ALSO BY THE AUTHOR

Dynamic Statutory Interpretation

The Case for SAME-SEX MARRIAGE

From Sexual Liberty to Civilized Commitment

WILLIAM N. ESKRIDGE, JR.

1996

THE FREE PRESS

New York London Toronto Sydney Tokyo Singapore

Will they? There is reason to doubt it. Indeed, it is the same reason advanced by Hawaii: antihomosexual sentiment. Despite fact, notwithstanding reason, and in spite of human need, judges who harbor such feelings or fear their backlash may not support same-sex marriage. Yet it only requires a few judges in one state to reverse the presumptions established by homophobia, and that state promises to be Hawaii. Chief Justice Ronald Moon and Associate Justices Steven Levinson and Paula Nakayama of the Hawaii Supreme Court have tentatively taken a position that cuts the Gordian knot. In the case brought by Ninia Baehr and Genora Dancel they have relied on a different equal protection argument to require the state to justify its discrimination. The next chapter explores their bold constitutional move.

6

THE CONSTITUTIONAL CASE: DISCRIMINATION

Loving v. Virginia,[1] the leading case for the right to marry, is mainly a discriminatory classification case.[a] Although *Loving*'s creation of an independent right to marry is directly applicable to state prohibitions of same-sex marriage, its race discrimination holding seems on its face inapplicable to the same-sex marriage issue. But is it? Both in the legal world and outside it, we make arguments by analogy. Those on one side argue, "How can we ban gay marriage if we don't ban marriage among transvestites or transsexuals?" Those on the other ask, "If gay marriage, then why not bigamy? Why not incestuous marriage?" This chapter explores the politically charged analogy of interracial marriage, like that in *Loving*, to gay marriage, like that in *Baehr*.

The history of Virginia's law prohibiting different-race marriage, including its downfall, bears on the state's prohibition of same-sex marriages. They are parallel histories. Those defending the prohibitions in both cases relied on arguments that deny marriage's social and contingent features. Specifically, the supporters of antimiscegenation statutes made the same kind of definitional and natural law arguments that supporters of statutes barring same-sex marriage now

[a]Chief Justice Warren's discussion of the right to marry is an alternative basis for the Court's disposition in *Loving*. The primary reasoning of the Court was that the Virginia antimiscegenation statute was an "invidious" racial classification that violated the equal protection clause of the Fourteenth Amendment because it was not justified by a compelling state interest.

make. *Loving* rejected all those arguments and exposed them as pretexts for a discriminatory race-based classification for which the state could advance no compelling interest. Following the Hawaii Supreme Court in *Baehr*, this chapter maintains that *Loving* can be applied to require the state to justify its discriminatory sex-based classification in statutes prohibiting same-sex marriage. *Loving* can also be extended to require the state to adduce a neutral justification for discriminatory sexual-orientation-based classifications such as the same-sex marriage bar.[b]

THE MISCEGENATION ANALOGY

Recall the recurring argument made by opponents of same-sex marriage, namely, that marriage *by definition* cannot include same-sex couples (chapters 4 and 5). To support this definitional argument, opponents cite historical practice, natural law's emphasis on procreation, and religious text and tradition. The strategy of opponents has been to essentialize the social institution of marriage around the concept of husband and wife. The same strategy was followed by opponents of different-race marriage, who essentialized marriage around the concept of racial purity. To support their definitional argument, opponents cited historical practice, natural law's abhorrence of procreative mixing, and religious text and tradition. And for almost all of American history, opponents prevailed. *Loving* was a rejection of this way of thinking, however. Its reasoning provides support for other challenges to natural law thinking about the legal institution of marriage.

American Antimiscegenation Laws

Few traditions are as pervasive in American legal history as laws prohibiting different-race marriages.[2] Virginia's antimiscegenation law was first adopted in 1691, its stated purpose being to prevent "abominable mixture and spurious issue."[3] This law was characteristic

[b]Chapter 5 demonstrates that the state cannot produce a compelling justification for prohibitions on same-sex marriage, and I shall not repeat that discussion here.

of those prevailing in the colonies before the Revolution. After independence, antimiscegenation laws were enacted at one time or another by thirty-eight states. The laws were viewed as recognition of a natural order, but a more directive purpose was also articulated. A Virginia juror said 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."[4]

The Civil War and the Reconstruction amendments to the Constitution did virtually nothing to undermine such laws. Although opponents of the Fourteenth Amendment charged that it would lead to interracial marriages, supporters of the amendment assured Congress that antimiscegenation laws would not be disturbed by the amendment's guarantee of "equal protection of the law" for African Americans.[5] Accordingly, few states repealed their laws after the Fourteenth Amendment was ratified, and antimiscegenation laws were a centerpiece of the Jim Crow regime of *de jure* segregation in the South after Reconstruction. Whites in both the North and South firmly opposed different-race marriage for reasons that were to them fundamental. Senator James Doolittle of Wisconsin put it most broadly, "By the laws of Massachusetts intermarriages between these races are forbidden as criminal. Why forbidden? Simply because natural instinct revolts at it as wrong."[6] Others rooted their opposition in the desire to "maintain the purity of white blood, [to] assure for it that natural superiority with which God had ennobled it."[7] Most opponents sooner or later invoked an argument that African Americans were genetically inferior and that different-race marriages would produce inferior children. The eugenics movement of the late nineteenth century provided scientific respectability for a view long defended by reference to the Bible and theories of white supremacy.[8]

Legal challenges to state antimiscegenation laws in the nineteenth century were uniformly rejected under both federal and state constitutions. State court decisions upholding antimiscegenation statutes emphasized the same religious and scientific arguments made in the social and political arenas. For example, the Georgia Supreme Court upheld its statute in part because "amalgamation of the races is . . . unnatural," yielding offspring who are "generally sickly and effeminate, and . . . inferior in physical development and strength, to the

full-blood of either race."[9] The court also rested its judgment on the view that

> equality [of the races] does not in fact exist and never can. The God of nature made it otherwise, and no human law can produce it, and no human tribunal can enforce it. There are gradations and classes throughout the universe. From the tallest arch angel in Heaven, down to the meanest reptile on earth, moral and social inequalities exist, and must continue to exist through all eternity.[10]

The Missouri Supreme Court went further to opine "as a well authenticated fact" that "if the issue of a black man and a white woman, and a white man and a black woman, intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites."[11] Such reasoning might seem bizarre to us today, but it was fully consistent with the mind-set of those opposing different-race marriage in the late nineteenth century.

The United States Supreme Court resolved the issue in favor of such laws, but on narrower grounds. The Court in *Pace v. Alabama*[12] held that antimiscegenation laws do not offend the equal protection clause because their prohibition applies equally to all races. That is, a black person is just as much constrained by such laws as a white person. Because both races are equally disadvantaged, the Court reasoned, there is no equal protection problem. *Pace*, decided in 1883, was a harbinger of the "separate but equal" philosophy offered by the Court later in *Plessy v. Ferguson*,[13] the decision upholding racial apartheid in general. *Pace* was the parent of *Plessy* in another way, for the popular appeal of segregation in housing, public accommodations, and schooling was based on white fear of interracial mixing and different-race marriage.

The early twentieth century saw the creation of more elaborate legal regimes to regulate different-race marriages. Virginia, for example, updated its antimiscegenation law in the Racial Integrity Act of 1924.[14] The new statute sought the same goal as the former one (avoiding "pollution" of the white race by interracial sexual relations) but sought to implement the policy more thoroughly. The 1924 law made it "unlawful for any white person in this State to marry any

save a white person" and set forth a definition of "white person" for purposes of Virginia law.[15] The law charged local registrars to keep on file certificates of "racial composition"[16] and marriage license officials to require verification of applicants' declarations as to their race.[17] Virginia law not only prohibited a "white person" from marrying someone other than a "white person" but made it a felony to do so; it also made it a felony to file an inaccurate statement of one's race.[18] Post-1924 Virginia law punished interracial couples with one to five years in the state penitentiary.[19]

The Decline and Fall of Antimiscegenation Laws

Pace and the eugenics craze pretty much ended challenges to antimiscegenation laws until after World War II. Thirty states had such laws at the war's end.[c] These laws were increasingly viewed as problematic, partly because of their similarity to the racist regime of the recently defeated Nazis. Added to this, the civil rights movement and its challenge to *de jure* racial segregation drew worldwide attention to American antimiscegenation laws. In his widely read book on American apartheid, Dr. Gunnar Myrdal observed in 1944 that "[t]he ban on interracial marriage has the highest place in the white man's rank order of social segregation and discrimination."[20] Ironically, African Americans did not target these laws as the primary object of legal reform, and two early postwar challenges were brought by couples who were Latino-Caucasian and Asian-Caucasian. Nevertheless, the judicial response to these postwar challenges was mixed. The California Supreme Court struck down its law in *Perez v. Lippold*,[21] while the Virginia Supreme Court upheld its statute in *Naim v. Naim*.[22] Invoking precedent from other states as well as its own policy of racial integrity, the Virginia Supreme Court held that "the natural law which forbids [the Naims'] intermarriage and the social amalgamation which leads to a corruption of the races is as clearly divine as that which imparted to them different natures."

