly the same part of his body, and doing them to the same body parts of the other, as the lesbian. The genitalia of the person performing an act of oral sex are simply not involved in that act, except to the extent that someone's insistence makes them so. And what is sex discrimination but the insistence on the salience of genitalia always, in every context—so that a woman who seeks to practice law, for example, is seen as engaging in a fundamentally different kind of activity from that of a male lawyer (because she is rebelling against her essential nature, forsaking her proper maternal role, etc.)?\textsuperscript{53} The kind of argument necessary to make the sex of the performer relevant in the context of oral sex, in order to define the heterosexual man and the lesbian as "dissimilarly situated," is in principle equally available in every other context in which one might desire to defeat a claim of sex discrimination. If claims of sex discrimination could thus be defined away, the prohibition of sex discrimination would be eviscerated.\textsuperscript{54}

The same objection destroys the rationale that most courts have relied upon in rejecting the sex discrimination claim in the specific context of marriage.\textsuperscript{55} In \textit{Jones v. Hallahan},\textsuperscript{56} the Court of Appeals of Kentucky held that persons of the same sex could not marry, because "marriage has always been considered as the union of a man and a woman and we have been presented with no authority to the con-

\textsuperscript{52} Although the reproductive potentiality of "heterosexual sex" is often invoked as a basis for distinguishing it from "homosexual sex," that move is unavailable when any activity other than unprotected vaginal intercourse is permitted for different-sex couples and forbidden for same-sex couples. Oral sex, for example, will never lead to pregnancy, whatever the sexes of the persons performing it. See also Part III.A infra.

\textsuperscript{53} See, e.g., Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring) (upholding statute that forbade women from practicing law).


\textsuperscript{55} For a catalogue of the jurisdictions that have similarly denied the right of same-sex couples to marry see Lesbians, Gay Men, and the Law 418-20 (William B. Rübenstein ed., 1993).

\textsuperscript{56} 501 S.W.2d 588 (Ky. 1973).
The two women seeking to marry were prevented from doing so, not by any action of the state, “but rather by their own incapability of entering into a marriage as that term is defined.”58 “In substance, the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage.”59 Similarly in *Singer v. Hara*,60 a Washington court held that, although the state constitution included a provision forbidding sex discrimination, the losing parties “were not denied a marriage license because of their sex; rather, they were denied a marriage license because of the nature of marriage itself.”61 The Hawaii Supreme Court, however, dismissed this reasoning as an “exercise in tortured and conclusory sophistry,”62 and recognized that the miscegenation cases had already disposed of such claims:

The facts in *Loving* and the respective reasoning of the Virginia courts, on the one hand, and the United States Supreme Court, on the other, both discredit the reasoning of *Jones* and unmask the tautological and circular nature of [the] argument that . . . same sex marriage is an innate impossibility. Analogously . . . the Virginia courts declared that interracial marriage simply could not exist because the Deity had deemed such a union intrinsically unnatural, and, in effect, because it had theretofore never been the “custom” of the state to recognize mixed marriages, marriage “always” having been construed to presuppose a different configuration. With all due respect to the Virginia courts of a bygone era, we do not believe that trial judges are the ultimate authorities on the subject of Divine Will, and, as *Loving* amply demonstrates, constitutional law may mandate, like it or not, that customs change with an evolving social order.63

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57 Id. at 589.
58 Id. The historical claim made by the court is inaccurate. See generally William N. Eskridge, Jr., A History of Same-Sex Marriage, 79 Va. L. Rev. 1419 (1993) (documenting long tradition of same-sex marriages in Western and other cultures). The claim is particularly questionable in the case of Hawaii, where, before the arrival of Europeans, “Hawaiian culture attached no stigma or prohibition to same-sex relationships and indeed accepted and celebrated them. . . . Such relationships, in addition to being important to the individuals involved, were important to the political and social scheme of the Hawaiian community at large.” Robert J. Morris, Alkanes: Accounts of Hawaiian Same-Sex Relationships in the Journals of Captain Cook’s Third Voyage (1776-80), 19 J. Homosexuality 21 (1990); see also Robert J. Morris, Same-Sex Friendships in Hawaiian Lore: Constructing the Canon, in Oceanic Homosexualities 71 (Stephen O. Murray ed., 1992).
59 *Jones*, 501 S.W.2d at 590.
61 Id. at 1196.
63 Id. at 63 (citation omitted).
Civil marriage is wholly a creature of the state. Prohibition of sex discrimination is meant to change traditional practices which legally, and often socially and economically, disadvantage persons on the basis of gender. The state cannot, then, point to its own past discriminatory practices in order to evade the constitutional prohibition of sex discrimination. The strength of the sex discrimination argument is strikingly confirmed by the shabby definitional tricks to which courts have been forced to resort when they have been determined to reject it.\footnote{In a forthcoming article which criticizes an argument similar to the one advanced here, see Cass Sunstein, Homosexuality and the Constitution, 70 Ind. L.J. (forthcoming Winter 1994). Professor Craig Bradley offers two further counterarguments, see Craig Bradley, Why Sunstein's Proposal Won't Make Much Difference, 70 Ind. L.J. (forthcoming Winter 1994). First, Bradley claims that the sex discrimination argument is foreclosed by Bowers v. Hardwick, 478 U.S. 186 (1986), in which he thinks "the Court assumed that it was dealing with a statute that was limited to prohibiting homosexual sodomy (and thus made the gender of the participants relevant to the application of the statute). 478 U.S. at 188 n.2. Nevertheless, it upheld the statute without applying intermediate scrutiny." Bradley, supra. This is an overreading of the cited passage of Hardwick, which, after noting that a heterosexual couple's challenge to the Georgia statute was dismissed for lack of standing, states: "The only claim properly before the Court, therefore, is Hardwick's challenge to the Georgia statute as applied to consensual homosexual sodomy. We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy." Hardwick, 478 U.S. at 188 n.2. The Court thus did not assume that the statute included a sex-based classification. Any such assumption would be farfetched. See id. at 188 n.1 (quoting Georgia statute). Rather, the Court simply left open the question whether the case's outcome might be different were the statute applied to heterosexual sodomy. Leaving a question open is not the same as deciding it. The Court did not hold that it was permissible to treat homosexual sodomy differently from heterosexual sodomy. Moreover, even if the Court had so held, this could hardly be taken to reject the sex discrimination argument on its merits, since that argument was neither briefed nor argued before the Court, and in fact does not appear to have occurred to any of the Justices. The Court can hardly be said to have foreclosed an argument of which it was unaware. "It is of course contrary to all traditions of our jurisprudence to consider the law on this point conclusively resolved by broad language in cases where the issue was not presented or even envisioned." R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2545 n.5 (1992). Bradley's second counterargument is that, unless one accepts the premise that "mirror image restrictions" do not impose sex-based classifications, single-sex toilets in public buildings would be constitutionally suspect, a result he evidently regards as absurd. This is a more interesting objection, but it too is unpersuasive. To begin with, even if one accepted as an unshakable premise that single-sex bathrooms must be permissible, this hardly entails that such facilities do not classify on the basis of sex. The sign "MEN" on the door plainly indicates that only males may enter. Moreover, if it is insisted that mirror-image treatment keeps something from being a classification, then this insulates from scrutiny not only miscegenation prohibitions, but also the separate-race bathrooms that were one of the most insulting manifestations of segregation in the Jim Crow South. These would have to be deemed not to impose racial classifications! If, as settled doctrine holds, sex-based classifications are subject to heightened scrutiny, then heightened scrutiny is appropriate for single-sex bathrooms in public buildings.}
C. The Doctrinal Argument

Laws that discriminate against gays, because they classify on the basis of sex, are constitutionally suspect. Like racial classifications, gender classifications trigger heightened scrutiny under the fourteenth amendment—not as intensive as that applied to racial classifications, but nonetheless exacting. The U.S. Supreme Court has held that “the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an ‘exceedingly persuasive justification’ for the classification”65 and that “[t]o withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”66 According to the Court, “[t]he purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women.”67

That conclusion has little practical significance, however, because single-sex bathrooms can easily withstand such scrutiny.

Suppose we started by assuming that single-sex bathrooms are plainly permissible, while single-race bathrooms plainly are not, and then asked ourselves why this should be the case. The most obvious difference between the two cases is the different social meanings of the two practices. Single-race bathrooms were generally understood to connote that blacks were filthy, animal-like, and too polluted to be permitted to perform intimate functions in the same space as whites. Single-sex bathrooms have no such connotation of the inferiority of women. It is, of course, possible to argue that any classification on the basis of sex reinforces sexism, but this is a questionable claim. Feminists are deeply divided on whether sex equality requires the complete erasure of gender.

The triviality of the burden placed on any individual also contributes to the clarity of the case for single-sex bathrooms. The man who is required to use the men’s room, rather than the women’s, isn’t being deprived of anything particularly important (except, perhaps, a wholly illegitimate opportunity to invade the privacy of others). On the other hand, many people have a strong personal preference for single-sex bathrooms. Unlike southern whites’ preference for single-race bathrooms, it is far from clear that this preference is a consequence of prejudice against a traditionally disadvantaged group; it is likely that it is held more strongly by women than by men.

Contrast all this with the stigmatization of homosexuality. As I argue below, the understood social meaning of that stigma is tightly connected with the devaluation of women. Moreover, the burden imposed on individuals is hardly trivial. Most people do not choose between sexual partners with the same indifference that they choose between toilet stalls. What the first court that struck down a miscegenation law said is applicable here: “A member of any of these races [for which one might here substitute ‘sexes’] may find himself barred by law from marrying the person of his choice and that person to him may be irreplaceable. Human beings are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains.” Perez v. Lippold, 198 P.2d 17, 25 (Cal. 1948).

67 Mississippi Univ. for Women, 458 U.S. at 725-26.
A statute "providing dissimilar treatment for men and women who are . . . similarly situated . . . violates the Equal Protection Clause."68 Thus, laws that discriminate against gays are arguably just as arbitrary as the statute invalidated in McLaughlin v. Florida.69 It is difficult to see how a state seeking to defend such laws could meet its burden of proving that, for example, women who want to have sex with women are situated differently from men who want to have sex with women.70 As I noted at the beginning of this Article, one of the strengths of the sex discrimination argument is that, unlike the privacy and equal protection arguments, it shifts onto the state the burden of showing whether discrimination against lesbians and gay men is justified.

As with race, the Court has not confined its gender jurisprudence to denunciations of irrationality and inaccuracy, but has also inquired into the purposes served by sex-based classifications. Thus the Court has explained that heightened scrutiny is imposed because “[c]lassifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination.”71 It is because sex-based classifications have been instruments of the subordination of women that they arouse judicial suspicion; otherwise, they would not need any greater justification than a rational relationship to a permissible state purpose.

In determining whether a sex-based classification serves important governmental objectives, the Court has held that “[c]lare must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions.”72 The “archaic and stereotypic notions” that the Court has forbidden are often identified as being inaccurate empirical generalizations about women.73 But the impermissible “notions” also include the normative notion that women should not act in ways that are unseemly for their sex. The

69 379 U.S. 184 (1964) (invalidating statute prohibiting unmarried interracial couple from habitually living in and occupying same room at night).
70 The Eleventh Circuit recognized this in Hardwick when it declared that “[f]or some, the sexual activity in question here serves the same purpose as the intimacy of marriage.” Hardwick v. Bowers, 760 F.2d 1202, 1212 (11th Cir. 1985), rev’d, 478 U.S. 186 (1986). The State’s response, that this conclusion “has lowered the estate of marriage . . . to merely another alternative for sexual gratification,” Brief for Petitioner at 25, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140), implies that the satisfaction of sexual gratification is the only feature common to marriages and homosexual liaisons. This claim will not withstand the most cursory empirical investigation. See note 213 infra.
73 See, e.g., id. at 725-26; Frontiero v. Richardson, 411 U.S. 677, 686-87 (1973) (plurality opinion).
Court has consistently struck down statutes whose purpose was the imposition of traditional gender roles.74

The rationale for these holdings is most clearly evident in Stanton v. Stanton,75 in which the Court invalidated a statute requiring parents to support their sons until age twenty-one, but their daughters only until age eighteen. The State argued in defense of the law "that it is the man's primary responsibility to provide a home and that it is salutary for him to have education and training before he assumes that responsibility."76 The Court acknowledged that this "may be true,"77 but it remained unpersuaded.

No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. ... To distinguish between the two on educational grounds is to be self-serving: if the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed.78

74 Thus, in Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), the Court invalidated a Social Security provision that granted survivors' benefits to widowers and their children in lesser amounts than those granted to widows and their children. The traditional sexual division of labor, the Court held, could not "justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support." Id. at 645. Furthermore, the Court noted that "[t]he fact that a man is working while there is a wife at home does not mean that he would, or should be required to, continue to work if his wife dies." Id. at 651-52 (emphasis added).

In Orr v. Orr, 440 U.S. 268 (1979), the Court invalidated a law permitting alimony payments to be imposed only on husbands upon divorce. The Court noted that its "prior cases settle" that the Constitution will not permit laws "announcing the State's preference for an allocation of family responsibilities under which the wife plays a dependent role, and ... seeking for their objective the reinforcement of that model among the State's citizens." Id. at 279. "Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women" and therefore "must be carefully tailored" to avoid carrying "the baggage of sexual stereotypes." Id. at 283.

Mississippi University for Women held unconstitutional a state nursing school's policy of denying admission to males. The Court observed that the exclusion of males "tends to perpetuate the stereotyped view of nursing as an exclusively woman's job." 458 U.S. at 729. This policy "tends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women [become] a self-fulfilling prophecy." Id. at 730. The Court also noted evidence indicating that this "preferential treatment" had harmed rather than helped women: "Officials of the American Nurses Association have suggested that excluding men from the field has depressed nurses' wages." Id. at 729 n.15.

75 421 U.S. 7 (1975).

76 Id. at 14; see Stanton v. Stanton, 517 P.2d 1010, 1012 (Utah 1974), rev'd, 421 U.S. 7 (1975); Brief for Appellee at 18, Stanton v. Stanton, 421 U.S. 7 (1975) (No. 73-1461).


78 Id. at 14-15.
This holding is not explicable in terms of the statute's rationality. If the state's purpose was to maintain a pattern of sex relationships in which "it is the man's primary responsibility to provide a home," so that women would remain economically dependent on men, then this statute would appear to have been quite narrowly tailored to that goal. The fact that the practice promoted in the statute "coincides with the role-typing society has long imposed" should be a strength, not a weakness, under the rational relationship test. The problem with the statute is rather that it forces women to follow traditional sex roles. Laws that do this keep women locked in a subordinate social and economic position. They consign women to a position of inferiority on the basis of a status of birth.\(^\text{79}\) For this reason, the imposition of role-typing can never constitute an "important governmental objective." It is not even a permissible one.

Sex-based classifications therefore have been upheld only when the Court has found that they reflected accurate empirical generalizations.\(^\text{80}\) Since it began subjecting sex-based classifications to heightened scrutiny, the Court has never upheld a sex-based classification resting on normative stereotypes about the proper roles of the sexes.\(^\text{81}\)

\(^{79}\) Cf. Plyler v. Doe, 457 U.S. 202, 213 (1982) ("The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation.").

\(^{80}\) Thus, for example, in Michael M. v. Superior Court, 450 U.S. 464 (1981), the Court upheld a statutory rape law that punished the male, but not the female, participant in intercourse when the female was under 18 and not the male's wife. "Because virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female," Justice Rehnquist's plurality opinion explained, "a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct." Id. at 473. Thus, Rehnquist claimed, the statute did not rest merely on "the baggage of sexual stereotypes." Id. at 476 (quoting Orr v. Orr, 440 U.S. 268, 283 (1979)). Rehnquist nowhere suggests that such stereotyping is permissible; instead he relies on the fact that "this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." Id. at 469.

This distinction has been criticized for insulating longstanding patterns of domination from scrutiny. Some differences between the sexes are quite real, but arguably exist only because they have been imposed by society for a long time. See Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law 32-45 (1987); Sylvia A. Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955 (1984) [hereinafter Law, Rethinking Sex]. But whatever the deficiencies of the Court's approach, this Article does not rely on a radical revision of the Court's sex discrimination doctrine. It argues only that the existing doctrine should be applied consistently. But see Sylvia A. Law, Homosexuality and the Social Meaning of Gender, 1988 Wis. L. Rev. 187, 229 (arguing that Court has failed to hold squarely that enforcing traditional visions of family and sexuality is not legitimate state interest, making it difficult for gays to argue that these traditional concepts are insufficient to justify denial of their liberty) [hereinafter Law, Homosexuality and the Social Meaning of Gender].

\(^{81}\) Nor has the Court been tolerant of normative stereotyping when interpreting the Civil Rights Act of 1964. See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)
Nor has the Court announced any exception to the prohibition of normative stereotyping in cases where the desire for role-typing takes the form of deep moral conviction. It could hardly do so without vitiating the principle altogether, since all sexual role-typing has traditionally been thought to possess such moral force.\footnote{For example, in Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873), in which the Court upheld a law that forbade women to practice law, Justice Bradley explained the powerful moral beliefs on which his decision rested: “The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.” Id. at 141 (Bradley, J., concurring). Compare the following official statement of why lesbianism is forbidden: “The Creator has endowed the bodies of women with the noble mission of motherhood and the bringing of human life into the world. Any woman who violates this great trust by participating in homosexuality not only degrades herself socially but also destroys the purpose for which God created her.” This statement was part of a 1952 indoctrination lecture on homosexuality given by Navy chaplains to recruits, reprinted in Allan Berube & John D’Emilio, The Military and Lesbians During the McCarthy Years, 9 Signs 759, 769 (1984).}

Laws that discriminate against gays rest upon a normative stereotype: the bald conviction that certain behavior—for example, sex with women—is appropriate for members of one sex, but not for members of the other sex. Such laws therefore flatly violate the constitutional prohibition on sex discrimination as it has been interpreted by the Supreme Court. Since intermediate scrutiny of gender-based classifications is appropriate, and laws that discriminate against gays cannot withstand intermediate scrutiny, our legal argument is concluded. A court applying received doctrine should invalidate any statute that singles out gays for unequal treatment.

The implications of this doctrinal argument for the trial court, and eventually the Hawaii Supreme Court, in \textit{Baehr} should be clear. This Part has argued that laws that expressly treat members of same-sex couples differently from members of opposite-sex couples cannot survive even the intermediate level of scrutiny that the U.S. Supreme Court applies to sex-based classifications. A fortiori, they cannot survive the more exacting strict scrutiny that the Hawaii constitution requires for such classifications.

\footnote{(holding that employer who acts on basis of belief that women cannot or should not be aggressive has acted on basis of gender for purposes of Title VII).}
II

A SOCIOLOGICAL ARGUMENT

A. Racism and the Miscegenation Taboo

The Supreme Court does not require that a challenge to a sex-based classification show that the challenged classification is caused by or reinforces sexism. Rather, once a sex-based classification is shown, the law is presumed to be unconstitutional, and the burden shifts to the state to rebut that presumption by showing that the classification is substantially related to the achievement of important government objectives.\(^{83}\) Unless that can be shown—and in the case of laws that discriminate against gays, it cannot—the law is invalid. There is thus, so to speak, a firewall between the argument thus far and the more controversial sociological and psychological claims that follow. All the parts of the argument I am making fit together into a single structure, but the logic of those parts of the argument that have been presented up to this point is doctrinally complete, and thus is insulated from the destructive force of any skepticism you may feel toward the rest of the argument. This is because the argument thus far rests on pronouncements of the United States Supreme Court that lower courts are not at liberty to reject or disregard. Existing doctrine requires the judicial invalidation of laws that discriminate against gays, even if these lower courts do not accept a word of what I am about to say.

Theorists and state supreme courts interpreting their own constitutions, if not lower courts, should go beyond this firewall because received doctrine is unpersuasive.\(^{84}\) It is now a commonplace view among constitutional scholars that the levels-of-scrutiny approach takes the court unnecessarily far afield from the systems of illegitimate hierarchy that were the target of the Reconstruction Amendments, and sometimes even perversely reinforces those systems.\(^{85}\) Even if existing equal protection doctrine would require the invalidation of miscegenation laws or laws disadvantaging gays, judges may well wonder whether either result is in accord with the purposes of the fourteenth amendment. If they believe it isn’t, they are perhaps justified in torturing the doctrine (as, in the past, they have) in order to

\(^{83}\) See text accompanying notes 65-66 supra.

\(^{84}\) The U.S. Supreme Court evidently has little interest in reexamining existing doctrine, even when that doctrine reveals itself to be completely incoherent. See, e.g., City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (purporting to apply minimal scrutiny yet invalidating application of statute).

\(^{85}\) The most thorough indictment of the doctrine is Owen M. Fiss, Groups and the Equal Protection Clause, in Equality and Preferential Treatment 84, 84-154 (Marshall Cohen et al. eds., 1977); see also C. MacKinnon, supra note 80, at 32-45.
reach a result more consistent with those purposes. As William Eskridge observes:

A gap in the analogy [between the homosexuality and miscegenation taboo] is that the connection between the discriminatory classification (sex) and the harm (reinforcing gender stereotypes) is abstract and hard to connect with legislative motivations. Judges may find it difficult to understand how denying two gay men the right to marry is driven by an ideology that oppresses straight women.\(^{86}\)

An analogous objection may be made to the claim that the laws against miscegenation violate the constitutional prohibition of racial discrimination. The question left unanswered by *McLaughlin v. Florida*\(^{87}\)—which, as it happens, is the first case in which the Court expressly applied strict scrutiny in its modern sense (scrutiny that is "strict in theory and fatal in fact")\(^{88}\)—is whether prohibitions of miscegenation were part of the system of racial oppression that the fourteenth amendment seeks to eliminate and, if so, in what way. It was, perhaps, the *McLaughlin* Court's desire to avoid this difficult sociological inquiry that led it to adopt the mechanistic, levels-of-scrutiny approach, which thereafter came to dominate equal protection doctrine.\(^{89}\)

I will now explore the connection between racism and the miscegenation taboo in some detail. I will do this for two reasons. First, this exploration will show how one group's oppression can be rooted in another's. Once it is made clear how discrimination against members of interracial couples is part of a larger pattern of domination of blacks by whites, the idea that discrimination against gays is part of a larger pattern of domination of women by men may seem less conceptually novel. Second, this exploration will show that sociological argu-

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\(^{86}\) Eskridge, supra note 58, at 1509-10; see also Jeffrey Rosen, Sodom and Demurrer, New Republic, Nov. 29, 1993, at 16, 18 (observing that sex discrimination argument for gay rights "requires a degree of sociological abstraction that is open to question"). But see William N. Eskridge, Jr., A Social Constructionist Critique of Posner's *Sex and Reason*: Steps Toward a Gaylegal Agenda, 102 Yale L.J. 333, 356-57 (1992) (arguing that same-sex marriages could erode traditional, gendered work roles in the home, and thereby ease women's now disproportionate burden of domestic labor).

