

## Review Essays

### THE LIMITS OF *GAYLAW*

**GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET.** William N. Eskridge, Jr.<sup>1</sup> Harvard University Press. 1999. Pp. 512. \$45.00.

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The world into which *Gaylaw* arrives is one whose poles are very far apart. At one pole, a man fatally fractures his dog's skull by beating him with a plastic vacuum cleaner accessory and then throwing the dog against a tree trunk.<sup>3</sup> Why? The man concluded the dog was homosexual after he saw the poodle-Yorkshire terrier mix repeatedly attempt sexual activity with another male terrier.<sup>4</sup> At the man's subsequent trial for animal cruelty, a veterinarian testified that such behavior in dogs is a common way for them to assert dominance, rather than necessarily a sexual act, much less evidence of a homosexual orientation. It's a measure of how deeply rooted shame and hostility about homosexuality are that, in the eyes of some, even a mutt's behavior is imbued with negative sexual significance in need of a corrective.<sup>5</sup>

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3. "Ocala Man Sentenced to Six Months in Jail for Beating Dog," Associated Press (June 26, 2000); available in Westlaw, ALLNEWSPLUS Database.

4. This is not the first time the concept of a gay dog has entered the public arena. An episode of the popular animated television show, *South Park*, satirized the fear of canine homosexuality.

5. Another administration of sexuality-corrective occurred recently in New York. The parents of a 17-year-old Bronx youth kicked their son out of the house when he told them he was gay. Not content with that, the parents pursued him to the aunt's house where he had sought refuge and beat him repeatedly with a lead pipe and an unidentified

At the other pole, five days after the Associated Press reported the gay dog-killing, a “civil unions” law took effect in Vermont. Pressured by the state supreme court to equalize benefits for gay couples,<sup>6</sup> Vermont’s governor signed a bill guaranteeing to registered same-sex couples all of the rights, privileges, and responsibilities available to married couples under state (though not federal) law.<sup>7</sup> What separates gay couples from straight couples in the eyes of the state of Vermont is a word—“marriage”—and nothing more. It’s a measure of how far the law has come in its disposition toward homosexuality that an American jurisdiction now has the most nearly equal legal regime for gay couples that has ever existed.<sup>8</sup>

Between these poles lie large continents of ignorance and understanding, of fear and acceptance, of shouted insults in high school hallways, of soldiers beaten while they sleep, of couples together for decades yet still strangers to the law, of religious people who love and irreligious people who hate, of law that forces separation and law that forces togetherness, and of everything in between. It is a varied terrain, hard to map and harder to mold, yet the tectonic plates underneath it are unmistakably shifting.

Part of Professor William Eskridge’s mission in *Gaylaw* is to describe the historical development of the complex legal and, to some extent the cultural, landscape for gays. (pp. 17-137) His presentation makes it clear that it’s very much a modern world, meaning that its features are young. Given Eskridge’s analysis, the poles described above could not have existed a little more than a century ago. It is unlikely that a man of 1865 would have beaten his dog for being “homosexual,” since the word and perhaps the concept did not exist at the time.<sup>9</sup> It is more unlikely

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object while shouting, “God will punish you for your lifestyle!” and “You can’t be gay!” After being rushed to the emergency room and treated for multiple welts on his body, the young man survived. The parents were charged in the beating. New York Daily News (Aug. 13, 2000), available at [www.nydailynews.com](http://www.nydailynews.com). Following the theme of linking dogs and gays, a city in Mexico recently prohibited “dogs and homosexuals” from having access to its beaches. “Dogs and Homosexuals are Barred from Entering Beach Area.” *La Jornada* (Aug. 25, 2000), <<http://jornada.unam.mx/index.html>>.

6. *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

7. See 15 V.S.A. § 1204 (2000), available in LEXIS, “Vermont Statutes Annotated” Database.

8. The distinction will not last long. Effective in 2001, the Netherlands will recognize full-fledged same-sex marriages. “Dutch Legislators Approve Full Marriage Rights for Gays,” *N.Y. Times* A4 (Sept. 13, 2000).

9. However, there might have been other terms meaning something similar to homosexual; there were certainly people engaging in same-sex acts before the introduction

that a state in that year would have fully sanctioned an intimate relationship between two people of the same sex. Though not much of Eskridge's presentation of the history of American law's treatment of gays draws from original research, its synthesis of the available secondary sources is a useful contribution and will likely become a staple of classes treating the subject.

The larger part of *Gaylaw* is an argument for moving the continents, or perhaps for reshaping them. This is the book's greatest challenge and the place where *Gaylaw* will draw the most fire. Eskridge offers some fairly standard but nonetheless powerfully-reasoned arguments that the right of privacy should be applied to protect individuals from criminal sanction for consensual sodomy. (pp. 152-73) He makes an intriguing but incomplete case that state criminal prohibitions on sodomy run afoul of the First Amendment. (pp. 176-202) On Eskridge's view, the Equal Protection Clause should invalidate a wide range of laws discriminating against homosexuals. (pp. 207-31) Finally, he urges that the similarities between religion and homosexuality should lead to greater constitutional solicitude for the latter. (pp. 296-302)

In the process, *Gaylaw* leads readers on a tour of the familiar battlefields of the culture war: rape, employment discrimination, obscenity, adultery, prostitution, pornography, sado-masochism, intergenerational sex (pedophilia and pederasty), polygamy, maternal surrogacy contracts, and public sex. It's all there.

The theoretical goal for Eskridge is to craft an approach to constitutional and policy issues that borrows heavily from feminism but is marginally distinct from it in outcomes and rationale. This approach, which Eskridge calls "gaylaw," differs from what Eskridge calls "regulatory feminism" chiefly in its deep, across-the-board distrust of state sexual regulation. Thus, gaylaw criticizes prohibitions on prostitution, sado-masochism, pornography, and some intergenerational sex that regulatory feminism supports. It is, with a slightly libertarian twist, the dominant approach in gay-sympathetic legal scholarship. *Gaylaw* is pro-sex feminism.

At the same time, gaylaw sees state regulation of sexuality, including the resultant creation of a closet into which gays re-

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of the word homosexual (and those acts, in America and in Europe, were often socially and legally disapproved); and there were people prior to the 19th century who seem to have had a primary erotic orientation to others of the same sex.

treat, through the feminist prism of gender. Eskridge undoubtedly believes that approach is amply justified by, among other things, the history he recites. He views anti-gay prejudice as indistinguishable from sex discrimination both doctrinally and theoretically because the two prejudices are linked. He conceptualizes sexual nonconformity as a species of gender nonconformity.

There are clear doctrinal advantages to the sexual-nonconformity-is-gender-nonconformity model. If discrimination by government, as in the marriage laws and in laws forbidding same-sex sodomy, is sex discrimination then it is subject to heightened scrutiny and probable invalidation across a broad range. Further, statutes prohibiting private sex discrimination (in employment, for example) should be interpreted to prohibit sexual orientation discrimination as well. (pp. 231-33)

The model also has undeniable factual and historical resonance. Traditional views about the place of men and women in society have certainly fed anti-gay sentiment. Scratch a sexist and you almost always find a homophobe, and vice versa.

But the model proves too much and accomplishes too little. It overemphasizes the undeniable overlap between sexual rebellion and gender rebellion, including the state's past attempts to suppress them both. That overemphasis misunderstands gay life because it reduces it to one part. It misses the constitutive role law plays in gender rebellion. It allows the opponents of gay equality to set the terms of the debate. And it fails fully to account for and to engage the many non-sexist arguments now advanced against gay equality. The gain—allowing gays to share with feminists an identity of gender oppression—may not be worth the pain.

*Gaylaw* is an admirable attempt to liberate us—gay and straight—from what Eskridge calls in the book's subtitle, "The Apartheid of the Closet." Yet it turns out that in subtle and unintentional ways *Gaylaw* manages to liberate from a closet what it then confines to a prison. It is an "identity prison", to borrow Eskridge's useful phrase, (p. 7) one that has the virtue of being roomier than the old closet but the vice of being another confinement.

Nevertheless, *Gaylaw* is a clear and soberly written<sup>10</sup> argument, a powerful accomplishment that both reflects and rein-

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10. A lone exception is Eskridge's brief flirtation with vegetation similes. We en-

forces what have become some of the principal approaches to legal scholarship in the area.<sup>11</sup> It manages to connect contemporary discrimination against gays with the extensive historical record of such discrimination. And it envisions a moral dimension to gay equality that is both provocative and refreshing. For those reasons alone, it cannot be ignored.

## I. GAYLAW'S HISTORY

"The modern regulatory state cut its teeth on gay people," Eskridge writes. (p. 43) *Gaylaw* chronicles, in detailed fashion, the often cruel ways in which it did so. More than just a tale of woe, however, *Gaylaw* also shows how the decentralized structure of American government and the country's libertarian leanings undermined the campaign to repress homosexuals.

### A. MUNICIPAL, STATE, AND FEDERAL REGULATION: 1880-1946

Eskridge begins his history of the legal regulation of same-sex intimacy in America with the period after 1880. On the one hand, this seems an odd starting point since many states had laws prohibiting "crimes against nature," "sodomy," and "buggery" well before that time, as *Gaylaw's* useful Appendix A1 demonstrates. (pp. 328-37) (listing dates of first sodomy laws for each state, starting in 1610) There is a history of the pre-Civil War interaction of law and "sodomitical sin,"<sup>12</sup> but only brief references to it can be found in *Gaylaw*.

On the other hand, the pre-Civil War laws were vague and there seems to have been little public concern about them, much less a concerted effort to enforce them. New York City, for example, prosecuted a mere twenty-two sodomy cases between 1796 and 1873. By 1900, the city prosecuted more than twice that number *every year*. (p. 25) Even accounting for population increases, that's a dramatic rise.

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ture three of them in the space of five pages ("gay bars and baths proliferated *like mushrooms after a spring rain*," (p. 113), "gay college groups grew *like wildflowers*," (p. 116), and "gay literature flourished *like azaleas in April*" (p. 118) before they disappear like dead leaves in the first winter snow).

11. For a classic statement of the link between the violation of sexual norms and the violation of gender norms, see Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187.

12. See, e.g., Jonathan Ned Katz, *Gay/Lesbian Almanac* 23-133 (Carroll & Graf Pub., 1994) (collecting original source materials for the period 1607-1740, including statutes, cases, and first-hand accounts).

Moreover, prior to the Civil War, the law concentrated on prohibiting acts without conceiving the people who committed them as a type of person. An analogue today might be handedness. We know people who are left-handed, deviating from the mathematical norm of right-handedness, but we do not have a word for “left-handed people,”<sup>13</sup> do not see them as having a separate identity based on handedness, and do not attach any legal, social, or moral significance to their deviant dexterity.