---

[c] Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virgina, West Virginia, and Wyoming.

In the wake of its controversial decision in *Brown v. Board of Education*, the Warren Court left the divergent state resolutions alone in the 1950s. The Court did act decisively in the 1960s, after half the states had repealed their antimiscegenation laws. In *McLaughlin v. Florida* the Court applied the antidiscrimination principles of *Brown* to invalidate a statute criminalizing interracial cohabitation. Implicitly overruling *Pace*, the Court held that *any* classification based on race is an "invidious discrimination forbidden by the equal protection clause," unless it can be justified by some "overriding state purpose."[23] *McLaughlin* set the stage for the Warren Court's showdown with antimiscegenation laws.

Mildred Jeter and Richard Loving were convicted of violating Virginia's Racial Integrity Act in 1959. Their one-year prison sentence was suspended on condition that they leave Virginia, which they did. Later, the Lovings sought to have their conviction overturned in state court. Notwithstanding *McLaughlin*, they lost in the Virginia courts—for reasons straight out of the nineteenth century. Consistent with the Virginia Supreme Court's reasoning in *Naim*, the trial court held:[24]

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangements 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.

The Virginia Supreme Court adhered to its decision in *Naim*, where the court had held that the state must have the power "to regulate the marriage relation so that it shall not have a mongrel breed of citizens. We find there is no requirement that the State shall not legislate to prevent the obliteration of racial pride, but must prevent the corruption of blood even though it weaken or destroy the quality of its citizenship."[25]

The Lovings appealed to the United States Supreme Court. The Supreme Court unanimously reversed the Virginia ruling. Confirming that *McLaughlin* had overruled *Pace*, Chief Justice Warren's opinion held that race-based "classifications" of any kind require a "heavy burden" of state justification. The opinion also rejected the argument that the original intent of the Fourteenth Amendment's framers was

not to interfere with antimiscegenation laws. Although many such statements could be found in the historical record, such an intent was inconsistent with the "broader, organic purpose" of the amendment. In two sentences bursting with history, the chief justice concluded Part I of the opinion by summarily dismissing three centuries of Virginian public policy:[26]

> The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy. We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race.

Sixteen state antimiscegenation schemes were thereby constitutionally dissolved. Even though most Virginians and many Americans still do not like different-race marriages, thousands are performed each year in the United States, with no fuss.

The Implications of Loving *for Same-Sex Marriage*

The second part of the *Loving* decision, which recognizes that different-race couples have a fundamental right to marry, bears directly on the right of same-sex couples to marry. The first part of *Loving*, where the Court discusses issues of race discrimination, does not directly implicate same-sex marriage, but its logic is relevant to gay and lesbian challenges to state bars against same-sex marriage.

To begin with, *Loving* rejects defenses similar to those routinely advanced to deny same-sex marriage. For a hundred years definitional arguments had been accepted as sufficient legal justification for antimiscegenation laws. Virginia and other states maintained that different-race marriages are "unnatural"; contrary to American religious and legal traditions; and inconsistent with the overriding purpose of marriage, namely, procreation. The first two arguments are simply the same as those made by opponents of same-sex marriage. The procreation argument is slightly different. Opponents of same-sex marriage claim that same-sex couples cannot procreate whereas opponents of different-race marriage (with some exceptions, such as the Missouri Supreme Court's opinion, quoted earlier) admitted that

different-race couples can procreate but lamented the consequences. Both sets of opponents essentialize marriage around procreation and then exclude couples who cannot procreate in the desired way.

By rejecting these arguments *Loving* cautions us to think twice before we claim that marriage is "inherently" such and such. Neither history nor the Bible nor the imperative of procreation establishes what marriage *must* be, as a matter of law. Marriage is an important social and legal construction, and it is what we *make* it to be. In America marriage has been opened up to virtually any couple who want to take advantage of its legal benefits and obligations. There are few restrictions on who may marry, thanks in part to the Supreme Court decisions protecting the right to marry. Most of the restrictions, such as the bar to different-race marriage, are legally constructed practices reflecting divisive social prejudice rather than sound policy. *Loving* is at odds with the philosophy that historical pedigree alone justifies a dividing practice restricting who may enjoy state benefits. Many arrangements accepted as natural by the founding generation of our society are constitutionally unacceptable in today's world. Slavery and bans on interracial sexuality head the list, which also includes the exclusion of women from political citizenship and their economic and social inequality, the death penalty for sodomy, extraordinary penalties for adultery and fornication, bars against contraception and abortion, limits on who can serve on juries, and property or wealth requirements for voting and other rights of citizenship.

Loving not only rejects the definitional arguments but dismisses them as irrelevant. Although Chief Justice Warren could have cited social science literature (as he did in *Brown*) to refute Virginia's "mongrel race" assumption, he did not bother to do so. In the two sentences quoted earlier the Court noted that the statute only prevented Caucasians from marrying outside their race (Asian- and African-American citizens, for example, could marry one another). What this reasoning revealed was that the statute's goal boiled down to "White Supremacy," a goal that was not only uncompelling but confirmatory of the invidiousness of the racial discrimination effected by the law. What *Loving* rejects, therefore, is not just an essentialist view of marriage but a caste system and its philosophy of white supremacy.

I would read *Loving* in light of the history it reflects. Apartheid was a web of institutions reflecting a caste system in which whites were privileged and blacks subordinated. One institution key to apartheid was marriage, which was defined so as to avoid "pollution" of the white caste, and to prevent confusion as to the caste arrangement generally. As anthropologist Kingsley Davis put it in 1941, "either intermarriage must be strictly forbidden or racial caste abandoned."[27] Dissenting from the Court's sanction of separate-but-equal racial segregation in *Plessy*, Justice John Harlan had warned against the perpetuation of a "caste system" in the United States. "In respect of civil rights, all citizens are equal before the law," he said. *Brown* had adopted Justice Harlan's result. *Loving* adopted Justice Harlan's philosophy and extended it to strike down the dividing practice that was dearest to apartheid. This chapter argues that the state's prohibition of same-sex marriages reflects two related caste systems: an apartheid of the kitchen harmful to women and an apartheid of the closet harmful to gay people.

Either system can be understood as an invidious discrimination violating the constitutional guarantee of equal protection. In both *McLaughlin* and *Loving* the Court seized on the racial *classification* to discredit the states' argument that racial *classes* were being treated equally (whites were just as prohibited as blacks from different-sex marriages). A classification-based attack on bars to same-sex marriage is straightforward because the bars classify according to sex. I am a man. Therefore, I am barred from marrying another man while permitted to marry a woman. This is unequal. Sex-based classifications are subjected to heightened scrutiny under the United States Constitution and state constitutions. You do not get much more sex-based than heterosexual marriage. From another angle, the prohibition against same-sex marriage is even more discriminatory than the prohibition against different-race marriage. Even under *Pace* the states could not enact a law saying African Americans could not marry one another. Yet this is how current state law affects the class of so-called homosexuals: we cannot marry one another. I shall argue that sexual orientation classes should be given some level of constitutional protection against popular prejudice and for the same reasons race and gender classes are protected.

The sex-classification argument and the sexual-orientation-classification argument in this chapter are independent arguments under the equal protection clause. Either is sufficient to invalidate state prohibitions against same-sex marriage under either the national or state constitutions. I make both arguments, and they complement one another.

PROHIBITING SAME-SEX MARRIAGE AS SEX DISCRIMINATION

Relying on Washington State's equal rights amendment, lawyers for John Singer and Paul Barwick were the first to argue in court that the state's refusal to give marriage licenses to same-sex couples is sex discrimination. The state court of appeals rejected their argument in 1974.[28] For the next decade and a half the argument lay dormant, until Professors Sylvia Law and Andrew Koppelman revived it with more sophisticated (feminist) theory and analysis.[29] Ultimately speaking for a majority of the Hawaii Supreme Court, Justice Steven Levinson's opinion in *Baehr v. Lewin* adopted the Law–Koppelman argument as its interpretation of Hawaii's equal rights amendment.[30] The Hawaii court made the right decision, and its logic should be extended to other state constitutions and, ultimately, to the United States Constitution. This part of the chapter lays out the argument, develops a counterargument suggested by *Loving*, and responds to the counterargument.

Same-Sex Marriage Prohibitions Are Sex Discrimination

The state prohibition against same-sex marriage in *Baehr* is on its face sex discrimination in exactly the same way that the prohibition against different-race marriage was held to be race discrimination by *Loving*. In *Loving* a marriage between a *black* man and a black woman was legal, but one between a *white* man and a black woman was not. The only variable (the item that changed, in italics) was the race of one partner. *Loving* held that to be a classification-based race discrimination. In *Baehr* a marriage between a *man* and a woman was legal, but one between a *woman* and a woman was not. The only variable (the italicized term) was the sex of one partner. *Baehr* held that to be a classification-based sex discrimination.

Loving held that race-based discrimination is invidious and invalid unless justified by a compelling state interest. The Court did so by interpreting the equal protection clause of the Fourteenth Amendment. Although that amendment does not mention race as a classification meriting special attention, as an element of the Reconstruction amendments adopted after the Civil War it nonetheless clearly targets race-based classifications. The Hawaii court was applying Hawaii's equal rights amendment, which is more specific than the federal equal protection clause and reads as follows: "No person shall . . . 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."[31] Sixteen other state constitutions explicitly prohibit discrimination on the basis of sex.[d] It should be clear where I am heading.

