

DEFENDING THE SEX DISCRIMINATION ARGUMENT FOR LESBIAN AND GAY RIGHTS: A REPLY TO EDWARD STEIN

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Edward Stein's is only the latest and most systematic of a growing number of criticisms of the sex discrimination argument, from the left and from the right. Stein's doctrinal objections to the argument misconceive the reach of present doctrine, which treats all sex-based classifications with deep suspicion. His empirical doubts misapprehend both the argument's claims and the enduring connections between heterosexism and sexism. His only persuasive claim is his moral objection, which argues that the sex discrimination argument ignores, and may render invisible, a central moral wrong of antigay discrimination. This is a profound moral difficulty, but it is one that is present in almost any legal argument, and perhaps in language as such. It therefore cannot be an objection against any particular argument.

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So many things are wrong with laws that discriminate against gay people that it is hard to know where to begin. They intrude on citizens' privacy.¹ They enforce indefensible beliefs about sexual morality.² They give the state's

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1. See ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* ch. 2 (forthcoming 2002).

2. See *id.* ch. 4; Andrew Koppelman, *Is Marriage Inherently Heterosexual?*, 42 AM. J. JURIS. 51 (1997).

imprimatur to a theology, and a dubious one at that.³ They interfere with matters in which the law has no competence and that are none of the state's business.⁴ They oppress a long-suffering minority.⁵ Their enforcement typically involves cruelty and hypocrisy.⁶

They also discriminate on the basis of sex, and they depend on and reinforce the subordination of women.⁷

Each of the preceding seven sentences is an inadequate portrait of antigay oppression to the extent that it fails to mention the wrongs cited by the others. This is one of the limitations of language. Edward Stein's critique of the sex discrimination argument for gay rights is concerned about what the argument leaves out. I do not want to leave them out, either. But that is not a reason to neglect the wrongs specifically revealed by the sex discrimination argument.

Stein's is the latest and most systematic of a growing number of criticisms of the sex discrimination argument, from the left and from the right.⁸

3. See Koppelman, *supra* note 2, at 70–77, 92–95.

4. See Andrew Koppelman, *Sexual and Religious Pluralism*, in *SEXUAL ORIENTATION AND HUMAN RIGHTS IN AMERICAN RELIGIOUS DISCOURSE* 215 (Martha C. Nussbaum & Saul M. Olyan eds., 1998).

5. See KOPPELMAN, *supra* note 1, ch. 1; Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89 (1997) [hereinafter Koppelman, *Romer v. Evans and Invidious Intent*]; Andrew Koppelman, *Why Gay Legal History Matters*, 113 HARV. L. REV. 2035 (2000) [hereinafter Koppelman, *Why Gay Legal History Matters*].

6. See Andrew Koppelman, *Gaze in the Military: A Response to Professor Woodruff*, 64 UMKC L. REV. 179 (1995).

7. See ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* 146–76 (1996); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994) [hereinafter Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*]; Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988) [hereinafter Koppelman, *The Miscegenation Analogy*].

8. In addition to those treated in this Reply, see, for example, Craig M. Bradley, *The Right Not to Endorse Gay Rights: A Reply to Sunstein*, 70 IND. L.J. 29 (1994); David Orgon Coolidge, *Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy*, 12 BYU J. PUB. L. 201 (1998); Richard F. Duncan, *From Loving to Romer: Homosexual Marriage and Moral Discernment*, 12 BYU J. PUB. L. 239 (1998); and Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1.

On the other hand, some who were initially skeptical of the argument have become converts. Compare Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 684 (1980) (dismissing the sex discrimination argument as “makeweight”), with Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499 (1991) (tracing connections between heterosexism and the ideology of masculinity); compare William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1510 (1993) (“[J]udges may find it difficult to understand how denying two gay men the right to marry is driven by an ideology that oppresses straight women.”), with WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* 153–72 (1996) [hereinafter ESKRIDGE, *THE CASE FOR SAME-SEX MARRIAGE*] (expounding and endorsing the sex discrimination argument), and WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 218–28 (1999) [hereinafter ESKRIDGE, *GAYLAW*] (1999) (same). See also David A.J. Richards, *Seventy-Fifth Anniversary Retrospective: Most Influential Articles*, 75

This is not the place for a comprehensive restatement and defense of the argument.⁹ I will here confine my attention to Stein, with occasional reference to others who have made claims similar to his. Some of Stein's objections are doctrinal; some raise empirical doubts; some articulate moral worries. I shall address these in turn. The only persuasive one is the last, which claims that the sex discrimination argument ignores, and may render invisible, a central moral wrong of antigay discrimination. This is, indeed, a profound moral difficulty. It is, however, a difficulty that is present in almost any legal argument, and perhaps in language as such. It therefore cannot be an objection against any particular argument.

I. DOCTRINAL OBJECTIONS

A. The Formal Objection

The formal argument that discrimination against gays is a kind of sex discrimination is stated briefly and accurately by Stein:

If a person's sexual orientation is a dispositional property that concerns the sex of people to whom he or she is attracted, then, to determine a person's sexual orientation, one needs to know the person's sex and the sex of the people to whom he or she is primarily sexually attracted. For example, if A is sexually attracted exclusively to men, then A is a heterosexual only if A is a woman, and A is a homosexual only if A is a man.¹⁰

This argument is formally incomplete, Stein thinks, because a law that discriminates against gays may just as easily be understood as treating both sexes equally by forbidding both to engage in sexual conduct with persons of the same sex. "Deciding whether a statute that discriminates on the basis of sexual orientation discriminates on the basis of sex seems, in light of this problem, like deciding whether a glass is half empty or half full."¹¹

Stein acknowledges that the miscegenation cases presented a similar problem, and that the U.S. Supreme Court ultimately rejected the idea that

N.Y.U. L. REV. 1517, 1561 (2000) (reviewing Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994)).

9. See KOPPELMAN, *supra* note 1, ch. 3. One major critic of the argument, John Gardner, is not addressed in that chapter, but is considered at length in Andrew Koppelman, *The Miscegenation Analogy in Europe, or Lisa Grant Meets Adolf Hitler*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW (Robert Wintemute & Mads Andenas eds., 2001).

10. Edward Stein, *Evaluating the Sex-Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471, 486–87 (2001) (footnotes omitted).