After the Civil War, the country became increasingly industrialized and, with that, urbanized. Large numbers of people moved to cities from small towns and rural areas. Cities, in turn, offered relative anonymity and separation from extended families. At the same time, large cities at once brought together people with varying sexual desires and offered more opportunity to satisfy them. By 1881, sexual subcultures existed in New York City, San Francisco, St. Louis, Philadelphia, Chicago, Boston, New Orleans, and Washington, D.C. (pp. 20-21)

According to Eskridge, the “most significant feature” of the burgeoning sexual subcultures of the late 19th century was “a conscious interconnection of cross-gender dress and sexual desires.” (p. 21) Some women dressed as men and married other women, taking on male sexual and professional roles. A striking example is that of Elvira Mugarietta, a biological female, who passed as male between 1892 and 1936, enabling her to serve in professional capacities largely closed to women, including the military, journalism, and philanthropy. Alice Mitchell, “a Memphis belle,” proposed to marry another woman by passing as a man. (p. 17) Men, too, cross-dressed and attracted male sexual partners. Effeminate males known as “fairies” sought out soldiers and working-class men willing to receive oral sex or give anal sex. (p. 22)

Reacting to the growth of these subcultures, cities and states began regulating sexuality as never before. Although the sodomy laws extant in every state during the period played a role in this repression, they were not the main tool. Eskridge identifies four primary categories of early state and municipal laws intended to constrain deviance: laws against cross-dressing—publicly wearing garb traditionally associated with the opposite sex; laws against public indecency and sexual solicitation, includ-

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13. “Southpaw” might qualify but it is used to describe left-handed baseball pitchers rather than to describe left-handed people generally.

ing laws against “disorderly conduct” and “lewd vagrancy”; child molestation laws; and obscenity laws. (pp. 27-34)

It is noteworthy that the first category (laws against cross-dressing) regulated gender nonconformity regardless of whether it was accompanied by sexual deviance. The latter three categories (public indecency, child molestation, and obscenity), together with sodomy laws, regulated sexual nonconformity regardless of whether it was accompanied by other markers of gender nonconformity. The law’s concern about these activities may have sprung from similar roots, but they were not the same weeds. Indeed, as Eskridge writes, “[d]uring this period the law began seriously to focus on homosexuals as a regulatory class *apart from other gender-benders.*” (p. 54) (emphasis added)

Enforcement of the laws against cross-dressing appears to have been sporadic, suggesting less state concern for sartorial gender-bending than for sexual deviance. *Gaylaw* provides almost no arrest or prosecution data for violations of the cross-dressing laws. This contrasts with Eskridge’s detailed and valuable presentation of data for arrests and prosecutions for sex-related offenses in several American cities. (Appendices C1-C6) In St. Louis, the one city for which cross-dressing arrest data are supplied, arrests were rare, especially compared to arrests for sex-related offenses. There were none after 1922. (Appendix C4) There were, however, repeated incidents of police harassment of drag balls in many American cities. (p. 45)

State and municipal laws were enforced to suppress homosexual association, including groups formed to advocate liberalization of sex regulations. An especially aggressive intrusion on free association came in 1924 against the Chicago-based Society for Human Rights, a small group that supported repeal of the Illinois sodomy law. After the wife of a member complained to police, they arrested the leaders of the group on disorderly-conduct charges, confiscated the group’s records, and seized one leader’s personal diary. (pp. 44-45) Additionally, license laws requiring holders to be of “good character” were used both to prevent gay bars from opening and to shut them down when they slipped through the system. New York’s State Liquor Authority, among others, prohibited bars from serving prostitutes and homosexuals. (pp. 45-46, 78)

Tougher child molestation laws were seen as an especially needed protection against predatory homosexuals, whom one

Ohio judge in 1922 memorably described as “wild ferocious animals.” (p. 40)

Federal authorities also took a hand in regulating sexuality before 1946. They did this by seizing and destroying obscene publications, excluding immigrants convicted of sexual crimes, and barring military service by degenerates. (pp. 34-37) U.S. Customs censored or seized novels depicting homosexuality in a positive way, including the 1886 edition of *The Arabian Nights*. (p. 47) Authorities censored homosexual content from films. (p. 48)

Some of the laws enacted during this period seem especially draconian by today’s standards. A 1911 Massachusetts law allowed the state to incarcerate degenerates and other “mental defectives” for indefinite periods of time in state mental institutions. More commonly, state laws called for sterilization or castration of moral degenerates and sexual perverts, mostly homosexuals. To “treat” homosexuals, hospitals performed pre-frontal lobotomies, injected massive doses of male hormones, and administered electric shock and other aversion therapy. (p. 42) None of it worked: homosexuality survived.

#### B. ANTI-GAY REGULATION AND THE GAY REACTION: 1946-PRESENT

Immediately following World War II, American government and society became increasingly alarmed by the spread of Communism. This was also a period of what Eskridge calls “a national antihomosexual Kulturkampf.” (p. 59) Between 1946 and 1961 alone, when arrests for violation of sodomy laws reached historic highs, the state “imposed criminal punishments on as many as a million lesbians and gay men engaged in consensual adult intercourse, dancing, kissing, or holding hands.” (p. 60)

Officials often worried that homosexuals, like Communists, were infiltrating and undermining government agencies. The “sexual perverts,” warned one politico, were just as “dangerous as the actual Communists.” (p. 68) In the space of seven months in 1950, President Harry Truman’s administration investigated the alleged sexual perversion of 382 civil servants, most of whom subsequently resigned. A government report warned that “[o]ne homosexual can pollute an entire office.” In fact, more State Department employees were fired for homosexuality

than for Communist sympathies in 1951 and 1952, the height of McCarthy-era red-hunting. (p. 69)

Immigration law reflected the concurrent national security concern with political and sexual subversives. The McCarran-Walter Act of 1952 excluded Communists, anarchists, and "persons . . . who are homosexuals or sex perverts." The federal investigations continued into the administration of Dwight Eisenhower. (pp. 69-71) The FBI kept close watch over homosexual political groups and federal authorities censored or confiscated homosexual publications. (pp. 74-78)

At the same time, states cracked down on homosexuals. They used professional licensing laws to prevent homosexuals from becoming doctors, dentists, pharmacists, embalmers, guardians, lawyers, teachers, and other professionals. (pp. 72-74) Many states removed "public place" requirements from their lewdness or indecency statutes, meaning that not only private gay sex was prohibited but that even proposing such private conduct was illegal. (p. 62) Law enforcement authorities aggressively used police stakeouts at suspected gay bars, decoy operations, and police raids to arrest large numbers of socializing homosexuals. For example, a 1960 raid on a San Francisco bar resulted in the disorderly-conduct arrests of 103 people for same-sex dancing. (pp. 63-64) Remarkably, when a serial killer targeted homosexuals in Santa Monica in 1956, police used details of the killer's confession *to start an anti-gay cleanup of the city*. (p. 65)

States and municipalities intensified their campaign to close gay bars through business and liquor license schemes. (pp. 78-80) A 1954 Miami ordinance, for example, made it illegal for a bar owner "to knowingly allow two or more persons who are homosexuals, lesbians or perverts to congregate or remain in his place of business." This one-homo-per-bar rule resulted in the closing of all of Miami's gay bars by the late 1950s. (p. 79)

Gays reacted to this crusade by invoking, with some success, substantive and procedural privacy protections. (pp. 83-92) Yet this strategy offered limited solace because "homosexuals would be let alone [only] so long as they acknowledged the shameful-ness of sexual and gender deviation." (p. 92) They could hide in the closet, concealing their orientation from a state partly stripped of the power to pursue them there, but they could not safely "come out."

In the 1960s and 1970s, with the help of Warren Court jurisprudence and the legal victories of the black civil rights movement, conditions improved. Increasingly robust criminal procedure rights decreased the success rate and increased the costs of anti-gay prosecutions. (pp. 101-04) Due process policies of fair notice and anti-vagueness helped strike down some lewdness and sexual solicitation laws, as well as episodically-enforced laws against cross-dressing. (pp. 108-11) Litigants successfully used the First Amendment's freedom of association to open gay bars and to form gay organizations, churches, and school clubs. (pp. 112-16) Free speech and free press guarantees allowed gay literature and newspapers to flourish. (pp. 116-25)

However, Eskridge perceptively observes that some legal advances were less important than political gains. Procedural guarantees for those accused of sex crimes did not reduce actual arrest rates until an increase in gay political power "forced police departments to consider their interests." (p. 104) Sodomy laws fell in state after state before 1978, usually by legislative rather than by judicial action. (p. 106)

Another useful insight from *Gaylaw* is that gay advocates were able to invoke the idea of legal neutrality to "appeal to an antigay judiciary to protect private gay spaces and the territory of gay sub-culture." (p. 100) The precepts of American law, many of them with historic and traditional roots in the nation's founding and in English common law, were applied to protect members of a newly-recognized and unpopular group.

Eskridge briefly recounts what many regard as a defining moment in the history of the gay civil rights movement, the riot that erupted after police raided a New York gay bar, the Stonewall Inn, in 1969. His description of the riot as an uprising of "drag queens, butch lesbians, and fairies" resonates with his belief in the link between sexual and gender rebellion. But, as history, the description is partial. Contrary to popular mythology, the clientele of the Stonewall comprised largely middle-class white men. Very few drag queens, gay women, or nonwhites were even admitted to the bar.<sup>14</sup> Of course, this observation does not deny that gender-benders were *present* at the riot. It

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14. Stephen O. Murray, *American Gay* 59 n.140 (U. of Chicago Press, 1996). A famous drag queen who was present that night has also debunked the notion that the Stonewall Inn was a "bar for drag queens." Eric Marcus, *Making History: The Struggle for Gay and Lesbian Equal Rights, 1945-90* at 190-91 (Harper Collins, 1992) (account from Rey "Sylvia Lee" Rivera).

only makes the point that their centrality to it has been exaggerated, perhaps for political or ideological reasons.

Despite all their gains through the late 1990s, including the passage of employment non-discrimination ordinances in several states and scores of municipalities, "gay people remain second-class citizens in the United States." Homosexuals are prohibited from marrying each other, considered criminal under the sodomy laws of nineteen states (six of which are directed *solely* at gay sex), discriminated against in child-custody and adoption proceedings, barred from service in the military, and legally unprotected from private employment discrimination in most of the country. (pp. 139-40) Ending that second-class status is the constitutional and policy project of *Gaylaw*.<sup>15</sup>

## II. GAYLAW'S PREMISE

Before considering Eskridge's constitutional and policy arguments, a preliminary issue must be addressed. Underlying the history and argument of *Gaylaw* is a fundamental premise: sexual nonconformity is gender nonconformity (the "gender premise"). The gender premise has profound consequences for the way we should think about gay life and the law. Because it is behind Eskridge's theoretical and some of his constitutional approach, it's critical both to understand the gender premise and to assess its merits.

Eskridge believes "there is a historical as well as logical connection between *compulsory gender binarism*, the idea that men must be masculine and women must be feminine, and *compulsory heterosexuality*, the idea that sexuality must consist of a man having sex with a woman." (p. 224) (emphasis original) This observation is the basis for his doctrinal argument that anti-gay discrimination is a form of sex discrimination subject to heightened scrutiny under the Fourteenth Amendment. (pp. 218-28) In short, "issues of sexual nonconformity should not be separated from issues of gender nonconformity." (p. 1)<sup>16</sup> On the history and logic presented, is he right?

The gender premise has three functions for Eskridge. It offers an *historical* explanation of the social and legal link between

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15. See Part III *infra*.

16. Indeed, Eskridge "uses the term 'gay people' to include both sexual orientation minorities—lesbians, gay men, and bisexuals—and transgendered people—transsexuals and transvestites." (p. 1) This is the path taken in William N. Eskridge, Jr. and Nan D. Hunter, *Sexuality, Gender, and the Law* (Foundation Press, 1997).

gender and sexual deviance. It is *descriptive* of gay life: homosexuals are gender rebels and the resistance they meet can be understood as a reaction to that fact. And it has *legal* implications in its attempt to link sexual orientation discrimination to sex discrimination. I consider each of these functions below.

#### A. THE HISTORICAL FUNCTION OF THE GENDER PREMISE

At first blush, the gender premise seems historically justified by the observed behavior of the sexual nonconformists. Recall Eskridge's discussion of the perceived connection between cross-gender dress and same-sex sexual desires in the early sexual subcultures of many American cities.<sup>17</sup> These sexual subcultures included women, like Elvira Mugarietta and Alice Mitchell, who dressed and behaved like men and were attracted to other women. The subcultures also included effeminate males—"fairies," to use the word of the time—who sought other men for sex. (p. 22)

The gender premise also seems justified by the historical obsessions of governmental authorities. There are numerous accounts—drawn from police records, professional "sexologists" and other medical observers—describing the early sexual subcultures and the people who comprised them. One 1889 account by a doctor described the "colony of male sexual perverts" in Chicago who had both "abnormal sexual impulses" and "effeminacy of voice, dress, and manner." Female impersonators and fairies frequented the periodic drag balls and burlesques that became popular in the 1890s. (p. 21-23)

In a preview of the gender premise, medical and mental health professionals of the late 19th and early 20th centuries began to see a connection between same-sex sexual activity and gender-bending behavior. They also began to see both as a sickness. They developed elaborate and, to modern ears, bizarre theories to explain the new phenomena of widespread sexual and gender nonconformity. These theories generated a specialized medical vocabulary. Early sexologists studied what they called "inverts," people who rejected both their appropriate sexual and gender roles. The invert's body and mind took on traits associated with the opposite sex. Feminized males or masculinized females were a "degeneration," a reversion to an earlier evolutionary status. One doctor wrote in 1884 that when

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17. See Part I.A. *supra*.

people's "sex is perverted . . . men become women and women men, in their tastes, conduct, character, feelings and behavior." (p. 22)

An early theorist who bravely opposed criminal sodomy laws was German attorney Karl Heinrich Ulrichs, himself an invert, who wrote: "That an actual man would feel sexual love for a man is impossible. The urning [Ulrich's term for an invert] is not a true man. He is a mixture of man and woman. He is man only in terms of body build."<sup>18</sup> Eskridge does not quote this passage, but it is the clearest early statement from a gay-sympathetic source of the notion that gays are natural gender rebels. There are echoes of the urnings theory in the modern equation of sexual and gender nonconformity.

