

Homosexuality and the Constitution

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Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards. . . . Blackstone described "the infamous crime against nature" as an offense of "deeper malignity" than rape

—*Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring).

I'm going to make you my girlfriend.

—Mike Downey, *Fighting the War of Words*, L.A. TIMES, June 19, 1991, at C1, C9 (quoting then-heavyweight champion, Mike Tyson, to his challenger Razor Ruddock).

INTRODUCTION

Unexpectedly, discrimination on the basis of sexual orientation has become one of the most important equality issues of the 1990's. The development is unexpected because *Bowers v. Hardwick*,¹ the Georgia sodomy case, had been thought to resolve most of the issues as a matter of constitutional law. But, a range of new questions has emerged.

What if a state adopts a constitutional prohibition on laws forbidding discrimination on the basis of sexual orientation?² To say the least, this issue is not squarely covered by *Bowers*. Or suppose that homosexuals are excluded from federal employment, whether in the military or elsewhere. *Bowers* was decided under the Due Process Clause, not the Equal Protection Clause, and did not involve discrimination at all. Perhaps most discrimination on the basis of sexual orientation is irrational in the constitutional sense; perhaps discrimination on the basis of sexual orientation should be subjected to special judicial scrutiny.

My goal in this Article is to set out and evaluate a range of constitutional arguments involving discrimination on the basis of sexual orientation. I devote special attention to what seems to me to be the most interesting and powerful argument, that discrimination on the basis of sexual orientation is a form of discrimination on the basis of sex. At the same time, I suggest that the judicial role is properly limited in this context, especially because of a need to limit the clash between public judgments and judicial judgments in so

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1. 478 U.S. 186 (1986) (upholding a homosexual's criminal conviction for sodomy).

2. See Craig C. Burke, Note, *Fencing Out Politically Unpopular Groups from the Normal Political Processes: The Equal Protection Concerns of Colorado Amendment Two*, 69 IND. L.J. 275 (1993).

sensitive an area. I therefore argue for the narrowest and most incremental of the judicial possibilities. In all likelihood, laws against homosexual orientation and behavior will soon come to be seen as products of unfounded prejudice and hostility, and private prejudice and hostility will themselves recede. Courts should play a limited if perhaps catalytic role in this process.

This Article consists of three parts. Part I discusses a wide range of constitutional claims in the context of homosexuality. Part II sets out an anticaste principle, designed to help explain why and when sex discrimination is constitutionally illegitimate. I spend a fair amount of space on the appropriate conception of sex discrimination. This subject is both of considerable interest in its own right and of great importance to an understanding of the issue of sexual orientation. Part III then connects the legal attack on gender caste with the issue of same-sex relations. Here, I explore the possibility that bans on same-sex relations are a form of sex discrimination and therefore constitutionally unacceptable. Part IV discusses the properly limited role of courts under the Constitution and indicates how judicial limitations might bear on the judicial role with respect to laws that disadvantage homosexuals. It also suggests that these limitations apply, though to a lesser degree, to the President and all others charged with constitutional interpretation.

My conclusion is that it is important both to have a firm sense of the constitutional principle that dooms discrimination on the basis of sexual orientation, and to insist on that principle. But in the implementation of the principle, it is necessary for courts to be cautious and selective. Caution about issues of implementation should not be taken to suggest ambivalence about the principle itself. Abraham Lincoln's approach to the issue of slavery provides a model in this regard.

I. CONSTITUTIONAL POSSIBILITIES

In applying the Constitution to issues involving homosexuality, there is a range of options. I discuss them briefly here.

A. Privacy

It is perhaps most tempting to apply the right of privacy—a form of “substantive due process”—to sexual autonomy in homosexual relations. As a practical matter, however, this route has been foreclosed by *Bowers*. *Bowers* is of course much maligned. But for at least two reasons, the outcome in that case has at least a degree of plausibility.

First, any form of substantive due process has controversial foundations as a matter of text and history.³ It is unclear, to some reasonable people, that substantive due process deserves much life as a basis for invalidating legislation, except perhaps in egregious cases. Second, any constitutional

3. See JOHN H. ELY, DEMOCRACY AND DISTRUST 15-18 (1980).

“privacy” rights usually are rooted in Anglo-American traditions, which often have refused to recognize the legitimacy of homosexuality. If the Due Process Clause creates substantive rights largely because of tradition,⁴ the privacy claim in *Bowers* was highly vulnerable.

Perhaps these are largely technical difficulties. Substantive due process is well-established in some privacy cases, and perhaps the relevant tradition should be read at a sufficient level of abstraction to include consensual relations between homosexuals. But there are other problems as well. The fundamental problem for homosexuals is not well-described as a simple absence of privacy. Homosexuals can disguise their sexual orientation. The “closet” can furnish a degree of privacy. But the possibility of disguise is hardly a full solution to current problems. For this reason the emphasis on privacy rights seems to misconceive the basic issue. The lack of privacy against public and private intrusion is certainly one problem, but it is a problem primarily because of deeper problems of discrimination. A resort to rights of privacy is therefore a misleading or, at least, an incomplete foundation for constitutional law in this area.

B. Equality and Irrationality

1. Equality in General

Because the Equal Protection Clause was designed as an attack on traditions, it is a far more promising source of new constitutional doctrine than the right to privacy. Most generally, the Due Process Clause is associated with the protection of traditionally respected rights from novel or short-term change.⁵ It is largely Burkean and backward-looking. By contrast, the Equal Protection Clause is self-consciously directed against traditional practices. It was designed to counteract practices that were time-honored and expected to endure. It is based on a norm of equality that operates as a critique of past practices.⁶ Because opposition to homosexuality has deep historical roots,⁷ the Equal Protection Clause is the more sensible source of constitutional doctrine.

4. See Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1170-74 (1988).

5. *Id.* at 1170.

6. See *id.* at 1174-75.

7. There is some dispute, however, about the depth and length of the roots. See generally JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE AND SEXUALITY* (1980); JOHN BOSWELL, *SAME-SEX UNIONS IN PREMODERN EUROPE* (1994); K.J. DOVER, *GREEK HOMOSEXUALITY*, (Harv. Univ. Press 1989) (1978).

2. Equality and Rationality

Under the Equal Protection Clause, the Supreme Court has invalidated certain forms of discrimination on the ground that they are irrational or unconnected with any legitimate public purpose.⁸ This idea is connected with an interesting conception of democracy: the distribution of benefits or the imposition of burdens must reflect a conception of the public good. The Court has also disqualified, as justifications of legislation, certain ideas on the ground that they reflect "prejudice" or "hostility." A statute based on "prejudice" cannot qualify as rational.⁹

We should think of the category of "prejudice" as a placeholder for a complex moral argument; the term is usually a conclusion masquerading as an analytic device. But in some important cases, lower federal courts have said that discrimination on the basis of sexual orientation can indeed be irrational because it is a simple product of prejudice or irrational fear. Thus, for example, some courts have said that the exclusion from the military of people with homosexual "orientation"—unaccompanied by homosexual acts—is irrational and therefore unconstitutional under the Equal Protection Clause.¹⁰

In the important ruling in *Steffan v. Aspin*,¹¹ the Court of Appeals for the District of Columbia Circuit held that it was irrational to exclude from military service people of homosexual orientation, short of a demonstration of homosexual conduct. In the court's view, homosexual orientation alone was not a legitimate basis for discharge because it was unconnected with any plausible government interest. The court did not address the question whether homosexual conduct could be a basis for discharge. Two district courts reached the same conclusion, finding exclusion from the military to be unconnected with any legitimate public goal.¹²

These cases represent an unusual step in the law. The legislature is usually given the benefit of every doubt against claims of irrationality because judges lack factfinding capacity and a democratic pedigree.¹³ Moreover, discrimination on the basis of sexual orientation is based on widespread moral convictions and debated empirical claims. Some people think that homosexual conduct is immoral, though it is not clear what status this argument should have. Others think that sexual orientation is often chosen, not a product of genetics or early family influence, and that the state can therefore channel people toward heterosexuality.

In part because of its modesty, the use of rationality review is quite promising, even if it is inventive. I cannot fully resolve the rationality issue here but must restrict myself to three notes. First, the Supreme Court has been

8. See, e.g., *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

9. See *id.* at 450.

10. E.g., *Steffan v. Aspin*, 8 F.3d 57, 70 (D.C. Cir. 1993), *vacated*, 1994 U.S. App. LEXIS 9977 (D.C. Cir. Jan. 7, 1994); *Dahl v. Secretary of the United States Navy*, 830 F. Supp. 1319, 1337 (E.D. Cal. 1993); *Meinhold v. United States Dep't of Defense*, 808 F. Supp. 1453, 1455 (C.D. Cal. 1993).