11. *Id.* at 490. This objection is stated in a more sophisticated fashion in John Gardner, *On the Ground of Her Sex(uality)*, 18 OXFORD J. LEGAL STUD. 167, 180 (1998). I address his argument and answer it in Koppelman, *supra* note 9.

both races were treated identically by laws against interracial marriage. But, he claims, in those cases there was “a fit between the class disadvantaged by the law and the suspect classification the law employs.”¹² And he proceeds to raise questions about the sociological connection between antigay animus and sexism.

This, however, leaves legal doctrine behind, because it misstates what the Court did in the miscegenation cases.¹³ Stein is correct that *Loving v. Virginia*¹⁴ noted a connection between the miscegenation prohibition and racism. But *Loving* was preceded by *McLaughlin v. Florida*,¹⁵ in which the Court unanimously invalidated a criminal statute prohibiting an unmarried interracial couple from habitually living in and occupying the same room at night. “It is readily apparent,” the Court held, that the statute “treats the interracial couple made up of a white person and a Negro differently than it does any other couple.”¹⁶ Racial classifications, it concluded, can only be sustained by a compelling state interest. Because the State had failed to establish that the statute served “some overriding statutory purpose requiring the proscription of the specified conduct when engaged in by a white person and a Negro, but not otherwise,”¹⁷ the statute necessarily fell as “an invidious discrimination forbidden by the Equal Protection Clause.”¹⁸

McLaughlin, not *Loving*, was the groundbreaking case that laid the equal application argument to rest, and *McLaughlin*, not *Loving*, is the crucial precedent on which the sex discrimination argument relies.¹⁹ It should not

12. Stein, *supra* note 10, at 492–93.

13. Stein is not the first critic of the sex discrimination argument to misdescribe the miscegenation cases he is seeking to distinguish. A more egregious example is Jay Alan Sekulow & John Tuskey, *Sex and Sodomy and Apples and Oranges—Does the Constitution Require States to Grant a Right to Do the Impossible?*, 12 *BYU J. PUB. L.* 309 (1998). Sekulow and Tuskey offer a different disanalogy with *Loving v. Virginia*, 388 U.S. 1 (1967), relying on the fact that the statute challenged in that case “did not treat the races equally” because it allowed whites only to marry other whites, while members of other races could marry anyone who was not white. Sekulow & Tuskey, *supra* at 324. State marriage laws, on the other hand, “treat men and women alike.” *Id.* This distorts the U.S. Supreme Court’s opinion in *Loving*, which notes the statute’s formal racial inequality but also declares that “we find the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the ‘integrity’ of all races.” *Loving*, 388 U.S. at 12 n.11. Had the Court not said this, some miscegenation statutes would probably have remained valid, and Virginia itself might have taken advantage of the loophole thus created.

14. 388 U.S. 1 (1967).

15. 379 U.S. 184 (1964).

16. *Id.* at 188.

17. *Id.* at 192.

18. *Id.* at 192–93.

19. Stein’s move, of ignoring *McLaughlin* and only talking about *Loving*, has become depressingly typical of those who wish to deny the formal power of the sex discrimination argument. See, e.g., Baker v. State, 744 A.2d 864, 880 n.13 (Vt. 1999); Wardle, *supra* note 8, at 75–82. The argument’s power is vindicated when those who seek to refute it find it necessary first to mischaracterize it.

even be necessary to cite it as a precedent, because it stated the obvious. If prohibited conduct is defined by reference to the actor's own race or sex, the prohibition is not neutral with reference to that characteristic. Indeed, in the states that specifically prohibit homosexual sex, the defendant's own sex would appear to be one of the essential elements of the crime that the prosecution must prove.²⁰

McLaughlin did not rely on any claims whatsoever about the motive for the law or about the class that was harmed by the law.²¹ It simply noted that there was a racial classification and applied heightened scrutiny. The sex discrimination argument for protecting gays from discrimination requires nothing more.²²

B. The "Actual Differences" Objection

Stein correctly observes that sex discrimination doctrine permits discrimination in cases in which the discrimination reflects real differences between men and women. Courts have relied on that doctrine to reject the sex discrimination argument. But does current doctrine permit this result? There are a few cases, which Stein notes, that do permit reliance on those

20. See ARK. CODE ANN. § 5-14-122 (Michie 1997); KAN. STAT. ANN. § 21-3505 (1995); MO. ANN. STAT. § 566.090.1 (West 1999); MONT. CODE ANN. §§ 45-2-101(20), -5-505 (2000); NEV. REV. STAT. ANN. § 201.190 (Michie 1995); TEX. PENAL CODE ANN. § 21.06 (Vernon 1994); see also *Schochet v. State*, 580 A.2d 176, 184 (Md. 1990) (holding that a facially gender-neutral sodomy statute does not apply to "consensual, noncommercial, heterosexual activity between adults in private," and expressly distinguishing cases involving homosexual activity); *Post v. State*, 715 P.2d 1105, 1109 (Okla. Crim. App. 1986) (invalidating facially gender-neutral sodomy statute in case of different-sex sodomy, but noting that "[w]e do not reach the question of homosexuality since the application of the statute to such conduct is not an issue in this case"). Compare the following:

To be a negro is not a crime; to marry a white woman is not a crime; but to be a negro, and being a negro, to marry a white woman is a felony; therefore, it is essential to the crime that the accused shall be a negro—unless he is a negro he is guilty of no offense.

Jones v. Commonwealth, 80 Va. 538, 542 (1885). See generally Koppelman, *The Miscegenation Analogy*, *supra* note 7, at 149–51.

21. Nan Hunter observes that the formal equality doctrine was also sufficient to decide *Loving*. [H]owever favored by progressive scholars, anti-subordination theory is not the law. The anti-subordination language of *Loving* was dicta; the reliance on color-blindness and formal neutrality in constitutional jurisprudence has increased, not decreased, since that decision. If courts were to assert the inadequacy of anti-subordination reasoning as a doctrinal bar to sex discrimination claims in gay marriage cases, that rationale would reek of intellectual dishonesty.

Nan Hunter, *The Sex Discrimination Argument in Gay Rights Cases*, 9 J.L. & POL'Y 397, 411 (2001) (footnotes omitted).