By 1921 the Army defined the nervous condition of "degeneration" as "often marked by diminished stature and inferior vigor; males may present the general body conformation of the opposite sex." To the military, "sexual perversion" was not simply an act but often a medical condition. And it was clearly linked to gender-bending. (p. 37)

It's difficult, from across a century, to know precisely what significance to draw from the reported behavior and dress of the early gender-benders. Many of the accounts of their lives come from those—the police and medical authorities—pre-disposed both to disapprove them and to see them as necessarily a threat to traditional gender roles. For the lawmaker, the law enforcer, and the medical observer of the late 19th and early 20th century, same-sex sexual behavior could only be the act of an invert. It could not be the act of a normal person.

It should not be surprising that such authorities linked sexual and gender nonconformity. Gender deviance is observable; homosexuality is not. Gender deviants were the deviants such authorities could see and study. The sexual deviants who were not otherwise gender-bending, on the other hand, were harder to find. Moreover, it's plainly true that same-sex sexual desire and behavior do not conform to one basic and important traditional gender expectation: a person should be sexually attracted to the opposite sex.

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18. Karl Heinrich Ulrichs, *Araxes* (1870) (quoted in Mark Blasius and Shane Phelan, eds., *We Are Everywhere: A Historical Sourcebook of Gay and Lesbian Politics* 63, 64 (Routledge, 1997)).

It should also not be surprising that some inverts behaved in gender nonconforming ways (apart from their same-sex sexual activity) by, for example, taking on the dress associated with the opposite sex. Eskridge recounts this behavior but offers no theory to explain it, except perhaps the gender premise itself.

One explanation of gender nonconformity among inverts 100 years ago, and among gays today, is that there is a necessary connection between gender and sexual rebellion. To give up the traditional sex role by being homosexual, according to this explanation, is to surrender to gender rebellion across a broad front of manner, dress, and behavior.

An alternative explanation is that gender nonconformity among inverts, and among modern gays, is partly an artifact of social stigma and legal repression. This is evident in three ways.

First, gender nonconformity is a way for some people to access advantages and attract mates available only to the opposite sex while escaping detection from legal, familial, and social observers. Perhaps, as the sexual-nonconformity-is-gender-nonconformity model suggests, women like Mugarietta cross-dressed because they were truly uncomfortable with the gender (feminine) assigned to them by tradition because of their sex (female). On the other hand, perhaps some of these women did it because in late 19th and early 20th century America, that was the only practical way for a woman to become a soldier, journalist, and philanthropist. Maybe women like Mitchell thought of passing as a man because they rejected socially-assigned gender roles. Or perhaps, on the other hand, they did it because under the constraints of the time a gender-bending act would enable a woman to marry the person she loved — another woman.

Second, as Eskridge recognizes, an atmosphere where acknowledged homosexual desire is penalized and stigmatized results in the creation of the closet as “a suffocating situs of sexual secrecy.” (p. 56) Homosexuals hide to avoid anti-gay social and legal disabilities. In such a climate, a degree of gender nonconformity acts as a relatively safe signaling device to identify other homosexuals. It is a way for gays to find each other, even as they hide in the closet, while reducing the risk of discovery by those who would disapprove. This signaling might take a variety of forms: particular words given a special meaning in the subculture,<sup>19</sup> a particular mannerism, an article of clothing, etc. Since

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19. In an earlier era, it was common for a gay person to call another gay person a

experienced inverts and authorities were taught by science and medicine to associate sexual deviance with gender role confusion, gender nonconformity would have seemed a natural way for closeted inverts to send signals to one another without tipping off *uninitiated* friends, co-workers, and family members.

Third, for gay males in an era when femininity was identified with inferiority, behaving in a gender nonconforming manner helped reassure their sexual partners that they retained their masculinity even though they were having male-male sex. Since, under a traditional understanding an "actual man" could not feel sexual desire for another actual man, it helped if one played a more traditionally feminine role in dress, manner, language, and sexual position. Thus, as Eskridge reports, fairies took on the passive or receptive role associated with femininity when having sex with traditionally masculine men.

A 1919 investigation of naval facilities in Newport, Rhode Island, for example, uncovered a group of fairies who fellated sailors. The fairies took on women's names, dressed as women, walked and minced in girlish ways, hugged each other, and played the woman's part in sex. (p. 36) They were classic gender benders. For the sailors and even for the authorities investigating Newport, oral sex with fairies was not "morally problematic so long as [the sailors] were playing the man's part, the inserter, and the degenerate was playing the woman's part, the insertee." (p. 38) This reasoning allowed the dominant or insertive partner to retain his status as "straight" and hence normal.

Did the fairies behave as they did because they were uncomfortable with rigid gender roles or, rather, because they wanted sex with men and being feminine was the way to get it? It's hard to say with certainty, but for many fairies gender-bending may well have been a means and not an end. These men wanted sex, not a gender rebellion.

In each of these ways some degree of gender nonconformity, whether it takes a minimal or maximal form, could be understood as a rational response to social and legal repression.<sup>20</sup> It is

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"friend of Dorothy," referring to Judy Garland's character in *The Wizard of Oz*.

20. I do not claim here that, in the absence of social and legal repression, there would be less gender nonconformity among gays than among straights. See Richard Posner, *Sex and Reason* 301 (Harvard U. Press, 1992) (greater incidence of childhood gender nonconformity among gay men "makes it plausible to expect that effeminacy would be more common among homosexual than among heterosexual adults" even absent repression). My only claim here is that the incidence of such nonconformity would likely not be as great at lower levels of such repression. At the very least, repression

a way of acting to maximize the availability of things one desires. On this view, gender nonconformity among the inverts of yesteryear or the gays of today is socially constructed—at least as much as are traditional gender roles or the concept of homosexuality itself.<sup>21</sup> Consider that in ancient Greece male-to-male sexual activity was an integral part of masculinity, not a threat to it.<sup>22</sup> The conception of same-sex desire as necessarily gender-bending is conventional, not natural.

More than that, ironically perhaps, gender nonconformity among gays may be socially *induced*. In the ways described above, it is a product of the very homophobia gaylaw seeks to eliminate. Rather than being a sign of freedom it is a mark of imprisonment. Once generated, it is mimicked by others in the gay subculture as a way to connect with and to maintain a communal identity.<sup>23</sup> Young gays learn gender nonconformity from other gays.<sup>24</sup> Gender insubordination is an imitation for which there is no original.<sup>25</sup>

Eskridge generally recognizes law's role in shaping behavior and desire in unexpected ways. In an especially insightful passage, he writes,

A leading heterofear is that gays in the military, same-sex marriage, and gay families with children would unleash weirdness upon the country. Greater weirdness has been built up by state campaigns against gay people, for such campaigns drive people away from mainstream values and create unproductive anger, as well as empower society's worst bigots. (p. 10)

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causes both homosexuals and heterosexuals "to exaggerate the percentage of [male] homosexuals who are effeminate." *Id.* at 301-02.

21. I leave to one side the question whether social constructionism is generally a useful or accurate way to look at the world.

22. See generally Byrne Fone, *Homophobia: A History* 25 (Metropolitan Books, 2000) ("For the Greeks, warrior, citizen, husband, and lover of boys were all fruits of masculine identity.")

23. Eskridge notes that "[t]he law helped engender a *group identity* among gay people both by persecuting them as gays and by protecting gay public expression." (p. 92) (emphasis original) It is the gender-nonconforming aspects of that group identity I point to here.

24. Paula Martinac, *Learning 'Cultural Queerness,'* Bay Area Reporter 10 (Aug. 17, 2000) (describing how she "'learned' lesbianism from my friends and lovers," as a result of which "I . . . cut my hair short, and put on men's jeans and shirts").

25. Compare Judith Butler, *Imitation and Gender Insubordination*, in Diana Fuss, ed., *Inside/Out: Lesbian Theories, Gay Theories* 13 (Routledge, 1991) ("gender is a kind of imitation for which there is no original. . . .").

For example, he writes, "by teaching thugs that they could have their way with fairies without accountability, the law encouraged their sadism; by teaching fairies that they were subhuman, the law inculcated in some of them a victim mentality of masochism." (p. 54) Thus, on Eskridge's account, law unintentionally creates sado-masochistic subculture.

I doubt that gay sado-masochistic subculture is entirely a product of the legal repression of homosexuals. But the structure of Eskridge's argument here is noteworthy because he does not apply the same insight to gender rebellion. It could be that the legal and social equation of sexual and gender nonconformity, including the punishment of both, has played a constitutive and causal role in gender-bending among some gays. It's a proposition worth considering, but it can't be found in the pages of *Gaylaw*. Instead, Eskridge uncritically accepts the notion advanced by many feminists and by those who advocate the legal and social repression of homosexuality: that gays share some sort of "rejection of gender role." (p. 55)

#### B. THE DESCRIPTIVE FUNCTION OF THE GENDER PREMISE

Another function of the gender premise is to describe both gay life and the source of the obstacles gays face. Gays just *are* gender rebels, it asserts. Moreover, their troubles are deeply connected to traditional views about the proper roles of men and women.

The gender premise is descriptively reductionist, and overstated, in its equation of sexual nonconformity and gender rebellion. As the model insists, gays reject at least one traditional gender characteristic by virtue of their same-sex erotic attraction. But does this mean they reject "gender role" as a general matter?

Suppose there are a hundred qualities packed into the traditional notion of what it is to be a masculine male.<sup>26</sup> These qualities might include everything from general traits, like aggressiveness, to specific ones, like watching televised sports. One of them—and surely a very important one—is desiring women for sex. Gay men, by definition, reject that trait. But a riotous act is

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26. The idea that there is a single traditional notion of what it is to be a masculine male or a feminine female, or that such conceptions have been stable over time, is doubtful. Although there are some widely-shared views about what constitutes masculine and feminine qualities, there is no unanimity about them and, because they are conventional, they are changeable.

not a revolution. Many gay men accept most or all of the other ninety-nine hypothetical traits of masculinity; and many gay women, femininity.

For example, it's quite possible (even common) for a gay male to embrace the traditional masculine belief in the superiority of men to women. By his erotic attachment to other men, and his erotic rejection of women, he might be thought to embrace masculinity *more* emphatically than do heterosexual males. Far from being a gender *nonconformist* by virtue of his sexual deviance, he might be a gender *superconformist*. He's not a gender rebel, but a gender patriot. Some lesbian feminists have bitterly made this point about gay men, with one labeling gay rights "the fundamentalism of the global religion which is Patriarchy."<sup>27</sup>

An advantage of linking gender and sexual nonconformity might be that destabilizing strict gender roles will undermine traditional male-female sexual expectations, liberating homosexuals. (pp. 224-26) A society unconcerned with policing gender will likely be less interested in policing gay sexuality. But this victory, if ever achieved, is not absolute. There are good reasons for policing some expressions of sexuality (e.g., bestiality, incest, pedophilia, prostitution, and rape) that have little or nothing to do with the enforcement of rigid gender roles. Similarly, there are reasons often offered for policing gay sex (e.g., protecting children from sexual predation, preventing the spread of disease, and discouraging the modeling of an inherently unhappy lifestyle) that also have little or nothing to do with the enforcement of rigid gender roles. Eskridge recognizes that modern anti-gay rationales are shifting away from explicitly sexist appeals. (pp. 226-27) Linking gender and sexual nonconformity is, at best, an incomplete way to attack anti-gay impulses, leaving untouched much of today's homophobic terrain. The gender premise seems increasingly like an attempt to fight the present war with the weapons and strategies successful in the last. As a tool of legal and cultural criticism, it is becoming anachronistic.