11. *Steffan*, 8 F.3d 57.

12. *Dahl*, 830 F. Supp. 1319; *Meinhold*, 808 F. Supp. 1453.

13. See *Dahl*, 830 F. Supp. at 1326.

highly reluctant to invalidate laws on grounds of irrationality, identifying that notion with a kind of legislative absurdity. The Court is understandably loathe to attribute absurdity to a legislature.

Second, the idea of irrationality really depends on a judgment that the grounds lying behind legislation are objectionable or invidious. It is not easy to explain why the judgments that underlie discrimination on the basis of sexual orientation are invidious; to make that claim, we have to make a moral argument about liberty and equality, one that opposes other moral arguments. The claim of irrationality disguises the necessary moral argument. While the claim of irrationality seems modest, it depends at bottom on relatively adventurous claims. Probably it can be said that discrimination on the basis of sexual orientation alone—unaccompanied by conduct—ought to be invalidated on rationality grounds. When conduct is at issue, the question is whether its punishment can be associated with legitimate social goals, unrelated to simple hostility or prejudice.

Third, the irrationality argument cannot be assessed in the abstract. It requires a close encounter with the particular government action at issue in various settings. Different forms of discrimination might be treated differently. Consider, for example, a ban on grade-school teaching by homosexuals. The ban should probably be struck down as irrational. If it is defended as a means of preventing child abuse, the state should have to show, with at least minimal plausibility, that a wholesale ban on employment is a reasonable means of protecting against the abuse of children. Child abuse can be treated as a separate crime, and there appears to be no evidence that homosexuals abuse children more than heterosexuals. For this reason, such a ban would be a good occasion for mildly aggressive rationality review and should probably be invalidated.

Compare various bans on military service by homosexuals or by “known” homosexuals. This is a harder case for a claim of irrationality, at least if courts stay with their usual posture of extreme deference. Perhaps homosexual relations would have adverse effects on military morale; perhaps the existence of known homosexual soldiers would undermine recruitment; perhaps the interest in privacy is sufficient to protect young soldiers from serving in such close quarters with people of the same sex who might have a sexual interest in them. To be sure, it is not easy to separate these interests from prejudice or hostility, and, in the military context, many of the grounds for discrimination are disturbingly close to those that have justified race segregation and the exclusion of women. But courts should undoubtedly be cautious in the military context in light of the high stakes, the possibility (even if slight) of disaster, and the complexity of the underlying facts, which are not well-suited to judicial resolution. One might therefore believe that the ban on homosexual service in the military should be presumed unconstitutional by Congress and the President, without also believing that federal courts should strike down the ban except perhaps in the most egregious cases.¹⁴

14. *Steffan* was probably an egregious case since it involved orientation alone.

Consider finally the interests that justify constitutional bans on laws discriminating on the basis of sexual orientation, or more dramatically, bans on same-sex marriages. The ban on same-sex marriages is not easy to support, especially in light of the possibility that the ban contributes to the AIDS crisis.¹⁵ Perhaps the ban could be justified as a means of restricting the benefits of marriage to relations that involve children. As stated, this justification is quite crude to say the least. Homosexuals can adopt children if the law permits, and, if the law permits, homosexuals may even have children with a biological connection to one parent. In any case, many heterosexual marriages do not involve children, because the couple cannot or does not want to have children. Moreover, the state does not prevent marriage by infertile couples, by fertile couples who choose not to have children, or by people too old to have children. The claim that marriage should be restricted to situations involving the potential to have biological offspring therefore seems weak. Nevertheless, it could survive rationality review. It is at least rational—in the technical sense—to say that marriage is reserved for cases in which children can potentially result from the married couple.

Alternatively, the state might say that it does not want to “advertise” that same-sex relations can be happy, healthy, and successful, and the grant of a marriage license would be an endorsement of a practice deserving at best neutrality and not approval. This argument is fragile as well. Whether same-sex relations are less happy and healthy than heterosexual relations— independent of public and private discrimination—is most unclear. Much the same might be said about interracial relations, and the possibility of less happiness in that context is not a reason for discrimination. On the other hand, if rationality review applies, almost any argument is good enough, so perhaps this would be sufficient to validate the ban on same-sex relations.

A final argument would rely on the widespread moral disapproval of same-sex relations. This argument was found sufficient in *Bowers v. Hardwick*,¹⁶ and perhaps it is sufficient here too. On the other hand, widespread moral disapproval is not always a legitimate basis for law; consider the bans on miscegenation or discrimination against the mentally retarded. The task for courts invoking irrationality in the context of same-sex marriages is to distinguish the contexts in which moral disapproval is legitimate from those in which it is not. But so long as ordinary rationality review applies, the state can almost certainly meet its burden at the present time. At least at the national level, the Supreme Court should be reluctant to invalidate the ban on same-sex relations on grounds of irrationality.

On the other hand, it is not at all clear that the state can invoke these arguments to justify constitutional barriers to forbidding discrimination on the basis of sexual orientation. This issue is addressed below.

15. See THOMAS J. PHILIPPSON & RICHARD A. POSNER, PRIVATE CHOICES, PUBLIC HEALTH 150 (1993).

16. *Bowers*, 478 U.S. 186, 196 (1986).

C. Equality and Suspect Classes

Perhaps it should be argued that discrimination on the basis of sexual orientation is analogous to discrimination on the basis of race or sex and therefore should be invalidated except in the rarest of circumstances. This is a highly plausible argument, though a great deal would have to be said in order to make it fully. The argument has also attracted some favorable attention from lower courts. In *Jantz v. Muci*,¹⁷ a district court held that discrimination on the basis of sexual orientation "is inherently suspect," and a panel of the Court of Appeals for the Ninth Circuit agreed, though its opinion was vacated.¹⁸

The Supreme Court has granted "heightened scrutiny" to laws that discriminate against certain identifiable groups likely to be at particular risk in the ordinary political process.¹⁹ When the Court grants heightened scrutiny, it is highly skeptical of legislation, and the burden of every doubt therefore operates on behalf of groups challenging the relevant laws.

In deciding whether to grant heightened scrutiny, the Supreme Court has not been altogether clear about its underlying rationale. The Court appears to have looked most carefully at the likelihood that the group in question will be subject to prejudice, the existence of past and present discrimination, and the group's lack of political power.²⁰ In this way, it has moved well beyond the defining case of discrimination against blacks to include discrimination against women, illegitimate children, and, at times, aliens.²¹ The Court has not yet decided how discrimination against homosexuals should be treated.

A brief overview of the traditional factors and of how they might apply in this context follows. It seems reasonable to think that discrimination on the basis of sexual orientation is especially likely to reflect prejudice (subject to the qualification above, noting that prejudice is a complex category, a placeholder for a moral argument). When government disadvantages homosexuals, it seems plausible to think that it will often do so because of an unreasoned or visceral belief in their sickness or inferiority, or because of sheer ignorance of relevant facts. In this way, discrimination on the basis of sexual orientation seems closely akin to discrimination on the basis of race and sex. In all of these settings, prejudice—understood as stereotypical thinking based on factual falsehoods and often rooted in simple hostility—is likely to account for discrimination.

17. 759 F. Supp. 1543, 1551 (D. Kan. 1991), *rev'd on other grounds*, 976 F.2d 623 (10th Cir. 1992).

18. *Watkins v. United States Army*, 847 F.2d 1329, 1349 (9th Cir. 1988), *withdrawn*, 875 F.2d 699 (9th Cir. 1989), *cert. denied*, 498 U.S. 957 (1990).

19. *See, e.g., City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989); *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *Craig v. Boren*, 429 U.S. 190 (1976).

20. *See Cleburne*, 473 U.S. at 442-45.

21. *See, e.g., Cleburne*, 473 U.S. at 440 (mentally retarded persons), *Jimenez v. Weinberger*, 417 U.S. 628 (1974) (illegitimate children); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (women); *Graham v. Richardson*, 403 U.S. 365 (1971) (aliens).