\(^{87}\) 379 U.S. 184 (1964) (invalidating statute prohibiting unmarried interracial couple from habitually living in and occupying same room at night).


\(^{89}\) For a statement of the very different, and less settled, equal protection doctrine that prevailed on the eve of *McLaughlin*, see Harvey M. Applebaum, Miscegenation Statutes: A Constitutional and Social Problem, 53 Geo. L.J. 49 (1964) (arguing that unless Court modified existing doctrine by shifting burden of justification onto the state, the state would probably prevail).
ment of the kind that I am proposing is neither unprecedented nor avoidable in constitutional law. The well-established doctrine that miscegenation laws are unconstitutional necessarily depends upon precisely the same kind of argument.

One way of establishing the connection between racism and the miscegenation taboo is to look at the common-sense meaning of the challenged taboo. Most people recognized that (at least among whites) the miscegenation taboo tended to be held most strongly by racists, that it tended to reinforce racism, and that it played an important role in the system of white supremacy. 90 They could not, however, be confident of the precise way in which it played this role, since the mechanisms in question took place within people's psyches. Nonetheless, those mechanisms were not altogether inaccessible. As Charles R. Lawrence III argues, "the 'cultural meaning' of an allegedly racially discriminatory act is the best available analogue for, and evidence of, a collective unconscious that we cannot observe directly." 91 This is because, if an action has cultural meaning, "this meaning must have been transmitted to an individual who is a member of that culture. If he professes to be unaware of the cultural meaning or attitude, it will almost surely be operating at an unconscious level." 92 The miscegenation taboo notoriously had invidious racial connotations. Here, then, is a second firewall: One can recognize what everyone knows, that the miscegenation taboo is somehow linked to white supremacy, that that link is part of its implicit meaning, without wading into the murky psychological waters in which the linkage dwells. This recognition appears to be the basis of the Court's most important miscegenation decision, *Loving v. Virginia.* 93

When the Supreme Court next visited the miscegenation question after *McLaughlin,* in *Loving,* it focused directly on the purpose of the statute's racial classifications. *Loving* involved a challenge to a law prohibiting interracial marriage. Chief Justice Warren, writing for the Court, observed that the Supreme Court of Appeals of Virginia had held "that the State's legitimate purposes were 'to preserve the racial integrity of its citizens,' and to prevent 'the corruption of the blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride,' obviously an endorsement of the doctrine of White Supremacy." 94 On this evidence, he concluded that "the racial classifications must stand on

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92 Id. at 357.
93 388 U.S. 1 (1967).
94 Id. at 7 (quoting Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955)).
their own justification, as measures designed to maintain White Supremacy," and that the purpose of the statute thus "violates the central meaning of the Equal Protection Clause." Loving thus indicates that the "central meaning" of equal protection is the prohibition, not of racial classification (as McLaughlin had implied), but of officially sanctioned racism, and Loving went beyond formal analysis to discern the racism that underlay the miscegenation prohibition.

The Loving opinion did not fully explain how the prohibition of interracial marriage was linked to white supremacy, but the existence of the linkage should have been clear to most Americans. Before abolition, the connection was clear: as one Virginia jury foreman put it in 1833, "the law was made to preserve the distinction which should exist between our two kinds of population, and to protect the whites in the possession of their superiority." Kingsley Davis observes that laws against interracial marriage are important for the continued functioning of a caste-based society.

Such laws indicate one thing: that the racial integrity of the upper caste is to be strictly maintained, to the degree that all persons of mixed racial qualities shall be placed unequivocally in the lower of the two castes. To permit intermarriage would be to give the hybrid offspring the legal status of its father, and would soon undermine the very basis of the caste order. Hence either intermarriage must be strictly forbidden or racial caste abandoned.

Even when the legislators self-consciously strove to maintain the caste system, their concern was not limited to the danger to the superiority of the white race brought about by the production of mulatto children. "When they addressed black male/white female sexual relations, the relations themselves, as well as their likely result, disturbed the white male legislators." By the time the miscegenation prohibition came before the Supreme Court in the mid-twentieth century, it had become autonomous from its historical origins, a deeply felt taboo in itself, and was, in fact, a principal basis for the defense of racial segre-

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95 Id. at 11.
96 Id. at 12.
97 Loving was not the first Supreme Court decision to do this. One earlier opinion recognized the significance of the miscegenation prohibition as a "stigma, of the deepest degradation . . . fixed upon the whole [black] race." Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 409 (1857).
100 Higginbotham & Kopytoff, supra note 98, at 1995 n.131.
gation in general. Why did so much passion attach to the miscegenation taboo?

The miscegenation taboo presumed, in the first place, that the sex act had hierarchical significance, with penetration expressing the dominance of the man over the woman. The idea that sexual penetration implies the subordination of the person penetrated should hardly be unfamiliar to modern Americans. One of the commonest of obscenities, the verb "fuck," refers in a vulgar way to sexual intercourse, but as Robert Baker has observed, it also is ordinarily used to indicate harm, and the fact that this metaphor makes sense to us suggests that "we conceive of the female role in intercourse as that of a person being harmed (or being taken advantage of)." The word implies "that intercourse is both the normal use of a woman, her human potentiality affirmed by it, and a violative abuse, her privacy irredeemably compromised, her selfhood changed in a way that is irrevocable, unrecoverable."

Sexual penetration of a member of one race by a member of the other was understood symbolically either to represent or to invert the whole order of racial hierarchy. Thus white men took access to black women for granted, before and after emancipation, while the barest hint (or even the projected fantasy) of a black man's desire for a white woman often sufficed to bring out the lynch mob. A white woman

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101 According to Myrdal:

The ban on intermarriage has the highest place in the white man's rank order of social segregation and discrimination. Sexual segregation is the most pervasive form of segregation, and the concern about "race purity" is, in a sense, basic. No other way of crossing the color line is so attended by the emotion commonly associated with violating a social taboo as intermarriage and extra-marital relations between a Negro man and a white woman. No excuse for other forms of social segregation and discrimination is so potent as the one that sociable relations on an equal basis between members of the two races may possibly lead to intermarriage.


103 Andrea Dworkin, Intercourse 122 (1987). One can recognize the pervasiveness of this view in our culture without leaping to the conclusion that "intercourse itself is immune to reform," id. at 137, or that "intercourse itself determines women's lower status," id. at 138.

who consented to miscegenation was seen as degrading herself, and one of the earliest miscegenation laws, a 1664 Maryland statute, provided that any "freeborn [white] woman who thereafter married a slave would be required to serve the master of such slave during her husband's life, and that any children born of this union would be slaves."\textsuperscript{105} Implicit in the taboo were the premises that sexual penetration is a nasty, degrading violation of the self, and that there are some people (black women) to whom, because of their inferior social status, it is acceptable to do it, and others (white women) who, because of their superior social status, must be rescued (or, if necessary, forcibly prevented) from having it done to them. The taboo connoted a narrative in which black men represented a dangerous, predatory, uncontrollable sexuality, and white women represented a fragile, asexual purity, the protection of which was the special duty of white men.\textsuperscript{106} This narrative was commonplace—not accepted by everyone.


The caste rule against intermarriage is enforced against both sexes strictly, but a violation by a higher caste woman and a lower caste man is likely to be punished more harshly than one between their opposite numbers. The difference in treatment reflects the subordination of women to men in most societies. Male domination, derived from the patriarchal system, includes the arrangement of marriages of females, and this sort of misalliance by a higher caste woman constitutes flagrant disrespect for the authority and prestige of the males of her caste.

David H. Fowler, Northern Attitudes Towards Interracial Marriage 16-17 (1987). This specter of sexual pollution continues to police the behavior of higher caste females. "Infrequent though black-on-white rape was [in 20th-century America], the image of the black rapist could serve not only to control the behavior of black men in the North, but also to instill fear into white women who moved too freely in the public world." J. D'Emilio & E. Freedman, supra note 104, at 297-98.

\textsuperscript{106} This narrative has been noted by many commentators. See, e.g., C. Stember, supra note 101, at 121-43. The taboo is also reasonably open to other constructions less flattering to the objects of its protection:

Sex was the whip that white supremacists used to reinforce white solidarity, probably the only whip that would cut deeply enough to keep poor whites in line. Political slogans that spoke straightforwardly of property or wealth (which not all whites held) had failed to rally whites en masse. However, nearly all white men could claim to hold a certain sort of property, in wives, sisters, and daughters. When women were reduced to things, they became property that all white men could own. The sexually charged rhetoric of "social equality" invited all white men to protect their property in women and share in the maintenance of all sorts of power (including the economic and political, which disproportionately benefited the better-off) in the name of protecting the sexuality of white womanhood.
but understood by everyone—in white American culture. This information was available to Chief Justice Warren because it was available to everybody.

It's often been argued that citation of social science evidence in Brown v. Board of Education,107 which became the object of considerable controversy,108 was unnecessary because everyone knew that segregation harmed and stigmatized blacks and was specifically intended to do so. Common-sense reasoning, it has been argued, should have been sufficient to dispose of the case.109 In Loving, Chief Justice Warren may have taken this criticism of his earlier opinion seriously. Thus, the second firewall: The Court's decision in Loving did not depend on, or even cite, questionable social science evidence. For anyone who honestly didn't know that the miscegenation taboo was linked to racism, however—say, a recent immigrant—social science evidence might have helped to make the decision more persuasive. Even for those who recognize the invidious social meaning of the taboo, moreover, the question remains whether Warren's causal claim, that miscegenation laws are "measures designed to maintain White Supremacy,"110 is accurate. Underlying the doctrinal question is a moral one: Is it wrong to stigmatize miscegenation? If so, why? If the claim is that the taboo is motivated by racism, what evidence have we that this is so? If the miscegenation taboo reinforces white supremacy, how does it do this? The judicial question of the prohibition's constitutionality has been resolved, and sits safely behind the two firewalls, but we must now push past them. No answer to the doctrinal question that ignores this moral question can be fully satis-

Nell I. Painter, "Social Equality," Miscegenation, Labor, and Power, in The Evolution of Southern Culture 47, 49 (Numan V. Bartley ed., 1988). It has also been noted that property of a more tangible sort was at issue in most of the legal cases:

Until the mid-twentieth century, only a few of these [miscegenation] cases were brought either by interracial couples seeking the right to marry or by law enforcement officials trying to prevent them from doing so. Most of the cases were ex post facto attempts to invalidate interracial marriages that had already lasted for a long time. Such cases were brought by relatives or by the state after the death of one spouse, most often a white man. The lawsuits were designed with a specific purpose in mind: to take property or inheritances away from a surviving spouse, most often a woman of color.

Peggy Pascoe, Race, Gender, and Intercultural Relations: The Case of Interracial Marriage, 12 Frontiers 5, 7 (1991).


109 The classic statement of this argument is Charles L. Black, Jr., The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421 (1960).

factory, because any doctrinal answer implies a conclusion about the moral question.

Let us now at last consider what, precisely, the equal protection clause of the fourteenth amendment should be understood to forbid. There are several theories that have attempted to specify what it means to “deny . . . the equal protection of the laws.”

The process defect theory, most prominently developed by John Hart Ely, holds that minorities must not be denied “equal concern and respect in the design and administration of the political institutions that govern them.” The fourteenth amendment, according to Ely, requires that all citizens “be represented in the sense that their interests are not to be left out of account or valued negatively in the lawmaking process.” On this account, a law that is generated by a process tainted by prejudice, in which the legislators were biased against some of their constituents, is unconstitutional.

A second theory, the stigma theory, most prominently associated with Kenneth Karst, argues that the substantive core of the equal protection clause is “a principle of equal citizenship, which presumptively guarantees to each individual the right to be treated by the organized society as a respected, responsible, and participating member.” This principle “presumptively forbids the organized society to treat an individual either as a member of an inferior or dependent caste or as a nonparticipant. Accordingly, the principle guards against degradation or the imposition of stigma.” According to this theory, any law that stigmatizes or insults some citizens violates the Constitution.

A third theory, the group-disadvantage theory, holds that the amendment is primarily concerned with the material subordination of groups, such as blacks, that have been in a perpetually disadvantaged condition. According to this theory, the equal protection clause presumptively forbids any state law or practice which “aggravates (or perpetuates?) the subordinate position of a specially disadvantaged group.” (This theory will be of less interest to us here than the other two, because if the other two theories can be satisfied, this one can, too: Any law that is biased against and stigmatizes a group will also work to its material detriment, at least in the long run.)

111 U.S. Const. amend. XIV, § 1.
113 J. Ely, supra note 112, at 223 n.33.
115 Id. at 6.
116 See generally, e.g., Fiss, supra note 85.
117 Id. at 134.
In our search for evidence of a link between the miscegenation taboo and white supremacy, we’ve thus far focused on the understood social meaning of the taboo, which is what stigma-based theories of equal protection emphasize. From the standpoint of stigma theory, Loving was a remarkably easy case. It’s also easy from the standpoint of the group-disadvantage theory: blacks’ material disadvantages were the direct result of the racism that laws of this kind encouraged, and which biased both public and private decisionmaking. The principal proponent of the process defect theory, however, argues that stigma is relevant, not as a prohibited kind of harm, but only “[i]nsofar as it signals the attitudes that ‘normals’ are likely to entertain respecting the stigmatized individual,” since prejudiced attitudes are then more likely to have infected the decisionmaking process.\textsuperscript{118} Rather than attempt to adjudicate this dispute, I will here take the process theory as a given and see whether the result is different. Is there evidence that the miscegenation prohibition is the product of a lawmaking process that is tainted by racism?

One indicator, the one seized on by McLaughlin, is the bald fact of racial classification itself. If a legislature classifies on the basis of race, it’s plain that the legislature thought that race mattered, and given the sorry history of race-consciousness in the United States, there is thus reason to suspect that racial antagonism is at work. That’s why such laws are presumptively unconstitutional. “Racial classifications that disadvantage minorities are ‘suspect,’” writes Ely, “because we suspect they are the product of racially prejudiced thinking of a sort we understand the Fourteenth Amendment to have been centrally concerned with eradicating.”\textsuperscript{119} But here we’ve resolved to push beyond this test, to see whether the suspicion is justified in this case. What other evidence have we that it is?

A second indicator is the cultural meaning of the prohibition. As noted above, the cultural output of a prohibition is a promising indicator of the cultural input that produced it. This is the basis of Lawrence’s cultural meaning test, which looks to the generally understood meaning of a law as a proxy for the unconscious motivations that produced it.\textsuperscript{120} It is impossible to believe that the generally understood racist connotations of the miscegenation taboo were not in the minds of the legislators. Such laws would not have been enacted had whites and blacks been regarded with equal concern and respect. (For that matter, the implicit connotations of sexual penetration as both de-

\textsuperscript{118} See J. Ely, supra note 112, at 160 n.*.
\textsuperscript{119} Id. at 243 n.11.
\textsuperscript{120} See Lawrence, supra note 91, at 324.
grading and appropriate only for (certain) women make it clear that such laws would not have been enacted by legislators who regarded men and women with equal concern and respect.\textsuperscript{121}

Finally, we can turn to the findings of social science. Social scientists have studied the links between various prejudiced attitudes, trying to discern which attitudes are reliable predictors of other attitudes and (more difficult to prove) which attitudes cause other attitudes. Such investigations have been undertaken into the connection between whites’ attitudes toward blacks and their attitudes toward miscegenation. The results have been revealing.

The most promising explanation of the miscegenation taboo begins with the premise that “people hold and express particular attitudes because they derive psychological benefit from doing so, and that the type of benefit varies among individuals.”\textsuperscript{122} Racism, for example, may have any of a number of motivational causes. Racial bias “might: 1. reflect exposure to a limited and inaccurate range of information about Negroes, 2. reflect conformity to prevailing social pressures, or 3. represent the use of Negroes as social media for such ego-defensive purposes as the projection of unconscious and unacceptable impulses.”\textsuperscript{123} Opposition to miscegenation functions similarly. Some of those who were opposed to miscegenation honestly believed pseudo-scientific claims that intermarriage led to sickly offspring.\textsuperscript{124} Some simply internalized the norms that already existed in their society. As Peter Berger and Thomas Luckmann observe, any society’s universe of symbolic meanings “is self-maintaining, that is, self-legitimating by the sheer facticity of its objective existence in the society in question.”\textsuperscript{125} Many individuals learned the custom of stigmatizing miscegenation along with all the other customs in their culture, and held to it because they had learned that that was the way things ought to be.

For some whites, however, this custom came to have a particular emotional resonance. These individuals’ sense of identity became bound up with the miscegenation taboo, and so with the entire system of social hierarchy with which it was connected. It was for these individuals that the taboo was most important. And the participation of such individuals in political decisionmaking greatly increased the like-

\textsuperscript{121} See C. Stember, supra note 101, at 202-03.
\textsuperscript{123} Daniel Katz et al., Ego-Defense and Attitude Change, 9 Hum. Rel. 27, 28 (1956).
\textsuperscript{124} See Applebaum, supra note 89, at 71-72 (discussing studies).
lihood that the taboo would persist as a part of the social and legal code.

The identity of southern whites was defined at a fundamental level by their status as white, which was defined by contrast with the purported laziness, stupidity, uncleanness, criminal propensity, and hypersexuality of blacks. Their self-esteem was largely derived from the contrast between themselves and the despised racial Other. The miscegenation taboo appears to be close to the psychological core of the system of white supremacy that prevailed in the South after Reconstruction. Its prototypical mode of enforcement was the Lynch mob. As Joel Kovel observes,

the archetypal lynching in the old South was for the archetypal crime of having a black man rape (= touch, approach, look at, be imagined to have looked at, talk back to, etc.) a white lady. Moreover, the archetypal lynching often included a castration of the black malefactor; and even when it didn’t, the idea of castration was immanent in the entire procedure. Before there were lynchings in the South, there were laws to do what mobs took upon themselves to perform after the Civil War, and these same laws often punished Negro infractions of all kinds with castration.

White supremacy was thus understood, and often expressly justified, as a means of protecting white women from black men. The psychological basis of this understanding (which needed explaining; one writer observed that the actual danger that a southern white woman would be raped by a black man was much less than her danger of being struck by lightning) has been explored by many writers, who have arrived at widely divergent conclusions. Some claim that the concern about interracial sex was really a concern about racial pu-

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128 J. Kovel, supra note 126, at 67. This mythology was an important part of the ideology supporting lynching, even though most of the lynchings that actually took place were not motivated by allegations of rape. See Painter, supra note 106, at 53; Joel Williamson, The Crucible of Race: Black-White Relations in the American South Since Emancipation 183-89 (1984).
129 This did not, however, prevent white mobs from inflicting terrible punishments, sometimes including genital mutilation, on white women thought to have cohabited with black men. See Hodes, supra note 104, at 410-12.
131 The following is not an exhaustive catalogue. See R. Sickels, supra note 90, at 10-31; C. Stember, supra note 101, at 37-89.
rity," but as we have seen, this concern rarely extended to the fathering of mulatto children by white men. Some have argued that the miscegenation prohibition was based on whites’ desire for economic superiority, rather than any actual abhorrence of interracial sex. This, however, fails to explain why the taboo is held by even whites who support the economic advancement of blacks. More interesting is the hypothesis that some kind of projected guilt was at work. John Dollard thought that “the white men are defending their women not only from the sexual thoughts and attentions of Negroes, but also from their own, and what they deny to themselves in fantasy they will hardly permit Negroes in fact.” Calvin Hernton argues that there were two sources of such guilt for the southern white man: his frequent cohabitation with black women, and his sense of the immorality of slavery, and later, of the Jim Crow system. White womanhood was perceived as precious but endangered, and this danger justified all the repressive measures that were brought to bear on the black population. “In the mind of the Southerner the word ‘rape’ not only applied to sexual assaults on white women by Negroes, but to any attempt at changing what the Southerner called ‘our way of life.’” This account complements the Freudian hypothesis of Kovel, who contends that in the miscegenation taboo, the black man became the surrogate for the white man’s own oedipal fears. The black man was made to represent both father and son in their destructive aspects. There is evidence for this in the structure of his social role: he is the bad father who possesses the black mammy (who is herself impure), and he has the genital power which forever excites the child’s envy; he is also the bad child who lusts after the pure and utterly forbidden white mother (made sexless, in reality). By making the rape fantasy the cornerstone of his culture, the white male only repeats in adulthood the central incest taboo of his childhood. And here southern

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122 This concern was the ostensible basis for the Virginia statute, entitled “An Act to Preserve Racial Integrity,” which was invalidated in Loving. See Paul A. Lobardo, Miscegenation, Eugenics, and Racism: Historical Footnotes to Loving v. Virginia, 21 U.C. Davis L. Rev. 421, 423 (1988).

123 See, e.g., Oliver C. Cox, Caste, Class, and Race 386-87, 526-27 (1948).

124 See C. Stemler, supra note 101, at 5-9, 32-34; see also Howard Schuman et al., Racial Attitudes in America: Trends and Interpretations 195 (1985) (“[B]y 1983 approval of integrated marriage had reached only the same level [40%] that approval of integrated transportation had reached in the early 1940s.”).

125 J. Dollard, supra note 104, at 137.

126 Calvin C. Hernton, Sex and Racism in America 24 (1966) (“Sacred white womanhood emerged in the South as an immaculate mythology to glorify an otherwise indecent society.”).