It is certainly true that opponents of gay legal equality have historically tended to fuse homosexuality and gender nonconformity, although as noted above that form of anti-gay argument

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27. Marilyn Frye, *Lesbian Feminism and the Gay Rights Movement: Another View of Male Supremacy, Another Separatism* (1981), in *We Are Everywhere* 499, 501-03 (cited in note 18) (asserting that gay men's effeminacy, rather than signifying an "identification with women or the womanly," is "a casual and cynical mockery of women").

is waning. Thus, the gender premise might be defended as a practical response to the opposition, treating the symptom of homophobia by curing the disease of sexism. Yet, as Eskridge shows, gay-equality opponents have equated homosexuality with everything from pedophilia to communism.<sup>28</sup> No one thinks, for that reason, we should paint gays as natural child molesters. No one supposes gays have a shared rejection of capitalism.<sup>29</sup> It's a strange path to liberation that takes the opposition's stereotype (gays are gender rebels) as a starting point. A more successful legal and cultural strategy might be to dislodge the stereotype root and branch, not feed its growth.

To the extent gender rebellion is a worthwhile gay cause at all, it would seem the most subversive homosexual matches are (1) a masculine man loving a masculine man, and (2) a feminine woman loving a feminine woman. These combinations upset traditional gender expectations in a way that general gender nonconformity by gays does not. The traditionalist *expects* a gay man to be effeminate and a gay woman to be butch. It's when gays do not conform to this nonconformity model that the traditionalist is most discomfited.<sup>30</sup> After all, recall that on the traditional view it is literally impossible for an actual man to feel sexual love for another man. Traditionalists and feminists thus agree: gays necessarily reject their appropriate gender role. The former laments this rebellion; the latter embraces and celebrates it.

Theory aside, the fact is many gay women and men see themselves in gender-conforming terms and seek gender-conforming traits in their mates. They do not see dismantling

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28. See Parts I.A. and I.B. *supra*.

29. Actually, it's not quite true that *no one* thinks this. Kay Lahusen, who worked in the pre-Stonewall homophile movement and labored to have the American Psychiatric Association remove homosexuality from its list of mental disorders, remembers how some activists in the 1970s constantly tried "to make the good case for how great it would be under socialism and how *our cause was really an economic cause*." Marcus, *Making History* at 214 (cited in note 14) (emphasis added). Now come feminists to claim that gay equality is really about gender. Someone, it seems, is always trying to claim that gay equality is about something other than homosexuality.

30. In contrast to the social science research emphasizing a possible link between homophobia and traditional attitudes about women's place in society, (p. 224) some research has found greater hatred and fear of gays who can pass in straight settings than of gender-nonconforming gays. See Mary Riege Laner and Roy H. Laner, *Personal Style or Sexual Preference: Why Gay Men are Disliked*, 9 *Int'l Rev. of Mod. Soc.* 215, 219-27 (1979); Mary Riege Laner and Roy H. Laner, *Sexuality Preference or Personal Style? Why Lesbians are Disliked*, 5 *J. of Homosexuality* 339, 345-53 (1980). Neither gender nonconformity nor sexual nonconformity alone adequately explains popular revulsion to homosexuals. I thank Stephen Murray for pointing me to this research.

gender roles as a precondition to the fulfillment of their deepest aspirations for love and commitment. Quite the contrary, part of the reason they are attracted to members of the same sex is that they expect their potential mates to fit expected gender roles. The gender premise seems inadequate to the task of explaining the lives and experiences of a large portion of gay women and men in America today. Whether the fact that many homosexuals conform generally to traditional gender expectations is good, bad, or neither is another question. But this fact at least challenges the conclusion that gays necessarily share, with each other and with transgendered people, a broad "rejection of gender role."

### C. THE LEGAL FUNCTION OF THE GENDER PREMISE

A final function of the gender premise is its doctrinal suggestion that sexual orientation discrimination is a form of sex discrimination. (pp. 218-28) This argument has been developed in greater detail by Andrew Koppelman,<sup>31</sup> among others. If it's right, sexual orientation discrimination ought to receive the same close scrutiny that sex discrimination receives. The legal argument relies in part on the historical and descriptive components of the gender premise described above. For the same reasons they are flawed it is flawed.<sup>32</sup>

There's more. Anti-gay prejudice is not just a means to sustain patriarchy, as the gender premise implies. It has other sources, purposes, and effects. It might arise, for example, from generalized sex-negativity in American culture.<sup>33</sup> It might also arise from long-standing religious doctrines. These observations suggest that discrimination based on sexual orientation might well survive the demise of sexism.<sup>34</sup> As noted above, the state has plenty of justifications for discrimination against gay women and men that have little or nothing to do with sex discrimination.

31. See Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. Rev. 197 (1994).

32. See Parts II.A. and II.B. *supra*.

33. Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in Carole S. Vance, ed., *Pleasure and Danger: Exploring Female Sexuality* 267, 300-09 (Routledge & Kegan Paul, 1984) (arguing that feminism's critique of gender hierarchy is useful but inadequate and that "an autonomous theory and politics specific to sexuality must be developed").

34. As my colleague Don Dripps points out, in recent years there has been little opposition to confirming women as Supreme Court Justice, Secretary of State, and Attorney General, but it took a heroic effort to confirm a gay man (James Hormel) as ambassador to Luxembourg.

Perhaps partly for these reasons, courts have often rejected various forms of the sex-discrimination argument when used to attack private anti-gay employment discrimination under Title VII<sup>35</sup> or a state's ban on same-sex marriage.<sup>36</sup>

#### D. AN ALTERNATIVE TO THE GENDER PREMISE: THE PARTICULARITY THESIS

Maybe the gender premise is unconvincing in its historical analysis, inaccurate as a description of gay life and the discomfort homosexuality causes traditionalists, and incomplete as a tool for the legal analysis of anti-gay discrimination, but is it all we have? Distinct from both traditionalism and feminism is a third position which holds that issues of sexual nonconformity and gender nonconformity share some common ground but are not coterminous and are thus analytically distinct. This alternative to feminism and traditionalism examines homophobia in its particularity, recognizing its similarities to other kinds of prejudice (like sexism and religious bigotry), but examining and attacking its unique attributes. Call it the particularity thesis.<sup>37</sup>

After the publication of *Gaylaw*, the Vermont Supreme Court gave legal expression to a kind of particularity thesis in *Baker v. Vermont*,<sup>38</sup> the decision ending anti-gay marriage discrimination in that state. There, contrary to the gender premise, (pp. 220-24) the court rejected an argument that the state prohibition of same-sex marriage was a form of sex discrimination.<sup>39</sup> The court distinguished the Supreme Court's sex-discrimination

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35. See, e.g., *DeSantis v. Pacific Telephone & Telegraph Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979) (no Title VII claim for "discrimination on the basis of sexual preference").

36. See *Baker v. Vermont*, 744 A.2d 864 (1999). But see *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (holding same-sex marriage ban violates state constitution's prohibition on sex discrimination). I do not urge here that the sex-discrimination argument for gay equality is completely unfounded or inappropriate as a way to dismantle some discrimination against gays. For example, Title VII's prohibition on "sex" discrimination might plausibly be applied to bar anti-gay discrimination, (pp. 231-33) though courts have so far rejected that view. I have argued that same-sex sexual harassment, including anti-gay abusive treatment, is a form of sex discrimination prohibited by Title VII. Dale Carpenter, *Same-Sex Sexual Harassment Under Title VII*, 37 S. Tex. L. Rev. 699, 720-26 (1996).

37. A book review is no place to develop the particularity thesis in detail. I simply want to call attention to the possibility of crafting an alternative way to look at homosexuality, the relationship of homosexuality to gender nonconformity, and the prejudices that both (pardon the word) engender.

38. 744 A.2d 864 (1999).

39. *Id.* at 880 n.13. Courts have similarly rejected the view that the prohibition on sex discrimination in Title VII also prohibits sexual orientation discrimination. See *DeSantis*, 608 F.2d at 329-30.

precedents by noting that “[a]ll of the seminal sex-discrimination decisions . . . have invalidated statutes that single out men or women as a discrete class for unequal treatment.”<sup>40</sup> Traditional marriage laws are facially neutral because “each sex is equally prohibited from precisely the same conduct,” marrying a person of the same sex.<sup>41</sup> To invalidate a facially neutral law, it must “be traced to a discriminatory purpose.”<sup>42</sup> But although some laws related to marriage may have been intended to ensure men’s supremacy, there is no evidence “the authors of the marriage laws excluded same-sex couples because of incorrect and discriminatory assumptions about gender roles or anxiety about gender-role confusion.”<sup>43</sup> Instead, the court found the state’s gay marriage ban violated the state constitution’s Common Benefits provision, a clause with at least some similarities to the federal constitution’s Equal Protection Clause.<sup>44</sup>

Under a particularity thesis, many instances of anti-gay discrimination might violate the Equal Protection Clause but under a different analysis than that which applies to a standard male-dominance theory of sex discrimination. Unfortunately, imprisoned by the gender premise, *Gaylaw* does not systematically explore the possibility of an analysis of anti-gay discrimination independent of the sex-discrimination framework.

On the other hand, *Gaylaw* documents an extensive history of anti-gay discrimination, much of which has been independent

40. *Baker*, 744 A.2d at 880 n.13 (citing *United States v. Virginia*, 518 U.S. 515, 555-56 (1996) (“repudiating statute that precluded women from attending Virginia Military Institute”); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 731 (1982) (“invalidating admission policy that excluded males from attending state-supported nursing school”); *Craig v. Boren*, 429 U.S. 190, 204 (1976) (“invalidating statute that allowed women to purchase nonintoxicating beer at younger age than men”); *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (“striking statute that imposed more onerous requirements upon female members of armed services to claim spouses as dependents”)).

41. *Baker*, 744 A.2d at 880 n.13.

42. *Id.* (quoting *Personnel Adm’r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979)).

43. *Baker*, 744 A.2d at 880 n.13. For this reason, the court rejected a sex-discrimination analogy to the race discrimination found by the Supreme Court to invalidate anti-miscegenation laws in *Loving v. Virginia*, 388 U.S. 1 (1967), where it was clear the law was a ruse to perpetuate white supremacy. Eskridge relies heavily on an analogy to *Loving* to argue that laws against same-sex marriage are a form of sex discrimination. (pp. 218-28)

44. *Baker*, 744 A.2d at 886. The *Baker* court emphasized the differences between the state constitution and federal constitutions on this point, but the distinction looks more tactical than substantive. Relying on a formally different analysis allows the Vermont court to distance itself from the federal precedents that have rejected same-sex marriage while at the same time employing the logic of equal protection.

of gender-role enforcement.<sup>45</sup> It also presents material suggesting that much present-day discrimination is at least the residue of anti-gay animus, an impermissible basis for legislation under the Equal Protection Clause.<sup>46</sup> Thus, *Gaylaw* helpfully supplies some of the background necessary for developing a particularity approach.

### III. GAYLAW'S CONSTITUTION

In the most ambitious parts of *Gaylaw*, Eskridge uses different constitutional theories and provisions to take aim at sodomy laws (right of privacy, First Amendment, Equal Protection), the ban on gay military service (First Amendment and Equal Protection), anti-gay child custody and adoption laws (Equal Protection), and state and federal bans on the recognition of gay marriage (Equal Protection). He also suggests a reading of the Due Process and Equal Protection Clauses informed by an asserted similarity between religion and homosexuality.

Although Eskridge does not lay out his constitutional method, a definite pattern emerges: he collects passages from the Supreme Court's decisions, restates them as a general principle, applies that general principle to invalidate one or another form of anti-gay discrimination by government, and then cites social science studies to reassure everyone that no real harm will be done. Some will take issue with this method generally, and others will question each of its steps as applied, but it is a coherent approach that Eskridge deploys with great skill.

#### A. HARDWICK GOES DOWN

Criticizing *Bowers v. Hardwick*,<sup>47</sup> the Supreme Court's decision upholding homosexual sodomy laws, is like standing in one of those game-show air chambers grasping at dollar bills as they whirl around you: there are many choices but it's hard to get a grip on one. Still, Eskridge makes a good case for overruling *Hardwick*, outlining four areas of vulnerability: it is inconsistent with *Romer v. Evans*,<sup>48</sup> the Court's decision striking down a state constitutional amendment repealing and prohibiting local anti-discrimination protections for gays ("Amendment 2"); (pp. 150-

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45. See Parts I.A. and I.B. *supra*.