It seems clear too, that homosexuals have been and continue to be subject to public and private discrimination. For most of American history, disclosure of a homosexual orientation was grounds for inflicting serious social harms. Even today, homosexuals must often keep their orientation secret in order to be free from discrimination and even violence. In many sectors of the economy, homosexuals cannot easily obtain jobs if their sexual orientation is disclosed.²²

Homosexuals may well be politically powerless in the constitutionally relevant sense. They often have difficulty in making alliances with other groups by virtue of the existence of widespread prejudice and hostility directed against them. Precisely because they are often anonymous (that is, not known to be homosexual) and diffuse (that is, not tightly organized), they face large barriers to exerting adequate political influence.²³ For this reason, it is probably not decisive that homosexuality—unlike race and gender—can be concealed. The ability to conceal can actually make things worse from the standpoint of exercising political power. This problem, severe in itself, is heightened by the fact that people who challenge discrimination on the basis of sexual orientation are often “accused” of being homosexual themselves, which may have harmful consequences for their reputations.²⁴ The existence of widespread hostility against homosexuals can thus make it difficult for homosexuals and heterosexuals alike to speak out against this form of discrimination.

All of these arguments seem to fit both the facts and the law, but there are some real complexities here. One problem with the issue of “political powerlessness” is that relevant judgments are based not simply on facts about political influence, but also depend on some controversial and usually unarticulated claims about how much political power is appropriate for the group in question, and about the legitimacy of the usual bases for legislative judgments on matters affecting the group. The claim that a group is politically weak in the constitutional test is thus a product of some controversial, value-laden claims, which are not always brought to the surface.

For example, it might be thought that homosexuals have a good deal of political power, for they can influence elections, even elections of the President. But the same is true of blacks and women, both of whom can influence elections a great deal. The potentially large electoral influence of both of these groups does not exclude them from the category of groups entitled to particular protection against discrimination. The reason is that even if political influence can be wielded, prejudice in the constitutionally relevant sense is likely to operate in the political process against both blacks and

22. See LESBIANS, GAY MEN, AND THE LAW, 243-48 (William B. Rubenstein ed., 1993).

23. See Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 729-30 (1985).

24. I know of no study of this phenomenon, but substantial evidence suggests that it is widespread. Consider the fact that there has been serious debate over whether “marching in a gay parade” should be taken as evidence of homosexuality. See 139 CONG. REC. S6691, S6692 (daily ed. May 27, 1993) (remarks of Sen. Nunn) (regarding Representative Frank’s proposal concerning gay men and women in the armed forces); *id.* at S11211 (daily ed. Sept. 9, 1993) (committee report).

women. The category of political powerlessness looks like an inquiry into political science, but it really depends on some normative judgments about the legitimacy of the usual grounds for government action. To say that homosexuals are politically powerless, it is necessary to say that the usual grounds for discrimination are impermissible. This is not a claim about political power alone. The usual grounds may indeed be impermissible; my point here is only that this claim cannot be separated from the claim of insufficient political power.

The Supreme Court has sometimes said that it disfavors discrimination based on "immutable" characteristics, but this is a confusing claim.²⁵ In fact the emphasis on immutability has much obscured analysis. Homosexuality may or may not be immutable in the relevant sense; this is a sharply disputed issue as a simple matter of fact. Mutability, however, is not the decisive factor. For one thing, immutable characteristics are not an illegitimate basis for adverse governmental action. For example, blind people can be told not to drive. Even if there were a biological predisposition toward certain criminal behavior, we could surely punish that behavior so as to deter and stigmatize it. A biological predisposition to engage in certain conduct is thus not a basis for immunity from the criminal law if the underlying conduct can legitimately be punished. If homosexual conduct can legitimately be punished, it ought not to matter if it can be shown that homosexual orientation is produced by biology or early childhood experiences. So too, it should not matter, for Equal Protection purposes, if skin color or gender could be changed through new technology. After all, discrimination on the basis of race would not become acceptable if scientists developed a serum through which blacks could become white.

Immutability is neither a necessary nor a sufficient basis for treatment as a "suspect class." The real question is whether legislation disadvantaging the relevant group is peculiarly likely to rest on illegitimate grounds; heightened scrutiny is a way of testing whether it does. I do not think that on this count, discrimination against homosexuals is less troublesome than discrimination against blacks and women. But here too, any judgments turn on complex arguments.

From what I have said thus far, it seems reasonable to believe that discrimination against homosexuals should be subject to strict scrutiny. Despite its plausibility, however, the argument that homosexuals are entitled to special protection from discrimination is unlikely to be accepted by the Court that decided *Bowers*, and in any case perhaps we can build more narrowly on existing law.

25. See, e.g., *Frontiero*, 411 U.S. 677, 686-87.

D. Political Rights and Equality Rights

Some states have enacted or are considering constitutional amendments that would forbid laws prohibiting discrimination on the basis of sexual orientation. Colorado's Amendment Two, for example, says that no state law may ban discrimination against homosexuals.²⁶ Are these measures constitutional?

The constitutional challenge to such measures is quite different from the arguments described thus far. The challenge involves a claim about interference with protected rights, not merely about group status. In several cases, the Supreme Court has invalidated laws that seem to impose special political barriers to well-defined groups. Thus, in *Hunter v. Erickson*,²⁷ the Court invalidated an amendment to the Akron city charter barring the City Council from implementing any ordinance dealing with discrimination in housing without voter approval. This "explicitly racial classification treating racial housing matters differently from other racial and housing matters" involved the political process and could not survive strict scrutiny.²⁸ Similarly, in *Washington v. Seattle School District No. 1*,²⁹ the Court struck down a law forbidding any school board from requiring a student to attend a school other than the school geographically nearest the student's place of residence. According to the Court, governments may not restructure political processes "by explicitly using the racial nature of a decision to determine the decision-making process."³⁰

The Colorado Supreme Court built upon *Hunter* and *Washington*, suggesting that when a law imposes special barriers to political participation by "an identifiable group," there has been a violation of the Equal Protection Clause.³¹ But both of the United States Supreme Court precedents are distinguishable; they were written and understood as race cases. A statute that explicitly or implicitly allocates political benefits and burdens along racial lines should of course be presumed unconstitutional.³² By contrast, in the context of an amendment forbidding laws banning discrimination on grounds of sexual orientation, there is no racial issue. It could therefore be concluded that states may allocate their own internal authority as they like—imposing supermajority requirements in some cases or allowing state-level decisions or local autonomy in others—so long as race and sex discrimination are not involved. In general, this proposition seems unexceptionable.

Hunter and *Washington* would therefore have to be extended to invalidate any law that imposes distinctive political barriers not just to blacks but to other groups defined in certain terms. This step would be an innovation, but

26. Amendment 2 to COLO. CONST. art. II, § 2 (adopted Nov. 3, 1992).

27. 393 U.S. 385 (1969).

28. *Id.* at 389.

29. 458 U.S. 457 (1982).

30. *Id.* at 470 (emphasis in original).

31. *Evans v. Romer*, 854 P.2d 1270, 1273 (Colo.), cert. denied, 114 S. Ct. 419 (1993).

32. See Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 141.

it is not clear that it would be too broad. In fact, the Colorado Supreme Court relied on a United States Supreme Court case suggesting that special barriers are permissible when an "identifiable group" is not involved.³³ Perhaps we can read "identifiable group" to include not simply blacks but any group defined in terms of some characteristic that is not ordinarily a legitimate basis for the allocation of political authority. Perhaps the Court could say that, without reaching the question of whether discrimination against homosexuals is suspect and without saying that such discrimination is generally irrational, it will require powerful justifications for any law that imposes special democratic barriers to legislation protecting homosexuals from discrimination.³⁴

This is not a simple test; it remains to say exactly what sorts of democratic barriers are constitutionally suspect. But the test would have the beneficial characteristic of narrowness. Without deciding that discrimination on the basis of sexual orientation is generally suspect, or generally irrational, courts might well conclude that no state may impose special barriers to democratic deliberation about this subject. I suggest that though the precedents do not require this result, the Equal Protection Clause should forbid special constitutional barriers to laws that prohibit discrimination on the basis of sexual orientation.

E. Equality, Sex Discrimination, and Homosexuality

To approach the possibility of a link between discrimination on the basis of sex and discrimination on the basis of sexual orientation, consider Chief Justice Burger's striking concurrence in *Bowers*. There, the Chief Justice offered an approving reference to Blackstone's suggestion that sodomy is "an offense of 'deeper malignity than rape,' a heinous act, 'the very mention of which is a disgrace to human nature,' and 'a crime not fit to be named.'"³⁵ It might be worthwhile to linger for a moment over the suggestion that consensual sexual relations among men are of "deeper malignity than rape." How could this possibly be so? Why did both Blackstone and the Chief Justice think it worthwhile to compare the two crimes, and to assert the comparatively greater malignity of consensual sodomy?