How can one avoid the conclusion that a state bar against same-sex marriage is sex discrimination? Judges resisting this conclusion have argued that same-sex couples are denied marriage licenses because of the "recognized definition of marriage," and not because of their sex.[32] Not only is such a definitional argument factually wrong, but it is exactly the same kind of definitional argument Virginia made, and lost, in *Loving*. The Washington Court of Appeals decision denying relief to Singer and Barwick also offered this justification: "The [state] ERA does not create any new rights or responsibilities, such as the conceivable right of persons of the same sex to marry one another;

[d]Provisions similar to Hawaii's, where *sex* is specifically inserted into a broader equal protection clause, are Alaska Constitution, Article I, § 3 (*sex* added 1972); Connecticut Constitution, Article I, § 20 (added 1974); Illinois Constitution, Article I, § 17 (1970 revised constitution); Massachusetts Declaration of Rights, part I, Article I (added 1976); Montana Constitution, Article II, § 4 (1972 revised constitution); New Hampshire Constitution, part I, Article 2 (added 1974); Texas Constitution, Article I, § 3a (added 1972); Virginia Constitution, Article I, § 11 (added 1970); Wyoming Constitution, Article I, § 3 (1889 Constitution).

Some states have clauses specially protecting against sex discrimination, such as Colorado Constitution, Article II, § 29 (equal rights amendment added 1972): "Equality of rights under the law shall not be denied or abridged by the State . . . or any of its political subdivisions on account of sex." To the same effect are Illinois Constitution, Article I, § 8 (equal rights provision in 1970 revised constitution); Maryland Declaration of Rights, Article 46 (added 1972); New Mexico Constitution, Article II, § 18 (added 1972); Pennsylvania Constitution, Article I, § 28 (added 1971); Utah Constitution, Article IV, § 1 (1896 Constitution); Washington Constitution, Article 31, § 1 (added 1972).

rather, it merely insures that existing rights and responsibilities as may be created in the future, which previously might have been wholly or partially denied to one sex or to the other, will be equally available to members of either sex."[33] The same argument has been made by the Hawaii legislature in response to *Baehr*: "There is simply no class of individuals under [the marriage law] that have been discriminated against in relation to another group of similarly situated individuals. Because all men and all women are treated alike by [the marriage law], there is no sex- (i.e., gender-) based classification."[34] Yet this is precisely the form of argument that had been accepted in *Pace*, which upheld antimiscegenation laws because all "rights and responsibilities" of marriage were "equally available to members of either" race. Whites were barred from different-race marriages in the same manner as blacks. Just as *McLaughlin* and *Loving* overruled *Pace*, so these current precedents cannot be read for any other proposition than the one originally pressed by Singer and Barwick and now invoked by Ninia Baehr and Genora Dancel, namely, that the sex-based classification itself triggers the exacting judicial scrutiny.

Baehr is the correct approach to state equal rights amendments protecting against sex discrimination and ought to be followed in the sixteen other states having such amendments (see note d), as well as in the District of Columbia, which has an equal rights superstatute protecting against sex discrimination.[35] *Baehr*'s reasoning is also applicable to the federal equal protection clause and to analogous state clauses that do not mention "sex." In *Craig v. Boren* the United States Supreme Court interpreted the federal equal protection clause to require that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[36] The Court has repeatedly applied *Craig* to invalidate sex-based classifications, especially where "the statutory objective itself reflects archaic and stereotypic notions."[37] The only issue that remains open is whether sex-based classifications are as completely suspect as race-based classifications are.[38] However that issue is resolved, it is clear that any sex-based classification requires substantial justification under the federal equal protection clause, and state courts are at least as liberal when interpreting their general equal protection provisions.

In short, sex discrimination is now constitutionally questionable in every state and at the national level. As a result, we must carefully examine *all* laws that employ sex-based classifications. Such laws cannot survive constitutional scrutiny unless their defenders can adduce compelling reasons of social policy. Put another way, the burden of proof is now on *opponents* of same-sex marriage because the bar is a sex-based classification.

Must There Be a Link Between Classification and Class?

Baehr was correct to reject the old definition-of-marriage response to the *Loving* analogy, but there is a better objection: Is it not odd that constitutional protection against sex discrimination is invoked to protect gay people? Why should *gay men* benefit from a constitutional protection that is supposed to benefit *women*? The following is a legal way of putting the objection.

Loving holds that the state's use of a racial classification requires a compelling justification, but that holding is expressed in the context of the core purpose of the Fourteenth Amendment, namely, the rejection of a philosophy of white supremacy. In the context of that philosophy the racial classification was revealed to be sinister in a way *Pace* and later *Plessy* refused to recognize: The classification was part of a legal "caste system" subordinating African Americans and other racial groups. *Loving*, therefore, might be narrowly limited as a decision where a particularly invidious classification is used to suppress a group whose identity is defined by that classification. *Baehr* may not be a sex discrimination case in the same way *Loving* is a race discrimination case. The classification in *Baehr* is sex, but the class being disadvantaged is defined by sexual orientation (lesbians, gay men, bisexuals, and some transgendered people), not by sex (women). The philosophy that justifies their disadvantage is "compulsory heterosexuality," that is, the requirement that citizens be (or pretend to be) heterosexual. This may not be the quintessential sex discrimination case, where a sex-based classification disadvantages women on the basis of a philosophy of sexism.

This doctrinal argument parallels the commonsense objection. *Baehr* is not like the classic sex discrimination case because the

classification (sex) does not match up with the disadvantaged class (sexual orientation minorities). That match fails to occur because the disadvantage is the result of compulsory heterosexuality rather than sexism. *Baehr* is also unlike *Loving* for the same reason. Table 1 maps the differences among the cases.[e]

The argument in Table 1 is doctrinally oversimple in one dimension, the middle column (Disadvantaged Class). In *Loving*, for example, the immediately disadvantaged class is composed of people who fall in love with someone of another race. Such people are a minority among both whites and blacks. While African Americans may ultimately have been disadvantaged by the classification, many did not feel that way in 1967 and many do not feel that way now. Racial minorities were disadvantaged by the classification only by reasoning from the ideology (racism or white supremacy). Hence, the middle column in *Loving* reflects an indirect reasoning process rather than direct harm. The Equal Rights Amendment (ERA) line must be qualified in the same way by reference to *Craig v. Boren*, the case that established heightened scrutiny for sex-based classifications. In *Craig* the disadvantaged group was eighteen-to-twenty-one-year-old boys who were denied the right to buy low-alcohol beer, which eighteen-to-twenty-one-year-old girls enjoyed. Justice William Brennan's opinion for the Court emphasized that sex-based classifications ostensibly benefiting men are just as objectionable as those ostensibly benefiting women when they reflect "'archaic and overbroad generalizations'" about women or "outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas.'"[39] When sexist assumptions animate a sex-based classification and gender stereotypes are reinforced, women as a group suffer (at least indirectly). Again, the middle column only reflects indirect harm, deriving from the underlying philosophy (sexism) and not from the classification in a particular case (women can buy drinks earlier than men).

This subtler analysis of the miscegenation analogy leaves one question unanswered: Does constitutional doctrine disapproving sex-based classifications rooted in sexism apply to sex-based classifications rooted in compulsory heterosexuality? More simply, does the prohibition of same-sex marriage serve sexist goals? Professors Law and Koppelman have suggested reasons why it does.

[e] I developed Table 1 as a way of commenting on the Law–Koppelman thesis at a panel sponsored by the American Association of Law Schools in January 1995. Professors Law and Koppelman both responded to the doctrinal argument captured by Table 1. I consider their responses persuasive, and they are reflected in the discussion.

TABLE 1

	Classification	*Disadvantaged Class*	*Philosophy*
Loving	Race	Racial minorities	Racism
ERA	Sex	Women	Sexism
Baehr	Sex	Sexual orientation minorities	Compulsory heterosexuality

Homophobia as a Weapon of Sexism

There is no inevitable connection between the prohibition of same-sex marriage and sexism, as the history in chapter 2 illustrates. Embracing companionate marriage, medieval Christianity represented an advance in women's status, yet it was more (and increasingly) hostile to same-sex male unions than ancient Greece and imperial Rome were. Conversely, ancient Greece was severely sexist by modern standards yet tolerated same-sex unions, especially male unions. Some anthropologists view the African institution of woman marriage as reinforcing patriarchal stereotypes, because the "female husband" takes on the male role. Nonetheless, in the context of modern Western culture there is a strong connection between antihomosexual rules and sexism. Indeed, the construct of "the homosexual" is one modern response to gender equality.[40]

Western history has long stigmatized the "passive" partner in a same-sex male relationship on the ground that he was compromising his "superior" male identity by taking an "inferior" female role. In the modern era, starting no later than the eighteenth century for England, men who lusted after other men were stigmatized as "effeminate sodomites," whatever role they took in intercourse. This represented a historical transition from stigma because of acts to stigma because of

identity. The transition was completed in the late nineteenth century by the appearance of the construct of "the homosexual," the person defined by the new concept of "sexuality." This is the chronology generally accepted by historians of homosexuality. More speculative are the reasons why these cultural changes occurred.