46. See Part III.C. *infra*.

47. 478 U.S. 186 (1986).

48. 517 U.S. 620 (1996).

51, 209-11) it is inconsistent with the Court's prior privacy jurisprudence; (pp. 152-56) it relies on erroneous history regarding the content of prohibitions on sodomy at the time the 14th Amendment was enacted; (pp. 156-66) and it is bad policy. (pp. 166-73)

### 1. The *Evans* Attack

First, Eskridge urges that *Evans* spells doom for *Hardwick*. Justice Scalia, in his *Evans* dissent, argued that it made no sense to permit a state to criminalize same-sex sexual behavior as the Court did in *Hardwick*, but to forbid a state from withdrawing legal protections for the group that engages in that very behavior. According to Scalia, the greater power, to make criminals of gays, includes the lesser power, to deny them what he called "special protections."<sup>49</sup> Eskridge turns that argument around and asks, given Scalia's objection to the result in *Evans*, how can *Hardwick* stand? If the state can't withdraw "special protections" from gays, it surely can't make them criminals. Although the *Evans* court never mentioned *Hardwick*, the Seventh Circuit seems to agree that its days are numbered.<sup>50</sup>

On the other hand, *Hardwick* involved a criminal prohibition on specific conduct; it did not involve a sweeping denial of legal protections to a single class, as in *Evans*. Although the criminal law (as applied) in *Hardwick* focused on a single class, those who engage in same-sex sexual conduct, it did not withdraw that class generally from the protection of the law. Thus, Scalia and Eskridge may have their "greater" and "lesser" powers backward. The state lacks the "greater" power to enact a sweeping denial of rights but has the "lesser" power to focus its prohibitory efforts on discrete areas—like the specific conduct at issue in *Hardwick*.<sup>51</sup>

Eskridge has a better argument for the vulnerability of *Hardwick* after *Evans*. Under *Evans*, a law is unconstitutional if its passage was motivated by sheer animosity toward the class of people affected. Eskridge compares this purposive failing in Colorado's Amendment 2 in *Evans* to prohibitions on same-sex

49. *Id.* at 641 (Scalia, J., dissenting) (emphasis omitted).

50. See *Nabozny v. Podlesny*, 92 F.3d 446, 458 n.12 (7th Cir. 1996) (*Hardwick* "will soon be eclipsed by the area of equal protection by the Supreme Court's holding in *Romer v. Evans*").

51. For a syllogistic critique of Scalia's argument, see Lynn A. Baker, *The Missing Pages of the Majority Opinion in Romer v. Evans*, 68 U. Colo. L. Rev. 387, 389-99 (1997).

sodomy in *Hardwick*, noting that same-sex-only sodomy laws are relatively novel in American law (appearing for the first time in 1969). (p. 210) The *Hardwick* court held that the moral views of Georgians, expressed in the sodomy law of their state, was a sufficient rational basis for it. Eskridge views the enactment of such a moral perspective, directed at a single class of people and unaccompanied by credible claims that the disfavored class is committing harm, as evincing nothing more than “popular animosity” prohibited as a justification for legislation under *Evans*. (pp. 150-51)

This is an appealing argument both because it fits well with *Evans* and because it draws on common sensibilities in a democratic society about the danger of animus-based, non-deliberative factionalism. But the argument raises serious and familiar questions about how the Court is to know the purposes of a collective body, whether a legislature or an electorate. If a state comes into court saying that broad legislation targeted at a single class is justified by unadorned disapproval of the class, it will likely lose after *Evans*. But for that reason, a state will not make that argument in the context of broad, class-specific legislation. The state will always have other justifications, however contestable and pretextual, at its fingertips.

Perhaps the answer is that judges should require a higher standard of support for class-specific (and certainly for status-based) legislation that appears overly broad. But what standard? How is it to be applied? When is it triggered? *Gaylaw* doesn't say, but a consideration of the history *Gaylaw* presents might offer one possibility for deciding when a state's claimed justification for legislation warrants close scrutiny. The court might inquire whether, historically, legislation directed at the targeted class is more likely than not to be animus-based, or based on now-discredited stereotypes or once-reasonable beliefs clearly refuted by the advance of positive knowledge. For example, one such discredited stereotype with respect to homosexuals, refuted by the advance of positive knowledge, is that gays are more likely than heterosexuals to molest children. Any justification for legislation aimed at gays based on such a rationale should not be credited. Ironically, this history-bound approach might in general be more likely to trigger distrust of vintage laws, whose passage in an earlier era is more likely to have reflected erroneous assumptions and stereotypes about gays, than of recent and novel laws like Amendment 2.

Eskridge has presented abundant historical materials to raise substantial questions about the motivations behind measures like Amendment 2 and anti-gay sodomy laws, notwithstanding a state's claimed justifications. (pp. 17-137) As Eskridge concludes,

[L]aws focusing on homosexuality or gay people have usually been motivated by hysterical, obsessional, or narcissistic and not public-regarding, fact-based reasoning; have repeatedly proven to be socially unproductive laws that either wreak policy havoc or waste state resources or (if unenforced) simply serve as symbolic spite measures; and focus on a class of people subject to unjustified scorn and violence, whose unfair plight has typically been worsened by state brutalization and stigma. (p. 217)

In short, the history of sexual regulation offers good reason for courts to be dubious of much legislation directed at gays since such legislation is more likely than not to be animus-based and the justifications offered for it pretextual or simply wrong. If *Gaylaw* accomplished nothing else, this insight alone would make it worth reading, studying, and considering in constitutional litigation affecting gays.

## 2. The Privacy Attack

Second, Eskridge attacks *Hardwick* as inconsistent with the Court's prior privacy decisions. He holds that, taken together, those decisions establish two closely-related principles. One is the libertarian idea that the state should leave people alone unless their conduct harms others. (p. 155) The other, an "anti-commandeering" principle, forbids the state from using "our bodies for its rather than our causes, absent a compelling public interest." (p. 155) To Eskridge, Georgia's prosecution of *Hardwick* offends both principles.

There is a large argument over what coherent idea, if any, the Court's right of privacy cases establish. It's a stretch to assert the Court has adopted the fourth chapter of John Stuart Mill's *On Liberty*, however normatively appealing such a constitutional doctrine might be. The Court has never squarely held, for example, that morality alone ("nosy preferences" for Eskridge and Mill) cannot be the basis of legislation.<sup>52</sup> (*Evans*

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52. In other places, Eskridge distinguishes morality (permissible as a basis for legislation) from animus (not permissible), arguing that morality is based on "traditionally

might be read to do that in the unusual circumstances presented there: a broad denial of legal protection to a specific class.) To the extent the Court has invalidated state regulation of sex, the cases have tended to be either explicitly<sup>53</sup> or implicitly<sup>54</sup> in the context of heterosexual practice. The Court would certainly allow state regulation of some sexual practices (like prostitution) that have, at most, only indirect effects on third parties. Of course, it's possible to find (as Eskridge has) general language in the privacy opinions that, taken from context, would apply to protect a very wide range of human behavior from state regulation. But such rhetorical arguments aren't likely to be persuasive to judges not already inclined to agree *Hardwick* should go.

Even under Mill's harm principle, moreover, there are tough calls to make about when the external harm of consensual sexual activity is sufficient to warrant state regulation. Even for Eskridge, what two people do consensually in the privacy of a bedroom is not invariably only a matter of concern for them. He concedes that, in an age of AIDS, unsafe sex "reintroduces serious collective stakes in individual sex acts." (p. 259) He seems to agree that the Court's precedents draw the line at constitutionally protecting things like adultery and prostitution (though Eskridge doesn't ultimately think these activities *should* be prohibited) because these activities have deleterious third-party effects. (pp. 154-55)

Yet while adultery and prostitution have possible third-party effects (disruption of families and the spread of venereal disease, among others), neither *necessarily* has such effects. Unlike rape, which is non-consensual and inherently harms the victim, an act of adultery is consensual for the participants and might be perfectly acceptable to its "victim," the non-adulterous spouse. While prostitution could spread venereal disease, it needn't do so, and it's consensual in the usual sense that word is used. If the privacy precedents allow such flimsy justifications for state intrusion on consensual sex, why would they not accept similarly thin explanations for same-sex sodomy bans, e.g., that criminalization retards the spread of HIV? On the other hand,

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public-regarding policies" whereas animus is based on "traditional antigay stereotypes and discourses." (p. 212) It's not clear this distinction is helpful or even meaningful as applied to much legislation directed at gays. See Part III.C. *infra*.

53. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (protecting marital privacy against state anti-contraceptives law).

54. *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (protecting right of unmarried couples to use contraceptives).

Eskridge may think the claimed third-party harms of same-sex sodomy are even more tenuous than those for adultery and prostitution. If so, he's probably right. But under the Court's meandering precedents, why isn't that a nice policy judgment legislatures should make?

### 3. The Originalist Attack

Third, Eskridge challenges *Hardwick's* supposedly originalist result. Unlike prior privacy cases, *Hardwick* relied heavily on the argument that the activity sought to be shielded, sodomy, was not protected when the Fourteenth Amendment was enacted in 1868. Thus, the Court relied on the notion that the right of privacy should recognize only traditional, historically-protected rights, not novel ones. Eskridge correctly points out that this rationale for bounding the right of privacy departs from the Court's precedents (protecting a historically-novel right to abortion, for example, in *Roe v. Wade*<sup>55</sup>). More than misreading its own precedents, however, Eskridge argues the *Hardwick* Court misunderstood the historical regulation of sodomy. Of the four arguments he offers against *Hardwick*, this one may have the best chance of swaying judicial conservatives.

Although every state had "sodomy" laws (variously appearing as laws against "buggery" and "crimes against nature") in 1868, Eskridge convincingly shows that these laws were not explicitly understood to prohibit oral sex. Pennsylvania was the first American jurisdiction, in 1879, to define "sodomy and buggery" as including oral sex. (pp. 157-61) By contrast, the distribution of contraceptives and many abortions were crimes before or soon after the Civil War, making *Hardwick's* activity "a better case for originalist protection than either Estelle Griswold's or Jane Roe's conduct." (p. 164)

It's a better case than Griswold's or Roe's but still not a very good one from an originalist perspective. Applying an ostensibly originalist analysis, Eskridge asks: Did the framers of the Fourteenth Amendment understand then-extant sodomy laws to prohibit oral sex? The answer, based on the history he supplies, should be "no." (p. 165) So *Hardwick* falls.

But for an originalist that is the right answer to the wrong question. The better originalist question is: Would the framers have understood the amendment they drafted to give affirmative

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55. 410 U.S. 113 (1973).

protection to oral sex or otherwise to disable a state from criminalizing it, given that they thought it acceptable for the state generally to restrict non-procreative, non-marital sex? The answer to that, as Eskridge admits, is surely “no.” (p. 165) So *Hardwick* stands.

Eskridge tries to get around this inconvenient originalist answer by reframing the question to account for post-adoption case law: If the framers could have foreseen that their amendment would be employed to protect the use of contraceptives and a right to have an abortion—a general “right to sexual privacy”—would they have still objected to its application to consensual oral sex in a person’s home? (p. 165) Maybe not, but that inquiry stacks the analytical deck by embedding relatively recent precedents, like *Roe*, that an originalist would regard as highly questionable.<sup>56</sup>

Even if Eskridge managed to persuade a principled originalist that the Court should protect oral sex from criminalization, that would still leave the state free to regulate a lot of other sexual activity (like anal sex) that clearly was prohibited in 1868. So Eskridge quickly retreats from this foray into alien territory, concluding that originalism is neither objective nor constrained. He calls it “conservative,” not intending a compliment. (p. 165)

#### 4. The Policy Attack

The final argument Eskridge offers against *Hardwick* is that it is bad policy, resting on irrational prejudice and discredited assumptions. Adducing studies by experts in anthropology, biology, and psychology, Eskridge argues “there is nothing intrinsically dysfunctional about same-sex intimacy, including ‘homosexual sodomy.’” (p. 167) In addition to their homophobic defects, sodomy laws have been used to undermine the rights of criminal defendants by allowing prosecutors to bootstrap sodomy charges onto rape charges. If the jury isn’t convinced beyond a reasonable doubt that the sex was coerced, but thinks it *probably* was, it can acquit on the rape charge but convict for sodomy. (p. 171)

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56. A narrow approach to originalism, considering only the known views of the drafters about specific policy issues, would have to unravel much of Fourteenth Amendment jurisprudence. The Framers of the Fourteenth Amendment might well have been even more satisfied with racial segregation and sex inequality than with state regulation of consensual sexual activity in private homes. But that has not stopped equal protection jurisprudence from undoing their specific preferences in the areas of race and sex.