22. Thus, it is not true that the description of the argument presented in Stein's Table 2 is "the strongest form of the sex discrimination argument," Stein, *supra* note 10, at 496, 495 tbl.2. That table depends on contestable claims upon which the legal argument does not rely.

differences.²³ The laws upheld in those decisions, however, reflected accurate empirical rather than normative generalizations.²⁴ More importantly, the generalizations they reflected were exceptionless. If it were otherwise—if a sex-based classification could be justified by what is usually the case, or what is true about most members of either sex—then the constitutional doctrine would be eviscerated, because even the most invidiously sexist laws have been justifiable in terms of some argument of this sort.²⁵

What “real differences” could courts cite? Stein notes that some states have tried to defend some kinds of discrimination by arguing

that marriage is related to childrearing (and that . . . lesbians and gay men are bad parents compared to heterosexuals), that lesbians and gay men are less able to sustain the sort of long-term commitments the state wants to encourage in its citizens, and that the incidence of sodomy can be reduced by preventing homosexuals from marrying.²⁶

All of these claims involve the kind of stereotyping that the Court has consistently rejected in the sex discrimination cases. Some, such as the claim about parenting, are not even statistically accurate.²⁷ More importantly, none of them are true of all gay couples. Such generalizations have been relied on by courts denying gays’ sex discrimination claims.²⁸ But such generalizations have also been relied on to justify *all* forms of sex discrimination.²⁹

23. See *Miller v. Albright*, 118 S. Ct. 1428 (1998); *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Michael M. v. Superior Court*, 450 U.S. 464 (1981).

24. See Koppelman, *The Miscegenation Analogy*, *supra* note 7, at 157 n.78.

25. When I responded to certain generalizations about homosexual couples in an earlier article, I did not emphasize this legal point sufficiently, but simply undertook to show that the generalizations were false. See Andrew Koppelman, *Three Arguments for Gay Rights*, 95 MICH. L. REV. 1636, 1662–66 (1997). I continue to think that the falsity of the generalizations is morally if not legally relevant.

26. Stein, *supra* note 10, at 511–12.

27. See Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253.

28. See, e.g., *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974):

[I]t is apparent that the state’s refusal to grant a license allowing the appellants to marry one another is not based upon appellants’ status as males, but rather it is based upon the state’s recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children. This is true even though married couples are not required to become parents and even though some couples are incapable of becoming parents and even though not all couples who produce children are married. *These, however, are exceptional situations.*

Id. (emphasis added).

29. Thus, Justice Joseph Bradley’s notorious concurrence in *Bradwell v. Illinois*, 83 U.S. 130 (1873), defended the exclusion of women from the practice of law on the grounds that “[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life,” that “[t]he harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband,” and that “[i]t is true that many women

It is now firmly established that generalizations of this sort, even if largely accurate, can never justify sex-based classifications. The Court has held that “the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an ‘exceedingly persuasive justification’ for the classification.”³⁰ Moreover, “[t]he burden of justification is demanding and it rests entirely on the State.”³¹ Any such justification “must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”³² “[G]eneralizations about ‘the way women are,’ estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description.”³³ As Anita Blair, an opponent of same-sex marriage, has conceded, the doctrine now is that “any justification is deemed overbroad if any individual might prove to be an exception to it.”³⁴

are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, *but these are exceptions to the general rule.*” *Id.* at 141 (Bradley, J., concurring) (emphasis added); *see also id.* at 141–42 (“[T]he rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.” (emphasis added)). In recent Supreme Court opinions, Bradley’s concurrence has repeatedly been cited as an instance of precisely the type of sexist stereotyping that the Fourteenth Amendment is now understood to prohibit. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 133 (1994); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 n.10 (1982); *Dothard v. Rawlinson*, 433 U.S. 321, 344 n.2 (1977) (Marshall, J., concurring in part and dissenting in part); *Frontiero v. Richardson*, 411 U.S. 677, 684–85 (1973) (plurality opinion).

30. *Hogan*, 458 U.S. at 724; *see also* *United States v. Virginia*, 518 U.S. 515, 531 (1996) (quoting same).

31. *Virginia*, 518 U.S. at 533. The suspicion with which the Court regards sex-based classifications thus approaches, if it does not equal, that directed toward race-based classifications. Lynn Marie Kohm fails to grasp this basic point of equal protection law, and so imagines that she can refute the sex discrimination argument merely by noting that sex-based classifications are not given the strict scrutiny accorded those based on race. *See* Lynn Marie Kohm, *Liberty and Marriage—Baehr and Beyond: Due Process in 1998*, 12 BYU J. PUB. L. 253, 260, 270 (1998). She is not alone; some courts have made the same mistake. *See, e.g.,* *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1977), *appeal dismissed*, 409 U.S. 810 (1977). Those courts’ decisions, however, predate the Court’s strong condemnations of sex discrimination just quoted. Kohm’s article does not. Stein notes that intermediate scrutiny is different from strict scrutiny, but he does not explain what he thinks the difference is. *See* Stein, *supra* note 10, at 484.

32. *Virginia*, 518 U.S. at 533.

33. *Id.* at 550.

34. Anita K. Blair, *Constitutional Equal Protection, Strict Scrutiny, and the Politics of Marriage Law*, 47 CATH. U. L. REV. 1231, 1242 (1998). The only exceptionless generalization that can be made to distinguish same-sex couples from opposite-sex couples is that the former cannot achieve the “two-in-one-flesh” communion that comes from being an organic unit of the procreative kind, as taught by Catholic natural law theory. *See, e.g.,* 2 GERMAIN GRISEZ, *THE WAY OF LORD JESUS: LIVING A CHRISTIAN LIFE* 633–80 (1993); John Finnis, *The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations*, 42 AM. J. JURIS. 97 (1997); John M. Finnis, *Law, Morality, and “Sexual Orientation,”* 69 NOTRE DAME L. REV. 1049 (1994); Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301 (1995); Patrick Lee & Robert P. George, *What Sex Can Be: Self-Alienation, Illusion, or One-Flesh Union*, 42 AM. J. JURIS. 135 (1997). Sekulow and Tuskey expressly rely on this theory in their response to the sex

Dubious antigay stereotypes are not sufficient to sustain antigay laws, if it is understood that such laws discriminate on the basis of sex.