127 Id.; see also W. Cash, supra note 130, at 114-17.
culture makes its unique contribution to an ageless human problem: the southern white male simultaneously resolves both sides of the conflict by keeping the black man submissive, and by castrating him when submission fails. In both these situations — in the one symbolically, in the other directly — he is castrating the father, as he once wished to do, and also identifying with the father by castrating the son, as he once feared for himself. All that he has to do to maintain this delectable situation is to structure his society so that he directly dominates black men.\textsuperscript{138}

Charles Stember, noting that sexual penetration is understood to connote achievement, mastery, and defilement, infers that male sexual pleasure is heightened by the conquest of a woman of superior social status, and that because white women are so much higher in social status than black men, the pleasure of black men in interracial sex is far greater than that available under any circumstances to white men. White men’s rage, he concludes, is the consequence of relative sexual deprivation.\textsuperscript{139}

None of these ideas are more than hypotheses. As Stember concedes, any explanation of the taboo must rest on “speculation and deduction.”\textsuperscript{140} It is, however, significant that they all posit a close link between the miscegenation taboo and whites’ conviction of black inferiority. All converge on the idea that if whites did not hold that blacks were less worthy of concern and respect than themselves, they would not hold the taboo. The fact that every investigator to venture into this mysterious territory has agreed on at least this proposition suggests that it can be held with confidence.

The miscegenation taboo served a defensive psychological function for a large subset of its supporters, and certainly for those who supported it most vociferously. It was an effect of its adherents’ racism—they were affronted by the idea of a black man penetrating a white woman—but as part of a publicly shared moral code, it also caused racism. It did so in large part at an unconscious level. The taboo wasn’t a rational belief; it was deeply rooted in culturally shared aversions that even strong antiracists usually could not escape internalizing. Harry Truman, who nearly lost the presidency because of his dedication to the ideal of racial equality, said in 1963 that “I don’t believe in it. What’s that word about ten feet long? Miscegenation? Would you want your daughter to marry a Negro?”\textsuperscript{141} Moreover, the

\textsuperscript{138} J. Kovel, supra note 126, at 71-72. For other psychological accounts of the taboo, all of which link it tightly to racism, see D. Bell, supra note 105, at 74-81.

\textsuperscript{139} C. Stember, supra note 101, at 144-65.

\textsuperscript{140} Id. at 206.

\textsuperscript{141} Quoted in R. Sickels, supra note 90, at 32.
way it played out in practice was remarkably irrational. The murderous, castrating mob described by Kovel appears to be in the grip of an uncontrollable passion. It was because of the centrality of the misce-
genation taboo to whites' racism, at a deep, unconscious level, that
overt racists could score debating points with the "your daughter"
line. (The fact that this particular line was so effective supports
Kovel's claim that the taboo also draws on incest guilt.)

When rational-actor models cannot explain human behavior, we must turn to some kind of psychological theory that tries to make sense of human irrationality. The theories described above offer an explanatory apparatus that accounts for all these phenomena more persuasively than any competing model.

Why should we believe these accounts of the psychological underpinnings of the miscegenation laws? Because they help us to make sense of the facts: the bizarre and thoroughly confused mythology of race and sex dangers that grew up around the miscegenation taboo, the centrality of the taboo to the ideology of white supremacy, the taboo's gender asymmetry (black male-white female pairings being the central fear), and its connection with sexist assumptions about the polluting effects of sexual penetration.

Any psychological explanation involves well-known dangers. Because psychological phenomena are obviously not available for empirical observation, it is difficult to identify a standard by which we can verify our hypotheses. As Thomas Nagel has argued, however, this difficulty should not be taken to vitiate the usefulness of psychological explanations:

Much of human mental life consists of complex events with multiple causes and background conditions that will never precisely recur. If we wish to understand real life, it is useless to demand repeatable experiments with strict controls. . . . That doesn't mean that explanation is impossible, only that it cannot be sought by the methods appropriate in particle physics, cancer research, or the study of reflexes. We may not be able to run controlled experiments, but we can still try to make internal sense of what people do, in light of their circumstances, relying on a general form of understanding that is supported by its usefulness in countless other cases, none of them exactly the same.

Explanations that refer to unconscious mental processes should be evaluated by the same standard. There may be some psychoanalytic explanations so simple that they can be tested by experiment or statistical analysis, but most are certainly not like that—rather they

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142 Even Stember, who sharply disagrees with Kovel's analysis, see C. Stember, supra note 101, at 53-54, 67-70, concedes that incest guilt plays a role in the taboo. See id. at 165.
are applications of psychological insight in highly specific circumstances, which go beyond the bounds of consciousness. . . . We simply have to decide whether this is an intuitively credible extension of a general structure of explanation that we find well supported elsewhere, and whether it is more plausible than the alternatives—including the alternative that there is no psychological explanation.\textsuperscript{143}

Because the most plausible story we can tell about the miscegenation taboo is the story we have just told, and because there is so much circumstantial evidence to support it, this story should be provisionally accepted as true until a better one is offered. This is why we can feel reasonably confident that \textit{Loving} was rightly decided. Although we cannot be certain that any of these explanations is true in every detail, all the evidence we have indicates that they are close enough to the truth that we can be reasonably sure that American society cannot purge itself of its racism and achieve the fourteenth amendment's aspiration of racial equality unless and until it destigmatizes miscegenation.

\textbf{B. Sexism and the Homosexuality Taboo}

I now return to the question of whether laws that discriminate against gays are inconsistent with the underlying purposes of the prohibition of sex discrimination. In order to demonstrate that they are, it will be necessary to draw upon anthropology, experimental social psychology, and cultural history. These may seem like strange sources on which to base a legal argument. Many of the steps of the argument that lead me into this territory will, however, be familiar to the reader after our exploration of the miscegenation question. In both cases, the methodological and epistemological issues are similar. At some points in the argument, unfamiliar and uncertain steps are necessary, but these steps are no more unfamiliar or uncertain than those that are necessary in the miscegenation case, where the correctness of the result is clear.

Much of the connection between sexism and the homosexuality taboo lies in social meanings that are accessible to everyone. It should be clear from ordinary experience that the stigmatization of the homosexual has \textit{something} to do with the homosexual's supposed deviance from traditional sex roles. "Our society," Joseph Pleck observes, "uses the male heterosexual-homosexual dichotomy as a central symbol for all the rankings of masculinity, for the division on any grounds

\textsuperscript{143} Thomas Nagel, Freud's Permanent Revolution, N.Y. Rev. of Books, May 12, 1994, at 34, 35.
between males who are 'real men' and have power and males who are not. Any kind of powerlessness or refusal to compete becomes imbued with the imagery of homosexuality."\(^{144}\) Similarly, the denunciation of feminism as tantamount to lesbianism is depressingly familiar. The connection between sexism and the homosexuality taboo has been extensively documented by psychologists and historians, and I shall shortly survey their work, but it should be obvious even without scholarly support.\(^{145}\)

Most Americans learn no later than high school that one of the nastier sanctions that one will suffer if one deviates from the behavior traditionally deemed appropriate for one's sex is the imputation of homosexuality. The two stigmas, sex-inappropriateness and homosexuality, are virtually interchangeable, and each is readily used as a metaphor for the other. There is nothing esoteric or sociologically abstract in the claim that the homosexuality taboo enforces traditional sex roles. Everyone knows that it is so. The recognition that in our society homosexuality is generally understood as a metaphor for failure to live up to the norms of one's gender resembles the recognition that segregation stigmatizes blacks, in that both are "matters of common notoriety, matters not so much for judicial notice as for the background knowledge of educated men who live in the world."\(^{146}\)

This common sense meaning shares certain implicit, rather ugly assumptions with the miscegenation taboo. Both assume the hierarchical significance of sexual intercourse and the polluted status of the penetrated person. The central outrage of male sodomy is that a man is reduced to the status of a woman, which is understood to be degrading.\(^{147}\) Just as miscegenation was threatening because it called into question the distinctive and superior status of being white, homosexu-


\(^{146}\) Black, supra note 109, at 426. Most readers will be able to think of anecdotal evidence that supports this claim. Anyone who can't should consult Marc Fajer's useful compilation in Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men, 46 U. Miami L. Rev. 511, 620-24, 631-32 (1992).

\(^{147}\) Most Americans will immediately understand the significance of the astonishing quotation, which appeared in Newsweek in 1991, referring to male sodomy as "the most de-
ality is threatening because it calls into question the distinctive and superior status of being male. Male homosexuals and lesbians, respectively, are understood to be guilty of one aspect of the dual crime of the miscegenating white woman: self-degradation and insubordination. As with miscegenation, a member of the superior caste who allows his body to be penetrated is thereby polluted and degraded, and he assumes the status of the subordinate caste: he becomes woman-like. "[M]en cannot simultaneously be used 'as women' and stay powerful because they are men." Just as miscegenation became the central symbol of the necessity of racial segregation, so today, homosexuality stands as the signifier of the importance of maintaining male status. Lesbianism, on the other hand, is a form of insubordination: it denies that female sexuality exists, or should exist, only for the sake of male gratification. The prohibition of lesbianism is, however, less central to the taboo. In the same way that black male-white female intercourse was the paradigmatic act that the miscegenation taboo prohibited, male sodomy is the paradigmatic act that the homosexuality taboo prohibits.149

As in the case of miscegenation, the judicial argument may end with a recognition of the homosexuality taboo's misogynistic implications, which are recognizable by most Americans. Both prohibitions clearly violate the fourteenth amendment as it is understood by the stigma theorists.150 Implicit in both taboos are the premises— incompatible with equal concern and respect for all citizens—that sexual penetration is a nasty, degrading violation of the self, and that there are some people (in the case of the homosexuality taboo, women) to whom, because of their inferior social status, it is acceptable to do it, and others (men) who, because of their superior social status, must be rescued (or, if necessary, forcibly prevented) from having it done to them. Thus, a court could dispose of a law that discriminates against

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149 Lesbians are often invisible in discussions of homosexuality. Respondents in surveys appear generally to equate "homosexuality" with "male homosexuality." Kathryn N. Black & Michael R. Stevenson, The Relationship of Self-Reported Sex-Role Characteristics and Attitudes Toward Homosexuality, 10 J. Homosexuality 83 (1984). In the recent political turmoil over the proposed lifting of the ban on gays in the military, there was almost no discussion of lesbians, even though women have been discharged from the armed forces on grounds of homosexuality at a rate far exceeding the rate for men. For the statistics, see sources cited in Kenneth L. Karst, The Pursuit of Manhood and the Desegregation of the Armed Forces, 38 UCLA L. Rev. 499, 551 n.200 (1991).

150 See notes 144-15 and accompanying text supra.
gays with a brief allusion to well-known cultural meanings, along the lines of *Loving v. Virginia.*\(^{151}\)

Here, then, the argument against the homosexuality taboo finds its second firewall. However, it’s not as strong a firewall as the first, or as either firewall in the miscegenation case, because many people don’t perceive any connection between sexism and the homosexuality taboo. It’s possible that a kind of willful blindness is operating here, like that of integration opponents who ingenuously defended the idea of “separate but equal,” but the objection deserves an answer. These people ask the same question that could have been asked about *Loving*—what is the causal connection between the taboo and the hierarchy with which it is supposed to be linked?—but they are perhaps entitled to ask it with a straight face.

Let us turn, then, from evidence of stigma—for I have offered all that I can on that point—to evidence of process defect. Can it be shown that laws that discriminate against gays are products of a legislative process tainted by sexism? I noted earlier that Chief Justice Warren’s claim that laws against miscegenation were “measures designed to maintain White Supremacy” would be strengthened if, for example, experimental social psychology could show a strong correlation between racism and intolerance of miscegenation, or if a historical showing could be made that the miscegenation taboo had developed at the same time as the racial caste system, and was developed by men who were anxious about maintaining racial caste. Such showings can, in fact, be made.\(^{152}\) Analogous showings can be made in the case of the homosexuality taboo.

Social psychologists have documented that hostility toward homosexuals is linked to other traditional, restrictive attitudes about sex roles. For example, one study found that “[h]igher support for equality between the sexes is associated with more positive attitudes toward male homosexuality and lesbianism,” and concluded that “a major determinant of negative attitudes toward homosexuality is the need to keep males masculine and females feminine, that is, to avoid sex-role confusion.”\(^{153}\) Other studies have shown that subjects’ dislike of, or unwillingness to interact with, a homosexual person is associ-

\(^{151}\) 388 U.S. 1 (1967).

\(^{152}\) For the social-psychological evidence, see G. Myrdal, supra note 101, at 60-61. For the historical evidence, see D. Bell, supra note 105, at 66-67; Joel Williamson, New People: Miscegenation and Mulattoes in the United States 91-100 (1980). See generally Higginbotham & Kopytoff, supra note 98; Hodes, supra note 104.

ated with the person's perceived incongruent sex role behavior.\textsuperscript{154} Another study concluded that the best single predictor of homophobia is a belief in the traditional family ideology, i.e., dominant father, submissive mother, and obedient children. The second best predictor of homophobia was found to be agreement with traditional beliefs about women, e.g., that it is worse for a woman to tell dirty jokes than it is for a man.\textsuperscript{155}

Still another found that research subjects who were most prejudiced against homosexuals "held stronger stereotypes of masculinity and femininity and were more willing on the basis of these stereotypes to label a male as homosexual when he exhibited what they thought of as a single feminine characteristic."\textsuperscript{156} Still other studies using a wide variety of measures of sex role attitudes and attitudes toward homosexuals have consistently found correlations between conventional expectations about gender roles and hostility toward homosexuals.\textsuperscript{157} Correlation, of course, does not indicate the direction of causation,

\begin{footnotesize}
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\item[\textsuperscript{156}] John Dunbar et al., Some Correlates of Attitudes Toward Homosexuality, 89 J. Soc. Psychol. 271, 278 (1973).
\item[\textsuperscript{157}] See Rodney G. Karr, Homosexual Labeling and the Male Role, 34 J. Soc. Issues, Summer 1978, at 73; Judith E. Krulewitz & Janet E. Nash, Effects of Sex Role Attitudes and Similarity on Men's Rejection of Male Homosexuals, 38 J. Personality & Soc. Psychol. 67 (1980); MacDonald & Games, supra note 153, at 9; Fred A. Minnigerode, Attitudes Toward Homosexuality: Feminist Attitudes and Sexual Conservatism, 2 Sex Roles 347 (1976); Alma D. Smith et al., Relationships Among Gender, Sex-Role Attitudes, Sexual Attitudes, Thoughts, and Behaviors, 46 Psychol. Rep. 359 (1980); Linda E. Weinberger & Jim Millham, Attitudinal Homophobia and Support of Traditional Sex Roles, 4 J. Homosexuality 237 (1979); Bernard E. Whitley, Jr., The Relationship of Sex-Role Orientation to Heterosexuals' Attitudes Toward Homosexuals, 17 Sex Roles 103 (1987). These results have also been found in cultures outside of the United States. See Marvin Brown & Donald M. Amoroso, Attitudes Toward Homosexuality Among West Indian Male and Female College Students, 97 J. Soc. Psychol. 163 (1975); John Dunbar et al., Attitudes Toward Homosexuality Among Brazilian and Canadian College Students, 90 J. Soc. Psychol. 173 (1973); see also R.W. Connell et al., A Bastard of a Life: Homosexual Desire and Practice Among Men in Working-Class Milieux, 29 Australian & N.Z. J. Soc. 112 (1993) (describing ways in which Australian gay men’s masculinity simultaneously depends on and disrupts existing gender order); R.W. Connell, A Very Straight Gay: Masculinity, Homosexual Experience, and the Dynamics of Gender, 57 Am. Soc. Rev. 735 (1992) (same). See also the critical review of this literature in Fajer, supra note 146, at 617-20.
\item Hostility toward homosexuals has also been shown to correlate with the belief that most homosexuals do, in fact, behave like members of the opposite sex—a belief that has been shown to be false. See Alan Taylor, Conceptions of Masculinity and Femininity as a Basis for Stereotypes of Male and Female Homosexuals, 9 J. Homosexuality 37 (1983).
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but it suggests that a causal connection exists which deserves explanation.

A similar connection between sexism and the homosexuality taboo can be inferred from ordinary language. Everyone understands "sexual preference" or "sexual orientation" to refer to the gender of one's object-choice. Why, given the immense number of axes along which human sexuality varies, is this presumed to be the one that matters most, the one that is defining?\footnote{158} Again, why are concerns about homosexuality so closely linked to gender?\footnote{159}

\footnote{158} Eve Sedgwick has enumerated a few of the manifold variations in sexuality:
  \begin{itemize}
  \item Even identical genital acts mean very different things to different people.
  \item To some people, the nimbus of "the sexual" seems scarcely to extend beyond the boundaries of discrete genital acts; to others, it enfolds them loosely or floats virtually free of them.
  \item Sexuality makes up a large share of the self-perceived identity of some people, a small share of others'.
  \item Some people spend a lot of time thinking about sex, others little.
  \item Some people like to have a lot of sex, others little or none.
  \item Many people have their richest mental/emotional involvement with sexual acts that they don't do, or even don't want to do.
  \item For some people, it is important that sex be embedded in contexts resonant with meaning, narrative, and connectedness with other aspects of their life; for other people, it is important that they not be; to others it doesn't occur that they might be.
  \item For some people, the preference for a certain sexual object, act, role, zone, or scenario is so immemorial and durable that it can only be experienced as innate; for others, it appears to come late or to feel aleatory or discretionary.
  \item For some people, the possibility of bad sex is aversive enough that their lives are strongly marked by its avoidance; for others, it isn't.
  \item For some people, sexuality provides a needed space of heightened discovery and cognitive hyperstimulation. For others, sexuality provides a needed space of routinized habituation and cognitive hiatus.
  \item Some people like spontaneous sexual scenes, others like highly scripted ones, others like spontaneous-sounding ones that are nonetheless totally predictable.
  \item Some people's sexual orientation is intensely marked by autoerotic pleasures and histories—sometimes more so than by any aspect of alloerotic object choice. For others the autoerotic possibility seems secondary or fragile, if it exists at all.
  \item Some people, homo-, hetero-, and bisexual, experience their sexuality as deeply embedded in a matrix of gender meanings and gender differentials. Others of each sexuality do not.
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\footnote{159} An earlier version of the argument I am making here, see Andrew Koppelman, Note, The Miscegenation Analogy: Sodomy Law as Sex Discrimination, 98 Yale L.J. 145 (1988), has been criticized on the following basis: "Because anti-gay bias, like all prejudice, partly derives from fear of difference, completely attributing anti-gay sentiment to gender roles is overly simplistic." Note, Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis, 102 Harv. L. Rev. 617, 629 n.63 (1989). But why do people regard sexual orientation as a "difference" that matters so much? Why are gays seen as "other," while most differences in preference—you like to eat liver, I can't stand it—are far less salient? This critic addresses this question only once, writing that "the very existence of the concept of sexual orientation derives from and perpetuates biased conceptions of gender roles." Id. at 629. This concedes my point.
There are significant differences between men's and women's attitudes toward homosexuality. Women's intolerance seems less profound and deeply rooted than that of men. Moreover, laws that discriminate against gays, like most other laws, are produced by an overwhelmingly male population of officials. For these reasons, the following discussion will focus first, and at greater length, on the psychic roots of male attitudes toward homosexuals. I shall then consider the somewhat different roots of women's hostility toward lesbians and gay men.

Correlations between sexism and heterosexism, similar to those found by social psychologists, have been noted by historians who have investigated the origins of the modern condemnation of "homosexuality." The work of these scholars, studying historical attitudes in a variety of different times and places, has converged in support of the hypothesis that the modern homosexuality taboo is linked with sexism.

The modern stigmatization of homosexuals as violators of gender norms—gay men as effeminate, lesbians as "mannish"—developed simultaneously with widespread anxieties about gender identity in the face of an emerging ideology of gender equality. It happened to male homosexuals first. Before about 1700, Randolph Trumbach has found that, although homosexual behavior was illegitimate, it was not the preserve of any distinct sub-class of society. The only males who suffered a loss of status were adults who took the passive role. "After

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160 According to Gregory Herek:
National opinion polls typically find no significant difference between males' and females' responses to questions about homosexuality. Smaller-scale experimental and questionnaire studies, in contrast, have generally found more negative attitudes among males than among females, especially with attitudes toward gay men... Both sets of data are revealing. Males and females probably hold roughly similar positions on general questions of morality and civil liberties, but males are more homophobic in their emotional reactions to homosexuality.


161 Homosexual acts "were usually between an active adult male and a passive adolescent." Randolph Trumbach, Gender and the Homosexual Role in Modern Western Culture: The 18th and 19th Centuries Compared, in Homosexuality, Which Homosexuality? 149, 152 (Dennis Altman et al. eds., 1989) [hereinafter Trumbach, Gender and the Homosexual Role]; see also Randolph Trumbach, The Birth of the Queen: Sodomy and the Emergence of Gender Equality in Modern Culture, 1660-1750, in Hidden From History: Reclaiming the Gay and Lesbian Past 129, 129-40 (Martin B. Duberman et al. eds., 1989).

The adult male usually also had sexual relations with women, and such men "who took the active role probably actually increased their standing as dominant males." Trumbach,
1700, [however,] it seems to make little difference whether a man takes the active or the passive role, or whether his partner is an adult male or a boy—any sexual desire by one male for another leads to categorization as an effeminate sodomite.” Trumbach links this transformation to the major cultural shift that was taking place at that time, in which a patriarchal morality that allowed adult men to own and dominate their wives, children, servants and slaves, was gradually challenged and partially replaced by an egalitarian morality which proposed that all men were created equal, that slavery must therefore be abolished, democracy achieved, women made equal with men, and children with their parents. This egalitarian shift, Trumbach contends, “raised profound anxiety in both men and women” that “resulted in a compromise with full equality that historians have called domesticity. Men and women were equal, but they were supposed to live in separate spheres, he dominant in the economy, she in the home.” This distinction between the sexes was reinforced by the idea of effeminate males and homosexuals as deviants from their entire gender role. “All women in societies with transvestites experienced sexual domination all their lives, but only the transvestite minority of males ever did so.”

The rise of domesticity produced changes in child-rearing arrangements which may have contributed to this anxiety about the boundaries of gender. Men’s work was increasingly relocated outside the home. The father was therefore away from home during most of a child’s waking hours, while the mother’s prime responsibility was child-rearing. She was excluded from other prestigious activities, and she therefore was far more likely than before to make the children the focus of her emotional life. Exploration of the way in which gender identity is formed in such nuclear families helps to clarify the nature of the psychological link between sexism and heterosexism that develops in such a context.

Gender and the Homosexual Role, supra, at 152. The boy, “provided that he switched to an active role as manhood came on, did not suffer any loss of gender status.” Id.