I think that the answer closely links the problem of discrimination on the basis of sex with that of discrimination on the basis of sexual orientation. Rape has often seemed far less violative of human nature than sodomy, and this says a good deal about the character of sex discrimination and sex differences. Chief Justice Burger's comment inadvertently helps explain why *Loving v. Virginia*³⁶ is a good precedent for the subject under discussion. But

33. *Evans*, 854 P.2d at 1282 (citing *Gordon v. Lance*, 403 U.S. 1, 7 (1981)).

34. *Cf. Plyler v. Doe*, 457 U.S. 202 (1982) (finding that Texas' reasons for controlling resources were not substantial enough to sustain a law that would harm illegal aliens).

35. *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *215).

36. 388 U.S. 1 (1967).

to say this is to get a bit ahead of the story. Let me turn more generally, then, to the equality principle of the Fourteenth Amendment.

II. THE ANTICASTE PRINCIPLE

A. In General

At the origin, the central target of the Fourteenth Amendment was not irrational distinctions on the basis of race, but the system of racial caste.³⁷ For those who ratified the Civil War Amendments, the problem was that the law had contributed to a system of caste based on race, thought to be a morally irrelevant characteristic. Those who framed and ratified these amendments were aware that the system of racial hierarchy had often been attributed to nature. Thus, in the aftermath of the American Civil War, it was expressly urged, "God himself has set His seal of distinctive difference between the two races, and no human legislation can overrule the Divine decree."³⁸ In the same period, anti-discrimination law was thus challenged squarely on the ground that it put the two races in "*unnatural relation . . . to each other.*"³⁹ The Civil War Amendments were based on a wholesale rejection of the supposed naturalness of racial hierarchy. The hierarchy was thought to be a function not of natural difference but of law, most notably the law of slavery and the various measures that grew up in the aftermath of abolition. The animating purpose of the Civil War Amendments was an attack on racial caste.

We might similarly understand the problem of sex discrimination, to the extent that it is troublesome, as amounting to the creation of something like a system of caste, based on gender and often operating through law. That system, like the racial caste system and others as well, is often attributed to "nature" and "natural differences." Consider here John Stuart Mill's remarks:

But was there any domination which did not appear natural to those who possessed it? . . . So true is it that unnatural generally means only uncustomary, and that everything which is usual appears natural. The subjection of women to men being a universal custom, any departure from it quite naturally appears unnatural.⁴⁰

37. See Akhil R. Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124 (1992).

38. 2 CONG. REC. app. 3 (1874) (statement of Rep. Southard).

39. 3 CONG. REC. 983 (1875) (statement of Rep. Eldredge) (emphasis in original).

40. JOHN STUART MILL, *THE SUBJECTION OF WOMEN*, 13-14 (MIT Press 1970) (1869).

Compare this description of attitudes in prerevolutionary America:

So distinctive and so separated was the aristocracy from ordinary folk that many still thought the two groups represented two orders of being. . . . Ordinary people were thought to be different physically, and because of varying diets and living conditions, no doubt in many cases they were different. People often assumed that a handsome child, though apparently a commoner, had to be some gentleman's bastard offspring.

GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 27 (1991).

A principal feature of the caste system based on gender consists of law and social practices that translate women's sexual and reproductive capacities into a source of second-class citizenship.

In these circumstances, I suggest that building on the racial analogue, the appropriate equality principle in the area of sex equality is an opposition to caste. The legal objection should be understood as an effort to eliminate, in places large and small, the caste system rooted in gender. A law is therefore objectionable on grounds of sex equality if it contributes to a caste system in this way. The controlling principle to be vindicated through law is not that women must be treated "the same" as men, but that women must not be second-class citizens. As discussed below, there are important differences between the two points.

The concept of caste is by no means self-defining. I will have to offer a brief and inadequate account here, one that is designed to provide a preface to the discussion of discrimination on the basis of sexual orientation.⁴¹ Of course, I do not suggest that the caste-like features of all societies containing sex inequality are the same. Certainly the American system of sex discrimination is far less oppressive than most systems of racial and gender caste. But I do claim that the caste-like features are what justify social and legal concern.

The motivating idea behind an anticaste principle, broadly speaking Rawlsian in character, is that without very good reasons, social and legal structures ought not to turn differences that are irrelevant from the moral point of view into social disadvantages. They certainly should not be permitted to do so if the disadvantage is systemic. A difference is morally irrelevant if it has no relationship to individual entitlement or desert. Race and sex are certainly morally irrelevant characteristics in the sense that, in general, skin color and gender are not appropriate grounds for the distribution of social benefits and burdens. A systemic disadvantage is one that operates along standard and predictable lines in many important spheres of life and applies in realms that relate to basic participation as a citizen in a democracy. The anticaste principle means that, with respect to basic human capabilities and functionings, one group ought not to be systematically below another.⁴²

Self-respect and its social bases ought not to be distributed along the lines of race and gender.⁴³ An important aspect of a system of caste is that social practices produce a range of obstacles to the development of self-respect,

41. See generally CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* ch. 11 (1993) [hereinafter SUNSTEIN, *PARTIAL CONSTITUTION*]; Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994).

42. On capabilities and functioning, see generally AMARTYA SEN, *COMMODITIES AND CAPABILITIES* (1985); AMARTYA SEN, *INEQUALITY REEXAMINED* (1992); Martha Nussbaum, *Aristotelian Social Democracy*, in *LIBERALISM AND THE GOOD* 203 (R. Bruce Douglass et al. eds., 1990). I am adding to these discussions (1) a suggestion that in the context of gender, the problem lies in the particular fact that one group is systematically below another along the relevant dimensions, and (2) an explanation of how this situation is produced by social practices and law.

43. See JOHN RAWLS, *POLITICAL LIBERALISM* 82, 180 (1993).

largely because of the presence of the morally irrelevant characteristic that gives rise to caste status.

In the area of sex discrimination, the problem is usually this sort of systemic disadvantage. A social or biological difference has the effect of helping to subordinate members of the relevant group, not because of "nature," but because of social and legal practices. Prominent among these practices is the social and legal control of women's sexual and reproductive capacities. The resulting inequality occurs in multiple spheres and along multiple indices of social welfare: poverty, education, health, political power, employment, susceptibility to violence and crime, and many others.⁴⁴ This is the caste system to which the legal system should be responding.

Of course, courts face important limits in implementing the anticaste principle. Indeed, it may be because of these limits that judges have attempted not to attack caste itself, but mostly to eliminate race and sex distinctions—an attempt that overlaps with, but is not identical to, an effort to counteract caste-like features of current practice. In describing the anticaste principle, I am emphatically not describing what courts should do. Courts should be modest in assuming tasks for which they are poorly suited. There is a space between a constitutional principle and judicial activity; this space will be addressed below.

B. Are Women Different? Does It Matter If They Are?

We are now in a position to make some general observations about the important and vexing matter of sex "differences"; these will bear directly on the issues raised by homosexuality. It is often said that women and men are different and that the differences help both to explain and to justify existing social and legal inequality.⁴⁵ It is often claimed, for example, that women are different from men and that different treatment in law is therefore perfectly appropriate. Indeed, in many legal systems, including that in America, the basic social and legal question is: Are women different from men? If not, have they been treated similarly?⁴⁶

However widespread, this approach will not do. The question for decision is not whether there is a difference—often there certainly is—but whether the legal and social treatment of that difference can be adequately justified. Differences need not imply inequality and only some differences have that effect. When differences do produce inequality, it is a result of legal and social practices, not the result of differences alone. Since they are legal and

44. See generally JONI SEAGER & ANN OLSON, *WOMEN IN THE WORLD: AN INTERNATIONAL ATLAS* (1986); DEBBIE TAYLOR ET AL., *WOMEN: A WORLD REPORT* (1985).

45. For a recent example, see RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS* 269-82 (1992).

46. On how these questions are at work in American law, see generally CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987) [hereinafter MACKINNON, *FEMINISM UNMODIFIED*]; CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989) [hereinafter MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE*].

social, these practices might be altered even if the differences remain. In any case, inequality is not justified by the brute fact of difference.