Then there is AIDS. Eskridge argues that sodomy laws impede public education about HIV transmission by criminalizing the underlying conduct. Public health experts generally agree that such education is the best way to fight transmission of the virus. Sodomy laws keep sex hidden, in the closet, which is “precisely the terrain that bred and spread HIV in the late 1970s and early 1980s.” (p. 172) Challenging this observation, however, is an uncomfortable correlation: the late 1970s and early 1980s, when HIV initially spread, were also a time of unprecedented sexual freedom coming on the heels of the widespread *decriminalization* of sodomy.<sup>57</sup> Still, the bulk of the policy evidence is on Eskridge’s side. In addition to their other flaws, sodomy laws have been a wasteful and counterproductive means to combat the spread of sexually-transmitted diseases.

Less persuasive is the idea that *Hardwick* “wounded” the Court (p. 150) or undermined its “legitimacy,” (p. 165) claims that have the ring of wishful thinking. While it has been widely unpopular among academics, the decision does not seem to have weakened the Court’s standing in the eyes of the public. Eskridge presents no evidence that it has. Other decisions, like *Roe*, which feminists generally approve, are much better candidates for self-inflicted battery by the Court.

#### B. SEX AS SPEECH

Eskridge goes after two controversial policies, the federal ban on military service by open homosexuals and state sodomy laws, on First Amendment grounds. The first challenge to the military policy, arguing that an expression of identity (“I am gay”) by a member of the armed forces is protected speech, is unexceptional but has not yet been successful. Courts have generally deferred in this area to the military’s professed judgment that the exclusion of openly gay personnel is served by substantial government interests (e.g., unit cohesion and morale) unrelated to the suppression of the identity speech.

The second challenge to the military policy and to sodomy laws generally—that sexual activity like sodomy is expressive conduct protected by the First Amendment—seeks to exploit the ambiguity and ambivalence in a few “symbolic speech” decisions

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57. A majority of states still had sodomy laws in 1981, when AIDS was first diagnosed in the United States.

from the Supreme Court. This argument is more interesting and audacious than the first. It is the one I will address here.

The structure of the argument is straightforward. The First Amendment protects more than “speech” understood as oral or written expression. It also protects, Eskridge asserts, *conduct* “that is intended to communicate a message and would be understood by others as communicative.” So, for example, majorities of the Supreme Court have held that flag-burning, destroying a draft card, erotic dancing, and wearing a swastika are forms of expressive conduct entitled to First Amendment refuge. (p. 176) It is a congenial doctrine for a smart advocate looking to expand the personal freedom protected by the Constitution.

Eskridge uses it adeptly. He argues that for many people sexual intercourse is filled with deep personal meaning. “For most of us,” he writes, “the acts of intercourse communicate love, appreciation, joy, and passion to one’s partner.” (p. 177-78) That much is inarguable. These “ideas,” he continues, are at least as “communicative” as erotic dancing and flag-burning. Moreover, treating sexual acts as expressive conduct serves what he offers as three values underlying the First Amendment: autonomy, pluralism, and equality. Once sexual acts are understood as protected speech, government cannot regulate them on the basis of the content of their message (although it may have other sufficient regulatory justifications). Free speech becomes a libertarian charter.

A major problem with this argument is that *Gaylaw* offers no general theory of what separates “expressive conduct” protected by the First Amendment from inexpressive conduct not protected. This is a surprising omission in a book that proposes a counterintuitive application of a speech right to protect sexual liberty. What Eskridge calls the “threshold inquiry”—whether the conduct is intended to communicate a message and is so understood by others—is little more than a restatement of the problem. Almost all behavior communicates some message and is understood as message-bearing by others. Gay marriage, public sex, and rape are all communicative in this sense. Even recreational dancing, which Eskridge acknowledges has no First Amendment protection, sends messages about appropriate uses of the human body, suggesting sex among other things. For that exact reason, recreational dancing has been a focus of moral concern for some religious denominations. Eskridge says drug

use is not expressive because it is done “to satisfy a bodily craving.” (p. 198)<sup>58</sup> Yet isn’t much sex, protected under his theory, the satisfaction of physical desire? And why isn’t satisfying a bodily craving itself a message to others that it’s acceptable to do so? Name an activity and someone will find a message.

The doctrinal uncertainty about expressive conduct is not a problem of Eskridge’s making. It’s a gift from the Supreme Court, which has noted the limited nature of conduct-as-speech without offering much clear guidance. Thus, in *United States v. O’Brien*, the draft-card burning case, the Court advised, “We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”<sup>59</sup> In *Texas v. Johnson*, the flag-burning case, the Court noted, “The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word.”<sup>60</sup> But what do these cautionary statements mean?

The “threshold inquiry” may be more strict than Eskridge suggests. The Court hasn’t simply asked: was the conduct “intended to communicate a message” that would “be understood by others as communicative”? (p. 176) Instead, the Court has inquired whether “[a]n intent to convey a *particularized* message was present, and [whether] the likelihood was *great* that the message would be understood by those who viewed it.”<sup>61</sup> The flag-burning and draft-card destruction cases pass this test more easily than does private sexual activity. It’s relatively easy to appreciate the message—or at least the narrow range of messages—intended to be sent by destroying a draft card at an anti-war rally, for example.

But what is the message of taking a person home from a bar for a one-night stand, or having sex with a lover after an argument, or doing it in a new position? At least for some people on

58. Eskridge adds that drug use is “often done alone.” (p. 198) Even if solitary drug use doesn’t at least indirectly send a message to others about the appropriateness of such use, this distinction raises an anomaly: group drug use might enjoy constitutional protection while drug use by a single person sitting alone would not.

59. 391 U.S. 367, 376 (1968).

60. 491 U.S. 397, 406 (1989).

61. *Id.* at 404 (emphasis added) (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)). The Court’s decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995), casts doubt on the *Johnson* standard. (“[A] narrow, succinctly articulable message is not a condition of Constitutional protection. . .”). The Court’s negative statement about what the Constitution *does not* require offers no guidance on what it *does* require.

some occasions sex is little more than pleasurable calisthenics or scratching an itch. (p. 179) In each instance, how is the act perceived? Is the message highly likely to be understood—or more likely to be *misunderstood*? Sex is such a variegated and rich experience, loaded with so much ambiguity and emotion and instinct and inadequately understood impulses, that it would be facetious to say it sends a discernible message comparable to burning a flag at a public protest. So much hope—often false hope—attends the act of sex that it seems just as likely the significance of it will be *mistaken* by the recipient than that it will be understood.

Sex is different from recognized forms of symbolic speech in another way. Who is the audience? Unlike the flag-burning and draft-card mutilation cases, which involved public acts, sex (at least in the form Eskridge defends it) occurs in private.<sup>62</sup> Eskridge argues that distinction doesn't matter because even private activity can serve the libertarian and pluralist values of the First Amendment by allowing gays to have an experiential basis upon which to develop a gay identity.<sup>63</sup> Homosexuals then take gay identity into the public sphere, where their perspectives and experiences enrich the debate. Because sex is an indispensable part of this chain of communication, Eskridge believes it should enjoy First Amendment protection. (pp. 178-81)

That sounds factually plausible but it is a considerable enlargement of free speech jurisprudence.<sup>64</sup> It is an argument that private sex contributes to the development of something (an identity) that then communicates a message to recipients who were not present when the original "speech" itself occurred. Eskridge would have the First Amendment protect not simply expressive conduct, but also *indirectly expressive conduct*.

Consider the effect of this expansion of the First Amendment. If it's true that much conduct is expressive, it's surely true that almost all conduct is at least indirectly expressive.

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62. Under a sex-as-speech theory, public sex should enjoy greater constitutional protection than private sex.

63. Ironically, Eskridge also believes legal repression "helped engender a *group identity* among gay people both by persecuting them as gays and by protecting gay public expression." (p. 92) (emphasis original) For Eskridge, law creates gay identity whether it punishes or frees homosexuals.

64. Other reviewers of *Gaylaw* have noted the alarming expansiveness of Eskridge's First Amendment argument. See Richard Posner, *Ask, Tell*, *New Republic* 52, 54-55 (Oct. 11, 1999) ("The whole of criminal law would unravel if Eskridge's [First Amendment] argument were accepted."); Andrew Koppelman, *Why Gay Legal History Matters*, 113 *Harv. L. Rev.* 2035, 2046-48 (2000).

Eskridge's approach sweeps in the seemingly limitless variety of conduct the Supreme Court has been trying to fence out. If it has the serious defect of constitutionalizing almost all private and public behavior—however criminal and harmful we have heretofore regarded that conduct—at least it has the virtue of nearly eliminating line-drawing problems. Few lines will be drawn.

Even if conduct is expressive, Eskridge notes it can still be regulated if the government has a sufficient justification unrelated to suppression of the message. Since the state has no adequate justification for regulating sodomy (p. 210) other than suppressing its message of gay affirmation (which is not a content-neutral justification and is therefore invalid under settled free-speech doctrine (p. 183)), Eskridge concludes such laws are unconstitutional.

But he stops on his way down the slippery slope to protecting some other activities. Even if it is communicative, drug use can be prohibited because of its harmful third-party effects: criminal activity to support drug habits, rape and disease, and defaults in family obligations created by the drug user's irresponsible mental state. Similarly, prostitution may lead to disease and crime. (pp. 198-99) Public sex and indecency can be regulated because of the state's legitimate concern for children. (p. 201)

In each instance, Eskridge seems to lose the courage of his otherwise bold sexual and constitutional convictions. The claimed externalities of drug use, prostitution, and public sex are indirect at best, and not invariably or necessarily a product of the activity the state wants to regulate. For example, many people who use drugs recreationally do so without resorting to crime or rape, without contracting deadly diseases, and without abandoning their families. A wholesale prohibition of each of these activities seems disproportionate to the state's asserted justifications. The justifications might support some narrowly-tailored regulation of the activities (e.g., designated "public sex" spaces—similar to adult-business zoning laws—so that parents can avoid taking children in those areas) but not an outright prohibition against them.

If drug use, prostitution, and public sex are really expressive conduct protected by the First Amendment, it should be intolerable to allow the state to ban them completely on the strength of such narrow concerns. But we do. Enlarging the free-speech

principle, Eskridge weakens it. The First Amendment begins to lose its character as an unusually principled jurisprudence when it appears to become a warrant for the decisionmaker to guard the things she likes to do (sodomy) yet allow the state to prohibit things she doesn't like to do (public sex). That's not a Constitution, it's personal fiat.

### C. EQUAL PROTECTION FOR GAYS

A major contribution of *Gaylaw* is its linkage of the Court's concern about anti-gay animus with the history of anti-gay discrimination in the law. Eskridge supports heightened scrutiny under the Fourteenth Amendment's Equal Protection Clause for laws classifying citizens on the basis of sexual orientation. (p. 217-18) However, he doesn't think it is necessary to add gays to the list of groups protected by strict scrutiny analysis in order to invalidate much anti-gay legislation since such legislation is usually the product of animus. *Evans* provides substantial if incompletely-crafted ammunition for this line of attack.

Eskridge skillfully exploits the conclusion in *Evans* that anti-gay prejudice alone (animus) cannot be the basis for legislation. Such prejudice is present, according to Eskridge, when laws are backed by "traditional antigay tropes that are not supported by experience or empirical evidence." Among these tropes are the ideas, seen in much of the history he discusses, that gays are "dirty sexualized subhumans," that they are "conspiratorial" and "sexually predatory," and that it is necessary and appropriate to protect "stable heterosexual identity" and gender roles against them. (p. 211)

Eskridge also links anti-gay discrimination to sex discrimination under the Equal Protection Clause, focusing particularly on why federal and state bans on gay marriage are a form of sex discrimination analogous to the race discrimination inherent in unconstitutional anti-miscegenation laws. (pp. 218-31)<sup>65</sup> He additionally attacks gay marriage bans as a denial of a fundamental liberty interest. (pp. 274-75)<sup>66</sup> Ultimately, however, he agrees with Richard Posner and Cass Sunstein that for pragmatic rea-

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65. The Vermont Supreme Court rejected this analogy in *Baker*. See *Baker*, 744 A.2d 864, 880 n.13 (1999).