C. The Objection from Limited Reach

Drawing on a taxonomy developed by William Eskridge, Jr.,³⁵ Stein observes that the sex discrimination argument does not reach all antigay laws. Specifically, he claims that sex classifications are found neither in laws that explicitly discriminate on the basis of sexual orientation (what he calls “type-1 laws”), nor in laws that do not facially discriminate but have discriminatory effects on gays (“type-3 laws”).³⁶

With respect to type-3 laws, Stein is undoubtedly correct.³⁷ This objection is not confined to the sex discrimination argument, however. It also deflates the argument that homosexuality is a suspect classification like race³⁸ and the argument that sexual orientation discrimination is like religious discrimination.³⁹ Disparate impact based on race⁴⁰ or religion⁴¹ is not now recognized as a basis for a constitutional claim. In this regard, the sex discrimination argument fares no worse than its rivals.⁴²

discrimination argument. See Sekulow & Tuskey, *supra* note 13, at 326. But this argument has been subject to voluminous criticism. See NICHOLAS BAMFORTH, *SEXUALITY, MORALS, AND JUSTICE: A THEORY OF LESBIAN AND GAY RIGHTS LAW* 148–74 (1997); KOPPELMAN, *supra* note 1, ch. 4; MICHAEL J. PERRY, *RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES* 86 (1997); Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871, 1912–18 (1997); Ronald R. Garet, *Deposing Finnis*, 4 S. CAL. INTERDISC. L.J. 605, 628–44 (1995); Koppelman, *supra* note 2; Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261 (1995); Martha C. Nussbaum, *Platonic Love and Colorado Law: The Relevance of Ancient Greek Norms to Modern Sexual Controversies*, 80 VA. L. REV. 1515 (1994); Paul J. Weithman, *Natural Law, Morality, and Sexual Complementarity*, in *SEX, PREFERENCE, AND FAMILY: ESSAYS ON LAW AND NATURE* 227, 228–29 (David M. Estlund & Martha C. Nussbaum eds., 1997); Paul J. Weithman, *A Propos of Professor Perry: A Plea for Philosophy in Sexual Ethics*, 9 NOTRE DAME J.L. ETHICS & PUB. POL’Y 75, 87 (1995).

35. See ESKRIDGE, *GAYLAW*, *supra* note 8, at 205.

36. Stein, *supra* note 10, at 509.

37. It is not clear, however, that facially gender-neutral sodomy laws (one of the examples cited by Eskridge) fall within this category. See Koppelman, *The Miscegenation Analogy*, *supra* note 7, at 151–53.

38. See Stein, *supra* note 10, at 516–17 (citing this argument with approval).

39. See *id.* at 517 (citing this argument with approval).

40. See *Washington v. Davis*, 426 U.S. 229 (1976).

41. See *Employment Div. v. Smith*, 494 U.S. 872 (1990).

42. For this reason, Stein’s hypothetical miscegenation case, see Stein, *supra* note 10, at 511–12, is a nonstarter, because miscegenation statutes almost never relied on sex-based classifications. See Hunter, *supra* note 21, at 410–11. Stein’s hypothetical argument must rely entirely on motive and impact, and so is a sure loser. In order for the hypothetical to work, he would have to suppose a different law, say one that prohibited only marriages between black men and white women. That law would be sex-discriminatory, it would reinforce sexist stereotypes, and it would be invalid on that basis (and other bases). Recognizing the stigmatic harm that such a law would inflict on all

The sex discrimination argument does, however, reach type-1 laws. Any law that discriminates against gays as such must be predicated on some procedure for determining who is gay.⁴³ Stein acknowledges that “to determine a person’s sexual orientation, one needs to know the person’s sex and the sex of the people to whom he or she is primarily sexually attracted.”⁴⁴ He thinks that the sex discrimination argument would not reach a law that prohibited gay people from marrying anyone of either sex.⁴⁵ In order to enforce this law, though, the registrar of marriages would need to know what A’s sex is in order to decide whether A’s attraction to B marks A as a gay person. Imagine a law that discriminated against “miscegenosexuals”⁴⁶ and denied them the right to marry or other benefits. Does Stein really think that such a law is not racially discriminatory, or that it would not be immediately recognized as such?⁴⁷

II. EMPIRICAL OBJECTIONS

A. The Sociological Objection

When I developed the sex discrimination argument in my 1994 article,⁴⁸ I emphasized that the formal argument above is complete, and that it does not depend on *any* claim about the connection between heterosexism and sexism.⁴⁹ I went on to develop such a claim, however, because I recognized that judges might wonder whether the protection of gays is consistent with

women would not be a sociological mistake. Recognizing its basis in sexism would not be a theoretical mistake. And recognizing that the law imposed an unconstitutional sex-based classification would not be a moral mistake.

43. Sex discrimination aside, legal procedures for such purposes are pernicious because they produce a culture of minute surveillance that constantly monitors every gesture for its message and continually requires members to reaffirm their heterosexuality. See JANET E. HALLEY, *DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY* (1999); Janet E. Halley, *Misreading Sodomy: A Critique of the Classification of "Homosexuals" in Federal Equal Protection Law*, in *BODY GUARDS: THE CULTURAL POLITICS OF GENDER AMBIGUITY* 351 (Julia Epstein & Kristina Straub eds., 1991); Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 *UCLA L. REV.* 915 (1989).

44. Stein, *supra* note 10, at 486.

45. See *id.* at 510–12.

46. This wonderfully awful neologism was invented by Samuel Marcossou. See Samuel A. Marcossou, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 *GEO. L.J.* 1, 6 (1992).

47. See *Gutwein v. Easton Publ'g Co.*, 325 A.2d 740, 742 (Md. 1974) (rejecting a defense that the firing of a white employee because he was engaged to a black woman “involved not his own race, but rather his fiancée’s”), *cert. denied*, 420 U.S. 991 (1975).