An analogy may be helpful here. The problems faced by disabled people are not a function of disability "alone" (an almost impenetrable idea—what would current disabilities even mean in an entirely different world?) but instead result from the interaction between physical and mental capacities on the one hand and a set of human obstacles made by and for the able-bodied on the other. It is those obstacles, rather than the capacities taken as brute facts, that create a large part of what it means, socially speaking, to be disabled. "Nature" is quite irrelevant. It would be implausible, for example, to defend the construction of a building with stairs, and without means of access for those in wheelchairs, on the ground that those who need wheelchairs are "different." The question is whether it is acceptable, or just, to construct a building that excludes people who need another means of entry. That question may not be a simple one, but it cannot be answered simply by pointing to a difference. The same is true for sex.

We can go further. Differences between men and women—especially those involving sexuality and reproduction—are often said to explain sex inequality, indeed to be the origin of inequality. But it might be better to think that at least some such differences are an *outcome* of inequality or its product.⁴⁷ Certainly some and perhaps many of the relevant "real differences" between men and women exist only because of sex inequality. Differences in physical strength, for example, would certainly exist without inequality, but such differences as there now are undoubtedly have a good deal to do with differences in expectations, nutrition, and training. These differences cannot solely be attributed to women's sexual and reproductive capacities. Indeed, the degree of difference between men and women is notoriously variable across time and space. These variations are sufficient to show that what society attributes to nature is often a social product.

Even differences in desires, preferences, aspirations, and values are in significant part a function of society and even law—in particular of what these institutions do with sexuality and reproduction. Preferences are often adaptive to the status quo, and a status quo containing caste-like features based on sex will predictably affect the preferences of men and women in different ways. It will lead to distinctive processes of preference formation, inclining men and women in different directions in both the public and private spheres.

This point suggests that it is wrong to base sex discrimination policy only on what women currently "want."⁴⁸ Existing preferences may well be at least

47. See MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 46, at 32-45. I phrase the point tentatively because ultimately this is a historical question on which there is now insufficient evidence for firm judgments.

48. In the context of sex discrimination, see MILL, *supra* note 40, and MARY WOLSTONECRAFT, *A VINDICATION OF THE RIGHTS OF WOMAN*, (Carol H. Poston ed., 1975). See generally Martha Craven Nussbaum, *Shame, Separateness, and Political Unity*, in *ESSAYS ON ARISTOTLE'S ETHICS 395* (Amélia Oksenberg Rorty ed., 1980); Amartya Sen, *Rational Fools*, 6 *PHIL. & PUB. AFF.* 317 (1977); Cass R. Sunstein, *Preferences and Politics*, 20 *PHIL. & PUB. AFF.* 3 (1991).

partly an artifact of a discriminatory status quo. Of course, current views of both men and women bear on what society and government should do. But many of the sex differences that are said to justify inequality—physical, psychological, and others—are really a product of inequality. This is, of course, an empirical claim. In light of current knowledge, we cannot say precisely how much of sex difference is a product of law and society. But we know enough to suggest that nature is not responsible for all of the inequality that we see.

III. ON SEX DIFFERENCE AND SEXUAL ORIENTATION

I now examine the relationship between sex discrimination and discrimination on the basis of sexual orientation. As I have noted, the ban on same-sex marriages is not now thought to raise a problem of sex inequality under the American Constitution. But might the legal ban (and the social taboo) not be a product of a desire to maintain a system of gender hierarchy, a system that same-sex marriages tends to undermine by complicating traditional and still-influential ideas about the “natural difference” between men and women?

It is possible to argue that in terms of their purposes and effects, bans on same-sex marriage have very much the same connection to gender caste as bans on racial intermarriage have to racial caste.⁴⁹ I am speaking here of the real-world motivations for these bans, and I am assuming, as does current law, that impermissible motivations are fatal to legislation. The claim of neutrality may be implausible in this context for exactly the same reason that it was implausible in *Loving*.⁵⁰ To say this is not to say that the ban on same-sex marriages is necessarily unacceptable in all theoretically possible worlds. But here, the ban is like a literacy test motivated by a discriminatory purpose or a veteran's preference law designed to exclude women from employment.

A. A True Story⁵¹

In 1958, Richard Loving, a white man, and Mildred Jeter, a black woman, were married in the District of Columbia.⁵² Soon thereafter, they returned to their home in Virginia and were promptly indicted. Their crime was to have married in violation of Virginia's prohibition on interracial marriage. They pleaded guilty to the charge and were sentenced to a year in jail. The trial judge suspended the sentence on the condition that the Lovings leave Virginia and not return for twenty-five years. The judge said: “Almighty God creates the races white, black, yellow, malay and red, and he placed them on separate

49. See generally Andrew Koppelman, *The Miscegenation Analogy*, 98 YALE L.J. 145 (1988); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187; Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in BLOOD, BREAD, AND POETRY 23 (1986).

50. See discussion *infra* part III.A.

51. See Koppelman, *supra* note 49.

52. The idea that there is an analogy between the *Loving* case and cases involving the ban on same-sex relations has been well-discussed elsewhere. Versions of the argument are made in Koppelman, *supra* note 49 and Law, *supra* note 49. I am much indebted to those treatments here.

continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."⁵³

The Lovings challenged the anti-miscegenation law on constitutional grounds, claiming that the law deprived them of the "equal protection of the laws."⁵⁴ Thus was born the most aptly titled case in the entire history of American law, *Loving v. Virginia*.

The legal issues before the United States Supreme Court in *Loving* were relatively straightforward. In 1954, the Court had decided *Brown v. Board of Education*.⁵⁵ There, the Court emphasized that racial discrimination is constitutionally unacceptable and that "separate but equal" is not equal.⁵⁶ The *Brown* Court held that under the Constitution, the government could not discriminate against blacks. This was the issue in *Loving*: Was the ban on racial intermarriage a form of discrimination in the relevant sense?⁵⁷ On this question, there was sharp dispute. Virginia thought that the answer was "Clearly not."

Virginia's lawyers argued that anti-miscegenation laws punished whites and blacks equally. They claimed that there was no discrimination against blacks. The only relevant discrimination was against people who sought to participate in mixed marriages, and such people were racially diverse. Unlike in *Brown*, where racial separation marked racial inequality, here separation was truly equal. Discrimination against people who seek to participate in mixed marriages is not "racial discrimination" at all. It does not draw a line between blacks and whites. It is a form of discrimination to be sure—but not the form that justifies special judicial skepticism under the Constitution. Because blacks and whites were treated exactly alike, that kind of skepticism was unwarranted.

From the standpoint of the 1990's, the argument may seem odd, even otherworldly. But if we linger over it, we will see that its logic is straightforward and even plausible. It is true that in an important way, laws forbidding interracial marriages treat blacks and whites alike. How did the Supreme Court respond? The key sentence in *Loving* says that "the racial classifications [at issue] must stand on their own justification, as measures designed to maintain White Supremacy."⁵⁸ This striking reference to White Supremacy—by a unanimous Court, capitalizing both words and speaking in these terms for the only time in the nation's history—was designed to get at

53. *Loving v. Virginia*, 388 U.S. 1, 3 (1967).

54. *Id.*

55. 347 U.S. 483 (1954).

56. *Id.* at 495. It should be noted that *Brown*, strictly speaking, was limited to the context of public school education. Later Supreme Court cases expanded upon *Brown* and found racial discrimination unconstitutional in other contexts. See, e.g., *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (per curiam) (public parks), *aff'g* 252 F.2d 122 (5th Cir. 1958); *Gayle v. Browder*, 352 U.S. 903 (per curiam) (buses), *aff'g* 142 F. Supp. 707 (D. Ala. 1956); *Holmes v. City of Atlanta*, 350 U.S. 879 (per curiam) (public golf courses), *vacating* 223 F.2d 93 (1955); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (per curiam) (public beaches), *aff'g* 220 F.2d 386 (4th Cir. 1955).

57. *Loving*, 388 U.S. at 2.

58. *Id.* at 11.

the core of Virginia's argument that discrimination on the basis of participation in mixed marriages was not discrimination on the basis of race.

The Supreme Court appeared to be making the following argument. Even though the ban on racial marriage treats blacks and whites alike—even though there is formal equality—the ban is transparently an effort to keep the races separate and, by so doing, to maintain the form and the conception of racial difference that are indispensable to White Supremacy. Viewed in context—in light of its actual motivations and its actual effects—the ban was thus part of a system of racial caste. Virginia really objected to racial intermixing because it would confound racial boundaries, thus defeating what the district judge saw as “natural” differences produced by God's plan. In a world with miscegenation, natural differences between blacks and whites would become unintelligible; the very word “miscegenation” would lose its meaning.