66. The fundamental right-to-marry argument, like the First Amendment argument, projects too far. As Andrew Koppelman notes, the right must have implicit limits. "It cannot mean that I have a right to marry my goldfish, or my sofa." Koppelman, 113 Harv. L. Rev. at 2046 (cited in note 64). *Gaylaw* offers no theory of what those limits might be.

sons the Court should stay its hand on same-sex marriage, letting legislatures and state courts grapple with the issue.<sup>67</sup>

I pass over the discussion of same-sex marriage in *Gaylaw* because it adds little to arguments previously made on the subject, including arguments formulated by Eskridge himself.<sup>68</sup> It is worth noting, however, how conservative he can sound on the issue: he justifies marriage, with “its requirement of fidelity,”<sup>69</sup> in part as a method of “taming the wild beast” of gay male promiscuity. (p. 228) This style of argument has earned him harsh—but unpersuasive—critics among sexual liberationists.<sup>70</sup>

Whether the subject is sodomy laws, (pp. 209-11) custody and adoption laws, (pp. 211-15) or the military’s exclusion of openly gay personnel, (pp. 215-18) the structure of Eskridge’s Equal Protection attack on the law is the same: identify the animus behind the policy and then show it cannot be supported by empirical evidence (often in the form of social science). One example of the method, and its potential weakness, will suffice.

Consider his attack on anti-gay adoption and child custody laws. Three states—Arizona, Florida, and Utah—prohibit adoptions by homosexuals. A larger number of states presume against child custody and adoption by gays. (p. 212) A possible basis for these laws is that gays are not fit parents or aren’t as likely as straights to be fit parents; it’s generally just not in the best interests of children to be raised by gays. This looks like a public-regarding justification for such laws, which Eskridge says is permissible, rather than sheer anti-gay animus, which he correctly says is impermissible after *Evans*. (p. 213)

But Eskridge maintains this best-interests justification is mere pretext for anti-gay animus, based especially on the false stereotype that gays prey sexually upon children. How does he know the justification is a facade? He knows because “dozens of empirical studies” have shown that there is no difference between homosexual and heterosexual parents; that there is no dif-

67. Compare pp. 228-31 with Richard A. Posner, *Should There Be Homosexual Marriage? And If So, Who Should Decide?*, 95 Mich. L. Rev. 1578, 1585-86 (1997), and Cass R. Sunstein, *One Case At A Time: Judicial Minimalism on the Supreme Court* 161 (Harvard U. Press, 1999).

68. See William N. Eskridge, Jr., *The Case For Same-Sex Marriage: From Sexual Liberty to Civilized Commitment* (Free Press, 1996)

69. The source of this fidelity requirement is unclear since Eskridge supports the decriminalization of adultery. (p. 269)

70. See, for example, Michael Warner, *The Trouble With Normal: Sex, Politics, and the Ethics of Queer Life* 92-95 (Free Press, 1999) (calling Eskridge’s moral support for same-sex marriage a “revisionist and powerfully homophobic narrative”).

ference in self-esteem or the incidence of emotional disorder for children raised by gay parents; that homosexual men are less likely to molest children than heterosexual men; that women, including gay women, are least likely to do so; and so on. (pp. 213-14)<sup>71</sup> Because there is no credible factual backing for the claims made in support of anti-gay adoption and child custody laws, the only remaining explanation for them is animus.

There are two basic problems with this line of argument, both of which show overconfidence in the resolution of contentious social issues by courts. First, Eskridge is too sanguine about what is really debatable and inconclusive social science on gay parenting. The studies he cites have been characterized by small sample sizes and nonrandom canvassing of subjects. Nearly all have involved gay female, rather than gay male, parents.<sup>72</sup> Elsewhere, Eskridge recognizes the provisional nature of the findings. "This is still a new area of inquiry," he writes, just 70 pages after arguing for close constitutional scrutiny of anti-gay child-rearing laws. "[L]engthy time series have not been reported yet, and the samples have generally been small and non-random." (p. 285) The truth is, we still can't be certain what effect gay parents have on the development of their children.

The weight of the available evidence supports Eskridge's empirical conclusion that good parenting does not depend on the sexual orientation of the parents. But is an opposing position, taking a cautious policy approach to the raising of children, really irrational and therefore unconstitutional? If the state of positive knowledge in a field supports no more than a tentative or probable conclusion on an issue, as it appears to do on the issue of gay parenting, shouldn't states decide the contestable policy choices? Why are courts, with all their institutional limitations, better positioned than legislatures, with all their political prejudices, to decide complex and doubtful matters of social pol-

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71. Eskridge similarly uses empirical evidence to undermine anti-sodomy laws, (p. 210) the military's gay ban, and state employment policies barring gays. (p. 215)

72. Philip A. Belcastro et al., *A Review of Data Based Studies Addressing the Effects of Homosexual Parenting on Children's Sexual and Social Functioning*, 20 *J. Divorce & Remarriage* 105, 107-09 (1993) (studies have lacked external validity, are non-random, and tainted by possible researcher bias); Mike Allen and Nancy Burrell, *Comparing the Impact of Homosexual and Heterosexual Parents on Children: Meta-Analysis of Existing Research*, 32 *J. Homosexuality* 19, 28-30 (1996) (correcting for some, but not all, of the problems identified by Belcastro, et al.). There is, to be sure, a lively academic debate over the significance of the various studies. At the very least, as Eskridge himself concedes, there is certainly some stress visited on the children of gay households because of teasing by other children. (p. 285)

icy? Legislators may be wrong in some of the choices they make regarding adoption and child custody, but they are not necessarily crazy. If it's morning for the empirical work, how can it be afternoon for the Constitution?

The second problem with this attack on the adoption and custody laws is that it fails to account for the ambiguity, complexity, and shifting nature of public policy choice. It seems reasonable to suspect most anti-gay adoption and custody laws have arisen from unreflective prejudice and stereotype rather than from dispassionate caution about conflicting and tentative empirical data. This suspicion is amply justified by the history Eskridge recites, especially the arguments, at least some of them now entirely discredited, advanced by opponents of gay child-rearing. (p. 214) But it could be that policymakers have reached the right conclusions (e.g., a presumption against gay adoptions) for the wrong reasons (e.g., they see gays as child molesters or simply bend to the will of constituents who viscerally dislike gays).

Or it could be that a policy once defended for a constitutionally impermissible reason is now defensible for debatable, but permissible, reasons. While Eskridge makes a very convincing case that "laws focusing on homosexuality or gay people have usually been motivated by hysterical, obsessional, or narcissistic and not public-regarding, fact-based reasoning," (p. 217) it could be that the same or similar laws now find legitimate, non-animus-based support.

Suppose a state-run blood bank historically refused to take blood from gay men because it despised them or because it thought homosexuality itself was a blood-borne disease. The first reason would be an impermissible animus-based justification for the policy; the second, if maintained today, would be empirically unsupportable and therefore likely a mask for mere animus. After *Evans*, the policy would seem to violate the Equal Protection Clause. But suppose today the same policy is justified by (1) the greater likelihood that gay men are HIV-infected than the general population, and (2) the fact that virus-detection tests for blood are imprecise and prone to error, including a lag time between the date of infection and the detection of HIV by standard tests. There would then be an arguable, public-regarding justification available for the policy excluding gay men from blood donations: it is rational risk-management, not preju-

dice.<sup>73</sup> It's the same policy targeting gays, but with a different justification. What result under a theory that such classifications are "usually" animus-based?

Recall also Eskridge's distinction between traditional anti-gay stereotypes (animus) and traditional public-regarding reasons (morality) as justifications for state policy. (p. 212) He treats these as if they are clean, discrete categories. It's hard enough to know when a legislature has been motivated by one or the other, or even to distinguish between the two. But suppose a policy can be traced to both impermissible animus and permissible morality? This might be true not only in the adoption context but in the federal ban on gay military service, where pure prejudice mixes with contestable concern for unit morale and cohesion. As a policy matter, again, Eskridge has the best of his opponents on the military exclusion. But should he get the best of them by command of Congress or by command of the Constitution? What is a court to do when faced with a mixed array of prejudice and plausible public-regarding rationales for classifications directed at gays? *Gaylaw* doesn't offer clear guidance.

#### D. THE UNWRITTEN SEXUALITY CLAUSE

*Gaylaw* isn't quite finished with its constitutional adventure. It draws finally on the idea that important similarities between religion and sexual orientation should influence the interpretation of the Constitution. Unfortunately, although *Gaylaw* offers some intriguing insights on this question, its implications for the Constitution are strained. Gay identity and religious identity are just too different to make the effort convincing.

Why is Eskridge interested in finding common ground for religion and sexual orientation? "Although America has internalized the idea of *benign religious variation* . . . , it rejects the idea of *benign sexual variation*," Eskridge observes. (p. 293) (emphasis original) The more religion and sexual orientation are thought to share important traits, the harder it is politically and culturally to accept deviance in the former but reject it in the latter. If religion and sexual orientation are comparable, maybe some of the acceptance now accorded once-despised religious

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73. This would certainly be true if the blood bank similarly barred donations from members of other high-risk groups (e.g., intravenous drug users and hemophiliacs). Something like the hypothetical blood bank's policy is currently the policy of the Food and Drug Administration. "F.D.A. Panel Rejects Bid to Ease Ban on Blood donations by Gays," N.Y. Times A25 (Sept. 15, 2000).

minorities like Jews, Mormons, and Catholics will be extended to gays.

Eskridge's Constitution has a sort of *unwritten sexuality clause* that protects the free exercise of sexuality and prohibits the government from establishing an approved sexual orientation. After acknowledging there are no explicit "sexuality clauses" in the Constitution analogous to the First Amendment's religion clauses, he submits that the similarities between religion and sexual orientation—and similarities between the prejudices they have inspired—"can inform judges' reading of the due process and equal protection obligations of the Constitution." (p. 302) (Just how it is supposed to do this is never spelled out in *Gaylaw*.) This imaginative conclusion needs closer inspection.

Eskridge perceives three points in common between religion and sexual orientation, each less supportable than the one before. First, unlike biological sex and race, religious and sexual identity are not detectable unless the individual self-identifies or engages in observed behavior that betrays the identity. Both religious and sexual minorities can "pass" as members of the majority. (p. 297) To escape persecution, both religious and sexual minorities have historically done precisely that.

Second, he argues, unlike race neither religion nor sexual orientation are popularly seen as being determined by biology. One's religion or sexuality need not be the same as one's parents; they are seen as chosen in a sense that race is clearly not. The fact that they are seen as voluntary makes deviant choices in either religion or sexual orientation seem blameworthy and therefore open to repression. (p. 297) Since we nevertheless do not repress the choice of religion we should not repress the choice of sexual orientation.

This second point of comparison is trickier. The best evidence available now suggests that sexual orientation is not consciously chosen. It is a likely product of genetics, biology, pre-conscious developmental influences, or some combination of these. Religion is different; although the basic religious *impulse* may not be consciously chosen, membership in a particular religion can be consciously chosen. For a gay-equality advocate to concede any similarity between religion and sexual orientation on the question of choice may be to surrender too much territory. Not all individual choices are equal under the Constitution. The First Amendment's Free Exercise and Establishment Clauses explicitly protect religious practice regardless of whether

we see it as a choice; it's much harder to argue the Constitution protects sexual orientation once it is thought to be chosen rather than innate.

The third point of comparison between religion and sexual orientation is the least persuasive of all. Eskridge argues that both religious and sexual subcultures are *nomos* communities, meaning that they are "people bonded by associations that preserve and develop a common normative heritage." They "have a vision of what is morally good." (pp. 294) They are people linked by "similar emotions and beliefs, moments of ritual ecstasy and fantasy, and fascination with sumptuary pomp." (pp. 297-98) As applied to religion, *nomos* might seem an accurate term.

As applied to sexual orientation, however, *nomos* is factually unsupportable. What is the "common normative heritage" of gays in America? What is its content and where do we find it? There is certainly no high priest or ayatollah of homosexuality. There is no gay sacred text, like a Bible or a Koran or a Book of Mormon. There is no authoritative source for a common "vision of what is morally good."