Historian Randolph Trumbach maintains that the effeminate sodomite stigma came when and because "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" of women's equality.[41] Men reacted to this new equality by creating differently defined gender roles. Marriage became a secure refuge of the striving urban bourgeoisie. In a companionate relationship men and women were formally "equal" but functionally unequal. This was possible because their equality was conceptualized by considering each supreme in a separate but equal sphere, that is, men in the workplace and women in the home. This new middle-class equilibrium was necessarily temporary inasmuch as it became possible for women to be economically independent of men. Nineteenth-century feminists demanded not only personal equality for women but also political and social equality. Opponents of women's equality have traditionally argued that it would destroy the family and undermine the institution of marriage. Although still accepted in some quarters, these arguments slowly gave way to women's increasing political clout. As women made gains in politics and the marketplace, middle-class anxiety about gender and the family was displaced onto another object: the homosexual.

Homophobia became one way modern urban culture responded to women's political and social equality.[42] Nervous that their manhood was under seige from the "new woman" (Carroll Smith-Rosenberg's term) and from an increasingly hierarchical economic structure, middle-class men latched onto the class of male "inverts" or homosexuals as their object of special scorn. By setting up the male homosexual as the antithesis of the normal heterosexual, men were reassured of their own sexuality and virility. Power and satisfaction derived from classification and deviance. Homosexual men were threats to the idea of masculinity, for the possibility that a man could

"cross over" into roles and dress traditionally reserved for women impeached the supposed superiority of the masculine role. Although the focus on sexual deviation did not include lesbians at first (but did so by World War II), lesbians, too, came to be seen as threats to male virility: they were the apotheosis of men's fears about feminism, namely, women who had no need for men. The "effeminate man" and "mannish woman" became virtual synonyms in the twentieth century for the male homosexual and the lesbian.

This account is not a demonstrated thesis so much as a coherent hypothesis. Consider other sources of support for the hypothesis. Most feminists (at least among those I have read or talked to) believe that resistance to women's equality, by women as well as men, is associated with antihomosexual patterns of belief. For example, a popular reproach to feminists has long been that they are lesbians and that women's equality will lead to gay marriage and other affronts to family values.[43] Persuasive theories of feminist psychology maintain that the Western concept of masculinity is itself a psychological reaction to men's childhood anxieties about their relationship to their mother and a displacement of those anxieties. Feminized men and masculinized women become objects of intense hatred by men hoping to reaffirm a manhood about which they are deeply uncertain.[44]

Independent survey evidence supports the account given by historians of sexuality and these feminist theorists. Scholars have been studying male homophobia for a quarter century. Many studies emphasize a correlation between antihomosexual feelings and "a belief in the traditional family ideology, i.e., dominant father, submissive mother, and obedient children," as well as "traditional beliefs about women, e.g., that it is worse for a woman to tell dirty jokes than it is for a man."[45] A few studies claim a causal link: "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."[46] One study found a significant correlation between antihomosexual attitudes and one's own conformity to traditional gender roles.[47] Of course, these studies should be read cautiously. Most of them involved small or unrepresentative samples, and causal claims are always suspect.

The Kinsey Institute published an unusually thorough survey using sophisticated statistical analyses in 1989.[48] These researchers found a host of variables positively correlated with antihomosexual attitudes. They were able to map a complicated array of factors associated with those attitudes, and their model employed regression analysis that permitted them to sort out causal from simply associated factors. One variable significantly linked to antihomosexual feelings was respondents' own fears and anxieties about the opposite sex. The researchers believe that people who feel threatened by the opposite sex are hostile to homosexuality as a defense mechanism, displacing an identity-shattering fear onto a socially safe object (gender-bending queers). "Accordingly, we may condemn the homosexual in order to reduce sex role confusion."[49]

Consider the implications of these studies and surveys, of feminist psychology, and of historical theory for the *Baehr* argument. Denying a marriage license to two women simply because one of the partners is not a man is discrimination by reason of a sex-based classification. The ideology that drives this discrimination is deep-seated and arouses fierce emotion in many people. Otherwise, the state would simply make the requirements gender neutral (two persons can get married, rather than a man and a woman), just as the state has since the 1970s routinely rewritten old laws to make them gender neutral (e.g., alimony is now owed to a financially dependent party in a divorce rather than to the wife).

One might simply say that those who oppose same-sex marriage hate homosexuals, but few people will admit that anymore in public discourse.[f] Instead, they will shop around for arguments that support their visceral positions. They may say that it is "unnatural" for two women to get married or that it is "impossible" for men to marry one another. "Who will be the wife?" is a typical crack, usually made in private. (This is a revealing comment, because it signals the underlying fear: If two men can get married, one of them must play housekeeper or the gendered nature of marriage will be lost.)

[f] For a recent example, the current majority leader of the House of Representatives referred to the openly gay representative Barney Frank as "Barney Fag" in a press meeting. The majority leader went to great lengths to cover his tracks, first attacking the media for reporting an allegedly off-the-record remark, then attacking the media for reading antihomosexual implications into a "slip of the tongue," and then apologizing to Representative Frank and indicating his own distaste for homophobic utterances. The slip-of-the-tongue explanation is particularly striking.

The idea that everyone must be heterosexual is closely associated with the idea that every wife must have a husband, which is in turn correlated (though not absolutely) with a belief that the wife rules the home while the husband supports the family. At the level of common sense as well as theory, there is a connection between compulsory different-sex marriage and sexist assumptions. Requiring the state to recognize same-sex marriage (*Baehr*) will not deliver us a world of gender equality any more than requiring the state to equalize beer-drinking ages for men and women did (*Craig*). Both moves do eliminate unjustified sex-based classifications, and they confront traditional views of women's role in society. The federal equal protection clause and state equal rights amendments are more than enough to require the state to show a compelling justification for its discrimination in barring same-sex marriage.

Table 2 maps the result of the foregoing analysis. Parentheses are used for the middle column in order to suggest that the identity of the disadvantaged class is based on inference from the underlying philosophy. In this table, *Baehr* is the same as *Craig* and analytically indistinguishable from *Loving*. *Baehr* and *Craig* involve sex-based classifications derived from a philosophy viewing men and women in traditional (i.e., gendered) terms. In both cases the state is obligated to show a strong interest to justify the continuing discrimination. Likewise, *Baehr* and *Loving* both involve classifications (sex and race, respectively) that restrict the right to marry. As the Supreme Court has interpreted the federal equal protection clause, both classifications

TABLE 2

	Classification	*Disadvantaged Class*	*Philosophy*
Loving	Race	(Racial minorities)	Racism
Craig	Sex	(Women)	Sexism
Baehr	Sex	(Women)	Sexism

are "suspect," for they are red flags triggering heightened scrutiny. Just as the state was unable to carry its burden to justify the invidious discrimination in *Loving* and *Craig*, it will be unable to do so in *Baehr* (for reasons laid out in chapter 5).

Prohibiting Same-Sex Marriage as Sexual Orientation Discrimination

There is a transvestite quality to the argument adopted by the *Baehr* majority. It dresses a gay rights issue up in gender rights garb.[g] Such legal transvestism is not uncommon, and this one is persuasive. But consider a complementary and more direct argument: Prohibiting same-sex marriage is invidious discrimination on the basis of sexual orientation. Several state courts have held that the states have an obligation under their state constitutions to justify such discrimination by reference to a compelling or at least neutral state interest.[50] Judge William Norris has articulated a similar interpretation of the U.S. Constitution.[51] For the reasons that follow, Judge Norris's position ought to be adopted as the standard for the equal protection provisions of both the state and federal constitutions. As we have seen, the exclusion of lesbian and gay couples from marriage would flunk any form of heightened scrutiny.

Issues Suggested by the Racial Classification Cases

The Supreme Court's decisions in *Loving* and *Washington v. Davis*[52] suggest threshold issues for a sexual orientation claim under the equal protection clause. In *Davis* the Supreme Court refused to apply heightened equal protection scrutiny to evaluate the state's use of a personnel test that had the effect of excluding a disproportionate number of African Americans from the civil service. "Standing alone, [disproportionate impact] does not trigger the rule that racial classifications," such as those in *Loving*, "are to be subjected to the strictest

[g]This is even more true of the *Baehr* concurring opinion by Justice James Burns, who believes Baehr and Dancel's equal rights amendment claim can only be justified if they show their sexual orientation to be "biologically fated," or immutable, and therefore part of their "sex." *Baehr*, 852 P.2d at 69–70 (Burns, J., concurring in the judgment).

scrutiny and are justifiable only by the weightiest of considerations."[53] *Davis* raises a question whether there is a sexual orientation "classification" akin to the racial classification struck down in *Loving* and the sex classification struck down in *Craig* and invoked in *Baehr*.