Trumbach, Gender and the Homosexual Role, supra note 161, at 153.

Id. at 154.

Id. at 155.

Id.

D. Greenberg, supra note 2, at 388.

and develops differently in different individuals, but the following pattern seems typical.\textsuperscript{168}

Because childrearing has been primarily a woman's task, children identify first with their mothers. For girls, this primary attachment continues uninterrupted through adulthood, because girls are taught that to become adults, they need only to become increasingly like their mothers. Boys, on the other hand, learn that to become adults, they must renounce this primary attachment and identify with their fathers, whose love is more distant and conditional. Their identity is not discovered, but fashioned, and the materials that constitute it are achievement, competition, hierarchy, and control over their own feminine tendencies. In short, a man must prove his masculinity, over and over again, and continually resist the temptation to identify with his mother. That early renunciation must be continually reaffirmed. At the same time, this renunciation produces an intense guilt and sense of loss for the abandoned mother, and a hopeless yearning to return to her.

As noted earlier, prejudice, especially when it is intensely felt, often functions as the external projection of hated aspects of the prejudiced person's own self. The racist struggles against his own impulses toward lechery, laziness, aggression, and slovenliness, and he accuses blacks of possessing these traits; the anti-semitic struggles against his own sins of pride, deceit, overambition, and sly achievement, and he personifies these evils in Jews.\textsuperscript{169} In modern society, the male homosexual often serves a similar projective function. If the argument of the previous paragraph is correct, in the eyes of other men he symbolizes the failure to individuate adequately from the mother.\textsuperscript{170} Whether it is correct or not, it is clear that in the community of males, the gay man is regarded as a slacker, one who has failed in or given up the difficult quest for masculinity.\textsuperscript{171}

\textsuperscript{168} This pattern is sometimes offered as a transcultural explanation for gender hierarchy, but as some critics have noted, it is dependent on modern Western society's gendered public/domestic separation. See, e.g., Linda J. Nicholson, Gender and History 84-88 (1986). The historicization of Chodorow's thesis would help to explain why the modern stigmatization of the effeminate gay man emerged at the time that it did.

\textsuperscript{169} See Gordon W. Allport, The Nature of Prejudice 199 (1954); Lawrence, supra note 91, at 333-34.

\textsuperscript{170} Lest there be any confusion on this point, I am expressing no opinion whatsoever with regard to psychoanalytic explanations of the etiology of homosexuality. To repeat, this Article is concerned solely with the psychology of those who stigmatize homosexuality. See note 1 supra.

\textsuperscript{171} Marilyn Frye observes that for some men, the connection of heterosexuality to male supremacy is even starker than this:

A great deal of fucking is . . . presumed to preserve and maintain women's belief in their own essential heterosexuality, which in turn (for women as not for men) con-
It should therefore be unsurprising that adolescent males, who tend to be most troubled by the conflict between their need to be dependent on their parents and the cultural expectation that they will separate from them, are the ones who most often carry heterosexism to the extreme of violent gay-bashing. Violence is, of course, itself regarded as a badge of masculinity. The hypothesis that some defensive mechanism is at work in heterosexism is supported by the extraordinary brutality with which gay-bashers attack their targets. Violence against gays frequently involves torture and mutilation. Homophobic murders typically involve mutilation of the victim. The coordinator of one hospital’s victim assistance program reported that “attacks against gay men were the most heinous and brutal I encountered.” A physician reported that injuries suffered by the victims of homophobic violence that he had treated were so “vicious” as to make clear that “the intent is to kill and maim”:

Weapons include knives, guns, brass knuckles, tire irons, baseball bats, broken bottles, metal chains, and metal pipes. Injuries include severe lacerations requiring extensive plastic surgery; head injuries, at times requiring surgery; puncture wounds of the chest, requiring insertion of chest tubes; removal of the spleen for traumatic rupture; multiple fractures of the extremities, jaws, ribs, and facial bones; severe eye injuries, in two cases resulting in permanent loss of vision; as well as severe psychological trauma the level of which would be difficult to measure.

This kind of behavior cannot intelligibly be attributed to the perpetrators’ desire to uphold Judeo-Christian moral standards. Judeo-Christian morality does not require—indeed, it does not permit—the torture, mutilation, or murder of strangers. Nor is this degree of brutality attributable to the sometimes violent propensities of many young men. Outside of war, violence of this degree of savagery is rarely heard of; one of the few parallels is the southern lynch mob’s treatment of a black man thought to have raping a white woman. Some extraordinary passion appears to be at work, such that the homosexual appears to the perpetrator to call for an extraordinarily vio-

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neces with and reinforces female hetero-eroticism, that is, man-loving in women. It is very important to the maintenance of male-supremacy that men fuck women, a lot. So it is required; it is compulsory. Doing it is both one’s duty and an expression of solidarity. A man who does not or will not fuck women is not pulling his share of the load. He is not a loyal and dependable member of the team.


173 Quoted in Kendall Thomas, Beyond the Privacy Principle, 92 Colum. L. Rev. 1431, 1463 (1992).

174 Quoted in id. at 1466. Other illustrations may be found in id. at 1462-70.
lent response. If the homosexual’s very existence threatens the security of the perpetrator’s valued sense of gender identity, then the vehemence of the perpetrator’s response becomes at least somewhat more intelligible.

In short, it appears that male hostility toward effeminate men has been a psychological defense against gender-identity conflict since at least the eighteenth century.

In early eighteenth-century England this hostility took the form of diatribes against fops and beaux—men who wore fancy clothes, paid excessive attention to their appearance, and spent too much time courting women. . . . Men’s clothing, which had been frilly in the Elizabethan age, became more sharply differentiated from women’s from the 1770s on.\textsuperscript{175}

And since then, any failure to conform to the norms of masculinity has become imbued with the stigma associated with same-sex sexuality:

\textit{[T]he most salient characteristic of the homosexual role from about 1700 to the present day has been the presumption that all men who engage in sexual relations with other men are effeminate members of a third or intermediate gender, who surrender their rights to be treated as dominant males, and are exposed instead to a merited contempt as a species of male whore.}\textsuperscript{176}

There was no such dynamic at work with respect to lesbianism, which did not so directly challenge male supremacy:

Though it may have challenged men’s presumption that all women were placed on earth to gratify men’s sexual desires and, when coupled with transvestism and financial independence, male supremacy in other spheres, it did not threaten male identity as such. . . . Nor did it threaten women’s gender identity, at least not to any great extent. Whereas a boy had to relinquish his early identification with his mother to become an adult, a girl did not; her sexual identity was thus more secure. As an adult she was not threatened by masculine women as men were by feminine males: she had never been forced to give up a strong childhood identification with her father. His absence from the home did not permit a strong identification with him to develop.\textsuperscript{177}

The contemporary notion of the “mannish lesbian,” who now seems to be the natural counterpart of the “effeminate queen,” achieved that parallel status only in the late nineteenth century, the same time that medical writers created the idea of a “homosexual,” a person (male or female) whose very being is constituted by his or her sexual orienta-

\begin{footnotes}
\item[175] D. Greenberg, supra note 2, at 390 (footnote omitted).
\item[176] Trumbach, Gender and the Homosexual Role, supra note 161, at 153.
\item[177] D. Greenberg, supra note 2, at 390 (footnotes omitted).
\end{footnotes}
tion. This was the period in which there first arose widespread concern over the "new woman," who preferred education and career to the traditional roles of wife and mother. Investigations into the medical literature of that time have supported the hypothesis that "[t]he distinguishing of a 'same-sex' from an 'opposite-sex' eroticism reflected an increasing social emphasis . . . on the differentiation of females and males" and was "an effort to contain the contemporary movement of women out of the traditional women's sphere." One illustration comes from the New York Medical Journal of 1900:

The female possessed of masculine ideas of independence, the virago who would sit in the public highways and lift up her pseudo-virile voice, proclaiming her sole right to decide questions of war or religion, or the value of celibacy and the curse of women's impurity, and that disgusting antisocial being, the female sexual pervert, are simply different degrees of the same class—degenerates.

The idea of homosexuality was a late development of this period, developing out of an earlier, distinct conception termed "sexual inversion." "Sexual inversion' referred to a broad range of deviant gender behavior, of which homosexual desire was only a logical but indistinct aspect, while 'homosexuality' focused on the narrower issue of sexual object choice." Given that during the Victorian period women were typically thought to be naturally passionless and asexual, a woman who showed any interest in sexuality was thought to have become manlike in her sexual desire, and thereby to have abjured femininity generally. "[A] woman could not invert any aspect of her gender role without inverting her complete role." Moreover, doctors writing about lesbian couples did not regard the women who took passive, "feminine" roles as particularly worthy of study, since these

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179 See 2 Women, the Family, and Freedom: The Debate in Documents 17-72 (Susan Bell & Karen Offen eds., 1983) (excerpting writings on this issue by Ibsen, Strindberg, Shaw, Nietzsche, and others).


183 Id. at 121.
roles seemed to be appropriate for women.\textsuperscript{184} On the other hand, as Carroll Smith-Rosenberg observes, medical writings of this period reveal profound concern about the medical implications of higher education for women.

The woman who favored her mind at the expense of her ovaries—especially the woman who spent her adolescence and early adulthood in college and graduate school—would disorder a delicate physiological balance. Her overstimulated brain would become morbidly introspective. Neurasthenia, hysteria, insanity would follow. Her ovaries, robbed of energy rightfully theirs, would shrivel... Her breasts might shrivel, her menses become irregular or cease altogether. Sterility could ensue, facial hair might develop.\textsuperscript{185}

This strategy for repressing women’s ambitions failed. As gender roles in American society became increasingly complex, with the number of employed women steadily increasing, the binary division implicit in the inversion theory simply stopped making sense to people.\textsuperscript{186} It was easy to show that deviation from traditional female roles did not destroy women’s health.\textsuperscript{187}

By the turn of the century, gender of sexual object became more important than passive or aggressive sexual behavior in the medical classification of sexuality.\textsuperscript{188} Doctors, psychologists, and academics "shifted the definition of female deviance from the New Woman’s rejection of motherhood to their rejection of men."\textsuperscript{189} The idea of female passiveness was replaced by an ideology that sought to use women’s sexual desires to bond them more tightly to men: the marriage manuals of the 1920s and 1930s stressed the need for men to

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\item[184] Id. at 125.
\item[185] C. Smith-Rosenberg, supra note 181, at 258, 260.
\item[186] Chauncey, supra note 182, at 143.
\item[187] C. Smith-Rosenberg, supra note 181, at 262-64.
\item[188] Lillian Faderman notes, however, that such a distinction is not “to be found in the work of many sexologists well into the twentieth century or in the popular imagination, which often assumes, even today, that lesbians are necessarily masculine and that female ‘masculinity’ is a sure sign of lesbianism.” Lillian Faderman, Odd Girls and Twilight Lovers: A History of Lesbian Life in Twentieth-Century America 41 (1991). A similar tension may be noted in popular discourse about male homosexuality, which as late as World War I was still uncertain whether the essence of the identity stigmatized as sexually deviant was effeminacy or sexual activity with men. See George Chauncey, Jr., Christian Brotherhood or Sexual Perversion? Homosexual Identities and the Construction of Sexual Boundaries in the World War I Era, in Hidden From History: Reclaiming the Gay and Lesbian Past, supra note 161, at 294, 294-317. As Eve Sedgwick has observed, “issues of modern homo/heterosexual definition are structured, not by the supersession of one model and the consequent withering away of another, but instead by the relations enabled by the unrationlized coexistence of different models during the times they do coexist.” E. Sedgwick, supra note 15, at 47.
\item[189] C. Smith-Rosenberg, supra note 181, at 265.
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develop “companionate marriages” in order to make marriage more attractive and satisfying to women.¹⁹⁰ “Linking orgasms to chic fashion and planned motherhood, male sex reformers, psychologists, and physicians promised a future of emotional support and sexual delights to women who accepted heterosexual marriage—and male economic hegemony. Only the ‘unnatural’ woman continued to struggle with men for economic independence and political power.”¹⁹¹ Thus J.F.W. Meagher wrote that “[t]he driving force in many agitators and militant women who are always after their rights is often an unsatisfied sex impulse, with a homosexual aim. Married women with a completely satisfied libido rarely take an active interest in militant movements.”¹⁹² For Meagher, healthy female sexuality meant deference to men.

If lesbians arouse bitterness on the part of males, it is of a different kind than that felt toward gay men. Perhaps it is predicated on the fear of being abandoned by the mother that one has oneself abandoned. A lesbian fails to provide the emotional nurturance and solace from the difficult world of maleness that, many men feel, women exist in order to provide; she signifies that there is no way back from that world. The prohibition of lesbianism has an unmediated, direct relation to gender inequality. Adrienne Rich argues that this prohibition is best understood as one item in an arsenal of male-created institutions that enforce “compulsory heterosexuality,” institutions that have the purpose and effect of guaranteeing that men will continue to have physical, economic, and emotional access to and control over women.¹⁹³ The familiar insinuation that all feminists are lesbians¹⁹⁴ supports Rich’s speculation that “men really fear . . . that women

¹⁹⁰ Christina Simmons, Companionate Marriage and the Lesbian Threat, Frontiers, Fall 1979, at 54, 54-59.
¹⁹¹ C. Smith-Rosenberg, supra note 181, at 283.
¹⁹² John F.W. Meagher, Homosexuality: Its Psychobiological and Pathological Significance, 33 Urologic and Cutaneous Rev. 510, 513 (1929), quoted in Simmons, supra note 190, at 57; see also id. (“A homosexual woman often wants to possess the male and not to be possessed by him . . . With them orgasm is often only possible in the superior position.”), quoted in Simmons, supra note 190, at 57.
¹⁹⁴ “In the early days of women’s liberation the most hurtful accusation was that they were a bunch of lesbians, and feminists such as Betty Friedan took considerable pain to show that this was untrue and that they really were ‘feminine’ (i.e. liked men) after all.” D. Altman, supra note 145, at 90-91. Such accusations continue to be potent weapons against feminists. See S. Pharr, supra note 145, at 27-43.

Although lesbians have become prominent in the feminist movement, this kind of labeling precedes that development. Ti-Grace Atkinson reports that she first began to think about the connection between lesbianism and feminism as a consequence of this persistent accusation:
could be indifferent to them altogether, that men could be allowed sexual and emotional . . . access to women only on women’s terms, otherwise being left on the periphery of the matrix."\textsuperscript{195} This enraging fantasy of maternal abandonment helps to explain why the stigmatization of lesbians by heterosexual men typically takes the form of a rape fantasy: all she needs is a good fuck to straighten her out. It also helps to explain why the armed services have tended to apply the label of “homosexual” to women who have resisted sexual harassment by men.\textsuperscript{196}

A final puzzle is a much more recent phenomenon, the stigmatization of the gay male “top,” the man who is not himself penetrated but who penetrates other men. There is nothing stereotypically effeminate about him. Nonetheless, his stigmatization is tightly bound up with the social meaning of gender. He is perceived as, if anything, too masculine; all the socially destructive potentialities of masculinity reach their maximal intensity in him. To the heterosexual male, the gay top is essentially a dangerous man. He preys on other men and degrades them by turning them into women. No man is safe from him. No man’s masculinity is secure against his assault. Like that other icon of unbridled male sexuality, the black rapist of white women, he defiles the temple and profanes what is most sacred, and he does this by penetrating the bodies of those who, because of their intrinsically superior status, are entitled to be assured that they will not be thus penetrated. With both sodomy and miscegenation, it is of little moment whether the person who is penetrated consents to the act. It is the caste to which that person belongs that is entitled not to be defiled; an individual who does not uphold the impenetrable character of the ruling caste is simply a traitor, whose consent does not excuse the crime committed by the penetrator.

As noted earlier, one effect of the miscegenation taboo, intended or not, is the maintenance of the boundary between the races on

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\item The beginning of the current Movement, feminist activity has been labeled lesbianism. The first time I was called a lesbian was on my first picket line, in front of the New York Times, to desegregate the help-wanted ads. Generally speaking, the Movement has reacted defensively to the charge of lesbianism: ‘no, I’m not,’ ‘yes, you are,’ ‘no, I’m not,’ ‘prove it.’ For myself, I was so puzzled by the connection that I became curious. Whenever the enemy keeps lobbing bombs into some area you consider unrelated to your defense, it’s worth investigating.
\item Ti-Grace Atkinson, Lesbianism and Feminism, in Amazon Expedition: A Lesbian Feminist Anthology, supra note 3, at 11.
\item Rich, supra note 193, at 643.
\item See Halley, Sexual Orientation and the Politics of Biology, supra note 1, at 554, and sources cited therein; see also Michelle M. Benecke & Kirstin S. Dodge, Lesbian Baiting as Sexual Harassment: Women in the Military, in Homophobia: How We All Pay the Price, supra note 145, at 167, 167-76.
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which the system of racism depends. Similarly, compulsory heterosexuality keeps women in relationships in which men exert power over their lives. The symbolic message of the miscegenation taboo associates racial equality with sexual danger and endorses the idea that the boundaries enforced by the taboo are terribly important ones. An analogous message can be seen in the homosexuality taboo. Sex equality is dangerous; it will reduce men to the level of women; thus, maintaining the boundary between the sexes is a terribly important undertaking.

The reinforcement of sexism, then, is both a cause and an effect of the homosexuality taboo’s survival. The taboo’s stigmatizing effect on women and the sexism that infects the legislative process are mutually reinforcing. Note the culturally specific nature of my claim: my evidence is confined to contemporary American culture and its antecedents, and my claim about the function of the taboo pertains only to this culture. I am not claiming that the stigmatization of homosexuality is indispensable to gender hierarchy. Such a claim would be unsustainable. Functional equivalents exist. Homosexuality has been tolerated and even institutionalized in cultures in which women are thoroughly subordinated, such as ancient Greece.197 Moreover, it is possible for male homosexuality at least, if not lesbianism, to be associated with male privilege and the repudiation of women.198 My claim is closer to Eve Sedgwick’s argument that “homophobia directed by men against men is misogynistic, and perhaps transhistorically so.”199

As with the miscegenation taboo and racism, some people support the homosexuality taboo for reasons unrelated to its connection to sexism. For some, it is simply part of the way in which they make sense out of the world: there are certain ways in which a person shouldn’t use her body, for the same reasons of convention that there are certain ways in which a person shouldn’t hold her spoon when she eats. For others, the taboo is simply an unexamined echo of attitudes that they have unreflectively learned and internalized.200 But for a significant subset, the taboo is part of a defensive attitude that responds to a perceived threat to the boundaries of the self.201 It is a

197 Revealingly, however, even those cultures tend to stigmatize the man who is penetrated, and this stigma arises out of the fact that he has allowed himself to be used like a woman.
198 See J. Stoltenberg, Refusing to Be a Man, supra note 145, at 132-33; M. Frye, supra note 171, at 128-51.
201 Gregory M. Herek, who has devised a test for measuring the different kinds of psychological benefit that different individuals derive from similar attitudes, found that hostil-
common view among political scientists that outcomes in democratic decisionmaking are often determined by small groups with intense preferences. One of the groups that is most concerned about maintaining the homosexuality taboo, evidently, is men who are anxious

...ity to gays served a defensive function (projecting unacceptable motives onto homosexual persons and then expressing hostility toward them) less often than it served a self-expressive function (providing a vehicle for expressing values that were considered important). "Persons who expressed negative attitudes in the Self-Expressive function usually focused on traditional religious standards of right and wrong." Gregory M. Herek, Can Functions Be Measured? A New Perspective on the Functional Approach to Attitudes, 50 Soc. Psych. Q. 285, 290 (1987). Herek therefore dismisses "a popular bit of folk-wisdom that all hostility toward gay persons results from personal conflicts about gender or repressed homosexual desires," because his data "suggest that such conflicts were central to the attitudes of only a minority of the respondents." Id. at 295. Herek's study does show that not all hostility toward gay persons can be thus explained, but the minority for whom ego-defense is the explanation is a substantial one: out of 205 respondents who wrote essays explaining their attitudes (both positive and negative) toward gays, 22 expressed negative attitudes in exclusively defensive terms, while 50 mixed defensive with other attitudes; 32 expressed negative attitudes in exclusively self-expressive terms, while 43 combined negative self-expressive attitudes with other attitudes. Three explained their negative attitudes exclusively on the basis of personal experience, and the rest expressed positive or mixed attitudes. Id. at 290.

Herek's study does not explore what lies beneath the respondents' values. The self-expressive function was found to correlate with strong attachment to a conservative religious denomination. The fact that a value is taught by one's church is not, however, a sufficient explanation for the fact that one believes it: most American Catholics, for example, routinely ignore and violate the church's teachings against contraception. See J. D'Emilio & E. Freedman, supra note 104, at 252. John Boswell observes:

If religious strictures are used to justify oppression by people who regularly disregard precepts of equal gravity from the same moral code, or if prohibitions which restrain a disliked minority are upheld in their most literal sense as absolutely inviolable while comparable precepts affecting the majority are relaxed or reinterpreted, one must suspect something other than religious belief as the motivating cause of the oppression.

J. Boswell, supra note 2, at 7.

In his writings on violence against gays, Herek appears to give greater weight to the idea that hostility toward gays is rooted in personal anxieties about gender identity. See Gregory M. Herek, Psychological Heterosexism and Anti-Gay Violence: The Social Psychology of Bigotry and Bashing, in Hate Crimes: Confronting Violence Against Lesbians and Gay Men, 149, 161-62 (Gregory M. Herek & Kevin T. Berrill eds., 1992); Gregory M. Herek, The Social Context of Hate Crimes: Notes on Cultural Heterosexism, in Hate Crimes: Confronting Violence Against Lesbians and Gay Men, supra, at 89, 96-97, 100. Such violence is hard to explain in self-expressive terms. Elsewhere Herek writes that it would be a mistake to assume a link between homophobia and the male sex role only for overtly defensive males. Defenses are employed only when more common measures fail. The defensive males I observed probably were not qualitatively different from other homophobic males; they simply were experiencing greater difficulty maintaining a heterosexual masculine identity. Their strategy for reducing the anxiety that ensued was to exaggerate the "normal" level of homophobia associated with the male role.