And what do we make of Eskridge's notion that gays share with religion "[a] fascination with sumptuary pomp"? *Gaylaw* offers no support for this exotic assertion about gay life. It sounds not just erroneous, but bizarre. It is quite possibly based on stereotypes about fussy gay men with their teacup collections, fascination with tragic divas, and love of show tunes and opera. It's the Newport fairies come back to haunt the Constitution.

Eskridge contends that gays have "similar experiences that have engendered a common framework of thinking about a wide range of issues" and "a collective commitment to implementing shared values in people's lives." (p. 304) These are aggressive and dubious claims to make about a group marked by every manner of racial, economic, national, religious, political, familial, physical, and even sexual diversity. There is only one thing we can say with some confidence all gays share: primary sexual attraction to members of the same sex. After that, the experiences of that sexual attraction, the discrimination encountered because of that orientation, and certainly the normative and policy conclusions drawn from those experiences and from that discrimination, vary so widely that any notion of a common normative heritage or shared values seems more aspirational than descriptive.

*Gaylaw* does not catalog the elements of this asserted common normative heritage or shared values. But they are suggested in various ways. I say "suggested" because the book never lists them. Instead, especially in its final chapter, *Gaylaw* tends to make sweeping assertions about what conclusions "gay experience" leads to. For example, Eskridge writes that "[g]ay experience resists" placing too much emphasis on the traditional legal distinction between public (governmental) and private action.<sup>74</sup> (p. 309) The implication is that any disagreement among gays must be the result of false consciousness by those homosexuals on the wrong side of "gay experience."

The first element of gays' hypothesized common normative heritage might be a shared rejection of gender role, but that is an invalid proposition for the reasons suggested in Part II above. Another candidate might be a shared distrust of sexual regulation, but that is implausible if it extends to the legalization of things like prostitution and adult incest. Yet another candidate might be a shared belief that eliminating governmental discrimination is insufficient as a means to secure liberty, but that dismisses a large and thoughtful population of libertarian gays who conclude from gay historical experience that government should be systematically distrusted. At least Eskridge does not pretend gay experience leads to a peculiarly homosexual view about affirmative action. (p. 321)

If by positing a common normative heritage Eskridge means to describe an actual, existing consensus among gays about a wide range of social, moral, and political issues then he is just wrong. He offers no evidence to support the existence of such a consensus and in the absence of such documentation its existence is extremely implausible.

On the other hand, if by positing a common normative heritage Eskridge means not to describe gay communities but to offer what he takes to be the best conclusions that can be drawn from gay experience and history, he is as free as anyone to make arguments. And he may win the argument on some points. But in that case, he is not *describing* an actual gay nomos, he is *hoping* for one.

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74. On the contrary, gay experience might lead to the opposite conclusion: state intrusion into, and regulation of, the private sphere has been a disaster for homosexuals for more than a century. See Part I *supra*. The regulatory state that cut its teeth on gays can scarcely be trusted by them.

The failure to justify the analogy between religion and sexual orientation is not a small one. Religion is a system of belief rooted in faith in the supernatural; sexual orientation is not a system of belief, not rooted in faith, and not tied to the supernatural. If discrimination on the basis of sexual orientation is wrong, as Eskridge and I agree it is, it's not for the same reasons that discrimination on the basis of religion (or sex) is wrong. It's for independent reasons. It must lean on the particularity thesis. And if religion and sexual orientation are so different, there is no warrant for judges to read religion-like precepts into the Due Process and Equal Protection Clauses applied to sexual variation.

#### IV. GAYLAW'S MORALITY

The final section of *Gaylaw* is a potpourri of theory and policy discussion. It expands upon constitutional arguments previously made regarding gay marriage (pp. 274-75) and child custody and adoption by gay parents. (pp. 275-78) It is the most abstract and least tightly-organized section of the book, often redundant of previous material,<sup>75</sup> finishing with a vague suggestion for compromise in the clash of gay rights and religious liberty. (pp. 302-23)

But just when you think you can safely stop reading, *Gaylaw* takes a fresh turn. For example, Eskridge ends his flirtation with libertarianism by announcing that "gaylaw realizes that freedom from state interference is not liberty when private discrimination and violence are pervasive." (p. 240)<sup>76</sup> Liberty requires not a minimal, neutral state, but the affirmative assistance of the state through various means, including employment non-discrimination laws. (pp. 233-36) The extensive history of state involvement in gay life has not led Eskridge to a categorical rejection of government power, although he remains wary of it. The regulatory state that cut its teeth on gay people is not bad in itself; it's bad when it bites badly.

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75. For example, the section revisits several times the data on children raised in gay households. (pp. 281, 285, 287)

76. We should have seen this coming when Eskridge praised the "republican vision of the state as exemplar of public values," calling it "attractive." In fact Eskridge differs with moralists Patrick Devlin and Justice Scalia not in the appropriateness of the state modeling a republican vision but in the content of that vision. (p. 199) (criticizing Devlin and Scalia for backing "the values of the nineteenth rather than the twenty-first century")

An even more significant fresh turn awaits the patient reader. *Gaylaw* is clear that liberal neutrality has only a dim vision of life. (p. 278) The legal and political cause of gay equality needs a substantive argument that it is good, not just a preference for the state to stay out of the way. It also needs a vision of the good life that rejects the relativist notion that all choices are equal.

An advantage of moving beyond strict neutrality is that it enables advocates to make a moral case for gay equality. To heterosexuals, the moral advocate of gay equality, as opposed to the libertarian one, can argue not simply that gays should have rights (like a right to marry), but that such rights *are right*. To gays, the moral advocate argues not just that marriage is a choice but that it is a *better* choice than others. The non-neutral state is free to nudge citizens in a healthy direction (e.g., by making available marriage, with its state-created package of legal goodies) as long as it does not coerce them in that direction (e.g., by requiring marriage).

Abandoning neutrality is a necessary maneuver in discussions about families, which focus less on the rights of individuals than on their needs. Consider that rights rhetoric is especially unpersuasive when children are involved. If *Roe* had involved a claimed constitutional right to remove a wart from the body, instead of an unborn child, no one today would care about the decision, however unhistorical and activist recognition of such a right might be. If excluding gays from adoption and custody can be shown to harm children by removing an entire class of loving parents from an already shallow pool of available caretakers, then such laws are themselves immoral.

Eskridge is an unabashed moral advocate of gay equality, which is a welcome move away from a pure rights discourse that grows anemic and alienating. "Human beings are not autonomous bundles of exogenously defined preferences seeking satisfaction," Eskridge writes, piercing liberalism's heart. "Instead, we are social beings struggling to make connections with one another." (p. 283) Consider this:

"[A]rguments for gay families must rest on something more profound than choice, and they in fact do: gay families are good for gay people and good for America because they provide fora in which people form mutual commitments and children are reared. Any effort by the state to discourage gay families is perverse because it discourages commitment and harms children." (p. 278)

This passage marks a profound shift in gay legal and political theory.<sup>77</sup> *Gaylaw* is not just another collection of liberal arguments for gay rights; it is a call for equality and inclusion that has a moral and social message. In the most evocative passage in *Gaylaw*, Eskridge asks readers to imagine they are sitting in an airplane plummeting to the ground.

“What goes through your mind in the last minutes of life? For most of us, it would not be the great sex we had, the property we have acquired, or the awards we have won. It would, instead, be the parents who nurtured us, the romances we have enjoyed, and the children we have raised. The magic moments are relational, and the memories of those we have touched and who touched us will form an indefinite chain of being between our parents and those who survive us.” (p. 286)

A straight person might not understand the pleasure of a particular homosexual act, or may in fact be repulsed by it. But every person, regardless of sexual orientation, can understand the sentiment in that passage.

Gay couples bond in the same way straight couples do. (pp. 285-86) Legal recognition of a gay couple will likely “enhance the durability of the relationship,” just as we expect it to do for a straight couple. (p. 287) It will also impress upon everyone, gays included, that life is not simply about rights belonging to individuals but about responsibilities owed to those around us. Thus, Eskridge criticizes domestic partnerships as a legal alternative to marriage not simply because they confer pitifully few benefits to participants but because they impose pitifully few reciprocal obligations on them. Without such obligations, domestic partnerships are “empty liberalism.” (p. 289)

*Gaylaw* thus begins to make a case for gay equality to those people—often social conservatives—concerned about the decline of the social and moral health of the country. Rather than tearing at the fabric of society, gay equality can strengthen it by bringing an entire class of citizens into the mainstream institutions of American life. Given that gays exist, and that more than a century of legal repression has failed to eliminate homosexuals,

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77. Eskridge is not the first writer to argue for a gay politics and jurisprudence of moral substance. See, e.g., Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 Cal. L. Rev. 521 (1989) (arguing that the “justice (or injustice) of laws against abortion and homosexual sodomy depends at least in part, on the morality (or immorality) of those practices”).

what is to be done with them? The principled citizen concerned with the moral and social climate would want, to borrow Eskridge's phrase, to move them "from sexual liberty to civilized commitment." You want to reduce weirdness? Then stop pushing people towards it by tormenting and excluding them at every turn.

What Eskridge calls "the traditionalist focus on obligation of each spouse to the family" is consistent with the recognition of gay families. On the other hand, the "liberal focus on autonomy of each spouse" is not a necessary step in recognizing gay families. (p. 280) Though Eskridge does not go so far, a moral gay-equality advocate could oppose the "liberal shift that brought the country no-fault divorce and high rates of marital breakups," (p. 280) could support laws against adultery, and could endorse "covenant marriages" that offer couples the option to enter a stricter legal commitment than standard marriage.

## V. CONCLUSION: GAYLAW'S LIMITS

*Gaylaw* has its limits. They are theoretical, constitutional, and political.

Its gender theory has limited explanatory and normative force. Underlying the book is the familiar but rickety idea in gay-feminist scholarship that issues of sexual nonconformity and gender nonconformity cannot be separated. This approach reduces homosexuality to gender rebellion and treats anti-gay discrimination as a wholly-owned subsidiary of sex discrimination. It fails to account for the diversity of gay life, misses the perverse role law and social stigma play in gender deviance, allows the enemies of gay equality to frame the debate, confines gays to an identity prison, and leaves intact many contemporary arguments against gay equality. If it is not completely wrong it is at least inadequate to the project of achieving equality.

The book's aggressive constitutional agenda is limited by the weak legs propping it up. None of the arguments *Gaylaw* offers for overruling *Hardwick* is a slam-dunk. The ambitious argument for the protection of sexual liberty as a form of speech is incomplete, lacking a theory of what constitutes expressive conduct. The Equal Protection analysis is too confident about doubtful empirical matters, inviting courts to impose solutions on complex and important social problems. And the analogy of homosexuality to religion is so tenuous it cannot be used to

magnify courts' constitutional scrutiny of anti-gay discrimination.

*Gaylaw* has limited political appeal. On the left, it will draw critics who distrust traditional institutions like marriage, or who want a movement that emphasizes untethered sexual freedom rather than commitment, or who disdain its pragmatic and compromising tone on matters such as accommodating anti-gay religious beliefs.

At the same time, *Gaylaw* is no apology for a right-wing jurisprudential or policy agenda. Many conservatives will be wary of its activist constitutional project and its embrace of gay marriage and openly gay military service. They will disapprove its willingness to experiment with the legalization of prostitution, adultery, adult incest, (pp. 268-69) and "third-parent" adoptions. (p. 292) They will be dismayed at its hesitation to criminalize adult-adolescent sex. (p. 267)

But the argument of *Gaylaw* is not pitched at the people who huddle around one of the poles of complete acceptance or rejection of gay equality. It is pitched at those who dwell somewhere on the land masses in between; that is, it is pitched at most thoughtful people. By linking historical repression to present-day discrimination, *Gaylaw* gives that large and critical constituency some context with which to evaluate modern controversies over the place of gays in society and in the law. By demanding consistency from constitutional decisionmaking, *Gaylaw* shames them into reconsidering doctrines that have thoughtlessly short-changed an entire class of citizens. And by envisioning a movement concerned not solely with rights but also with relations, *Gaylaw* shows them the core human dimension of gay equality. Whatever the limits of its power, and they are considerable, *Gaylaw* shakes the ground under our feet.