48. See Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, *supra* note 7.

49. See *id.* at 220; see also Koppelman, *The Miscegenation Analogy*, *supra* note 7, at 158, 160–61 (making the same point less clearly).

the purposes of sex discrimination doctrine. The answer depends on what one thinks sex discrimination law is for. If the purpose of this doctrine is to prevent the imposition of gender classifications on people's life choices, then the argument is over. This is just what the formal argument shows that antigay discrimination does.⁵⁰ If, however, one thinks that it exists in order to end the subordination of women, then one would have to demonstrate some link between antigay discrimination and the subordination of women.⁵¹ For this reason, I argued at length that sexism was an important wellspring of antigay animus, and that the homosexuality taboo functions to strengthen gender hierarchy.⁵²

Stein argues that the sex discrimination argument rests on a sociological mistake: "It mischaracterizes the nature of laws that discriminate against lesbians and gay men to see them as primarily harming women (or even as harming women as much as they harm gay men, lesbians, and bisexuals)."⁵³ This claim about comparative harm would be a mischaracterization if anyone were to make it. As far as I can tell, no one ever has.⁵⁴

50. This point was urged upon me energetically and persuasively by Mary Anne Case shortly before she stated it in print. See Mary Anne Case, *Unpacking Package Deals: Separate Spheres Are Not the Answer*, 75 DENV. U. L. REV. 1305 (1998).

51. The task is not, however, to show that there is anything inherent in gay people that challenges gender conformity. Dale Carpenter thinks that the sex discrimination argument depends on a claim that there is some connection, either necessary or historically contingent, between gender and sexual rebellion, so that gay people's lives and experiences would have to be understood to be defined by gender nonconformity. "Theory aside, the fact is many gay women and men see themselves in gender-conforming terms and seek gender-conforming traits in their mates." Dale Carpenter, *The Limits of Gaylaw*, 17 CONST. COMMENT. 603, 621 (2000). The fact he cites is true but irrelevant, because the sex discrimination argument is not a claim about gay people or their lives. The persons scrutinized by the argument are the ones who want to discriminate, not the ones who suffer the discrimination. See KOPPELMAN, *supra* note 7, at 7 n.15; Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, *supra* note 7, at 198 n.1.

52. See Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, *supra* note 7, at 234–57.

53. Stein, *supra* note 10, at 500.

54. Nor has anyone ever claimed that "*Loving* was decided on the wrong grounds because it failed to discuss the harm to women involved in antimiscegenation laws." *Id.* at 501–02. At one point he does concede that these laws do disproportionately harm women, but he nonetheless claims that "women" should not appear in the third cell of the last row" of his Table 2. *Id.* at 500, 495 tbl.2. He explains that women should be excluded because they are not the primary target of the law. See *id.* at 500. By this logic, though, "people of color" do not belong in Table 2 (or Table 4, see *id.* at 505 tbl.4) either, since most people of color were not targeted by laws against interracial marriage. Stein's understanding of what counts as "harm" is too confined. Cf. Andrew Koppelman, *On the Moral Foundations of Legal Expressivism*, 60 MD. L. REV. 777 (2001) (critiquing Matthew Adler for a similarly narrow conception of harm). This is most strikingly shown in his footnote 133, which concedes that some laws that discriminate on the basis of sexual orientation might harm lesbians more than gay men. His explanation of the point only counts as harmed those who are directly targeted and punished by the law, and leaves out of account any diffuse, stigmatic harm suffered by anyone not so targeted. This calculus makes unintelligible the claim that miscegenation laws harmed all blacks.

The big problem with his sociological objection is that it implies that *Loving* was wrong to talk about white supremacy. The same objection could have been raised in that case: Miscegenation laws primarily harmed, not blacks as such, but interracial heterosexual couples (a group that, by definition, included equal numbers of blacks and whites).⁵⁵ While the harm to blacks was recognized even by the most obtuse judges as a “stigma, of the deepest degradation . . . fixed upon the whole [black] race,”⁵⁶ it would be callous not to notice that the persons who were *most* severely harmed by those laws were the ones whose marriages were voided and who were, in many cases, sent to prison. If the harm to blacks counts against the miscegenation laws, then for the same reasons, the harm to women should count against antigay laws.

B. The “Theoretical” Objection

What Stein calls the “theoretical” objection (it appears just as sociological as its predecessor) is that “[w]hile sexism plays a role in the justification of laws that discriminate against lesbians, gay men, and bisexuals, homophobia plays a more central role.”⁵⁷ I do not know how to evaluate that comparative claim, which pertains to complex social and psychological processes that are largely mysterious (and that take very different forms in the psyches of different people).⁵⁸ What Charles Stember wrote about the basis of the miscegenation

If one only counts harms in this narrow way, then all miscegenation laws harmed blacks and whites equally. (Except, perhaps, those involving decedents’ estates, which usually prevented black women from inheriting from white husbands. See Peggy Pascoe, *Race, Gender, and Intercultural Relations: The Case of Interracial Marriage*, 12 FRONTIERS 5, 7 (1991).)

55. Stein concedes this in a passing footnote, but he does not notice that it undercuts the text to which it is attached. See Stein, *supra* note 10, at 492–93 & n.105.

56. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 409 (1857).

57. Stein, *supra* note 10, at 500.

58. This may be a good place to clarify an important misunderstanding. I have never claimed that gender role deviance is “the total explanation for homophobia.” Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 82 (1996); see also Roderick M. Hills, Jr., *You Say You Want a Revolution? The Case Against the Transformation of Culture Through Antidiscrimination Laws*, 95 MICH. L. REV. 1588, 1608–12 (1997). John Gardner appears to demand an even stronger connection, claiming that in order for the link to sexism to be satisfactorily shown, the tie between the two prejudices would have to be “a logical tie, so that traditional patriarchal sex roles were incorporated into the operative premises of the discriminator’s reasoning by *definition* whenever discrimination on grounds of sexual orientation takes place.” Gardner, *supra* note 11, at 184. This is too demanding and would shield too much invidious discrimination from scrutiny. Gardner is right that logic does not exclude innocent, nonpatriarchal explanations for discrimination against gays. Chief Justice Earl Warren raised the same problem of innocent explanations when he wrote in *Brown v. Board of Education*, 347 U.S. 483 (1954), that “[s]eparate educational facilities are inherently unequal.” *Id.* at 495. The statement was correct insofar as it recognized the implausibility of the “separate but equal” claim in the context of Jim Crow, but incredible insofar as it was phrased in terms of what Charles Black called “the metaphysics of sociology: ‘Must Segregation Amount to Discrimination?’”

taboo is equally true of the homosexuality taboo; any explanation must rely upon "speculation and deduction."⁵⁹ I do not know whether sexism or heterosexism (if the latter can be understood as a distinct social force) lies "at the core"⁶⁰ of these laws or plays a more central role in maintaining these laws. I do not think anyone knows.⁶¹ I prefer to rely on weak causal claims⁶² because weak causal claims are the only ones we can endorse with any confidence. Further, it seems to me pointless to argue about which strong causal explanation is the correct one. Surely we can work against these forms of oppression, and even perceive a functional connection between them, without first understanding every detail of how they came into existence or how they perpetuate themselves!