Herek, supra note 160, at 566.

about their own gender identity. The identity they are so eager to preserve is an identity based on sexual superiority, the superiority of men over women as manifested by the male’s status as an “impenetrable penetrator.” It should be clear that a law enacted on such a basis is unconstitutional. It stigmatizes women on the basis of their sex, and it is hardly predicated on a lawmaking process that treats their interests with equal concern and respect.

I have thus far focused on the reasons for men’s intolerance of lesbians and gay men. Now I shall turn to women’s attitudes. It may seem strange to think that women’s attitudes can be sexist. It would be most surprising if women were to undertake, as a deliberate project, the perpetuation of the subordination of women. Moreover, experimental social psychologists have found that among women who hold negative attitudes toward gays, sex role attitudes play a less important role than they do for men who hold such attitudes. Gregory Herek has offered the following explanation of this effect:

Because heterosexual females are less likely to perceive rejection of lesbians and gay men to be integral to their own gender-identity, they probably experience fewer social pressures to express hostile attitudes. Consequently, such women may have more opportunities for personal interaction with lesbians and gay men. However, where negative attitudes among heterosexual women exist, these presumably result from ideological concerns (religious beliefs, family- and gender-ideology) rather than gender-identity needs. . . . Gender-specific patterns such as these would help to explain why heterosexual males’ attitudes are especially hostile toward gay men while heterosexual females’ attitudes do not vary consistently according to the target’s gender.

When one examines the cluster of attitudes within which women’s antipathy toward gays is typically embedded, however—as Herek puts it, “religious beliefs, family- and gender-ideology”—that cluster seems to be closely tied to traditional meanings of gender. The most important predictor of women’s attitudes toward lesbians, one study found, was parents’ attitudes toward lesbians. Next in relative importance was gender role attitudes, authoritarian personality,
and exposure to education and media regarding lesbians.\textsuperscript{207} Although sex role attitudes are an important predictor of women's attitudes toward gays, then, so are these other factors. Do we know enough about the attitudes of women who both hold traditional gender role attitudes and strongly repudiate homosexuality to construct a persuasive hypothesis about the world view within which these attitudes are linked?

Political struggles over abortion and the equal rights amendment, as well as over homosexuality, have produced many writings by and studies of antifeminist women, and such works demonstrate a close relationship between such women's hostility toward lesbians and gay men and their desire to maintain traditional sex roles. On the most visceral level, this hostility seems to have something to do with the resentment that those whose familial responsibilities weigh heavily upon them feel toward those who seem free of such responsibilities.\textsuperscript{208} There is also an element of fear. The women who most strongly repudiate feminism do so because, as Jeffrey Weeks has written,

feminism may be seen as precisely a force that is undermining women's basic hold on social, economic, and sexual stability—marriage, family life and protection by men. In a culture where it is still relatively difficult for many women to become economically independent, and where status depends on the position of the male, women may see their very survival as dependent upon family life.\textsuperscript{209}

The well-grounded anxiety that underlies this resistance is a belief "that the changes of the past generation have served to undermine the ties that bind men to women. A powerful force in the anti-ERA campaign, was a fear of the sexes mingling, of a breakdown of the traditional boundaries between the sexes, and of women losing traditional male support as a result."\textsuperscript{210} From this perspective, homosexuality represents the culmination of the process, the ultimate disintegration of the gender order, with men and women entirely disconnected from one another. For women whose economic security depends on that order, homosexuality thus may connote a personal threat. This sense

\textsuperscript{207} See id.
\textsuperscript{208} "Many heterosexual women see [the lesbian] as someone who stands in contradiction to the sacrifices they have made to conform to compulsory heterosexuality." S. Pharr, supra note 145, at 18. See, in this regard, the writings of Midge Decter, which contain strong allegations against homosexuality that are entirely uncontaminated by empirical research, and which may profitably be studied as a naive exposition of one heterosexist woman's fears and fantasies. See, e.g., Midge Decter, The New Chastity and Other Arguments Against Women's Liberation (1972); Midge Decter, The Boys on the Beach, Commentary, Sept. 1980, at 35, 35-48.
\textsuperscript{209} Jeffrey Weeks, Sexuality and Its Discontents 37 (1985).
\textsuperscript{210} Id.; see also A. Dworkin, supra note 145; Deirdre English, The Fear That Feminism Will Free Men First, in Powers of Desire 477, 477-83 (Ann Smitow et al. eds., 1983).
of danger is revealingly displayed when Phyllis Schlafly, in trying to articulate her reasons for wanting to exclude gays from jobs as school-teachers, slides into fantasy: “Surely the right of parents to control the education of their children is a right of a higher order than any alleged right of, say, the two college-educated lesbian members of the Symbionese Liberation Army to teach our young people.”

When writers from this perspective address homosexuality, they overwhelmingly condemn it as a threat to the family. This is, at first blush, a curious argument. Most heterosexual family members do not appear to be so eager to become homosexual that only the fear of externally imposed sanctions prevents them from doing so. Many homosexual relationships are, except for the sex of the participants and the legal status of the union, indistinguishable from heterosexual marriages. Adoption and new reproductive technologies have made it

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212 Thus Phyllis Schlafly, for example, argues that the extension of antidiscrimination protections to gays “would be an assault on our right to have a country in which the family is recognized, protected, and encouraged as the basic unit of society.” Id.; see also Congregation for the Doctrine of the Faith, Letter to Bishops on the Pastoral Care of Homosexual Persons, 32 The Pope Speaks 62 (Spring 1987); J. Harvie Wilkinson III & G. Edward White, Constitutional Protection for Personal Lifestyles, 62 Cornell L. Rev. 563, 593-96 (1977); George F. Will, How Far Out of the Closet?, in The Pursuit of Happiness, and Other Sobering Thoughts 55, 55-57 (1978); Samuel McCracken, Are Homosexuals Gay?, Commentary, Jan. 1979, at 19. This theme appears repeatedly in the briefs of both the State and the amici supporting its position in Bowers v. Hardwick, 478 U.S. 186 (1986), the case that declared sodomy laws constitutional. Thus the State argued that “homosexual sodomy is the anathema of the basic units of our society—marriage and the family. To decriminalize or artificially withdraw the public’s expression of its disdain for this conduct does not uplift sodomy, but rather demotes these sacred institutions to merely other alternative lifestyles.” Brief for Petitioner at 37-38, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140); see also briefs of amici Catholic League for Religious and Civil Rights at 1, Hardwick (No. 85-140) (“With respect to the instant case, the League is directly concerned with the proper construction of the Constitution and alleged ‘fundamental’ rights thereunder as they promote or undermine the integrity of family and social relations.”); Concerned Women for America at 2, Hardwick (“We oppose any laws designed to grant special legal protection to those who engage in homosexuality. Such laws are an affront to public morality and our obligation to family life.” (quoting resolution passed at its 1984 convention)); Rutherford Institute at 26, Hardwick (“Not only does the unregulated practice of sodomy not lie at the base of all our institutions, but our institutions are built on a foundation which is incompatible with such practices—i.e., monogamous marriage and the family unit.”).

213 A study of San Francisco bay area gays found that 29% of the men, and almost three-fourths of the women, were currently involved in a stable relationship. Alan P. Bell & Martin S. Weinberg, Homosexualities: A Study of Diversity Among Men and Women 91, 97 (1978). Many of these couples foster the same intimacy, caring, and enduring commitment that are valued in the most successful heterosexual marriages. See generally Kath Weston, Families We Choose: Lesbians, Gays, Kinship (1991); Letitia A. Peplau, Research on Homosexual Couples: An Overview, J. Homosexuality, Winter 1982, at 3; and citations contained in both works.
possible for increasing numbers of gay couples to raise children.\textsuperscript{214} Moreover, there have been cultures in which homosexuality has been openly tolerated,\textsuperscript{215} and families in those cultures do not appear to have been less common or enduring than they are in contemporary America. How, then, can homosexuals be said to threaten the family?

The charge is intelligible only if “the family” is rigidly defined as an institution in which men, but not women, belong in the public world of work and are not so much members as owners of their families, while women, but not men, should rear children, manage homes, and obey their husbands. Homosexuality is a threat to the family only if the survival of the family requires that men and women follow traditional sex roles.\textsuperscript{216}

It may be that traditional sex roles are the best ones for women. That claim becomes less persuasive, however, when its proponents find it necessary to force women into those roles. Some people evidently do believe that restricting women’s options will contribute to the welfare of women. Many opponents of abortion, for example, feel that abortion is wrong “because by giving women control over their fertility, it breaks up an intricate set of social relationships between men and women that has traditionally surrounded (and in the ideal case protected) women and children.”\textsuperscript{217} Nonetheless, it is clear that those relationships historically have been ones of male domination and female subordination. The view that the subordination of women is a thing of the past is difficult to sustain when women continue to be forced into those roles. As noted above, the Supreme Court’s sensible (if, perhaps, inadequate) response to this debate has been to prohibit laws which impose traditional sex roles.\textsuperscript{218} The constitutional guarantee of equality isn’t worth much if the law can force people into relationships of hierarchy and dependency.\textsuperscript{219}

\textsuperscript{214} See Marjorie M. Shultz, Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality, 1990 Wis. L. Rev. 297, 314-16 (1990); see also note 290 infra.

\textsuperscript{215} See generally, e.g., J. Boswell, supra note 2, which demonstrates that homosexuality was widely tolerated in Western Europe in the first centuries of Christianity and during the eleventh and twelfth centuries.

\textsuperscript{216} See Law, Homosexuality and the Social Meaning of Gender, supra note 80, at 218-21.

\textsuperscript{217} Kristin Luker, Abortion and the Politics of Motherhood 162 (1984).

\textsuperscript{218} See text accompanying notes 65-68 and 80-82 supra.

\textsuperscript{219} Some writers argue that the hierarchy of the sexes is inextricably linked with the stability of families, because families cannot endure unless women willingly subordinate themselves to men and children. I describe and address these arguments in Andrew Koppelman, Sex Equality and/or the Family: From Bloom vs. Okin to Rousseau vs. Hegel, 4 Yale J.L. & Human. 399 (1992).
Finally, some of those who most strongly endorse laws that discriminate against gays do so on the basis of their religious beliefs.\textsuperscript{220} This group overlaps, to some extent, with the others I have just described. Even if these people’s beliefs rest on religion rather than on gender-based concerns (to the extent that these are distinguishable), this hardly saves their position. Religious dogma is a wholly illegitimate basis for legislation. Even from a constitutional perspective that is generously disposed toward giving religious beliefs a role in political decisionmaking, legal discrimination against gays on this basis is impermissible.\textsuperscript{221}

If these are the positions from which the homosexuality taboo now receives most of its support, then it is fair to conclude that this taboo is crucially dependent on sexism, without which it might well not exist. And when the state enforces that taboo, it is giving its imprimatur to sexism. As with the miscegenation taboo, the effect that the taboo against homosexuality has in modern American society is, in large part, the maintenance of illegitimate hierarchy; the taboo accomplishes this by reinforcing the identity of the superior caste in the hierarchy, and this effect is at least in large part the reason why the taboo persists.\textsuperscript{222} Laws that discriminate against gays are the product of a

\textsuperscript{220} See, e.g., Anita Bryant, The Anita Bryant Story 16-18 (1977); Jerry Falwell, Listen, America! 181-86 (1980).

\textsuperscript{221} See, e.g., Kent Greenawalt, Religious Convictions and Political Choice 87-95 (1988).

\textsuperscript{222} In an earlier version of the argument I am making here, I expressed this thought by writing that the maintenance of traditional sex roles is the “purpose” or “function” of laws that discriminate against gays. See Koppelman, supra note 159, at 147, 158. The word “purpose” is misleading inasmuch as it signifies conscious intention. Although “function” is a somewhat better word to use, I have not emphasized function in the text because the idea of function is associated with a certain kind of bad explanation in the social sciences. See generally Marion J. Levy, Jr., Functional Analysis: Structural-Functional Analysis, in 6 International Encyclopedia of the Social Sciences 21 (David L. Sills ed., 1968). A word about the notion of function that is implicit in the above account may, however, be helpful to readers interested in methodological issues.

The basic idea behind any kind of functional explanation is that persistent patterns of action can be explained as being the result of other persistent patterns of action. “Function” has a variety of meanings, but in ordinary usage, it refers to what Marion Levy has called “eufunction,” meaning “any function that increases or maintains adaptation or adjustment of the unit to the unit’s setting, thus making for the persistence of the unit as defined in its setting.” Id. at 24. In biology, the unit under consideration is typically an organism or a subsystem of an organism; in the social sciences, the unit is usually a system of action involving one or more actors. Put in these terms, my claim is that, in contemporary American society, the stigmatization of homosexuality is eufunctional for the hierarchy of men over women, and vice versa. Each is caused at least in part by the other; each increases the likelihood that the other will persist.

The claim that I made in my earlier work resembles that of Parsons and Bales, who were among the first to suggest that “the prohibition of homosexuality has the function of reinforcing the differentiation of sex roles.” Talcott Parsons & Robert F. Bales, Family, Socialization and Interaction Process 103 (1955). Parsons and Bales’s claim invites Jon
political decisionmaking process that is biased by sexism. They im-

Elster's objection (which he directs at functional explanation in general) that such a claim “seems to rest upon an implicit regulative idea that if you can demonstrate that a given pattern has unintended, unrecognized and beneficial effects, then you have also explained why it exists and persists.” Jon Elster, Ulysses and the Sirens: Studies in Rationality and Irrationality 32 (rev. ed. 1984). Such a regulative idea, Elster argues, is unjustified in the social sciences unless the scientist can specify, rather than simply posit, “a feedback relation whereby the effect maintains its cause.” Id. This stands in contrast to functional explanations in biology, where it is well established that patterns of anatomy and behavior that persist over time often do so because they increase the gene's likelihood of reproducing itself. Thus, for example, it makes sense to say that the function of a giraffe's long neck is to facilitate the giraffe's nutrition by making it possible to eat the leaves of high branches of trees, because that is the effect of the long neck, and the effect makes it possible (or more likely) for the giraffe to survive and reproduce, therefore producing more giraffes with long necks. A giraffe that, because of a mutation, had a shorter neck would be less likely to survive and to reproduce. In social life, there is usually no corresponding feedback mechanism. Parsons and Bales did not say how the reinforcement of differentiated sex roles caused people to continue for generations to prohibit homosexuality.

Moreover, even if a feedback loop is specified, the consequent explanation remains weak. The idea that a trait has a function in a system implies that (1) the system as a whole functions in accordance with certain specifications, (2) this functioning requires the satisfaction of a certain necessary condition, and (3) the presence of the trait in question satisfies the necessary condition. As Carl Hempel observes, claim (2) does not explain the presence of any particular trait, since more than one possible trait may satisfy the necessary condition. A primitive culture's system of magic can be explained in terms of its function—perhaps it satisfies certain needs to make sense of the world—but it might well be replaced by an extension of its rational technology plus some modification of its religion without disrupting the culture as a going concern. Functional analysis of this kind can thus offer only a very weak explanation of the presence of any particular trait. See Carl G. Hempel, The Logic of Functional Analysis, in Aspects of Scientific Explanation and Other Essays in the Philosophy of Science 297, 310-14 (1965). (I am grateful to Walter Murphy for calling Hempel's essay to my attention.) Finally, account must be taken of the possibility that a trait reproduces itself out of sheer inertia, because it is part of the system, does the system no harm, and so is carried along by the system's process of reproducing itself. See generally S.J. Gould & R.C. Lewontin, The Spandrels of San Marco and the Panglossian Paradigm: A Critique of the Adaptationist Programme, 205 Bull. Proc. Royal Soc'y London 581 (1979). The persistence of the human appendix, for example, cannot be explained in terms of its function.

My claim, once more, is about eufunction rather than causation. A claim of eufunction implies little about causation.

Eufunctions or dysfunctions and the corresponding variants of structure may exist, as far as a given unit is concerned, as elements of that unit (i.e., internal to it) or as elements of the setting of the unit concerned. Not all eufunctions for a unit are eufunctions of the unit, although ordinarily, when one uses the concept of eufunction, attention is focused on functions associated with the unit itself rather than on functions of operation in terms of other units in that setting.

Levy, supra, at 24. Similarly, the fourteenth amendment may be understood as a command that the law may not be eufunctional in certain ways for systems of ascriptive hierarchy based on birth. Thus understood, the law does not require judges to be sociologists who can sustain strong causal claims; they may appropriately decide cases on the basis of probabilistic or hermeneutic evidence. Since the process theory invalidates laws that are the product of a legislative process contaminated by sexism, one might say that it condemns patterns of lawmaking for which sexism is importantly eufunctional. Since the stigma theory condemns laws that signify the inferiority of women, one might say that it condemns
plicitly stigmatize women, and they reinforce the hierarchy of men over women. Laws enforcing the taboo against homosexuality therefore violate the fourteenth amendment, whether the amendment is theorized as prohibiting a tainted decisionmaking process, the imposition of stigma, or the disadvantaging of groups.223

C. Secret Identities

Whites stigmatized (and continue to stigmatize) miscegenation because their own racial identity is a precarious achievement which they value. Men support the stigmatization of homosexuality because their own gender identity is a precarious achievement which they value. In each case, the stigma reinforces the dominant group’s sense that this achievement is a secure one, by creating a class of inferior others who have not achieved it and by positing a wide ontological divide between the two classes.

Just as the hierarchy of whites over blacks is greatly strengthened by extreme differentiation of the races, so the hierarchy of males over females is greatly strengthened by extreme differentiation of the sexes. The element of both differentiations that promotes hierarchy is the idea that certain anatomical features necessarily entail certain social roles: one’s status in society is obviously and unproblematically determined by the color of one’s skin or the shape of one’s reproductive organs. Blacks are supposed to defer to whites and obey whites’ wishes because that is what blacks do. Women are supposed to defer to men and obey men’s wishes because that is what women do.

The reification of socially constructed reality is always useful for the maintenance of that reality.224 But such reification takes on added

laws that, by signifying the state’s endorsement of sexist ways of thinking, are eufunctional for those ways of thinking.

My claim in this Article has to do with eufunctions, and thus implies only weak causation. My claim is twofold. First, and relevantly for the process theory, I claim that sexism is eufunctional for the legal institutionalization of the homosexuality taboo, and that without sexism there is good reason to doubt that the taboo would persist. The process theory demands no more; it presumes such classifications unconstitutional on the basis of suspicion alone, as the term “suspect classification” indicates. Second, and relevantly for the stigma theory, I claim—and this is a weaker causal claim than the first—that the homosexuality taboo is eufunctional for the hierarchy of men over women, and that its significance as symbolizing that hierarchy is generally understood. These claims, taken together, may point to a feedback loop of the kind demanded by Elster—that question has been and continues to be explored by others—but they need not; their legal and moral power is undiminished even if there are other important causal factors that reinforce both heterosexism and sexism.

223 For a description of these competing theories, see notes 112-17 and accompanying text supra.

224 See generally P. Berger & T. Luckmann, supra note 125, at 89-92 (discussing the reification of social reality).
urgency in modern Western civilization, with its radically egalitarian philosophy that manifests itself in, among other things, the fourteenth amendment of the U.S. Constitution.225 Thus the miscegenation taboo ultimately could not be justified in terms of its real purpose, and ended its days rationalized as a eugenic measure, on the basis of the shabbiest kind of pseudo-science.226 Where hierarchies based on birth are illegitimate, their survival is greatly enhanced by invisibility. Overt homosexuality is thus a greater danger to gender hierarchy in our society than it has been in other, more stable cultures. It threatens the hierarchy of the sexes because its existence suggests that even in a realm where a person’s sex has been regarded as absolutely determinative, anatomy has less to do with destiny than one might have supposed. It is therefore unsurprising that, as we shall shortly see, the courts, which have enforced both of these putatively “natural” prohibitions, have struggled to conceal their socially constructed character.

The point of emphasizing this socially constructed character is not to argue that since social contexts—taken for granted meanings and habitual practices—can be revealed to be social constructions that restrict human possibilities, they ought to be smashed.227 Rather, the point is that certain meanings and practices operate in furtherance of morally indefensible ends. Where this is true, exposure of those meanings and practices as socially constructed deprives them of the invisibility provided by the appearance of “naturalness” and makes

225 Cf. G. Myrdal, supra note 101, at 591:
Not denying the partial reality of the white person’s psychological identification with the “white race” and his serious concern about “racial purity,” our tentative conclusion is . . . that the demand for “no social equality” is psychologically dominant to the aversion for “intermarriage.” The persistent preoccupation with sex and marriage in the rationalization of social segregation and discrimination against Negroes is, to this extent, an irrational escape on the part of the whites from voicing an open demand for difference in social status between the two groups for its own sake. . . . [T]he fortification in the unapproachable regions of sex of the unequal treatment of the Negro, which this popular theory provides, has been particularly needed in this nation because of the strength of the American Creed. A people with a less emphatic democratic ethos would be more able to uphold a caste system without this tense belief in sex and race dangers.

As Allport observes, this psychological tension is ameliorated for the individual member of the dominant caste by the massive ficticity of the caste system. He did not create the system and is not to blame for it. See G. Allport, supra note 169, at 332. Ficticity and reification are both aspects of the taken-for-granted character of existing social reality.

226 See R. Sickels, supra note 90, at 53-61.

them subject to criticism. In order to survive, these systems of social construction have to lie.\textsuperscript{228}

The point can be illustrated by contrast with another prohibition, that against adultery. One can draw certain analogies between the miscegenation and homosexuality taboos, on the one hand, and the taboo against adultery on the other. Each is the consequence of socially constructed institutions, race, gender, and monogamous marriage, respectively. Persons perpetuate the adultery taboo, in part, because doing so reinforces valued aspects of their own identities as faithful spouses who respect their marital commitments. Moreover, participation in enforcement of the adultery taboo—typically by stigmatizing those who violate it—casts out those aspects of the self that are disvalued, one’s own nonmonogamous impulses. There is, however, an important difference between the adultery taboo and the taboos against miscegenation and homosexuality. None of the adultery taboo’s psychological mechanisms need to be hidden. The adultery taboo isn’t endangered or delegitimated when people talk about the work that it does. The institution of monogamous marriage is capable of being publicly defended. People who participate in and follow the prohibition of adultery do so without the hysteria, sneakiness, and anxiety that the homosexuality taboo typically engenders. Even the aspect of the self that is cast out can nonetheless be acknowledged. In 1976, presidential candidate Jimmy Carter told an interviewer, “I’ve looked on a lot of women with lust. I’ve committed adultery in my heart many times. This is something God recognizes I will do—and I have done it—and God forgives me for it.”\textsuperscript{229} The statement caused a minor flap at the time, but Carter went on to win the election. Imagine the reaction if he had said that he had looked on a lot of men with lust.