Indeed, in a world with racial mixing, it would be unclear who was really black and who was really white. The categories themselves would be unsettled—revealed to be a matter of convention rather than nature. In such a world, White Supremacy could not maintain itself. Because this was the assumption behind Virginia's law, the law stood revealed as an unacceptable violation of the Equal Protection principle.

B. A Hypothetical Story

Now let us imagine a hypothetical case. Two women seek to marry. They are prevented from doing so by a law forbidding same-sex marriage. They argue first that the relevant law violates their right to be free from sex discrimination. This seems to be a good strategic choice on their part. It is of course well-established that laws discriminating on the basis of sex will be subject to careful judicial scrutiny and will generally be invalidated.⁵⁹ By contrast, it also seems clear—at least for the time being—that laws discriminating on the basis of sexual orientation will be subject to deferential judicial scrutiny and will generally be validated.⁶⁰

Our hypothetical couple would therefore do very well to argue that they are subject to discrimination on the basis of sex, not sexual orientation. They might try to establish this argument by saying what seems clearly true, that if one of them were a man, there would be no barrier to the marriage. The law therefore seems to contain explicit discrimination on the basis of sex. It treats one person differently from another simply because of gender. It is therefore a form of sex discrimination.

This argument appears straightforward. Laws forbidding same-sex relations do involve an explicit gender classification. Under current law, however, the argument gets nowhere.⁶¹ The prohibition on same-sex marriage, it is said,

59. See, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-27 (1982).

60. The Court has not yet resolved this issue, however. Lower courts generally, though not unanimously, apply “rational basis” review of laws discriminating on the basis of sexual orientation.

61. This is true at least at the federal level. With respect to application of the argument at the state level, see *Bachr v. Lewin*, 852 P.2d 144 (Haw. 1993).

discriminates on the basis of sexual orientation rather than on the basis of sex. There is no sex discrimination because women and men are treated exactly the same. If a man wants to marry a man, he is barred; a woman seeking to marry a woman is barred in precisely the same way. For this reason, women and men are not treated differently. From this we see that the complaint in our hypothetical case is really about discrimination on the basis of sexual orientation, not about discrimination on the basis of sex. To the extent that discrimination on the basis of sexual orientation is subject to highly deferential "rational basis" review, resulting in the validation of most classifications, the barrier to same-sex marriages and relations is constitutionally acceptable.

This is indeed the answer offered by current constitutional law. Thus concluded the Supreme Court of Missouri as against an argument of this kind. According to the court:

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.⁶²

It will readily appear that this response is the same answer offered by the State of Virginia in the *Loving* case.⁶³ To the extent that *Loving* is now believed inapposite, it is because a law forbidding racial intermarriage is now seen as an effort to promote White Supremacy. The separation of the races, especially in matters of sexuality and marriage, was part and parcel of the subordination of blacks to whites. Undoubtedly, this separation was part of the creation of a fixed category of racial differences. No one really denies this. It seems clear that if racial mixing were common, no one would know who is black and white; indeed the categories would lose much of their meaning. (It even seems reasonably clear that issues of sex discrimination are at work in this context, since the availability of black women to white men was common, and since the miscegenation laws seem especially inspired by the effort to prevent black men from having relations with white women.) The effort to promote "white purity" was conspicuously intended to prevent the various results that would come about from racial mixing. The Supreme Court's reference to "White Supremacy" was thus both necessary and sufficient to defeat Virginia's argument, and it was readily shown that the miscegenation laws were connected to that constitutionally unacceptable social institution.⁶⁴

For participants in the current legal system, it is much harder to say that bans on same-sex relations are connected to a similarly unacceptable social

62. *State v. Walsh*, 713 S.W.2d 508, 510 (Mo. 1986) (en banc).

63. See Koppelman, *supra* note 49, at 149-50.

64. *Loving v. Virginia*, 388 U.S. 1, 7 (1967).

institution.⁶⁵ Exactly how is the prohibition on same-sex marriage an effort to promote sex inequality or even male supremacy? How can one have anything to do with the other? Racial intermarriage was objectionable because of its effects on racial differences (deemed natural and desirable), but thought (by the 1960's) to have social consequences only because of social institutions that produced a caste-like system based on race. Surely, it might be suggested, the question of same-sex relations raises no analogous issues.

I believe that it is puzzlement about such matters that accounts for the failure to see that *Loving* is a relevant or perhaps even decisive precedent for the view that the prohibition on same-sex relations is impermissible sex discrimination. In the end, however, *Loving* may well be an important precedent for protecting same-sex relations. Very briefly: A ban on racial intermarriage may well be part of an effort to insist that with respect to race there are just "two kinds." The separation of humanity into two rigidly defined kinds, white and black, is part of what White Supremacy means. Even though some people have darker skin color than others and even though genes do diverge, this separation is, in important respects, a social artifact. People's genetic composition is very complex; most so-called blacks have many white ancestors; the division of humanity into "blacks" and "whites" is hardly determined by genetics. To say that there are just "two kinds" of people, black and white, is not a simple report on the facts; it is instead the construction of a distinctive and unnecessary way of thinking about human beings. That distinctive way of thinking about human beings, to the extent that it is converted into action based on law, raises serious problems under the Equal Protection Clause.

It is tempting to think that the same cannot be said for the separation of humanity into two other kinds, women and men. Perhaps that separation is genuinely ordained by nature; perhaps it is not a social artifact at all, at least not in the same way. Certainly there are women and men, and certainly this fact, at least, is determined by genetics. Who would deny that the distinction between men and women is fundamental in this sense?

But perhaps this argument goes by too quickly. It is indeed true that some people are black, in the sense that they have African-American ancestors, and others are white, in the sense that they do not. Very plausibly, this is no less true, or less "factual," than the division of humanity into men and women. The question is what society does with these facts. It is possible to think that the prohibition on same-sex marriages, as part of the social and legal insistence on "two kinds," is as deeply connected with male supremacy as the prohibition on racial intermarriage is connected with White Supremacy. Perhaps same-sex marriages are banned because of what they do to—because of how they unsettle—gender categories. Perhaps same-sex marriages are

65. Note also that miscegenation laws attempt to keep blacks and whites apart, while bans on same-sex relations attempt to keep men and women together. If the argument below is correct, however, this difference does not make a difference, since the effort to keep blacks and whites apart was an effort to maintain a caste system based on race, just as the effort to keep men and women together is—by preventing same-sex relations—part of a system of sex-role stereotyping.

banned because they complicate traditional gender thinking, showing that the division of human beings into two simple kinds is part of sex-role stereotyping, however true it is that women and men are "different."

This is not merely a philosophical or sociological observation. It is highly relevant to the legal argument. It suggests that, like the ban on racial intermarriage, the ban on same-sex marriages may well be doomed by a constitutionally illegitimate purpose. The ban has everything to do with constitutionally unacceptable stereotypes about the appropriate roles of men and women.

Moreover, the ban may well have constitutionally unacceptable effects. It is part of a system of sex-role stereotyping that is damaging to men and women, heterosexual and homosexual alike, though in quite different ways. Indeed, one of the most interesting issues has to do with the distinctive ways in which the ban differentially harms heterosexual men, gay men, heterosexual women, and lesbians.⁶⁶

In this space, I will not be able fully to defend this thesis, on which much work remains to be done. Certainly the thesis is not belied by the fact that some "macho" cultures do not stigmatize male homosexuality as much as (say) the United States.⁶⁷ Even in such cultures, a sharp distinction is drawn between passivity and activity in sexual relations, and cultural understandings of passive and active operate in gendered terms.⁶⁸ Thus, the passive role is both stigmatized and identified with femininity, whereas the active role is socially respectable and identified with masculinity. In such cultures, sex-role distinctions have somewhat different manifestations, but sex discrimination is fully operative in thinking both about men and women and about sexuality.⁶⁹

My claim about the reasons behind the ban on same-sex marriages is in part an empirical one; and it has suggestive empirical support in psychological studies. For example, one social psychologist, capturing much of the general view, finds 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."⁷⁰ The evidence taken as a whole suggests that the prohibition on homosexual relations is best seen as an effort to insist on and to rigidify so-called natural difference, in part by crisply separating gender roles.⁷¹ This occurs largely by ensuring that there are firm and clear lines,

66. Cf. Rich, *supra* note 49 (arguing that anti-lesbian views not only stigmatize lesbians apart from other homosexuals but harm heterosexual women as well).