On the other hand, *Davis* denied that "a law's disproportionate impact is irrelevant. . . . A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race."[54] For this proposition *Davis* cited *Yick Wo v. Hopkins*,[55] where the Court had invalidated as race-based discrimination a seemingly race-neutral rule that laundry houses must not be constructed of wood. *Yick Wo*'s classification operated as a race-based one because it excluded all Chinese American applicants for licenses to run laundries and allowed all but one non-Chinese applicant for such a license. The operation of the state's ban on same-sex marriages is almost as lopsided as the rule in *Yick Wo*, for the large majority of same-sex couples who would desire to get married are homosexual couples. That lopsided effect of the law is no accident, because the state's requirement that marriage involve partners of different sex is animated in large part by the state's insistence on compulsory heterosexuality. Some states express the obvious, providing (as Virginia does) that "homosexual marriage" is prohibited in the jurisdiction. In short, the pervasive class-based effect of the same-sex marriage ban permits challenge of that ban as a discriminatory classification.

A harder issue under *Davis* and *Loving* arises from their shared view that "[t]he *central purpose* of the equal protection clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of *race*."[56] Ratified in 1868, the Fourteenth Amendment sought to consolidate a new legal regime made possible by the North's victory in the Civil War. The equal protection clause is soaked with race and blood. Why should a constitutional provision concerned with race discrimination be expanded to police issues of sexual orientation? Would the framers of the Fourteenth Amendment have intended such coverage?

To begin with, the equal protection clause is not by its terms limited to racial discrimination. Its assurance that no "person" shall be denied the "equal protection of the laws" is so open textured that the job of the Court has been to narrow its limitless ambit. Serious

judicial scrutiny of legislative classifications will only occur when the legislature is *either* abridging fundamental rights (chapter 5) *or* relying on suspect classifications (this chapter). The phrase *suspect classification* (or sometimes *class*) has become famous in civil rights debates. Often forgotten is that the idea of a *suspect* classification is inspired by the Court's desire to limit the exceedingly broad language of the Fourteenth Amendment.

Does the framers' original intent limit the Court's creativity? The Supreme Court's answer to this question has repeatedly been no. The Court's equal protection jurisprudence finds little support in the framers' original intent. Given pervasive white support for antimiscegenation laws in the 1860s, the Supreme Court in *Loving* did not adopt the pretense that it was simply applying original intent.[57] It was, instead, applying the general antidiscrimination principle when it struck down Virginia's race-based marriage rules. Similarly, the Court's decisions applying heightened scrutiny to sex-based classifications have not been justified by reference to the framers' intent.[58] The framers of the reconstruction amendments made a deliberate decision not to include protections against sex discrimination, and several leading feminists of the 1860s opposed one or more of the amendments for that reason. Scores of sex-based classifications went unchallenged after the adoption of the Fourteenth Amendment, and the Supreme Court upheld these classifications in every case it heard until 1971. As Judge, now Justice, Ruth Bader Ginsburg conceded in 1979, "Boldly dynamic interpretation, departing radically from the original understanding, is required to tie to the Fourteenth Amendment's equal protection clause a command that government treat men and women as individuals equal in rights, responsibilities and opportunities."[59]

Loving and decisions strictly scrutinizing sex-based classifications arguably cut against the intent of the framers, who filled the historical record with their views about different-race marriage (against it) and sex-based exclusions (for them). Ironically, an interpretation of the equal protection clause that subjects antigay discrimination to heightened scrutiny would only reach beyond (not necessarily against) the framers' original intent. Because sexual orientation was not even a coherent category of thought in the 1860s (recall the

status of Walt Whitman, discussed in chapter 2), the framers would have had no serviceable intent as to the rationality of laws classifying on the basis of sexual orientation. The framers would have been familiar with sodomy laws, but the laws they knew applied equally to different-sex and same-sex sodomy[h] and had no connection to the not-yet-born idea of sexual orientation. The concept of homosexuality was formulated by a German doctor in 1869, a year after the Fourteenth Amendment was ratified. Although state marriage laws were on their face limited to different-sex marriage in 1868, the concept of gay marriage, which dominates the current debate, was inconceivable. In any event, *Loving* found irrelevant the overwhelming state practice of prohibiting different-race marriages in 1868 and thereafter.

In short, the U.S. Supreme Court and state high courts have not followed an original intent approach to elaborating the equal protection clauses of the federal and state constitutions. Instead, they have pragmatically adopted a category-by-category approach to determining which classifications are "suspect" under the broadly phrased clause.[i] The U.S. Supreme Court has held that classifications based on race, ethnicity, sex, illegitimacy, and (because of the First Amendment) religion are "suspect" and therefore require heightened scrutiny.[60] Over dissents, the Court has held that classifications based on age, income level, physical or mental disability, addiction, and marital status do not require heightened scrutiny.[61] In which grouping does sexual orientation belong? By analogy to the classifications previously categorized (especially sex, the most recent addition) and the reasoning behind their categorization, a neutral analysis would place sexual orientation in the first group.

---

[h] If the framers had read the sodomy cases that had been reported as of 1868, they would have found that the large majority of cases involved different-sex sodomy (typically between a man and an underage girl) and bestiality, namely, sex between men and barnyard animals. This will be documented in William N. Eskridge, Jr., *Gaylaw*, chapter 1 (Cambridge, MA: Harvard University Press, in press).

[i] Several states (including Hawaii) have equal rights provisions that contain lists of suspect classifications. The argument in the text works less well for these states, unless the category of sexual orientation can be shoehorned into that of sex, as Justice Burns tried to do in *Baehr* (note g above).

Sexual Orientation as an Irrational Classification

Justice Brennan's plurality opinion in *Frontiero v. Richardson* is the Court's primary explanation for why sex-based classifications are suspect. "[W]hat differentiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society."[62] *McLaughlin* had made a similar point about race-based classifications, finding them "in most circumstances irrelevant" to any legitimate state purpose.[63] The same is intuitively true of ethnicity, illegitimate birth, and religion inasmuch as those personal characteristics have no rational relationship to the person's ability to do a job, participate in society and politics, and carry on a productive life. Relatedly, drawing lines based on race, ethnicity, religion, sex, and nonmarital birth is typically motivated by stereotypical rather than fact-based thinking. "These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy," the Court has said.[64]

Conversely, the Court has denied heightened scrutiny to classifications that a neutral decision maker will often want to consider. A critical reason the Court gave for declining to subject age-based classifications to heightened scrutiny is that aged people have not been "subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."[65] Age affects people's judgment, physical abilities, and mental capacity, all of which are considerations policymakers ought to be able to take into account. Likewise, the Court declined to give special attention to classifications based on mental disability because "those who are mentally retarded have a reduced ability to cope with and function in the everyday world."[66] The Court's approach to classifications based on income, addiction, and marital status has relied on a similar judgment that these classifications typically serve legitimate social functions and are not pretexts for prejudice.

Sexual orientation classifications almost never serve legitimate state goals. Although once pervasive in American law, most such classifications have been abandoned because neutral observers concluded

that they serve no rational purpose and are, instead, animated by ignorance or prejudice. The case of the immigration exclusion is representative.[67] The McCarran-Walter Act of 1952 prohibited entry into the United States of any person "afflicted with psychopathic personality." This phrase was widely considered a code phrase for "homosexuals" because of medical and psychiatric beliefs that such people are sick.[68] Those beliefs were based on no rigorous neutral or empirical research. As researchers published more rigorous studies, these beliefs came under fire. The evidence has become overwhelming that sexual orientation per se has no connection with intelligence, personality disorder or psychopathy, capacity to interact with others, or the ability to mate and raise a family.[69] After unprecedented debate, the American Psychiatric Association (APA) delisted homosexuality as a mental illness in 1973 on the basis of increasing evidence that "homosexuality per se implies no impairment in judgment, stability, or general social or vocational capabilities."[70] Other professional groups followed the APA's lead, and in 1979 the Public Health Service (PHS) announced that it would no longer cooperate in the exclusion of gay and lesbian immigrants on the basis of the "psychopathic personality" exclusion of the immigration law, which the PHS administered. Lacking the PHS's cooperation, the Immigration and Naturalization Service adopted a "don't ask, don't tell" approach to enforcing the provision, and it went virtually unenforced. In 1990, Congress repealed it. Senate floor manager Alan Simpson, Republican of Wyoming, explained that the exclusion of homosexuals was irrational and grounded on obsolete thinking.[71]

Like the immigration exclusion, one classification after another has been discarded as evidence of its irrationality became too overwhelming to ignore. No impartial judge, no executive officer, no respected professional, no competent senator, no unbiased observer of any scruple is willing to say that sexual orientation bears any relation to lesbian and gay people's ability to participate in and contribute to society. The leading antigay regulation currently in force, the marriage exclusion, is ultimately justified not by any neutral reason but by people's hostility to gay marriage. In short, sexual orientation as a classification is irrational along both dimensions emphasized by the Supreme Court's cases; that is, it is linked to no characteristic neutral

policymakers would normally consider and it is often a pretext for prejudice.