Again, the root of the difference seems to lie in the precariousness of masculine identity. When I as a man yearn for perfect masculinity, part of what I’m trying to achieve is the stable identity that I, as a boy, associated with my father, who was always already masculine all the way down. As Judith Butler has written, “the very notions of an essential sex and a true or abiding masculinity or femininity are . . . part of the strategy that conceals gender’s performative character and the performative possibilities for proliferating gender configurations outside the restricting frames of masculinist domination and compuls-


sory heterosexuality.”230 Once again, however, the trouble is not that human possibilities are restricted, but that the restricting is done in ways that are indefensible.231 And the necessity of lying is one indicator that, with both the miscegenation and homosexuality taboos, this is the case.

I have said that the explanation of the homosexuality taboo that I have offered is more persuasive than any alternative. The most coherent of the alternative explanations is that many people sincerely hold moral objections to homosexual acts.232 This explanation, however, misdescribes most anti-gay prejudice, which focuses on gay identity rather than homosexual conduct, and it fails to explain the savagery of violence against gays.233 The most interesting test of these two com-

231 Iris Marion Young contends that homophobia rests on anxiety about the borders of the self. “Homophobia is one of the deepest fears of difference precisely because the border between gay and straight is constructed as the most permeable; anyone at all can become gay, especially me, so the only way to defend my identity is to turn away with irrational disgust.” Iris M. Young, Justice and the Politics of Difference 146 (1990). This makes sense only if this border is one of the defining boundaries of my identity. Why should it be? Young’s answer is the same as mine: “Homosexuality produces a special anxiety . . . because it seems to unsettle [the] gender order. Because gender identity is a core of everyone’s identity, homophobia seems to go to the core of identity.” Id. at 155. This is, however, true of only a certain kind of identity, one that rests on one’s place in the gender order. Moreover, this kind of identity is not necessarily tied to gender per se, but specifically to a certain kind of gender order, one in which sexual penetration connotes the dominance of the male over the female. Thus it is an overstatement to claim that “confronting homophobia involves confronting the very desire to have a unified, orderly identity, and the dependence of such a unified identity on the construction of a border that excludes aspects of subjectivity one refuses to face.” Id. Young has not shown that it is impossible to have “a unified, orderly identity” in a society that does not stigmatize gays, or that it is necessary for such an identity to be predicated upon stigmatization.
232 See, e.g., Bowers v. Hardwick, 478 U.S. 186, 196 (1986); J. Ely, supra note 112, at 255-56 n.92. I shall take up below the question whether this claim is constitutionally sufficient to justify a law discriminating against gays. See Part III.B infra.
233 As John Boswell observes:

[M]ost modern hostility has little if anything to do with the specific “activities” performed by gay people. It is being a homosexual that disturbs most of the public, from school systems to the U.S. Army. What people do in private . . . is of much less concern than what they say in public. “Avowed homosexuals” are excluded from the ministry of nearly all church denominations, even if they choose to be celibate. What is at issue is the category, a category independent of any sexual activity. The allegedly antisocial behavior known as “flaunting”—a focus in such anti-gay campaigns as that of Anita Bryant—does not involve any genital activity at all: it refers to public honesty and openness about one’s erotic feelings. “Pansy,” “queer,” and “faggot” allude not to explicit, dangerous acts, but to private, invisible preferences, or even such personal and—one might have thought—unthreatening aspects of an individual as his aesthetic taste or the way he walks or holds his hands in conversation. Violence against gay people on the streets of American cities arises not from the observation of prohibited acts, which almost all gay people perform out of view, but from the supposition that someone is a lesbian or a gay man. . . . [I]t is unrelated to any external activity: the aim is to punish, injure, or eliminate persons who are gay.
peting hypotheses, for our purposes, is an examination of how the law operates. Do laws that discriminate against gays focus on their conduct?

Ordinarily, it is not hard to define prohibited conduct. The law does it all the time. In the case of the miscegenation taboo, however, the courts had great difficulty in fashioning coherent doctrine. The source of the difficulty was that the real object of the law’s attention was not conduct, but identity—a racial identity whose fragility could not be acknowledged. The consequence of this difficulty, I shall now show, was persistent anxiety about boundaries, confusion as these boundaries were taken as natural by the same agents who were busily constructing them, a variety of consequent epistemological pathologies, persistent efforts to push facts that were inconsistent with the prevailing narrative to the boundaries of consciousness, and gaps of logic that reappeared in many different jurisdictions. After briefly describing these phenomena, I shall show how they all reappear with the modern administration of the homosexuality taboo. Often that taboo purports to concern itself with conduct, but identity-based definitions of homosexuality perennially recur, and the consequent confusion produces pathologies that are strikingly similar to those just described. This is powerful evidence that the homosexuality taboo, too, is really about identity rather than conduct. I shall now examine in turn how issues of identity have been the root of courts’ difficulties in administering the miscegenation and homosexuality prohibitions.

As Eva Saks observes, miscegenation law “upheld the purity of the body politic through its constitution of a symbolic prohibition against the dangerous mixing of ‘white blood’ and ‘black blood,’ casting social practices as biological essences.”234 Because in fact no biological essence was there to be found, the attempt to enforce the prohibition led courts into an impassable epistemological bog. In order to secure convictions, it was necessary to prove the race of the defendants.235 This required investigations of each defendant’s ancestry, the evidence of which could be maddeningly equivocal:

[It] is necessary to establish first, that the accused is a person with one fourth or more of negro blood, that is, that he is a negro .... [W]e find, that the accused was not a full-blooded negro, but had white blood in his veins, but there was no evidence to show the quantity of negro blood in his veins, and no evidence of his parent-

234 Eva Saks, Representing Miscegenation Law, 8 Raritan, Fall 1988, at 39, 40.
235 Id. at 55 (quoting Jones v. Commonwealth, 80 Va. 538, 542 (1885)); see note 49 supra.
age except that his mother was a yellow woman. If his mother was a yellow woman with more than half of her blood derived from the white race, and his father a white man, he is not a negro. If he is a man of mixed blood he is not a negro, unless he has one-fourth at least of negro blood in his veins . . . 236

The problem this inquiry faced was that “the legal test for proving ‘blood’ was so purely semiotic, so autonomous and non-referential, that the prosecution here could not meet the test with concrete evidence. The prosecution could prove the color of the mother’s skin—‘yellow’—but could not prove the color of her blood.”237

In another case, “[t]he state’s witness testified that ‘Ophelia Smith looked like a white woman—was a white woman.’”238 The lower court denied the defendant’s motion to exclude the first part of the statement, and on appeal it was held that even if this was error, it was harmless “because the positive evidence of the witness was that ‘she was a white woman.’”239 But the question lingers whether the witness misrepresented Smith’s race:

The court’s curious justification for overruling the objection to the admission of “looked like” is that the witness had also offered evidence that she “was.” But how did he know that she “was” a white woman, if not by the fact that she “looked like” a white woman? What does a white woman look like?240

Similar tangles arose in miscegenation decisions throughout the postbellum South.241 They were not the product of judicial carelessness. The problem was systemic and arose out of the nature of the enterprise.

Miscegenation law’s identification system, based on the metaphor of blood, was committed to the separation of looked like (possession of whiteness without legal title to it) from was (good title to whiteness). In the discourse of blood, semiotic representation simultaneously becomes inevitable and problematic—inevitable, because appearance (looking like) is no longer sufficient proof; problematic, both because the appearance of social life for blacks and whites is now called into question, and because no other evidentiarily acceptable proof of blood exists. To substantiate blood, to substantiate what is neither a mimetic description nor a

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236 Jones, 80 Va. at 544, quoted in Saks, supra note 234, at 55-56.
237 Saks, supra note 234, at 56.
238 Jones v. State, 47 So. 100, 102 (Ala. 1908) (emphases added), quoted in Saks, supra note 234, at 56.
239 Jones, 47 So. at 102 (emphasis added), quoted in Saks, supra note 234, at 56.
240 Saks, supra note 234, at 57.
241 See generally id. I have included only a sampling of the epistemological monstrosities that populate Saks’s zoo.
tangible entity but instead a semiotic figure, is impossible. Caught in an epistemological loop, courts were led right back to social codes based on appearance, which was where the problem had begun.242

The homosexuality prohibition resembles the miscegenation prohibition in its chronic anxiety about boundaries. No bright line exists to distinguish the white and black races, while the distinction between male and female is firmly rooted in biology; but there is no clear distinction between “homosexuals” and “heterosexuals.” The devising of a satisfactory definition of “a homosexual” poses perennial difficulties. “An essentialism of sexual object-choice,” Sedgwick observes, “is far less easy to maintain, far more visibly incoherent, more visibly stressed and challenged at every point in the culture than any essentialism of gender.”243 The prevailing understanding of sexuality holds the minoritizing view that there is a distinct population of persons who “really are” gay; at the same time, it holds the universalizing views that sexual desire is an unpredictably powerful solvent of stable identities; that apparently heterosexual persons and object choices are strongly marked by same-sex influences and desires, and vice versa for apparently homosexual ones; and that at least male heterosexual identity and modern masculinist culture may require for their maintenance the scapegoating crystallization of a same-sex male desire that is widespread and in the first place internal.244

Courts, legislators, and rulemakers have vacillated between definitions of homosexuality that focus on behavior and those that focus on identity, as constituted by the experience of sexual desire for members of one’s own sex.245 This inconsistency can be understood as the eclectic deployment of a variety of strategies in pursuit of a single goal, the rendering of a socially constructed gender hierarchy as natural.

The behavioral conception of homosexuality is reflected in the declaration of the D.C. Circuit in Padula v. Webster246 that inasmuch as the Supreme Court held in Bowers v. Hardwick247 that the constitutional right to privacy does not protect homosexual sodomy, homosex-

242 Id. at 58.
243 E. Sedgwick, supra note 15, at 34.
244 Id. at 85.
246 822 F.2d 97 (D.C. Cir. 1987).
uality cannot be a suspect classification under the equal protection clause, because sodomy statutes "criminalize the behavior that defines the class." As Janet Halley observes, the result is a less well-defined class than the court imagines:

The statute upheld in *Hardwick* defined sodomy as "any sexual act involving the sex organs of one person and the mouth or anus of another." Let us take the act of definition in *Padula* seriously. Lesbians who forego cunnilingus, the many gay men who have abandoned fellatio and anal intercourse to protect themselves from AIDS, self-identified gay men and lesbians who remain celibate—the *Padula* court has determined that none of these groups belongs to the class "homosexual." The court fails to observe that it may have defined the lesbian plaintiff before it out of the class "homosexual" that it both creates and contemns. Note, furthermore, that not all states define sodomy as Georgia does. The definition imposed in *Padula* produces the amusing result that the contours of the class "homosexuals" vary from state to state. And some states do not criminalize homosexual sodomy at all: how, in those states, is the class to be defined?

Even when a uniform, clear-cut definition of the prohibited conduct is offered, however, courts shrink from applying it uniformly. This can be illustrated by the performance of the New Hampshire Supreme Court when the state legislature asked the court for an advisory opinion on the constitutionality of a bill excluding homosexuals from adoption, foster care, and day care center employment. The bill defined "a homosexual" as "any person who performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another person of the same gender." This seems clear enough, but the court held that to save the bill's constitutionality, the bill had to be construed to exclude victims of homosexual rape and to make an exception for acts not "committed or submitted to on a current basis reasonably close to the filing of the application . . . . This interpretation thus excludes from the definition of homosexual those persons who, for example, had one homosexual experience during adolescence, but who now engage in exclusively heterosexual behav-

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248 *Padula*, 822 F.2d at 103.
250 Quoted in *In re Opinion of the Justices*, 525 A.2d 1095, 1096 (N.H. 1987). This decision is also noteworthy because David Souter, a member of the majority, has since joined the U.S. Supreme Court.
ior.” As Halley observes, this definition makes the category of “homosexual” at once fixed and fluid:

The category includes individuals whose desires may be predominantly homosexual, who have acted on them, but who have determined to mask these facts from themselves by embracing a purely subjective heterosexual subjective identity, and from others by passing as straight. The court’s example forgives these lies and builds them into the scheme of state enforcement. . . . Even as the New Hampshire Supreme Court, like the D.C. Circuit in Padula, attempts to erect a conceptual structure that will render the status ’homosexual’ rigid and immutable, it recognizes and privileges certain kinds of changes. The mutability of sexual identity is recognized, and its civil advantages are accorded exclusively to currently self-identified heterosexuals.

The “lies” to which Halley refers are only lies if they imply the absence of homosexual desire, rather than the absence of a homosexual pattern of behavior. That is, however, the implication in ordinary language of a finding that a person is not “homosexual,” as the next illustration shows.

Similar opportunities for mutability can be found in the U.S. Army regulation, on the books from 1981 to 1993, requiring exclusion of any “homosexual,” defined as “a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts.” This rule is status—rather than conduct-based, because it also contains what has been dubbed the “Queen for a Day” proviso, which states that “[p]ersons who have been involved in homosexual acts in an apparently isolated episode, stemming solely from immaturity, curiosity [sic], or intoxication, and in the absence of other evidence that the person is a homosexual, normally will not be excluded from reenlistment.”

The definition of the homosexual immediately becomes obscure: what could a homosexual be if it is possible for a person voluntarily to engage in homosexual acts—the regulation uses the plural—without being one? The regulation says that separation from the service is required if “[t]he soldier has stated that he or she is a homosexual or bisexual, unless there is a further finding that the

251 Id. at 1098.
252 Halley, supra note 249, at 950-51.
253 Army Regulation (AR) 635-200, § 15-2(a), quoted in Watkins v. United States Army, 847 F.2d 1329, 1336 n.11 (9th Cir. 1988), vacated, 847 F.2d 1362 (9th Cir.), aff’d on other grounds, 875 F.2d 699 (9th Cir. 1989) (en banc), cert. denied, 498 U.S. 957 (1990). “A homosexual act” is defined as “bodily contact, actively undertaken or passively permitted, between soldiers of the same sex for sexual satisfaction.” Id.
255 AR 601-280, § 2-21, quoted in Watkins, 847 F.2d at 1336.
soldier is not a homosexual or bisexual.”\textsuperscript{256} What could be the basis of such a finding?

The epistemological difficulties that such an inquiry faces are illustrated by the case of James Miller, who, faced with a Navy regulation mandating expulsion for homosexual acts, admitted to committing such acts but also “at various times denied being homosexual and expressed regret or repugnance at his acts.”\textsuperscript{257} (A medical officer who examined him found that Miller “did not appear to be ‘a homosexual.’”\textsuperscript{258}) Halley observes that the interaction in which Miller, threatened with compulsory punishment, made his disavowals, “create[s] for him a new public identity.”\textsuperscript{259} But the identity thus created is the product of an epistemological loop strikingly reminiscent of the miscognition cases. “[T]he utterances of the confessor and the categories imposed by the inquisitor have lost all referential power. In the case of plaintiff James Miller, the possibility of discovering any ‘true’ sexual orientation, if it ever existed, has now been destroyed.”\textsuperscript{260}

When enacted into law, the idea that homosexuality is a forbidden identity thus produces an identity that cannot be detected, an invisible mark that brands deviants who walk among us. The function of the law is to police a boundary whose location is undetectable, which is \textit{made} undetectable by the law. The only available targets are those who openly declare their homosexuality, and effective sanctions produce not heterosexuality but silence.

This silence is mirrored by the silence of “the official knower,”\textsuperscript{261} who does not say how he or she discovers who is homosexual and who is not. The precariousness of that knower’s status is illustrated by the case of the county jail that implemented its policy of segregating all homosexual inmates by authorizing the intake officer to “make a purely subjective judgement” based on whether, for example, “the intake officer’s impression is that the arrestee appears weak, small or effeminate.”\textsuperscript{262} As Halley observes, this practice serves as a powerful reminder that

\textsuperscript{256} AR 635-200, § 15-3(b), quoted in \textit{Watkins}, 847 F.2d at 1337 n.11.
\textsuperscript{257} Beller v. Middendorf, 632 F.2d 788, 802 n.9 (9th Cir. 1980).
\textsuperscript{258} Id. at 794. “The typography here recognizes the social artifice of the category ‘homosexual.’” Halley, supra note 249, at 952.
\textsuperscript{259} Halley, supra note 249, at 953.
\textsuperscript{260} Id. at 954.
\textsuperscript{261} Id. at 955.
\textsuperscript{262} Gay Inmates of Shelby County Jail v. Barksdale, No. 84-5666, 1987 WL 37565, at *2 (6th Cir. June 1, 1987). The epistemological loop is completed by a provision classifying inmates as homosexual if they have been so classified in the past. Id. This practice of
in order for the sign to ‘mean’ the signified, there must be an interpreter, and the interpreter cannot escape the web of signifiers that purport to indicate public sexual identity. If he is small himself, or delicate of build; if he is a behemoth; if he is just an average guy; no matter how many pounds of flesh lie on his bones, he will exercise his power of interpretation to channel interpretations of his own body.263

Self-interpretation is, after all, the point. Males are thus reassured about the superior status of masculinity—and kept a bit doubtful (but not too doubtful) about their own.

Members of both sexes are kept in line by the threat that those who do not conform to gender-related expectations will be labeled as deviant and sick, while those who do conform are reassured that a biologically fixed boundary divides them from the deviants.264 At the same time, there is a cure: those who have failed to conform in the past are perpetually offered a new, heterosexual identity which thereafter will be regarded as fixed, natural, and immutable.265 Homosexuality is declared immutable in order to ratify the naturalness of the boundaries, mutable in order to bring deviants into the fold and terrify insiders who might go astray. A Calvinist doctrine of predestination is incongruously combined with an evangelical doctrine of salvation through faith.266

In the face of this orthodoxy, the uncloseted homosexual is a heretic, and is treated as one. Sin, which transgresses the moral order, can be forgiven more easily than heresy, which attacks the foundations of the moral order itself. Thus we can explain the mystery presented when the Army or the New Hampshire Supreme Court can more easily forgive the commission of a homosexual act than one’s segregating homosexual inmates was held to be consistent with procedural due process. Id. at *1.

263 Halley, supra note 249, at 948.

264 It thus seems likely that the claim that gays deserve better treatment because homosexuality is immutable, although tactically useful because it has some persuasive power, also functions as yet another strategy for maintaining the homosexual/heterosexual divide’s appearance as “natural.” One reason for the doctrine’s attractiveness to self-identified “heterosexuals” is that it shows that it is possible to tolerate gays without placing in doubt one’s own gender identity. I owe this point to James W. Bailey.

265 Cf. D. Fernbach, supra note 145, at 81.

266 The fact that even the mental act of questioning one’s own gender identity is stigmatized reinforces the resemblance between the ideology of heterosexuality and that of Calvinism, in which “it is held to be an absolute duty to consider oneself chosen, and to combat all doubts as temptations of the devil, since lack of self-confidence is the result of insufficient faith, hence of imperfect grace.” Max Weber, The Protestant Ethic and the Spirit of Capitalism 111 (Talcott Parsons trans., 1958).
identification of oneself as a homosexual. The real culprit is neither conduct nor desire, but speech that calls the norm into question.\textsuperscript{267}

The hypothesis that speech is the real target also explains the incoherence of the policy guidelines, devised after lengthy negotiations between President Clinton and the Joint Chiefs of Staff, under which the military's branches would no longer actively hunt down gays within their midst, but would continue to prohibit "homosexual conduct."\textsuperscript{268} "Homosexual conduct" was defined as "a homosexual act, a statement that the member is homosexual or bisexual, or a marriage or attempted marriage to someone of the same gender."\textsuperscript{269} This guideline purported to shift the prohibition from status to conduct, but it declared that a revelation of one's status was itself prohibited conduct. At the same time, other signifying actions that fit more comfortably into the category of "conduct" yet stop short of such revelation were permitted:

Activities such as association with known homosexuals, presence at a gay bar, possessing or reading homosexual publications or marching in a gay rights rally in civilian clothes will not, in and of themselves, constitute credible information that would provide a basis for initiating an investigation or serve as the basis for an administrative discharge under this policy.\textsuperscript{270}

\textsuperscript{267} As John Boswell observes, "[w]hat people do in private... is of much less concern than what they say in public." Boswell, supra note 233, at 225. This aspect of anti-gay discrimination suggests that gays should be protected by the first as well as the fourteenth amendment. See David Cole & William N. Eskridge, Jr., From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct, 29 Harv. C.R.-C.L. L. Rev. 319 (1994); Jose Gomez, The Public Expression of Lesbian/Gay Personhood as Protected Speech, 1 L. & Inequality 121 (1983).

\textsuperscript{268} The irrational intensity with which the homosexuality taboo is held is illustrated by accounts tending to show that the military, which ordinarily places enormous weight on the obligation to follow orders, has in this case not followed the guidelines, but instead has pursued gays with even greater zeal than before. See Hanna Rosin, The Ban Plays On, New Republic, May 2, 1994, at 11, 11-13; Eric Schmitt, Gay Troops Say the Revised Policy is Often Misused, N.Y. Times, May 9, 1994, at A1.


\textsuperscript{270} Id. Similar language may be found in the present regulations. See Memorandum from Secretary of Defense Les Aspin to Secretaries of the Military Departments et al. on Implementation of DoD Policy on Homosexual Conduct in the Armed Forces 50 (Dec. 21, 1993) [hereinafter Aspin Memorandum]. The rule presently in effect, enacted into law by Congress, tries even harder to avoid the charge that it is based on anything other than conduct. The law rests on a finding that military morale and unit cohesion are threatened by "[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts." 10 U.S.C.A. § 654(a)(15) (West 1994). In general, it resembles the regulation that existed during the 1980s, see notes 253-56 and accompanying text supra, but in contrast to those places where the old regulation prohibits being a homosexual, or desiring to engage in homosexual conduct, the new law, and the regulations
The military demands the closet, even if it must settle for a closet that fools nobody. The only thing that the “secret” status of this open secret accomplishes—but perhaps this is the point—is to proclaim the continuing status of homosexuality as something that must be kept secret, a thing not to be spoken of, even when everyone knows it to be there, rather like flatulence in an elevator.  