I also disagree with the implication of Cheshire Calhoun's claim, cited by Stein,⁶³ that "[e]ven if empirically and historically heterosexual dominance and patriarchy are completely intertwined, it does not follow from this fact that the collapse of patriarchy will bring about the collapse of heterosexual dominance."⁶⁴ She is right.⁶⁵ It is also true that the two forms of oppression are different in kind: Women, like racial minorities, are disproportionately concentrated in disadvantaged places in society, while gay people have no

Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 427 (1960). Black's comment remains instructive:

That is an interesting question; someday the methods of sociology may be adequate to answering it. But it is not our question. Our question is whether discrimination inheres in that segregation which is imposed by law in the twentieth century in certain specific states in the American Union. And that question has meaning and can find an answer only on the ground of history and of common knowledge about the facts of life in the times and places aforesaid.

Id. Similarly, it is a matter of anthropological fact rather than metaphysical necessity that sexism and heterosexism are tightly intertwined. It could be otherwise, but it is not.

59. CHARLES H. STEMBER, *SEXUAL RACISM: THE EMOTIONAL BARRIER TO AN INTEGRATED SOCIETY* 206 (1976); Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, *supra* note 7, at 232 (quoting Stember).

60. Stein, *supra* note 10, at 500.

61. The proposition may be testable at particular sites within the culture, by intensively studying individuals or small groups, but Stein's claim is more sweeping than this, and appears to pertain at least to American culture as a whole.

62. I discuss the weakness of the necessary causal claims in a short essay masquerading as a footnote. See Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, *supra* note 7, at 255-57 n.222. I modify the argument somewhat in KOPPELMAN, *supra* note 1, ch. 3.

63. See Stein, *supra* note 10, at 499 & n.120.

64. Cheshire Calhoun, *Separating Lesbian Theory from Feminist Theory*, 104 ETHICS 558, 562 (1994).

65. I endorse without reservation Calhoun's argument that "it is a mistake for feminists to assume that work to end gender subordination will have as much payoff for lesbians as it would for heterosexual women." *Id.*

legitimized place at all in civil society.⁶⁶ Perhaps those who seek to end heterosexual dominance should not worry at all about patriarchy; perhaps the strategy of fighting heterosexism by fighting sexism is ill-conceived. Nonetheless, one cannot tell what the payoff will be until the strategy is tried. The same objection can be made against other attempts to fight a pervasive cultural form of oppression: Who could be sure in advance that school desegregation would help, even a little bit, in ameliorating racial oppression? Even if St. George does not know anything about the arrangement of the dragon's innards, though, he is still well advised to stick his sword into it, as often and in as many places as he can. One does not need a detailed anatomy of the beast in order to tell the difference between stabbing it and waving one's sword in some other direction.⁶⁷

At one point Stein makes the stronger claim that in contemporary America, "sexism and homophobia are coming apart."⁶⁸ I would have to see better evidence than that which Stein cites before I believed this.⁶⁹ The most thorough documentation of the linkage is the work of Francisco Valdes, which illustrates the ways in which literature, the discourse of scholarly psychologists, politics, public opinion, popular culture, and judicial decisionmaking have conflated sex, gender, and sexual orientation throughout the last century.⁷⁰ Valdes concludes that "sex, gender, and sexual orientation *never* have been constructed independently of each other in our society."⁷¹ If someone wanted to refute him, they could begin by citing instances of discourse in which sexual

66. See Cheshire Calhoun, *Sexuality Injustice*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 241 (1995).

67. George Dent is likewise correct that one can defend heterosexual privilege without assuming that women ought to be subordinated. See George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 608–14 (1999). Dent appears to think that the existence of such nonsexist motives proves that there is no link between heterosexism and sexism. See *id.* Social causation is simply more complicated than this. If a sex-based classification could not be deemed sexist unless it were motivated by nothing but sexism, then few if any such classifications would be invalid.

68. Stein, *supra* note 10, at 499. He later goes even further, writing that they "have become [completely?] disentangled." *Id.* at 502.

69. The only evidence that he does cite is the fact that women's status in marriage has improved dramatically, while gays are denied the right to marry altogether. See *id.* at 499.

70. See Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995). His evidence is too voluminous to summarize, so I simply incorporate it by reference here. Valdes's work also shows the dangers of ignoring the sex discrimination argument. His extensive study of the caselaw finds that, in cases involving straightforward sex discrimination, defendants have often succeeded by imputing homosexuality to the plaintiff on the basis of the plaintiff's purported gender-atypical behavior. Gender stereotyping is supposedly forbidden by sex discrimination law, but the decision to permit sexual orientation discrimination has created a huge loophole that has been deployed even against heterosexual plaintiffs. See *id.* at 119–207, 308–14.

71. *Id.* at 253.

orientation is constructed *without* reference to gender norms. However, this would not be an easy task. I cannot imagine where they would begin. The mere fact that women's status has improved, which is all that Stein cites, hardly suffices. The status of gays has improved at the same time, and those who have struggled against heterosexism and sexism are acutely conscious of the link.⁷²

III. THE MORAL OBJECTION

Finally, Stein objects that the sex discrimination argument "mischaracterizes the core wrong"⁷³ of antigay laws. "By failing to address arguments about the morality of same-sex sexual acts and the moral character of lesbians, gay men, and bisexuals, the sex discrimination argument 'closets,' rather than confronts, homophobia."⁷⁴

This is a powerful claim. Stein is only the latest of many writers who have worried that the sex discrimination argument marginalizes gays' moral claims. Jack Balkin writes that the sex discrimination argument implies "that discrimination against homosexuals is merely a 'side effect' of discrimination against women, and therefore somehow less important."⁷⁵ John Gardner thinks that "those committed to the moral wrongfulness of sexuality discrimination should not be at all happy to find this wrongfulness appended to the moral margins of somebody else's grievance, namely the grievance of those who are victims of sex discrimination."⁷⁶ William Eskridge writes that the sex

72. See Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187.

73. Stein, *supra* note 10, at 503.

74. *Id.* at 503-04.