Some judges and commentators have urged that suspect classifications should be limited to those which are immutable.[72] This is an unfortunate attempt to say that in all areas where one has a choice society can make political decisions to reward or punish. Would anyone seriously extend that logic to religion? It makes little sense of the cases or of constitutional theory to require that the identifying characteristic be one that literally cannot be hidden or changed at all. Although sex is widely considered an immutable characteristic, people can successfully conceal their sex and many have changed their sex. Race and, even more so, ethnicity can be concealed. The status of nonmarital children can be changed legally. It is easy to conceal or change one's religion. These suspect classifications are much more mutable than nonsuspect classifications such as age, intelligence, and most forms of disability. To the extent that there is an immutability element in suspect classification law, "a trait [is] effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity."[73]

Sexual orientation may be biologically immutable for at least some people, according to new genetic discoveries and to studies of identical twins separated at birth. This remains an unresolved scientific issue.[74] What is resolved among scientists is that sexual orientation is a characteristic formed early in one's life and that the person has little control over this feature of her or his identity.[75] People can more readily change their religion than change their sexual orientation and can just about as easily change their sex. In all cases (religion, sex, orientation), people's actions can go against their category: Protestants can take Catholic communion and go to confession, women can dress like men, and gay people can date persons of the opposite sex. Passing is possible, but should the benefits of the law depend on denying features of one's personhood? Judge Norris put the immutability question this way: "Would heterosexuals living in a city that passed an ordinance banning those who engaged in or desired to engage in sex with persons of the *opposite* sex find it easy not only to abstain from heterosexual activity but also to shift the object of their sexual desires to persons of the same sex?"[76]

Gay People as a Subordinated Minority

In deciding which classifications should be suspect, the Supreme Court has considered the extent to which the classifications have been used to persecute particular groups in American history.[j] Thus, Justice Brennan's plurality opinion in *Frontiero* emphasized how sex-based classifications had been used to suppress women's interests. Although women had not as a group been subjected to slavery, during most of American history women could neither vote nor hold public office and the law limited their ability to manage property, obtain employment outside the home, or even serve as legal guardians to their children. While "the position of women has improved markedly" in the last three decades, "it can hardly be doubted that, in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena."[77] Similarly, racial, ethnic, and religious minorities have all been subjected to legal as well as societal disabilities at various points in American history. All can testify to a history of group discrimination.

Conversely, the Court has sometimes, but not always, emphasized the absence of a history of discrimination when declining to hold a classification suspect. This was the main reason the Court declined to apply heightened scrutiny to age-based classifications, for example. The elderly "have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."[78] Although people with disabilities have been objects of prejudice, the

[j] The genesis of the idea is footnote 4 of Carolene Products v. United States, 304 U.S. 144 (U.S. Supreme Court, 1938), where the Court indicated, in dictum, that more searching judicial scrutiny of legislation is justified when it harms "discrete and insular minorities." The Court assumed that such minorities tend to be ill represented in the political process—see John Hart Ely, *Democracy and Distrust* (Cambridge, MA: Harvard University Press, 1980)—and tend to be objects of popular prejudice. For reasons developed by Bruce Ackerman, "Beyond *Carolene Products*," 98 *Harvard Law Review* 713 (1985), I do not rely on the "discrete and insular minorities" formulation in the text. Women, for example, are neither insular (everywhere you find men you find women) nor a minority (they are more than half the population). Lesbians and gay men are a minority but are typically anonymous or closeted rather than discrete (you cannot tell by looking) and are often dispersed rather than insular (though there are gay ghettoes in most major cities).

Court believed that "lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary."[79] As a result, the Court declined to subject disability-based classifications to heightened scrutiny.

People who commit sodomy have been punished, with varying severity, in Western culture for six hundred years or more. Since the creation of the category of sexual invert or homosexual in the latter half of the nineteenth century, there has been distinctly group-focused persecution by individuals and by the state.[80] Being known as a homosexual or associating with known homosexuals triggered all sorts of legal disadvantages as recently as the 1950s: you could not have a job in the federal or most state civil services, have a national security clearance, serve in the armed forces, immigrate to the United States or (if you slipped in by mistake) become a U.S. citizen, use the U.S. mails for your informational magazines, obtain some professional and business licenses, dance with someone of the same sex in a public accommodation, loiter in a public place, hold hands with someone of the same sex anywhere, or (heaven forfend) actually have intercourse with someone of the same sex.[81] Even statutes that were gay neutral on their face, such as vagrancy laws, were used by the police to target gay people and destroy their subculture. For much of this century gay people faced dismissal from their families, private violence and discrimination, and all-out war from the state.

Particularly after the Stonewall riots—when drag queens, dykes, and hangers-on actually resisted police violence against them—gay people have been able to press for the repeal, nullification, or amelioration of sexual orientation classifications. Nonetheless, lesbians, bisexuals, and gay men still live under a cloud of pervasive social homophobia and legal disability. Most gay people have been an object of hate crime or violence. An overwhelming majority of gay people conceal their sexual orientation at work, and a substantial minority have nevertheless suffered workplace discrimination.[82] Societal homophobia affects the ability of gay people to organize politically. Because most gay people are in the closet, their voices are not heard in the political arena. Because gay people remain unpopular, they are available scapegoats for politicians interested in scoring

easy points with voters. Even scrupulous politicians are reluctant to oppose gay bashing, because they reasonably fear a backlash because of their association with a disliked group.

For these reasons, protection of legitimate gay rights has been hard to come by in the political process. Gay rights regulations have been possible mainly in relatively tolerant jurisdictions where they are least needed. Even where such regulations have been adopted, proponents have often had to defend those victories against antihomosexual initiatives and referenda, just as civil rights advocates had to do in the late sixties and early seventies. Antigay amendments proposed in the U.S. Senate are regularly adopted by huge margins, even though they are often dumped behind the closed doors of a conference committee. In short, for every two steps forward the gay rights movement often suffers a step or two backward because of sometimes hysterical backlash against homosexuality.

Classifications according to sexual orientation have no legitimate role in neutral governance. In the past, such classifications have only served invidious goals. The equal protection clause has in the past been a politically necessary means of cleansing American law of classifications based on race, sex, and ethnicity and is just as needed against sexual orientation classifications today. The state's prohibition of same-sex marriage is the primary example of sexual orientation discrimination by the state. Like the immigration exclusion, it should follow the dodo bird's path to extinction.

The analogy between same-sex marriage and miscegenation can now be completed. Table 3 maps the completed analogy.

TABLE 3

	Classification	*Disadvantaged Class*	*Philosophy*
Loving	Race	(Racial minorities)	Racism
Baehr I	Sex	(Women)	Sexism
Baehr II	(Sexual orientation)	Sexual orientation minorities	Compulsory heterosexuality

Denying same-sex couples a marriage license is on its face a sex discrimination and in its effect a sexual orientation discrimination that is motivated by desire(s) both to suppress lesbian and gay couples and to preserve traditional gender roles. Either or both discriminations should trigger heightened scrutiny, and the state's justifications for opposing same-sex marriage are either insufficient or rest on a philosophy of rigid gender roles (the sex discrimination claim) or compulsory heterosexuality (the sexual orientation claim).

In trying to justify its discrimination against this two-pronged attack, the state may face argumentative dilemmas. For example, if it argues that the sexual orientation discrimination is justified by the state interest in procreation (see chapter 4), the state is helping to prove the sex discrimination case, which posits that it is an unacceptable gender stereotype that women get married so that they can be baby producers. If the state argues that the sex discrimination is a benign classification not aimed against women (about the only argument that occurs to me to justify the sex discrimination), it is helping to prove the sexual orientation discrimination case, which posits that the classification is targeted at lesbian and gay couples. The double-barreled argument of sex and sexual orientation discrimination ought to be enough, standing alone, to shoot down the state's prohibition against same-sex marriages. When you add the constitutional arguments based on citizens' fundamental right to marry, the constitutional case becomes irrefutable.

61. See, for example, State v. Buck, 757 P.2d 861 (Oregon Court of Appeals 1988) and State v. Kaiser, 663 P.2d 839 (Washington Court of Appeals, 1983), both of which concern a man and his stepdaughter.
62. Israel v. Allen, 577 P.2d 762 (Colorado Supreme Court, 1978).