The symbol of the civilization-destroying homosexual is most potent if there are no actual, self-identified homosexuals questioning homosexuality’s meaning as an abomination or a disease. The idea of

promulgated pursuant to it, consistently speak of a “propensity” to engage in homosexual acts.

The statute does not define “propensity.” The regulations define the word as “more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.” Aspin Memorandum, supra, at 12, 25. The statute still defines “homosexual conduct” as including statements of one’s own homosexuality. 10 U.S.C.A. § 654(b)(2) (West 1994). The regulations strive to clarify the difficulties in this formulation:

A statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member’s sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts. Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to continued service unless manifested by homosexual conduct.

Aspin Memorandum, supra, at 26. Such a statement, the regulations state, “creates a rebuttable presumption that the Service member engages in homosexual acts or has a propensity or intent to do so.” Id. at 27.

The continuing political nature of the prohibition is made clear by a hypothetical scenario that is included in the Department of Defense regulations. In it, “a young Service member comes into the commander’s office and states that he believes he may be homosexual. The commander advises the Service member of the military’s policy on homosexual conduct, and the Service member replies, ‘Maybe I shouldn’t say anything else.’” Id. at 80. The commentary accompanying the scenario explains that the commander probably would not initiate an inquiry on the basis of this conversation: “The statement, by itself, is ambiguous and quite possibly could indicate a young Service member’s confusion over some aspect of his sexual identity. It is not at all clear that the Service member intended to make a statement that he is homosexual.” Id. This final sentence is most puzzling. If he did not intend to say that, what did he intend to say? If, however, “make a statement” connotes making a political statement, one that defies the military’s imposition of the closet, then the scenario makes sense. It is only such statements, deliberately made, that trigger investigations and create presumptions against the service member. Once again, accidents and lies are forgiven. See also Cole & Eskridge, supra note 267, at 337-38.

271 I am grateful to Richard Mohr for this simile. See R. Mohr, supra note 203, at 113.

272 Some people are nostalgic for what they think they remember as a workable modus vivendi, in which homosexuals who were discreet about their socially unacceptable inclinations were, in the main, allowed to live out their lives with a minimum of legal harassment, while the ‘straight’ community was allowed to remain more or less ignorant of the ‘gay’ community in its midst.” Terry Teachout, Gay Rights and Straight Realities, National Review, Nov. 11, 1983, at 1408, 1409. This is not, strictly speaking, inaccurate, but the phrase “in the main” conceals a multitude of sins. Many examples could be offered; I choose one in which the attitude of the state is particularly clear. In the 1950s and 1960s, the U.S. Post Office and the FBI collaborated in surveillance of gay communities. “Postal inspectors subscribed to pen pal clubs, initiated correspondence with men whom they be-
heterosexuality as natural law is most completely reified if nature’s laws are never seen to be violated.\textsuperscript{273} The precarious status of the norm also helps to explain why the act of labeling another male as homosexual is itself regarded as a demonstration of masculinity:\textsuperscript{274} it suggests that the labeler, at least, is one of those (mythical?) fortunate ones for whom these constructs are not precarious, who understands the natural order of gender because his place in it is secure, who “knows without having to find out.”\textsuperscript{275} Because the orthodox view cannot acknowledge the status of the norm as a social construct that can be changed by human agency, it is left vacillating between a conduct-based conception of homosexuality, which cannot account for its hostility to mere declarations of sexual orientation, and a desire-based conception, which cannot account for the moral weight it attaches to sexual orientation.

\textsuperscript{273} If someone said that homosexuality is a natural law, can we assume that he is also suggesting that he understands the natural order of gender because his place in it is secure, who “knows without having to find out.”

\textsuperscript{274} For similar reasons, during slavery in the southern states, the law typically enacted statutes “to discourage nonslave blacks from entering their territories and becoming, by their presence and status, disruptive forces and living reminders that slavery was not the only possibility for black people.” D. Bell, supra note 105, at 17. Thus, for example, a South Carolina statute, eventually invalidated by a federal court, provided that if any ship came into a harbor of the state carrying a free black, that person was to be sold as a slave without trial. Id. at 17-18 (citing Elkison v. Delesseline, 8 F. Cas. 493 (C.C.W. 1823) (No. 4366) (invalidating statute)).

\textsuperscript{275} In one study, an experimental confederate whose phones were tapped and whose life was monitored was labeled by a second confederate as homosexual in the experimental condition, and not so labeled in the control condition. The subjects were then asked to rate the other members of their group, including the confederates. The confederate who had been labeled as homosexual was rated as being less masculine, less clean, softer, more womanly, more tense, more yielding, more impulsive, less rugged, and quieter than the same confederate when not labeled. Karr, supra note 157, at 79-80. The study also found that the confederates who actually performed the labeling were all perceived as significantly more masculine and more sociable when they labeled someone homosexual than when they did not. Id. at 82. The author suggested that men who demonstrate ability simply to identify another man as a homosexual are rewarded and reinforced by other men in our culture for possessing that “skill.” “Presumably the primary labeler is viewed more positively both because he is assertive enough to publicly label a societal deviant and because he helps group members conform to societal expectations by that act.” Id.

\textsuperscript{276} Halley, supra note 249, at 955. This suggestion appears to be one manifestation of “the implausible, necessary illusion that there could be a secure version of masculinity.” E. Sedgwick, supra note 15, at 84.
Perhaps the most striking intellectual dysfunction produced in the course of official attempts to give legal meaning to the homosexuality taboo has occurred among the federal courts that have considered whether sexual orientation should be deemed a suspect classification calling for heightened scrutiny under the equal protection clause of the fourteenth amendment. The factors that arouse such scrutiny would appear to be amply satisfied in the case of lesbians and gay men: a history of purposeful discrimination; the gross unfairness of that discrimination, as evidenced by the irrelevance of the basis for discrimination, the difficulty of changing the trait in question, or widespread prejudice and stereotyping of the group; and the group’s lack of the political power necessary to obtain redress from the political branches of government. Nonetheless, almost all of the federal courts that have considered the question have rejected the suspect classification claim.

The rationale invariably proffered by the courts is that the equal protection claim is foreclosed by Bowers v. Hardwick, which held that the due process clause does not protect the right to engage in homosexual sodomy. Thus, for example, the United States Court of Appeals for the District of Columbia Circuit declared: “It would be quite anomalous [sic], on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause.”

Because the Supreme Court held in Hardwick that a law disadvantaging gays did not violate the due process clause, these courts inferred that such a statute cannot be challenged on equal protection grounds, even though the Hardwick Court expressly declared that it

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276 The best statement of the argument for recognizing sexual orientation as a suspect classification is the majority opinion in Watkins v. United States Army, 847 F.2d 1329, 1345-49 (9th Cir.), vacated, 847 F.2d 1362 (9th Cir. 1988), aff’d on other grounds, 875 F.2d 699 (9th Cir. 1989) (en banc), cert. denied, 498 U.S. 957 (1990).
278 Id. at 190-96.
279 Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987); see also High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571-74 (9th Cir.), reh’g and reh’g en banc denied, 909 F.2d 375 (9th Cir. 1990); ben-Shalom v. Marsh, 881 F.2d 454, 466-66 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990). This reasoning was rejected in Watkins, 847 F.2d at 1345-49 (one judge dissenting), which was later affirmed on other grounds, 875 F.2d at 705-11 (applying principle of equitable estoppel against the military), and in Jantz v. Muci, 759 F. Supp. 1543, 1546-47 (D. Kan. 1991) (distinguishing conduct and sexual orientation in holding classifications based on sexual orientation inherently suspect), rev’d on other grounds, 976 F.2d 623 (10th Cir. 1992), and implicitly in Baehr v. Lewin, 852 F.2d 44, 57 (Haw. 1993), which rejected a privacy challenge to a statute disallowing same-sex marriages while sustaining an equal protection challenge to that same statute.
was not deciding that issue. The implicit premise of this reasoning is that, unless a statute violates every provision of the Constitution, it cannot violate any of them. That premise is altogether bizarre. Suppose, before Brown v. Board of Education, that some misguided attorney had unsuccessfully asserted the rather silly claim that school segregation violated the third amendment’s prohibition on quartering troops in citizens’ homes. Could one conclude from this result that Brown must be decided in the state’s favor, because the earlier third amendment case had already determined that segregated schools were constitutional?

This is an elementary abuse of legal reasoning. This malfunctioning of otherwise very capable minds of federal court of appeals judges (in some of the leading circuits) itself requires explanation. As with miscegenation, we are drawn to a narrative in which the attitudes serve an unconscious function for their holders.

The strength of the theory set forth here, like that of the psychological accounts of the miscegenation taboo explored earlier, is that it accounts for the persistence of the taboo and its psychological power as other theories cannot. It explains why homosexuality arouses such violently negative feelings in many people; it unpacks the familiar but incoherent defense-of-the-family arguments to show what is really at stake in them; it accounts for the association of homosexuality, gender ambiguity, and stigma in common perception; it shows

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280 See Hardwick, 478 U.S. at 196 n.8.


282 The example may sound farfetched, but the reasoning of Plessy v. Ferguson, 163 U.S. 537 (1896), the case that upheld racial segregation against an equal protection challenge, ran along precisely these lines. The Court cited, in support of its conclusion, eleven state and lower federal cases that had rejected challenges to segregation. “Unfortunately, not one of the eleven cases reached the constitutional issue presented to the Court in Plessy.” R. Kluger, supra note 108, at 78. Some of the cited cases predated the fourteenth amendment, and in none of them was the equal protection clause the basis of the challenge. Id.

283 See note 279 and accompanying text supra.

284 Similarly noteworthy is Chief Justice Burger’s bizarre, ranting concurrence in Hardwick. “Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization,” wrote Burger. Hardwick, 478 U.S. at 196 (Burger, C.J., concurring). “Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards.” Id. Homosexuality appears to have been so upsetting to Burger as to drive all memory of the first amendment’s existence from the judicial mind. “It is quite remarkable that a recent Chief Justice of the Supreme Court could imagine that he had cured the offensiveness of relying on ‘Christian’ precepts in a constitutional decision simply by adding the prefix ‘Judeo-‘ thereto.” Jed Rubenfeld, The Right of Privacy, 102 Harv. L. Rev. 737, 762 n.122 (1989). Similar lapses have been noted in the majority opinion. See generally Halley, Reasoning About Sodomy, supra note 1; Kendall Thomas, The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick, 79 Va. L. Rev. 1805 (1993).

285 See text accompanying notes 126-43 supra.
why issues of identity persistently infiltrate judicial discourse about homosexuality; and it even can begin to account for the confusion of the federal courts.

III

The Weight of the State’s Interests

Let us return now to the question that the trial court faces on remand, and which the Hawaii Supreme Court ultimately must answer, in Baehr v. Lewin. Can the State of Hawaii offer a compelling state interest to justify its sex discriminatory marriage statute?

A. Procreation

The interest most strongly emphasized by the State, when it was first pressed on remand to articulate the interests it would offer, was its interest in “fostering procreation in a marital setting.” It cited its interest in “protecting the health and welfare of children, adolescents, and other persons,” and claimed that “a child is best parented by its biological parents living in a single household.” Because “same sex couples cannot, as between them, conceive children,” it argued, “same sex couples cannot best parent a child in their household.” This argument seems doomed from the outset. As the Hawaii Supreme Court already observed in its opinion before the remand, the statute’s own provisions preclude the argument that the legislature intended that marriage be tightly linked to procreation.

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286 852 P.2d 44 (Haw. 1993).
287 Defendant’s Response to Plaintiffs’ First Request for Answers to Interrogatories at 7 (Dec. 17, 1993), Baehr v. Lewin, Civ. No. 91-1394-05 (Haw. 1st Cir.).
288 Id. at 5-6.
289 Id. at 6. The State also offered the following claims: “adoption of same-sex marriage in Hawaii ... would render all Hawaii marriages unenforceable in one or more other jurisdictions,” id. at 8; would create “disproportionate incentives [for same-sex couples] to move to and/or remain in Hawaii,” which would “distort the job and housing markets, increase demand for government and private services, tax the limited natural resources of the State, and otherwise burden the economic and social structures of Hawaii in unpredictable and deleterious ways,” id. at 9; and would “alter the State of Hawaii’s desirability as a visitor destination, and damage Hawaii’s leading industry, businesses and individuals dependent on it, as well as the tax base,” id. at 9-10. The first of these arguments is fanciful, and the others are speculative and almost certainly wrong, see Brown, supra note 14, and in any case are plainly inadequate bases for the denial of constitutional rights. Their inclusion in the State’s legal papers suggests that the State’s attorneys view their prospects on remand as desperate.
290 See Baehr, 852 P.2d at 49 n.1:

In 1984, the legislature amended the statute to delete the then existing prerequisite that “neither of the parties is impotent or physically incapable of entering into the marriage state[,]” Act 119, § 1, 1984 Haw. Sess. Laws 238-39 (emphasis added). Correlatively, section 2 of Act 119 amended HRS § 580-21 (1985) to delete as a ground for annulment the fact “that one of the parties was impotent or physically incapable
of entering into the marriage state” at the time of the marriage. Id. at 239 (emphasis added). The legislature’s own actions thus belie the dissent’s wholly unsupported declaration . . . that “the purpose of HRS § 572-1 is to promote and protect propagation . . .”

The legislature’s attempt to respond to this statement has produced astonishing intellectual contortions. The legislature claimed that Hawai‘i’s marriage licensing statutes “as originally enacted, were intended to foster and protect the propagation of the human race through male-female marriages.” Act of June 22, 1994, § 1, 1994 Haw. Sess. Laws 217. As for the amendment noted by the court above, “[t]he intent of this amendment was to remove any impediment that may have prevented persons who were physically handicapped or elderly, or who had temporary physical limitations, from entering into a valid marriage. This amendment, however, does not detract from the original purpose of section 572-1.” Id. The last sentence just quoted can hardly be said to rebut the court’s argument. It is a bald claim, supported by no reasoning at all.

Earlier versions of the legislation did contain reasoning, but it is not hard to see why the legislature did not see fit to include that reasoning, which is remarkably vulnerable, in the final version. As introduced, the bill sought “to clarify that the marriage licensing statutes relate solely to male-female couples, and that the primary purpose of issuing marriage licenses is to regulate and encourage the civil marriage of those couples who appear, by virtue of their sex, to present the biological possibility of producing offspring from their union.” H.B. 2312, 17th Leg. § 1 (Haw. 1994). The bill goes on to state that the primary purposes of civil marriage are “to impose, and have a logical basis for, the imposition of parental responsibility upon the partners to the union; to support and encourage the legally-married status as the most desirable status in which to bear and rear children; and to place restrictions upon the dissolution of the union.” Id.

These are plausible purposes for marriage, but it is mysterious how it follows, as the bill states, that these “important health and social concerns . . . arise only when a man and a woman enter into an intimate relationship.” Id. Many same-sex couples raise children. Indeed, one of the plaintiff couples in Baehr appears to have participated in the case at least in part because of the economic pressures of parenthood. “Over a period of many years they have fostered at least 10 children, and they have a daughter of their own. Women of color with little money and children to care for, the economic reasons for seeking marriage were compelling enough for them to go public in a big way.” Michelangelo Signorile, Bridal Wave, Out, Dec./Jan. 1994, at 68, 150. Although there are no hard figures on the number of lesbian and gay parents with children, informal estimates are consistently in the millions, and the number of lesbians who have borne children after coming out is likewise informally estimated to be in the thousands and growing. Children raised by same-sex couples develop just as well as (and, if it matters, are no more likely to be gay than) children of opposite-sex couples. See Charlotte J. Patterson, Children of Lesbian and Gay Parents, 63 Child Development 1025 (1992).

The proposed legislative “finding” that only different-sex couples raise children invites comparison with the legendary 1897 bill which nearly passed in the Indiana legislature, and which would have established that the value of pi (the ratio of a circle’s circumference to its diameter) is 3.2. See Petr Beckmann, A History of Pi 174-77 (4th ed. 1977). It is, perhaps, comforting for some to believe that same-sex couples do not raise children, just as it would ease the lot of many students of mathematics to believe that pi is a rational and easily divisible number, but neither is the case, and the fact that a state legislature says it is so cannot make it so.

It is hard to imagine how the court could defer to a legislative intervention of this sort. Once announced by a court, “it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.” Brown v. Board of Educ. (Brown II), 349 U.S. 294, 300 (1955). Nonetheless, the legislature asserts that “the question before the court in Baehr was and is essentially one of policy, thereby rendering it inappropriate for judicial response. Policy determinations of this na-
Courts in other jurisdictions, applying less stringent standards of review, have argued that failure of a marriage law to require heterosexual couples to show their capacity or willingness to procreate is a mere imprecision that is constitutionally tolerable. Thus one court, in holding that two males could not marry each other, reasoned that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children. This is true even though married couples are not required to become parents and even though some couples are incapable of becoming parents and even though not all couples who produce children are married. These, however, are exceptional situations.291

Another court similarly noted that although “the state does not impose upon heterosexual married couples a condition that they have a proved capacity or declared willingness to procreate . . . the classification is no more than theoretically imperfect.”292

As Mark Strasser has observed, however, “no responsible legal authority believes that the desire and willingness to have children is an essential precondition of marriage except in the context of attempting to show why there can be no homosexual marriages.”293 It is well-settled that the legislature are clearly for nonjudicial discretion, and are more properly left to the legislature or the people of the State through a constitutional convention.” § 1, 1994 Haw. Sess. Laws 217. The legislature does not explain what is encompassed by the phrase “policy determinations of this nature,” other than that this refers to that set of decisions which the legislature would like to be able to make without being constrained by constitutional limitations.

The legislature’s claim to superior wisdom in matters of constitutional interpretation is also thrown into doubt by the final section of the statute, which is evidently intended to throw a sop to the lesbian and gay community, creating a commission to consider the possibility of extending to same-sex couples some of the legal and economic benefits granted to opposite-sex couples:

The commission shall consist of eleven members, ten appointed by the governor of the State of Hawaii, of which . . . two shall be representatives from the American Friends Service Committee; two shall be representatives from the Catholic Church diocese; two shall be representatives from the Church of Latter-Day Saints . . . .

Id. § 6 (emphasis added). This is an extraordinary provision. It is well settled under the first amendment that “government may not delegate its decision-making power to churches,” and that “government may not discriminate among religions in allocating benefits or burdens.” Laurence Tribe, American Constitutional Law § 14-14, at 1276 (2d ed. 1988); see also U.S. Const. art. VI (“[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”). Yet here, a majority of the membership of a state agency is to be chosen on a religious basis, and that basis is curiously selective, excluding mainline Protestants as well as Moslems and Jews.

tled that the state may not compel procreation or forbid nonprocreative sex.294 What the court above regarded as a "theoretical imperfection" is no imperfection at all—and thus cannot salvage the reproductive justification for prohibiting same-sex marriage—if the purposes of marriage are not confined to procreation. The U.S. Supreme Court has not understood the purposes of marriage to be so confined.

It is probably unconstitutional for states to deny the right to marry to persons who cannot procreate. This conclusion is strongly implied by Turner v. Safley,295 in which the Supreme Court held that prison inmates have a right to marry. Although the Court held that inmates' right to marry was subject to substantial restrictions as a result of their incarceration, it noted that "[m]any important attributes of marriage remain".296

First, inmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. Third, most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated. Finally, marital status often is a precondition to the receipt of government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children born out of wedlock). These incidents of marriage, like the religious and personal aspects of the marriage commitment, are unaffected by the fact of confinement or the pursuit of legitimate corrections goals.

Taken together, we conclude that these remaining elements are sufficient to form a constitutionally protected marital relationship in the prison context.297

In the Court's enumeration of the "important attributes of marriage," the legitimation of children only appears at the very end of the

294 See Roe v. Wade, 410 U.S. 113, 152-54 (1973) (recognizing constitutional right of privacy that encompasses decision whether to terminate a pregnancy); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into ... the decision whether to bear or beget a child."); Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965) (striking down Connecticut statute forbidding contraceptive use as an unconstitutional violation of right of privacy).


296 Id. at 95.

297 Id. at 95-96.
list. All of the other listed attributes are at least as available to a same-sex couple as they are to a heterosexual couple, one member of which is in prison. Moreover, the Court notes only that most inmates eventually will be released, implying that even prisoners who are serving life sentences, and who therefore cannot procreate, have a presumptive right to marry. This conclusion is reinforced by the next lines of the opinion, which distinguish an earlier case upholding a prohibition on marriage for inmates sentenced to life imprisonment.\textsuperscript{298} The Court notes that in the earlier case, "importantly, denial of the right was part of the punishment for crime," and characterizes the lower court's judgment in that case as holding that the "asserted governmental interest of punishing crime [is] sufficiently important to justify deprivation of [the] right."\textsuperscript{299} The clear implication is that, absent the rationale of punishment, the mere inability of those inmates to procreate would not have sufficed to support the marriage prohibition. The accidental misfortune of being unable to procreate, the Court implies, cannot constitutionally subject a person to civil disabilities of a kind that are appropriate for convicted criminals.

\textit{Turner} thus appears to destroy the "mere imprecision" argument against same-sex marriage: It would be most anomalous to claim that a statute's legitimate purpose is one that it would be unconstitutional for the statute to pursue with precision.\textsuperscript{300}

\section{Morality}

A more interesting articulation of a state interest, which sufficed to satisfy minimal scrutiny in \textit{Hardwick}, is "the presumed belief of a majority of the electorate . . . that homosexual sodomy is immoral and unacceptable."\textsuperscript{301} Morality, the Court held, is an adequate rationale to support a law. "The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be

\textsuperscript{298} Id. at 96 (distinguishing Butler v. Wilson, 415 U.S. 953 (1974), summarily aff'g Johnson v. Rockefeller, 365 F. Supp. 377 (S.D.N.Y. 1973)).

\textsuperscript{299} Id. at 96 (citing Johnson v. Rockefeller, 365 F. Supp. 377, 381-82 (S.D.N.Y. 1973) (Lasker, J., concurring in part and dissenting in part)).

\textsuperscript{300} It would probably also be politically untenable. Few, if any, heterosexuals feel that their legal entitlement to marry is contingent on their ability or willingness to procreate.