67. See RICHARD A. POSNER, *SEX AND REASON* 291 (1990).

68. *Id.* at 64-66, 157.

69. *Id.*

70. Koppelman, *supra* note 49, at 159 n.86 (citing A.P. MacDonald & Richard G. Games, *Some Characteristics of Those Who Hold Positive and Negative Attitudes Toward Homosexuals*, 1 J. HOMOSEXUALITY 9, 19 (1974)); see also Marc A. Fajer, *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, 617 (1992); Bernard E. Whitley, Jr., *The Relationship of Sex-Role Orientation to Heterosexuals' Attitudes Toward Homosexuals*, 17 SEX ROLES 103 (1987) (examining the relationship between traditional sex-role beliefs, sex-role self-concept, and sex-role behavior pattern on the one hand and attitudes toward homosexuals on the other).

71. Koppelman, *supra* note 49, at 159 n.86.

defined in terms of gender and having what are believed to be necessary social consequences, about sexual (and social) activity, as opposed to sexual (and social) receptivity or passivity. The definition of men as essentially active in social and sexual arenas, and of women as essentially passive in both places, helps undergird sex inequality. I am speculating that it simultaneously helps account for the prohibition of same-sex relations. The social opprobrium directed against homosexuals may well be an outgrowth of the ways in which, for heterosexuals, the existence of homosexuality draws into question familiar ideas about the sex difference.

There are important distinctions here between the reasons that underlie the stigmatization of, or the prohibition on, male homosexual relations on the one hand and those that account for bans on female homosexual relations on the other. The evidence suggests that the social opprobrium against male homosexuality comes largely from the perceived unnaturalness of male passivity in sex.⁷² The male heterosexual opposition to male homosexuality stems largely from the desire to stigmatize male sexual passivity. We might speculate that subjection to sexual aggression of this kind is especially troublesome because, in a way, it turns men into women,⁷³ and in this way complicates ordinary views about the sex difference.

Thus, it is a familiar part of violent male encounters that the victim will be feminized, as in the boxer Mike Tyson's remark to challenger Donovan "Razor" Ruddock: "I'm going to make you my girlfriend."⁷⁴ I suggest that far from being an oddity, this comment says something deeply revealing about the relationship between same-sex relations and the system of caste based on gender.

Again speaking speculatively, the ban on lesbian relations appears to stem from quite different concerns.⁷⁵ Part of the purpose of such bans may be to ensure that women are sexually available to men;⁷⁶ the institution of lesbianism has been problematic partly for this reason. Another part of the concern may be the fact that lesbianism also complicates gender difference by creating a sexually active role for women,⁷⁷ one that also undermines existing conceptions of natural difference. It is for this reason familiar to see that socially active women are stigmatized as lesbians. Indeed, a charge of lesbianism is a standard delegitimizing device operating against women who have assumed stereotypically male social roles.⁷⁸ There is thus a close connection between sex inequality and the prohibition on lesbianism.

I am inclined to think that considerations of this sort may help to maintain the legal and social taboo on homosexuality, in a way that might well be damaging to both men and women, heterosexual and homosexual alike, though

72. See Fajer, *supra* note 70, at 623-24.

73. Cf. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 46.

74. Mike Downey, *Fighting the War of Words*, L.A. TIMES, June 19, 1991, at C1, C9.

75. See Rich, *supra* note 49, at 36-37.

76. See *id.* at 36.

77. See *id.*

78. See MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 46, at 122 ("[W]omen athletes are routinely accused, explicitly or implicitly, of being lesbian.")

of course in very different ways and to quite different degrees. The distinction between the rigid categories "male" and "female," with the accompanying social and sexual traits "active" and "passive," has especially conspicuous harmful effects for gay men and lesbians. But for all of us, the categories and the traits are much too crude to account for social and sexual life when both of these are going well. For heterosexual women as well, the distinction can be highly damaging because it is rigidly confining and untrue to the complexity of their experience, even when their sexual attraction is directed to men. The damage is closely connected to the castelike features of the current system of gender relations. For heterosexual men, very much the same is true since a degree of passivity in society and in sexual relations is both an inevitable and a desirable part of life, and since it is such an unnecessary burden to be embarrassed by or ashamed of this.

These are speculative and brisk arguments. They might properly be questioned on the ground that they depend on social and psychological claims that are not obviously right, that they require far more support than provided here, or that they are too uncertain to warrant judicial endorsement. Certainly I have not provided the full defense that would be needed to translate this argument into constitutional law. But formal sex inequality is an explicit part of the ban on same-sex relations, and there is good reason to think that formal inequality stems from impermissible sex-role stereotyping. While judges should probably not accept this argument today, it may ultimately be concluded, outside if not inside the courtroom, that the prohibition on same-sex relations is a form of discrimination on the basis of sex, just as the prohibition on miscegenation was a form of discrimination on the basis of race. Both prohibitions are invalid under the Equal Protection Clause.

IV. PRUDENCE AND CONSTITUTIONALISM: THE EXAMPLE OF ABRAHAM LINCOLN⁷⁹

Abraham Lincoln always insisted that slavery was wrong. On the basic principle, Lincoln allowed no compromises. No justification was available for chattel slavery. But on the question of means, Lincoln was quite equivocal—flexible, strategic, open to compromise, aware of doubt. The fact that slavery was wrong did not mean that it had to be eliminated immediately, or that blacks and whites had to be placed immediately on a plane of equality. In Lincoln's view, the feeling of "the great mass of white people" would not permit this result.⁸⁰ In his most striking formulation, he declared: "Whether this feeling accords with justice and sound judgment, is not the sole question, if indeed, it is any part of it. A universal feeling, whether well or ill-founded, can not be safely disregarded."⁸¹

79. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 64-68 (1962); HARRY V. JAFFA, *CRISIS OF A HOUSE DIVIDED* (1959).

80. BICKEL, *supra* note 79, at 66 (quoting Abraham Lincoln, speech at Peoria, Illinois (Oct. 16, 1854), in 2 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 256 (Roy P. Basler ed., 1953)).

81. *Id.*

In Lincoln's view, efforts to create immediate social change in this especially sensitive area could have unintended consequences or backfire, even if those efforts were founded on entirely sound principle. It was necessary first to educate people about the reasons for the change. Passions had to be cooled. Important interests had to be accommodated or persuaded to join the cause. Issues of timing were crucial. Critics had to be heard and respected. For Lincoln, rigidity about the principle would always be combined with caution about introducing the means by which the just outcome would be achieved. For this reason, it is a mistake to see Lincoln's caution about abolition as indicating uncertainty about the underlying principle. But it is equally mistaken to think that Lincoln's certainty about the principle entailed immediate implementation of racial equality.

As Alexander Bickel has emphasized, the point is highly relevant to constitutional law, especially in the area of social reform.⁸² As it operates in the courts, constitutional law is a peculiar mixture of substantive theory and institutional constraint. The best substantive thinking might call, for example, for a vigorous and immediately vindicated anticaste principle, more aggressively counteracting race and sex inequality than has the Supreme Court. But because of institutional constraints, courts might be reluctant to vindicate that right or to enforce that principle. Constitutional rights might therefore be systematically underenforced by the judiciary for good institutional reasons.⁸³ Those reasons have to do with the courts' limited factfinding capacity, their weak democratic pedigree, their limited legitimacy, and their likely futility as frequent instigators of social reform.

To reach this conclusion in any particular area, we would of course have to spell out the substantive principle and the institutional constraints in some detail. But often there is plausibly a difference between the real extension of a constitutional principle and the judicial enforcement of that principle. There might therefore be some space or gap between what courts are (properly) willing to require and what the Constitution is (properly) interpreted to mean.

For instance, in the area of welfare rights, the point seems readily visible. Let us suppose (to be sure, very controversially) that the Constitution should be interpreted to create such rights in the form of minimum guarantees of subsistence, on the theory that the equal protection of the laws so requires.⁸⁴ Judicial enforcement of welfare rights might call for a difficult managerial role. Courts would have to oversee complex institutions in order to ensure vindication of the relevant rights. Because of the distinctive nature of the welfare problem, the creation of subsistence rights might have adverse effects on other programs with equally compelling claims to the public fisc. To say the least, courts are not well-positioned to see those adverse effects. The managerial role is one for which they are ill-suited. This point applies in many areas of social reform in which courts are asked to act.