Chapter 6. The Constitutional Case: Discrimination

1. Loving v. Virginia, 388 U.S. 1 (1967).
2. On the history of antimiscegenation laws, see Derrick A. Bell, Jr., *Race, Racism, and American Law*, 64–108 (Boston: Little, Brown, 1992, 3d edition); Robert J. Sickels, *Race, Marriage, and the Law* (Albuquerque, NM: University of New Mexico Press, 1972); Harvey M. Appelbaum, "Miscegenation Statutes: A Constitutional and Social Problem," 53 *Georgetown Law Journal* 49 (1964); A. Leon Higginbotham and Barbara K. Kopytoff, "Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia," 77 *Georgetown Law Journal* 1967 (1989); James Trosino, "American Wedding: Same-Sex Marriage and the Miscegenation Analogy," 73 *Boston University Law Review* 93 (1993) (student note); and Walter J. Wadlington, "The *Loving* Case: Virginia's Anti-Miscegenation Statute," 52 *Virginia Law Review* 1189 (1966).
3. William Waller Hening, compiler, *Statutes at Large, Being a Collection of the Laws of Virginia from the First Session of the Legislature in the Year 1619*, volume 2, pp. 86–87 (New York: R. & W. & G. Bartow, 1823).
4. Quoted in Higginbotham & Kopytoff, "Racial Purity and Interracial Sex," 2019.
5. *Congressional Globe*, 39th Congress, 1st Session, part 1, 322 (1866) (Senator Lyman Trumbull, Republican, Illinois). See Alfred Avins, "Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent," 52 *Virginia Law Review* 1224 (1966).
6. *Congressional Globe*, 37th Congress, 2d Session, part 2, appendix, 84 (1863).
7. *The People Shall Judge: Readings in the Formulation of American Policy*, 784, 786 (Chicago: College of the University of Chicago, 1949, edited by the Social Science Staff), which excerpts the Constitution and Ritual of the Knights of the White Camellia (1869). A fascinating treatment of the "purity of blood" argument, and its practical difficulties in implementation, is Eva Saks, "Representing Miscegenation Law," 8 *Raritan*, Fall 1988, p. 39.
8. See F. James Davis, *Who Is Black?* (University Park, PA: Pennsylvania State University Press, 1991); Herbert Hovenkamp, "Social Science and Segregation Before *Brown*," 1985 *Duke Law Journal* 624; Paul A. Lombardo, "Miscegenation, Eugenics, and Racism: Historical Footnotes to *Loving v. Virginia*," 21 *University of California at Davis Law Review* 421 (1988); and Saks, "Representing Miscegenation Law."

9. Scott v. Georgia, 39 Ga. 321, 324 (Supreme Court of Georgia, 1869).
10. Id. at 326. See also Green v. State, 58 Ala. 190, 195 (Alabama Supreme Court, 1877), which stated that neither whites nor blacks can benefit from intermarriage, because "he [God] has made the two races distinct"; Lonas v. State, 50 Tenn. 287, 299–300 (Tennessee Supreme Court, 1871), which upheld antimiscegenation law, "[t]o prevent violence and bloodshed which would arise from such cohabitation, distasteful to our people, and unfit to produce the human race in any of the types in which it was created."
11. State v. Jackson, 80 Mo. 175, 179 (Missouri Supreme Court, 1883).
12. Pace v. Alabama, 106 U.S. 583 (U.S. Supreme Court, 1883).
13. Plessy v. Ferguson, 163 U.S. 537 (U.S. Supreme Court, 1896), which said the Fourteenth Amendment "could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either." In dissent, Justice John Marshall Harlan objected to segregation as legal backing for a social "caste" system.
14. An Act to Preserve Racial Integrity, Virginia Acts 1924, chapter 371, approved March 20, 1924, codified at § 5099a of the *Virginia Code of 1936* (Charlottesville, VA: Michie, 1936).
15. Id. § 5, *1936 Code* § 5099a(5).
16. Id. § 1, *1936 Code* § 5099a(1).
17. Id. § 4, *1936 Code* § 5099a(4).
18. Id. § 2, *1936 Code* § 5099a(2).
19. *1936 Code* § 4546.
20. Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy*, 606 (New York: Harper, 1944).
21. Perez v. Lippold, 198 P.2d 17 (California Supreme Court, 1948).
22. Naim v. Naim, 87 S.E.2d 749 (Virginia Supreme Court, 1955), remanded, 350 U.S. 891 (U.S. Supreme Court, 1956), reaffirming original opinion, 90 S.E.2d 849 (Virginia Supreme Court, 1956), appeal dismissed, 350 U.S. 985 (U.S. Supreme Court, 1956).
23. McLaughlin v. Florida, 379 U.S. 184, 188, 192–193 (U.S. Supreme Court, 1964).
24. Quoted in *Loving*, 388 U.S. at 3.
25. *Naim*, 87 S.E.2d at 756.
26. Id. at 11–12.
27. Kingsley Davis, "Intermarriage in Caste Societies," 43 *American Anthropologist* 376, 389 (1941).
28. Singer v. Hara, 522 P.2d 1187 (Washington Court of Appeals, 1974), review denied, 84 Wash. 2d 1008 (Washington Supreme Court, 1974).
29. Sylvia A. Law, "Homosexuality and the Social Meaning of Gender," 1988 *Wisconsin Law Review* 187; Andrew Koppelman, "Why Discrimination

Against Lesbians and Gay Men Is Sex Discrimination," 69 *New York University Law Review* 197 (1994). See also Andrew Koppelman, "The Miscegenation Analogy: Sodomy Law as Sex Discrimination," 98 *Yale Law Journal* 145 (1988) (student note), and Claudia A. Lewis, "From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage," 97 *Yale Law Journal* 1783 (1988) (student note).

30. Baehr v. Lewin, 852 P.2d 52 (Hawaii Supreme Court, 1993) (Levinson, J., for a plurality), reaffirmed by a majority of the court in response to the state's motion for reconsideration, 852 P.2d 74 (Hawaii Supreme Court, 1993).
31. Hawaii Constitution, Article I, § 5.
32. *Singer*, 522 P.2d at 1192 (distinguishing *Loving* in this way).
33. Id. at 1194.
34. Act of June 22, 1994, § 1, Hawaii Session Laws 217. Compare *Singer*, 522 P.2d at 1192 note 8: "[I]f the state legislature were to change the definition of marriage to include the legal union of members of the same sex but also provide that marriage licenses and the accompanying protections of the marriage laws could only be extended to male couples, then it is likely that the state marriage laws would be in conflict with the ERA for failure to provide equal benefits to female couples."
35. District of Columbia Human Rights Act, District of Columbia Code § 1–2501 *et seq.* (1994). See Dean v. District of Columbia, 653 A.2d 307 (District of Columbia Court of Appeals 1995) (opinion of Ferren, J., for the majority on the Human Rights Act issues), which assumes, consistent with the District's concession, that the Human Rights Act's prohibitions apply to the District and its laws.
36. Craig v. Boren, 429 U.S. 190, 197 (U.S. Supreme Court, 1976).
37. Mississippi University for Women v. Hogan, 458 U.S. 718, 725 (U.S. Supreme Court, 1982). For other examples, see Orr v. Orr, 440 U.S. 268 (U.S. Supreme Court, 1979), which invalidated a law permitting alimony to be assessed only against husbands and not against wives, and Weinberger v. Wiesenfeld, 420 U.S. 636 (U.S. Supreme Court, 1975), which invalidated the Social Security rule giving lesser survivors' benefits to widowers than to widows.
38. J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419, 1425 note 6 (U.S. Supreme Court, 1994), and Harris v. Forklift Systems, Inc., 114 S. Ct. 367, 373 (U.S. Supreme Court, 1994) (Ginsburg, J., concurring).
39. *Craig*, 429 U.S. at 198–199, quoting Schlesinger v. Ballard, 419 U.S. 498 (U.S. Supreme Court, 1975), first quotation, and Weinberger v. Wiesenfeld, 420 U.S. 636 (U.S. Supreme Court, 1975), second quotation.
40. The argument that follows is initially drawn from Law, "Homosexuality and the Social Meaning of Gender," and Koppelman, "Why Discrimination Against Gays and Lesbians Is Sex Discrimination."

41. Randolph Trumbach, "The Birth of the Queen: Sodomy and the Emergence of Gender Equality in Modern Culture, 1660–1750," in Martin B. Duberman et al., editors, *Hidden from History: Reclaiming the Gay and Lesbian Past*, 129 (New York: Meridian, 1989).
42. The account that follows is inspired by and borrows from George Chauncey, Jr., *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890–1940* (New York: Basic Books, 1994), and Carroll Smith-Rosenberg, *Disorderly Conduct: Visions of Gender in Victorian America* (New York: Oxford University Press, 1985). This account will be tied to a history of legal developments in William N. Eskridge, Jr., *Gaylaw*, chapter 1 (Cambridge, MA: Harvard University Press, forthcoming 1997).
43. See Suzanne Pharr, *Homophobia: A Weapon of Sexism* (Little Rock, AR: Chardon Press, 1988).
44. See Jessica Benjamin, *The Bonds of Love: Psychoanalysis, Feminism, and the Problem of Domination* (New York: Pantheon, 1988); Nancy Chodorow, *The Reproduction of Mothering* (Berkeley: University of California Press, 1978); Dorothy Dinnerstein, *The Mermaid and the Minotaur: Sexual Arrangements and Human Malaise* (New York: Harper & Row, 1976), and Paul Hoch, *White Hero, Black Beast: Racism, Sexism, and the Mask of Masculinity* (London: Photo Press, 1979).
45. Stephen F. Morin and Ellen M. Garfinkle, "Male Homophobia," 34 *Journal of Social Issues*, Winter 1978, pp. 29, 31. For similar findings, see Mary R. Laner and Roy H. Laner, "Sexual Preference or Personal Style? Why Lesbians Are Disliked," 5 *Journal of Homosexuality* 339 (1980), and Mary R. Laner and Roy H. Laner, "Personal Style or Sexual Preference? Why Gay Men Are Disliked," 9 *International Review of Modern Society* 215 (1979). Koppelman, "Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination," 238 note 157, lists other sources to the same effect.
46. A. P. MacDonald and Richard G. Games, "Some Characteristics of Those Who Hold Positive and Negative Attitudes Toward Homosexuals," 1 *Journal of Homosexuality* 9, 19 (1979).
47. Kathryn N. Black and Michael R. Stevenson, "The Relationship of Self-Reported Sex-Role Characteristics and Attitudes Toward Homosexuality," in John P. DeCecco, editor, *Bashers, Baiters and Bigots: Homophobia in American Society*, 83 (New York: Harrington Park Press, 1985).
48. Albert D. Klassen et al., *Sex and Morality in the U.S.: An Empirical Inquiry under the Auspices of the Kinsey Institute*, chapter 10 (Middletown, CT: Wesleyan University Press, 1989).
49. Ibid., 241, quoting A. P. MacDonald et al., "Attitudes Toward Homosexuality: Preservation of Sex Morality or the Double Standard?" 40 *Journal of Consulting and Clinical Psychology* 161 (1972).