\textsuperscript{301} Bowers v. Hardwick, 478 U.S. 186, 196 (1986). Some belief of this sort may underlie the State of Hawaii's assertion of the following interest: "allowing same sex couples to marry conveys in socially, psychologically, and otherwise important ways approval of non-heterosexual orientations and behaviors." See Defendant's Response to Plaintiffs' First Request for Answers to Interrogatories at 7 (Dec. 17, 1993), Baehr v. Lewin, Civ. No. 91-1394-05 (Haw. 1st Cir.).
invalidated under the Due Process Clause, the courts will be very busy indeed.\textsuperscript{302}

Is the state's interest in upholding moral beliefs sufficient to withstand strict scrutiny? This question is never clearly answered by case law (although, as I shall argue below, an answer is implicit in \textit{Loving v. Virginia}\textsuperscript{303}), and it has been thoughtfully debated by scholars. Some writers assert that the polity has an absolute right to enact whatever moralistic laws it deems appropriate. Thus, for example, Robert Bork condemns "the constitutionalizing of the notion that moral harm is not harm legislators are entitled to consider," because "[o]ne of the freedoms, the major freedom, of our kind of society is the freedom to choose to have a public morality."\textsuperscript{304} This argument is made more rigorously by Jed Rubenfeld's critique of the traditional defense of privacy rights that relies on "personhood," the freedom of self-definition. "[P]ersonhood," Rubenfeld observes,

seeks to protect the freedom of individuals to define themselves in contradistinction to the values of the society in which they happen to live. The premise of such freedom is an individualist understanding of human self-definition: a conception of self-definition as something that persons are, and should be, able to do apart from society.\textsuperscript{305}

As communitarian and republican theorists have recently been insisting,\textsuperscript{306} however, self-definition is a communal activity for at least some people, and intolerance of unorthodox identities may be an indispensable component of this activity.

In just those cases personhood considers most important, the individual identity sought to be protected can be seen as most clearly conflicting with the collective identity society seeks to maintain. On what ground can personhood uphold one person's right to define himself at the price of ignoring or even destroying an entire community's right to define itself?\textsuperscript{307}

If values of self-definition are equally at stake on both sides, then the judiciary ought to leave the weighing to the presumptively legitimate decisionmaker, the legislature. "Indeed, in such a balance, personhood would presumably weigh more heavily in favor of those ap-

\textsuperscript{302} \textit{Hardwick}, 478 U.S. at 196.
\textsuperscript{303} 388 U.S. 1 (1967).
\textsuperscript{305} Rubenfeld, supra note 284, at 761.
\textsuperscript{306} See generally, e.g., Alasdair MacIntyre, After Virtue: A Study in Moral Theory (2d ed. 1984); Michael Sandel, Liberalism and the Limits of Justice (1982).
\textsuperscript{307} Rubenfeld, supra note 284, at 763.
pealing to tradition in their self-definition, for the simple reason that there are likely to be more of them.\textsuperscript{308} In short, if autonomy and self-direction are valuable, as the traditional privacy argument insists, then moralistic legislation may be indispensable to the autonomy and self-direction of those who define themselves in terms of their communities.

Bork does not consider the relationship between moralistic legislation and the equal protection clause of the fourteenth amendment, and Rubenfeld does so only indirectly.\textsuperscript{309} The equal protection clause is relevant, however. It is not necessary to determine here whether the fourteenth amendment prohibits all moralistic legislation.\textsuperscript{310} It suffices that it must forbid some. The miscegenation prohibition, for example, was moralistic legislation. Moreover, it could not be condemned as irrational: it did accomplish what it sought to accomplish, and no less restrictive means appear to have been available to that end.\textsuperscript{311} But equal protection is not concerned only with means-end rationality. As Theodore Eisenberg has observed, the extreme emphasis on means-end rationality in contemporary equal protection jurisprudence has concealed the fact that certain ends cannot be pursued at all. The modern search for suspect classifications, fundamental interests, rational relationships, and underinclusiveness and overinclusiveness has overshadowed a more basic limitation: no matter how well-tailored a governmental act is to a governmental purpose, the relationship of act to purpose matters little if the objective itself is impermissible.\textsuperscript{312}

Some moral convictions derive their normative bite from a felt attachment to precisely those hierarchies based on ascriptive status that the fourteenth amendment forbids the state from promoting. "Wherever there is an ascendant class," John Stuart Mill wrote, "a large portion of the morality of the country emanates from its class interests and its feelings of class superiority."\textsuperscript{313} These moral convictions cannot justify otherwise impermissible state action. For the fourteenth amend-

\textsuperscript{308} Id. at 765.
\textsuperscript{309} Rubenfeld's main concern is not the subordination of groups, but totalitarian control over individuals. See generally id.
\textsuperscript{310} For a recent defense of the practice of using legislation to maintain a virtuous moral environment, see generally Robert P. George, Making Men Moral: Civil Liberties and Public Morality (1993).
\textsuperscript{311} The same is true of some sex-based classifications that the U.S. Supreme Court has invalidated. See notes 74-79 and accompanying text supra.
\textsuperscript{312} Theodore Eisenberg, Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication, 52 N.Y.U. L. Rev. 36, 99-100 (1977).
ment itself represents a moral conviction: that persons do not deserve to be, and should not be, stigmatized, discriminated against, or disadvantaged because of their race or sex. Some moral convictions hold the opposite of this: for example, that a person of inferior caste is morally obligated to defer to her betters. The fourteenth amendment cannot permit legislation based on this kind of moral conviction.\textsuperscript{314} On the contrary, the fourteenth amendment must hold that that conviction is wrong and evil, with no legitimate place in political decision-making. As we have seen, the contemporary homosexuality taboo is predicated on the assumption of male superiority, and it tends to reinforce that assumption. Laws that embody that taboo therefore deny some citizens equal protection.

\footnotesize{\textsuperscript{314} There are, of course, moral arguments against homosexual intercourse that do not rely on such considerations, but rather invoke the natural law tradition. That tradition is today of interest primarily to theologians and professors of philosophy, but it purports to rest on premises accessible to all. See, e.g., 2 Germain Grisez, The Way of Lord Jesus: Living a Christian Life 633-80 (1993); John M. Finnis, Law, Morality, and "Sexual Orientation," 69 Notre Dame L. Rev. 1049 (1994). It is impossible here to do justice to the substance of these arguments. I have criticized them elsewhere, see Andrew Koppelman, Homosexuality, Natural Law, and Morality (1994) (unpublished manuscript, on file with author), but this debate is beside the point here, because such arguments do not underlie the laws addressed here. The relation between scholarly moral philosophy and commonsense morality is always a complex one. Philosophers routinely refer to concepts and arguments that are specialized and unfamiliar, even when they are simply trying to account for ordinary moral intuitions. It is, however, unusually difficult to discern any continuity between them in this case. Popular condemnation of homosexuality appears to rest far less on the considerations adduced by Finnis and Grisez (whether in pure or popularized form) than on sexism, revealed religious dogma, and sheer prejudice. It is therefore incongruous to defend existing laws that discriminate against gays on natural law grounds, as Finnis has. Compare John Finnis, Disintegrity, New Republic, Nov. 15, 1993, at 12, 12-13 (reproducing testimony defending Colorado anti-gay rights amendment passed by voters) with Colorado For Family Values, Equal Rights—Not Special Rights! (1992) (pamphlet addressed to voters claiming, inter alia, that gays are not substantially disadvantaged by discrimination, that gays are child molesters, and that gay rights ordinances protect sexual intercourse in public places, would require businesses to construct separate bathrooms for gays, and would impose legal penalties upon churches that preach that homosexuality is wrong). See generally Gregory M. Herek, Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research, 1 L. & Sexuality 133 (1991) (cataloguing common, demonstrably false claims purporting to show that homosexuality is wrong). Moreover, the mainstream of the natural law tradition condemns not only homosexual intercourse but many practices that are not only permitted but constitutionally protected under modern American law. Among these are contraception, see Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965), abortion, see Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992); Roe v. Wade, 410 U.S. 113 (1973), and remarriage after divorce, see Zablocki v. Redhail, 434 U.S. 374 (1978). It is incoherent for law selectively to incorporate only those parts of the tradition that condemn homosexual conduct, while discarding everything in that teaching which displeases the heterosexual majority. Laws that discriminate against homosexuals cannot, in the modern United States, intelligibly be defended on such grounds.}
The disastrous implications of judicial deference to “moral convictions” about homosexuality can be shown by considering the best-known argument for such deference, which is made by John Hart Ely. As noted earlier,\textsuperscript{315} Ely aspires to develop a constitutional theory in which “the selection and accommodation of substantive values is left almost entirely to the political process”\textsuperscript{316} and judicial review is concerned solely with “what might capaciously be designated process writ large—with ensuring broad participation in the processes and distributions of government.”\textsuperscript{317} The basis of this concern about process is his theory of representative government, which requires

not simply that the representative would not sever his interests from those of a majority of his constituency but also that he would not sever a majority coalition’s interests from those of various minorities. Naturally that cannot mean that groups that constitute minorities of the population can never be treated less favorably than the rest, but it does preclude a refusal to \textit{represent} them, the denial to minorities of what Professor Dworkin has called “equal concern and respect in the design and administration of the political institutions that govern them.”\textsuperscript{318}

In order for the democratic process to function as it should, no citizen’s interests may “be left out of account or valued negatively in the lawmaking process.”\textsuperscript{319}

Ely notes two ways in which the legislative process may go wrong and require judicial correction. First, legislation that disadvantages a minority may be motivated by “a simple desire to disadvantage the minority in question.”\textsuperscript{320} Second, the legislation may reflect “prejudice,” which is “a lens that distorts reality” inasmuch as it “blinds us to overlapping interests that in fact exist.”\textsuperscript{321} He thinks, however, that all this is consistent with the right of the democratic majority to enact laws that discriminate against gays because it thinks that homosexuality is immoral.

This doesn’t mean that simply by incanting “immorality” a state can be permitted successfully to defend a law that \textit{in fact} was motivated by a desire simply to injure a disfavored group of persons. The legislature couldn’t, for example, outlaw the wearing of yarmulkes or dashikis and defend on the ground that it regards such conduct as immoral. The question here thus reduces to whether the claim is

\begin{itemize}
  \item \textsuperscript{315} See notes 112-13 and accompanying text supra.
  \item \textsuperscript{316} J. Ely, supra note 112, at 87.
  \item \textsuperscript{317} Id. (footnote omitted).
  \item \textsuperscript{318} Id. at 82 (quoting R. Dworkin, supra note 42, at 180) (footnotes omitted).
  \item \textsuperscript{319} Id. at 223 n.33.
  \item \textsuperscript{320} Id. at 147.
  \item \textsuperscript{321} Id. at 153.
\end{itemize}
credible that the prohibition in question was generated by a 
sincerely held moral objection to the act (or anything else that 
transcends a simple desire to injure the parties involved). It is tempting 
for those of us who oppose laws outlawing homosexual acts to try to 
parlay a negative answer out of the fact that, at least in the case of 
consenting adults, no one seems to be hurt in any tangible way, but 
on honest reflection that comes across as cheating.\footnote{322}

The emphases are mine, and they reveal the extent of Ely’s confusion.
He posits a rigid dichotomy: if a law “in fact was motivated by a de-
sire simply to injure a disfavored group of persons,” then the invoca-
tion of morality was disingenuous and deserves no consideration at all.
There are only two possible scenarios: bias and sincerity are mutually 
exclusive. But the example of miscegenation suffices to show that this 
dichotomy is false.

As Paul Brest has noted, antimiscegenation laws can equally be 
defended by invoking a bona fide feeling that miscegenation is immor-
al. “Automatically to exempt discriminatory legislation based on 
sincerely held moral beliefs ignores . . . the facility with which we find 
justifications, including the label of ‘immorality,’ for proscribing the 
behavior of a group, or the very existence of a group, we find threat-
ening.”\footnote{323} If this moral injunction is animated by a desire to injure 
blacks, it does so in a complex form: does that suffice to “transcend” 
the forbidden “simple desire”? Here is Ely’s response:

This . . . is a troubling criticism, but one that can be answered. As 
the Supreme Court has recognized, antimiscegenation laws were 
born of a desire to maintain White supremacy by keeping those of 
other races “in their place”—that is, away from the rest of us. 
Whatever objection one may have to laws proscribing homosexual 
acts, they cannot be responsibly thus characterized. I agree that 
such laws are stupid and cruel, but the claim that they respond to 
genuine revulsion with the act rather than constituting part of a gen-
eral attempt to isolate a minority is vastly more credible in the ho-
memosexual case. Indeed, as Professor Fickle has pointed out, laws 
against homosexuality—dramatically unlike laws against miscegena-
tion—are assimilationist, designed to “encourage people to join the 
majoritarian community.” One need hardly be a blinkered inter-
pretivist to suppose that the difference between a law that assimi-

\footnote{322} Id. at 256 n.92 (emphases added).

\footnote{323} Paul Brest, The Substance of Process, 42 Ohio St. L.J. 131, 135 (1981). For similar 
criticism, see Laurence H. Tribe, The Puzzling Persistence of Process-Based Constitutional 
Theories, 89 Yale L.J. 1063, 1076 & n.66 (1980).
lates and a law that segregates is one that is constitutionally relevant.\footnote{324}{John H. Ely, Professor Dworkin’s External/Personal Preference Distinction, 1983 Duke L.J. 959, 971 n.42 (citations omitted).}

Ely’s theory of judicial review is predicated on a theory of representative government that demands that all citizens “be represented in the sense that their interests are not to be left out of account or valued negatively in the lawmaking process.”\footnote{325}{J. Ely, supra note 112, at 223 n.33.} A law may improperly leave some citizens’ interests out of account or value them negatively even if it reflects sincerely held moral convictions. Ely, however, thinks, for reasons never set forth, that laws imposing such genuine convictions can never violate the Constitution. Ely is truest to his project of policing the decisionmaking process when he acknowledges that a moral injunction may be “part of a general attempt to isolate a minority.” He persists in his confusion, however, by posing this as an alternative to the possibility that antimiscegenation laws “respond to genuine revulsion with the act.” The two are not mutually exclusive. If “genuine revulsion” were sufficient to justify a law, then miscenagation laws would have to stand if (as appears to have been the case) southern whites weren’t lying about their feelings, but were sincerely horrified at the idea of sex between a black man and a white woman. Even miscenagation laws were “assimilationist” in that they sought to keep each race in its own proper place in the shared social order.\footnote{326}{See, e.g., Kinney v. Commonwealth, 71 Va. (30 Gratt.) 858 (1878): The purity of public morals, the moral and physical development of both races, and the highest advancement of our cherished southern civilization, under which two distinct races are to work out and accomplish the destiny to which the Almighty has assigned them on this continent—all require that they should be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion. Id. at 869.} There is, at least, room for argument whether laws outlawing homosexual acts “assimilate” or “segregate”: they assimilate gays into the heterosexual mainstream, but they also maintain a rigid boundary between masculine and feminine identity, which is part of a larger cultural system that devalues the latter.\footnote{327}{See Mary Becker, Strength in Diversity: Feminist Theories Approach Child Custody and Same-Sex Relationships, 23 Stetson L. Rev. 701, 733 (1994) (arguing that “forced integration of women and men in legally-sanctioned intimate relationships does not guarantee sexual equality,” but rather “coerce[s] women into economic, emotional and sexual dependence on men, thereby making their use of their majority status to achieve equality in the political system less likely”).}

The issue is not “whether or not to legislate morality,” but rather what kind of morality may be legislated. Certain moralities are tied to impermissible objectives; the Constitution forbids laws the purpose of
which is to promote these moralities. The legislation of morality sometimes imposes norms of caste: the post-Civil War Southern Black Codes which, for example, made it a crime for a black to be insolent or disrespectful toward a white;\textsuperscript{328} the slightly later laws against hiring a runaway servant;\textsuperscript{329} or miscegenation laws. These laws undeniably rested on powerful moral convictions. But those convictions were predicated on a world view which deemed some persons intrinsically less worthy of concern and respect than others on the basis of race or sex or both. The trouble was not with the fact that these laws legislated morality, but with the kind of morality that they legislated.

\textbf{Conclusion}

The bottom line to which our inquiry brings us is that the taboo against homosexuality reinforces the inequality of the sexes, and that is, at least in large part, why the taboo exists. From an antidiscrimination perspective, the problem with the prohibitions of both miscegenation and homosexuality is not that they interfere with individual liberty—the incest prohibition also interferes with sexual freedom—but the reasons for the interference. To say it once more: The equal respect that the state owes its citizens, and that the citizens owe one another, is incompatible with the idea that sexual penetration is a nasty, degrading violation of the self, and that there are some people (black women, or women simpliciter) to whom, because of their inferior social status, it is acceptable to do it, and others (white women, or men) who, because of their superior social status, must be rescued (or, if necessary, forcibly prevented) from having it done to them.

What this conclusion requires of legal doctrine should be clear by analogy with the miscegenation cases. Just as interracial couples cannot be made to suffer any legal disadvantage that same-race couples are spared, gay couples cannot be made to suffer any legal disadvantage that heterosexual couples are spared. Lesbians and gay men must be permitted to marry.\textsuperscript{330} Nonmarital sex cannot be more heav-


ily criminalized when it is homosexual than when it is heterosexual.\textsuperscript{331} Societal disapproval is not a permissible ground for denying custody of a child to a gay parent.\textsuperscript{332} In short, any state action that discriminates against lesbians and gay men solely because they are gay is impermissible.

The obligations of ordinary citizens should be equally clear. If there is a moral and civic duty to avoid being racist or sexist, to become aware of one's own unconscious racism and sexism, and to purge one's thinking and behavior of them, then this duty demands the destigmatization of miscegenation. This is because the miscegenation taboo rests on and reinforces both racism and sexism. The same duty, I have argued here, demands destigmatization of homosexuality. What is at issue in this dispute is not only the social status of homosexuality, but also the social meaning of heterosexuality. For far too long, heterosexuality has connoted the dominance of men over women. If our culture's devaluation of women is ever to be eliminated, then the homosexuality taboo, in which that devaluation is so deeply encoded, has got to go.

The Hawaii case will be worth watching. The state supreme court didn't conclusively decide that same-sex marriages are legal. It sent the case back to the trial court, holding that, under the state constitution's equal protection clause, the statute was "presumed to be unconstitutional" unless the State could show that the statute's sex-based classification is necessary to serve compelling state interests.\textsuperscript{333} It's not clear how the State can possibly satisfy that test—what bad thing is likely to happen if Hawaii recognizes same-sex marriage?—but it will be interesting to see it try. If Hawaii does become the first state to allow gays to marry, a second wave of litigation will follow all over the United States. As noted earlier, some states hold that marriages of residents performed in other states are good at home; others invalidate marriages performed when residents travel elsewhere just to avoid restrictions at home, and, in many states, the law is simply unclear.\textsuperscript{334} The issue should stay alive for years to come.\textsuperscript{335}

\textsuperscript{331} Cf. McLaughlin v. Florida, 379 U.S. 184 (1964) (invalidating statute prohibiting unmarried interracial couple from habitually living in and occupying same room at night).


\textsuperscript{333} Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993).

\textsuperscript{334} See note 14 and accompanying text supra.

\textsuperscript{335} It is, perhaps, not too early to predict that this will eventually create a distinctive body of case law in the conflict of laws, just as miscegenation did, and that this case law will eventually become obsolete as the invidious nature of the prohibition becomes clear. See Applebaum, supra note 89, at 55-56; Albert A. Ehrenzweig, Miscegenation in the Conflict of Laws: Law and Reason Versus The Restatement Second, 45 Cornell L.Q. 659 (1960).
I have argued here that reason and constitutional law demand that same-sex marriages be recognized. This is, however, far from being a prediction of the rule of decision that will ultimately prevail. The plaintiffs seem likely to win in Hawaii, but even there, it is impossible to say with any confidence how enduring that result is likely to be. The legal equality of blacks was guaranteed by the Constitution in plain terms after the Civil War, but for lack of political will it remained a dead letter for the next century. Gays could easily suffer a similar fate.336 Scholarly argument, of the kind presented here, is impotent without political struggle. Identifying the good guys is not a trivial task, but nor does its accomplishment ensure that the good guys will win.

The courts, of course, ought to ignore political pressure and do their job. The courage displayed by the Hawaii Supreme Court is rare and heartening. In the end, though, the gay rights question, like that of miscegenation, is both too important to leave to the judiciary and too big for the judiciary to resolve. If the real problem is that the stigmatization of gays is an instrument of illegitimate social control, then the judiciary alone, however courageous it may be, can't remedy that. All the judiciary can do here is what, as Ruth Bader Ginsburg writes, it has been doing in the sex discrimination cases: "functioning as an amplifier—sensitively responding to, and perhaps moderately accelerating, the pace of change, change toward shared participation by members of both sexes in our nation's economic and social life."337 Baehr is a useful step in that direction, as important for its educative

336 Gabriel Rotello's speculation about the possible consequences of the legalization of same-sex marriage in Hawaii, a step which might open the door to such legalization nationwide, deserves to be taken seriously:

At the very least it's likely that dozens of states, perhaps most, will seek to avoid Hawaii's fate by amending their constitutions to ban same-sex marriage. Conservatives in Congress, however, might not be satisfied with a piecemeal approach that leaves liberal states free to recognize gay marriages. Since the Constitution reserves marriage regulation to the states, the surest way effectively to ban same-sex marriage nationwide is to amend the Constitution.

Such a reaction might seem extreme, and thus extremely unlikely. But recall the hysteria of the gay/military debate and imagine that multiplied manyfold by the actual legalization of gay marriage in one U.S. state and the threat of its spread to others. In such a climate an amendment outlawing same-sex marriage would probably be supported by both parties and could conceivably sail through two-thirds of Congress and three-fourths of the states in record time.

Gabriel Rotello, Waikiki Wedding Bells Ring an Alarm, N.Y. Newsday, Apr. 14, 1994, at A52. For a similar prediction from the other end of the political spectrum, written in tones of hope rather than fear, see Hadley Arkes, Outflanking the Judges, Crisis, Jan. 1994, at 16-17.

effect as for its concrete result. It is important that it be generally understood that all of us, not only gays, have a personal stake in eliminating anti-gay prejudice. The sex discrimination argument for gay rights is a powerful one. We shouldn’t only be hearing it from the courts.

338 The argument resembles (and is in fact bound up with) the similar claim that men as well as women have a stake in eradicating sexism. See generally Koppelman, supra note 219.