75. J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2362 (1997). Similarly, Jonathan Goldberg worries that the argument conveys the unfortunate suggestion that [the prohibition of homosexuality is] important only insofar as it bears upon the relations between men and women, or upon women's rights to the control of her body By collapsing questions of sexuality into the "more important" realms of gender, homosexuality is allowed salience insofar as it seems assimilable to heterosexuality, insofar as same-sex relations are taken to be no different from cross-sex ones

JONATHAN GOLDBERG, *SODOMETRIES: RENAISSANCE TEXTS, MODERN SEXUALITIES* 14-15 (1992); see also Kenneth L. Schneyer, *Avoiding the Personal Pronoun: The Rhetoric of Display and Camouflage in the Law of Sexual Orientation*, 46 RUTGERS L. REV. 1313, 1388-89 (1994).

76. Gardner, *supra* note 11, at 183. Diana Majury offers a similar but distinct worry:

A successful formal equality analysis in this context would mean that the least oppressed lesbians and gays, that is those most like the dominant group, would be granted heterosexual status. As a corollary, the most oppressed lesbians and gays would be further marginalized and subject to more extreme forms of discrimination and subordination.

Diana Majury, *Refashioning the Unfashionable: Claiming Lesbian Identities in the Legal Context*, 7 CAN. J. WOMEN & L. 286, 309 (1994) (footnote omitted). Acceptance of the argument will not end these

discrimination argument has “a transvestite quality,” because “[i]t dresses a gay rights issue up in gender rights garb.”⁷⁷ Danielle Kie Hart argues that the sex discrimination argument “makes the lives of homosexuals invisible; it sends a clear message to society that it is not acceptable to discuss homosexuality in a public forum; and it reflects and may perpetuate negative attitudes about lesbians and gay men.”⁷⁸

All these concerns are valid. One can make the same point about the interracial couple prosecuted in *Loving*: the racist system primarily harmed blacks, but the white husband’s interests were hardly unimportant. Balkin’s rephrasing of the point is helpful: “gender categories are general forms of social subordination that subordinate the feminine and all things associated with the feminine. Thus, this system subordinates not only women, but homosexuals, bisexuals, and effeminate men.”⁷⁹

The problem here is the problem with any legal claim. Law always picks and chooses among facts in the world, deeming some relevant and ignoring others.⁸⁰ It thus flattens the richness of human life. Law is not literature. Its capacity “to speak in a strong moral voice”⁸¹ is inevitably limited. When we evaluate a human life, we do not just ask whether the person followed the rules. Othello and Iago both killed their wives; the law would make no distinction between them, even though any reader of Shakespeare’s play knows that the two men lived in different moral universes.⁸² Facts are messy. Legal categories make them clean, usually by stripping off the living flesh. There is a danger, which should always be resisted, that stories deemed irrelevant for legal purposes will be deemed irrelevant *simpliciter*.⁸³

people’s oppression, but it will eliminate all discrimination based specifically on their sexual orientation. That is all that one can reasonably ask antidiscrimination law to do.

77. ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE, *supra* note 8, at 172; see also ESKRIDGE, GAYLAW, *supra* note 8, at 220 (providing a similar comment).

78. Danielle Kie Hart, *Same-Sex Marriage Revisited: Taking a Critical Look at Baehr v. Lewin*, 9 GEO. MASON U. CIV. RTS. L.J. 1, 11 (1998).

79. Balkin, *supra* note 75, at 2362.

80. And, of course, different facts are relevant to different legal claims. The same act may be both a crime and a tort, and the elements of the crime will usually be different from the elements of the tort.

81. Stein, *supra* note 10, at 515. It simply is not true that courts need to speak in such a clear voice in order to vindicate the basic rights of despised minorities. *McLaughlin v. Florida*, 379 U.S. 184 (1964), as we saw above, completely evaded the central moral issues raised by Florida’s miscegenation law. *Brown v. Board of Education*, 347 U.S. 483 (1954), which declared segregated schools unconstitutional, and *Baker v. State*, 744 A.2d 864 (Vt. 1999), which vindicated the rights of same-sex couples to have their relationships legally recognized, were both masterpieces of obfuscation.

82. See WILLIAM SHAKESPEARE, *OTHELLO*.

83. There is also a danger that one who makes a legal argument will be misconstrued as making an essentializing claim. Susan Sterett has thus mistaken my claim: “Andrew Koppelman argues that sexual orientation discrimination is ‘really’ gender discrimination, because gay men and women are discriminated against on the basis of traits associated with femininity or masculinity. I

The sex discrimination argument relies on settled law that was established for the benefit of women, not of gays. It can be relied on because it is settled, but it is settled only because it was devised without thinking about (to some extent, by deliberately ignoring) the claims of gays. Accepting and relying on the sex discrimination argument thus means accepting and relying on a view of the world in which gays are at best marginal.

On the other hand, the marginalization of gays is precisely why the argument has the comparative advantages that it does. Each of the other principal arguments for gay equality—the privacy and suspect classification arguments—depend on an innovative extension of existing law to cover gays. The sex discrimination argument does not. On the contrary, it is its opponents who must ask for legal innovation, by carving out an exception to a settled rule.

CONCLUSION

The sex discrimination argument has usually been rejected by the courts.⁸⁴ However, this does not distinguish it from other arguments made on

would argue that there is no 'really,' except for the convenience of making a plausible claim in Title VII." Susan Sterett, *Husbands and Wives, Dangerousness and Dependence: Public Pensions in the 1860s–1920s*, 75 DENV. U. L. REV. 1181, 1213 (1998) (footnote omitted). Revealingly, there is no citation for the word she places in quotation marks. See *id.*

84. See *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 331 (9th Cir. 1979); *Smith v. Liberty Mut. Ins. Co.*, 395 F. Supp. 1098, 1099 n.2 (N.D. Ga. 1975), *aff'd*, 569 F.2d 325, 327 (5th Cir. 1978); *Dean v. District of Columbia*, 653 A.2d 307, 363 n.2 (D.C. 1995) (Steadman, J., concurring); *State v. Walsh*, 713 S.W.2d 508, 510 (Mo. 1986); *Baker v. State*, 744 A.2d 864, 880 n.13 (Vt. 1999); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974); *Phillips v. Wis. Pers. Comm'n*, 482 N.W.2d 121, 127–28 (Wis. Ct. App. 1992); *X & Y v. U.K.*, 5 E.H.R.R. 601 (1983); *R. v. Ministry of Defence ex parte Smith* [1996] Q.B. 517; *Smith v. Gardner Merch.* [1998] 3 All E.R. 852; *Grant v. S.-W. Trains, E.C.J.* Case C-249/96, ECR I-621, 1998 ECJ CELEX LEXIS 3673 (1998); see also *Valdes v. Lumbermen's Mut. Cas. Co.*, 507 F. Supp. 10 (S.D. Fla. 1980) (finding that discrimination against lesbians may constitute actionable "sex-plus" discrimination, but that an employer can rebut charge by showing that it discriminates equally against gay men).