82. *Id.* at 68.

83. Cf. Lawrence G. Sager, *The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

84. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1643-72 (2d. ed. 1988).

In the area of sex discrimination, such managerial issues are not necessarily present. Suppose, for example, that the ban on same-sex marriage is challenged on equal protection grounds. Here, ongoing judicial supervision of complex institutions is not really at issue. Nonetheless, there is reason for great caution on the part of the courts. An immediate judicial vindication of the principle could well jeopardize important interests. It could galvanize opposition. It could weaken the anti-discrimination movement itself. It could provoke more hostility and even violence against gays and lesbians. It could jeopardize the authority of the judiciary. It could well produce calls for a constitutional amendment to overturn the Supreme Court's decision.⁸⁵

At a minimum, courts should generally use their discretion over their dockets in order to limit the nature and the timing of relevant intrusions into the political process. Courts should also be reluctant to vindicate even good principles when the vindication would clearly compromise other important interests, including ultimately the principles themselves.

Consider, for example, the issue of abortion. Suppose we think that restrictions on abortion violate the right of privacy or (in an argument more congenial to that offered here) that such restrictions deny women the right to equal protection of the laws.⁸⁶ Is it therefore clear that *Roe v. Wade*⁸⁷ was rightly decided? Surely not. The precipitous vindication of the relevant principle might well have been a mistake.⁸⁸ Indeed, it is for this reason, and not because of any supposed abuse of interpretive authority, that *Roe* may have been wrong when initially decided.

It seems at least reasonable to think that the *Roe* decision prematurely committed the nation to a principle toward which it was in any case steadily moving, and that the premature judicial decision had a range of harmful consequences. These included the creation of the Moral Majority, the death of the Equal Rights Amendment, the galvanizing of general opposition to the women's movement, the identification of that movement with the single issue of abortion, the dampening of desirable political activity by women, and the general transformation of the political landscape in a way deeply damaging to women's interests.⁸⁹ This result suggests that even if discrimination on the basis of sexual orientation is often a violation of the Equal Protection Clause, courts should be cautious and selective in vindicating that principle.

In the area of homosexuality, we might make some distinctions. Certain imaginable rulings would minimally stretch judicial capacities and authority; other imaginable rulings would pose problems of judicial prudence in their

85. Compare the decision of the Hawaii Supreme Court in *Baehr v. Levin*, 852 P.2d 144 (Haw. 1993). An advantage of a federal system is that it allows successful experiments in constitutional law at the state level.

86. See SUNSTEIN, *PARTIAL CONSTITUTION*, *supra* note 41, at 270-85.

87. 410 U.S. 113 (1973).

88. I therefore agree with the controversial remarks on the abortion issue by then-Judge Ginsburg. See Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985).

89. Some of these claims are made in GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1992).

most severe form. For example, the argument I have explored here—for the proposition that same-sex relations and even same-sex marriages may not be banned consistently with the Equal Protection Clause—is, to say the least, quite adventurous. If the Supreme Court of the United States accepted the argument in 1995, or even in 1996 or 1997, it might cause a constitutional crisis, a weakening of the legitimacy of the Court, an intensifying of homophobia, a constitutional amendment overturning the Court's decision, and much more. Any Court, even one committed to the basic principle, should hesitate in the face of such prospects. It would be far better for the Court to start cautiously and to proceed incrementally.

The Supreme Court might, for example, accept the most narrow arguments, and reject or (better) avoid passing on the more general and intrusive ones. It might conclude that the Equal Protection Clause forbids state constitutional amendments that interfere with the attempts of ordinary democratic processes to outlaw discrimination on the basis of sexual orientation. The Court might say that such amendments do not merely discriminate on the basis of sexual orientation, but also disfavor a defined group in the political process in a way that involves issues of political equality.

Alternatively, the Supreme Court might say—as some lower courts have—that government cannot rationally discriminate against people of homosexual orientation without showing that those people have engaged in acts that harm a legitimate government interest. Courts could recognize that discrimination on the basis of orientation alone has the basic characteristics of a “status offense” disfavored in American law.⁹⁰ Despite its problems, “rationality” review might well be the best route here. Narrow rulings of this sort would allow room for public discussion and debate before obtaining a centralized national ruling that preempts ordinary political process over a moral issue about which society is in a state of evolution.

We can go further. Constitutional law is not only for the courts; it is for all public officials. The original understanding was that deliberation about the Constitution's meaning would be part of the function of the President and legislators as well. There was not supposed to be a judicial monopoly on that process.⁹¹ The post-Warren Court identification of the Constitution with the decisions of the Supreme Court has badly disserved the traditional American commitment to deliberative democracy. In that system, all officials, not only the judges, have a duty of fidelity to the founding document. And in that system, elected officials will have a degree of interpretive independence from the judiciary. They will sometimes fill the institutional gap created by the courts' lack of factfinding ability and policy-making competence.⁹² For this reason, they may conclude that practices are unconstitutional even if the Court would uphold them, or that practices are valid even if the Court would invalidate them. Lincoln is an important example here as well. Often, he

90. See, e.g., *Robinson v. California*, 370 U.S. 660 (1962).

91. See SUNSTEIN, *PARTIAL CONSTITUTION*, *supra* note 41, at 9.

92. See generally *id.* at 151-53 (urging that legislators should interpret the Constitution more broadly than courts).

invoked constitutional principles to challenge chattel slavery, even though the Supreme Court had rejected that reading of the Constitution.

Whatever the Supreme Court may say or do, it is therefore crucial for elected officials and even ordinary citizens to contend that discrimination on the basis of sexual orientation is incompatible with constitutional ideals. For example, the President has far more room to reach such conclusions than does the Court. But even a President determined to end such discrimination would not fare well if he insisted on immediate vindication of the principle. Instead, the President should be pragmatic and strategic. Following Lincoln's example, a President might insist, in all contexts, that this form of discrimination is wrong because it violates the most basic ideals of the Constitution. Indeed, it is both right and good for the President to show the connection between discrimination on the basis of sexual orientation and other forms of discrimination, most notably discrimination on the basis of sex.

In implementing the relevant principles, however, there is room for caution and care. Like the Supreme Court, the President and other officials can be selective about putting relevant issues on the agenda. Public officials might use especially egregious cases—involving, for example, discharge of qualified soldiers from the military, or discrimination against people with AIDS—to give weight to the principle in contexts in which it seems most acceptable. They can start slowly with the easiest areas. One of their major goals should be education. A relatively radical attack on the prohibition of same-sex marriages might come many years down the road, when the basic principle has been vindicated in many other less controversial contexts. But even if the principle is held firmly in view, and even if it is seen as part of a constitutional mandate, its vindication in American law and life need not be immediate—largely because an immediate insistence on principle would compromise so many other social goals, including those that underlie the principle itself.

CONCLUSION

In the 1990's, discrimination on the basis of sexual orientation promises to be one of the most important issues in constitutional law. Most of this discrimination is constitutionally troublesome in its own right because it is based on simple prejudice and hostility. There is even a connection between discrimination on the basis of sexual orientation and discrimination on the basis of sex. In the long run, I suspect, the ban on same-sex relations will be seen as having much the same relationship to male supremacy as did the ban on mixed marriages to White Supremacy. *Loving* is therefore a key case for those seeking to use the Constitution to counteract both sex discrimination and discrimination on the basis of sexual orientation.

This does not mean that current courts should require states to allow same-sex marriages. Under contemporary conditions, a judicial holding of this sort would probably be a large mistake, even though the basic principle is sound. It would be far better for courts to proceed slowly and incrementally. I have suggested that they should build on "rationality review" in the most egregious

cases and also invalidate measures that combine restrictions on the democratic process with discrimination. Broader rulings should be avoided. Elected officials, including the President, have somewhat more flexibility in carrying out their own independent constitutional responsibilities.

There is good reason to think that before terribly long, discrimination on the basis of sexual orientation will be seen as a product of unthinking prejudice and hostility, much like discrimination on the basis of race and gender. Courts can play a part in this process, requiring tangible justifications for the infliction of social harm, fortifying the process of democratic deliberation, and requiring genuine reason-giving in all cases of discrimination. But the judicial role, though important, is secondary. If discrimination against homosexuals is eventually to be seen—as I think that it should—to be inconsistent with constitutional principles, it will be the result of an extended process of deliberation, in which courts play an occasionally catalytic but far from decisive role.