50. See Gay Law Students Association v. Pacific Telephone & Telegraph, 595 P.2d 592 (California Supreme Court, 1979); Commonwealth of Kentucky v. Wasson, 842 S.W.2d 487 (Kentucky Supreme Court, 1992); see also Gay Rights Coalition v. Georgetown University, 536 A.2d 1 (District of Columbia Court of Appeals, en banc, 1987), which interpreted the District's Human Rights Act, a "super-statute."
51. Watkins v. United States, 847 F.2d 1329 (U.S. Court of Appeals for the Ninth Circuit, 1988), affirmed on other grounds [estoppel], 875 F.2d 699 (U.S. Court of Appeals for the Ninth Circuit, en banc, 1989).
52. Washington v. Davis, 426 U.S. 229 (U.S. Supreme Court, 1976).
53. Id. at 242, citing *McLaughlin*.
54. Id. at 240.
55. Yick Wo v. Hopkins, 118 U.S. 356 (U.S. Supreme Court, 1886).
56. *Davis*, 426 U.S. at 239 (emphasis added); accord, *Loving*, 388 U.S. at 9–10.
57. *Loving*, 388 U.S. at 9–10 (deliberations surrounding Fourteenth Amendment "inconclusive"); *McLaughlin*, 379 U.S. 184 (similar).
58. See *Craig*, 429 U.S. 190; Frontiero v. Richardson, 411 U.S. 677 (U.S. Supreme Court, 1973) (plurality opinion of Brennan, J.); Gerald Gunther, "The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," 86 *Harvard Law Review* 1 (1972).
59. Ruth Bader Ginsburg, "Sexual Equality under the Fourteenth and Equal Rights Amendments," 1979 *Washington University Law Quarterly* 161.
60. In addition to *Loving* (race) and *Craig* (sex), see Trimble v. Gordon, 430 U.S. 762 (U.S. Supreme Court, 1976), on nonmarital birth, and Korematsu v. United States, 323 U.S. 214 (U.S. Supreme Court, 1944), on race (although the Court upheld the challenged classification).

    The Supreme Court has also said that classifications based on citizenship or alienage are suspect classifications, Graham v. Richardson, 403 U.S. 365 (U.S. Supreme Court, 1971), but I read this line of cases as reflecting principles of federalism. Congress has primary authority for regulating immigration and citizenship, and the Court is alert to the concern that state regulations may interfere with this power and with national treaty obligations. See Toll v. Moreno, 458 U.S. 1 (U.S. Supreme Court, 1982). Hence, state classifications have frequently been invalidated, but congressional classifications have not.
61. See City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (U.S. Supreme Court, 1985), involving disability; New York City Transit Authority v. Beazer, 440 U.S. 568 (U.S. Supreme Court, 1979), involving addiction; Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (U.S. Supreme Court, 1976), involving age; Independent School District v. Rodriguez, 411 U.S. 1 (U.S. Supreme Court, 1973), involving wealth; and Dandridge v. Williams, 397 U.S. 471 (U.S. Supreme Court, 1970), involving wealth.

62. Frontiero v. Richardson, 411 U.S. 677, 686 (U.S. Supreme Court, 1973) (plurality opinion of Brennan, J.), quoted in *Cleburne*, 473 U.S. at 440; accord, Mathews v. Lucas, 427 U.S. 495, 505 (U.S. Supreme Court, 1976), on nonmarital birth.
63. *McLaughlin*, 379 U.S. at 192.
64. *Cleburne*, 473 U.S. at 440. See also Plyler v. Doe, 457 U.S. 202, 216 note 14 (U.S. Supreme Court, 1982), on how the invocation of such characteristics is a red flag that decision makers are responding to their own or others' "deep-seated prejudice."
65. *Murgia*, 427 U.S. at 313.
66. *Cleburne*, 473 U.S. at 442.
67. This story is told in William N. Eskridge, Jr., "Gadamer/Statutory Interpretation," 90 *Columbia Law Review* 609 (1990), and will be developed in greater detail in Eskridge, *Gaylaw*, chapters 2 and 3.
68. The Supreme Court so held in Boutilier v. Immigration and Naturalization Service, 387 U.S. 118 (U.S. Supreme Court, 1967).
69. Useful collections of evidence include Linda D. Garnets and Douglas C. Kimmel, editors, *Psychological Perspectives on Lesbian and Gay Male Experiences* (New York: Columbia University Press, 1993), and John C. Gonsiorek, "The Empirical Basis for the Demise of the Illness Model of Homosexuality," in James D. Weinrich and J. Gonsiorek, editors, *Homosexuality: Research Implications for Public Policy,* 115 (Newbury Park, CA: Sage Publications, 1991).
70. Resolution of the APA, December 15, 1973. An excellent history of the debate and the shift in evidence can be found in Ronald Bayer, *Homosexuality and American Psychiatry: The Politics of Diagnosis* (Princeton, NJ: Princeton University Press, 1987, new edition).
71. 135 *Congressional Record* S5040–S5042 (daily edition, May 9, 1989).
72. This claim is explored and persuasively critiqued in Janet Halley, "The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity," 36 *University of California at Los Angeles Law Review* 915 (1989).
73. *Watkins*, 847 F.2d at 1347.
74. The studies are sympathetically described and reviewed in Simon LeVay and Dean H. Hamer, "Evidence for a Biological Influence in Male Homosexuality," *Scientific American*, May 1994, pp. 44–49, and more critically in William Byne, "The Biological Evidence Challenged," *Scientific American*, May 1994, pp. 50–55.
75. See Alan P. Bell, Martin S. Weinberg, and Sue Kiefer Hammersmith, *Sexual Preference: Its Development in Men and Women* (Bloomington, IN: Indiana University Press, 1981); Richard Green, *The "Sissy Boy" Syndrome and the*

Development of Homosexuality (New Haven, CT: Yale University Press, 1987); and Richard A. Posner, *Sex and Reason*, 101–108 (Cambridge, MA: Harvard University Press, 1992).

76. *Watkins*, 847 F.2d at 1347–1348.
77. *Frontiero*, 411 U.S. at 685–686 (plurality opinion of Brennan, J.).
78. *Murgia*, 427 U.S. at 313; see also Bowen v. Gilliard, 483 U.S. 587, 603 (U.S. Supreme Court, 1987), and Lyng v. Castillo, 477 U.S. 635, 638 (U.S. Supreme Court, 1986), on family status.
79. *Cleburne*, 473 U.S. at 443.
80. Standard sources for the history of antihomosexual persecution before World War II include Chauncey, *Gay New York*; Lillian Faderman, *Odd Girls and Twilight Lovers: A History of Lesbian Life in Twentieth-Century America* (New York: Penguin, 1991). For World War II, see Allan Bérubé, *Coming Out Under Fire: The History of Gay Men and Women in World War Two* (New York: Free Press, 1990). For the postwar period, see Barry D. Adam, *The Rise of a Gay and Lesbian Movement* (Boston: Twayne Publishers, 1987), and John D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940–1970* (Chicago: University of Chicago Press, 1983).
81. See Eskridge, *Gaylaw*, chapter 2.
82. See Hearings of the Senate Committee on Labor and Human Resources (No. 103–703), 103d Congress, 2d Session (1994).

Epilogue: Fear of Flaunting

1. See McConnell v. Anderson, 451 F.2d 193 (U.S. Court of Appeals for the Eighth Circuit, 1971), upholding the withdrawal of employment from a gay man after he applied for a marriage license, and Singer v. United States Civil Service Commission, 530 F.2d 247 (U.S. Court of Appeals for the Ninth Circuit, 1976), vacated, 429 U.S. 1034 (U.S. Supreme Court, 1977) (same).
2. See Price Waterhouse v. Ann Hopkins, 490 U.S. 228 (United States Supreme Court, 1989), which holds that a woman can sue for sex discrimination if unfavorable employment action is based upon feelings that she is too "mannish," and Mary Anne Case, "Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence," 105 *Yale Law Journal* 1 (1995), demonstrating that *Hopkins* requires a finding of sex discrimination if a man is fired for being too "effeminate."
3. See Richard A. Isay, *Being Homosexual: Gay Men and Their Development* (New York: Farrar, Straus & Giroux, 1989), and Michael Ruse, *Homosexuality: A Philosophical Inquiry* (Cambridge, MA: Basil Blackwell, 1988). For a