On the other hand, successes exist. The only final appellate decision that fully adopts the argument and remains good law is *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). Even in that case, the argument was initially only accepted by two out of five judges; it took a supplementary opinion after a change of personnel to make it effectively a majority opinion. See *Baehr*, 852 P.2d at 74; Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, *supra* note 7, at 204–05. The argument was accepted by intermediate appellate courts in *Engel v. Worthington*, 23 Cal. Rptr. 2d 329 (Cal. Ct. App. 1993), a case in which review was denied and the opinion was withdrawn from publication in official reports, No. S036051, 1994 Cal. LEXIS 558 (Cal. Feb. 3, 1994) (discrimination against same-sex couple); *Lawrence v. State*, Nos. 14-99-00109-CR & 14-99-0011-CR, 2000 WL 729417 (Tex. App. June 8, 2000), available at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=639>, a two-to-one panel decision on June 8, 2000, which was reversed seven-to-two by en banc court, 41 S.W.3d 349 (Tex. App. 2001) (same-sex sodomy); and *MacDonald v. Ministry of Defence* [2000] Industrial Relations Law Reports (IRLR) 748 (Scottish Employment Appeal Tribunal) (3-0), *rev'd*, [2001] IRLR 431 (Court of Session, Inner House) (2-1),

behalf of gays. The rule of law is always an aspiration, never perfectly realized. Courts have for a long time been predisposed to reject claims made by gay people regardless of their merits.⁸⁵

The sex discrimination argument has an important analytic strength, particularly when one compares it to the other available arguments. The equal protection argument for judicial protection of gays as such is supported by the long history of antigay discrimination, but the indeterminacy of equal protection doctrine makes this strategy an uncertain one.⁸⁶ The privacy argument is even less certain, because it is unclear how one determines whether any particular conduct is protected by it.⁸⁷

The sex discrimination argument is not free from indeterminacy, to be sure. With any presumptively unconstitutional law, the question inevitably arises as to whether the state can offer an adequate justification for what it

http://www.scotcourts.gov.uk/opinions/XA172_00.html (military employment). The argument was intimated, but its implications were not fully articulated, in *Nabozny v. Podlesny*, 92 F.3d 446, 454–55 (7th Cir. 1996), which found sex discrimination when a state school tolerated violent harassment of an openly gay student “because both the perpetrators and the victims were males”; it was “impossible to believe that a female lodging a similar complaint would have received the same response.” *Id.* The argument was accepted by one judge of a final appellate court in two same-sex marriage cases: *Baker v. State*, 744 A.2d 864, 904–07 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part), and *Quilter v. Attorney-General* [1998] 1 NZLR 523, 535–36 (New Zealand Court of Appeal) (Thomas, J.). The argument was adopted by trial judges in *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998), which was subsequently rendered moot by an amendment to the state constitution, see ALASKA CONST. art. I, § 25, and in *Picado v. Jegley*, No. CV-99-7048 (Ark. Cir. Ct. Mar. 23, 2001), available at <http://www.lambdalegal.org/sections/library/decisions/picadodecision.pdf>. In *Toonen v. Australia*, Communication No. 488/1992, 1 Int’l H.R. Rep. 97, 105 (1994), available at <http://www1.umn.edu/humanrts/undocs/html/vws488.htm>, which banned all male-male sexual activity, the United Nations Human Rights Committee declared that the prohibition of sex discrimination in the International Covenant on Civil and Political Rights includes sexual orientation, but did not state its reasoning.

85. For a collection of horror stories from not very long ago, see Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1979). The survey amply documents “systematic and pervasive discrimination against homosexual individuals in our courts.” *Id.* at 947.

86. See Koppelman, *Romer v. Evans and Invidious Intent*, *supra* note 5.

87. See KOPPELMAN, *supra* note 1, ch. 2; Koppelman, *supra* note 25; Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, *supra* note 7, at 198–201; Koppelman, *Why Gay Legal History Matters*, *supra* note 5, at 2042–46. These arguments, too, fail to claim that same-sex sexual desire is of the same moral status as opposite-sex sexual desire, that same-sex sexual acts are of the same moral status as opposite-sex sexual acts, and that relationships between people of the same sex have the same moral status as relationships between people of the opposite sex.

Stein, *supra* note 10, at 504. Because these claims involve moral status rather than positive law, it is unclear that any argument based on positive law can resolve them. An argument that fully addresses these issues would have to engage the relevant religious questions, such as whether homosexual conduct is an abomination unto God. American law has long refused, for excellent reasons, to address such questions. See Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. (forthcoming 2002).

has done, and then a court must balance the interests involved in a way that will unavoidably allow for judicial discretion. With the sex discrimination argument, it is uncertain what distinguishes sex discrimination in marriage from similar separate-but-equal discrimination in restrooms.⁸⁸ On the other hand, with the sex discrimination argument, the *prima facie* case has been made, and the burden is on the state to get out from under it. The indeterminacy works, to that extent, to the advantage of the person challenging the law. With liberty or sexual-orientation-as-a-suspect-classification arguments, on the other hand, the indeterminacy plagues the plaintiff at the level of his or her *prima facie* case. The law's inertia is in favor of validation. In short, it matters a lot at what stage of the argument the indeterminacy comes in.⁸⁹

The sex discrimination argument's comparative moral strengths are less stark than its doctrinal advantages, but they are worth noting. The privacy and suspect class arguments do point to important and valid moral claims, even if it is hard to translate those claims into legal doctrine. Sodomy laws do intrude into matters that are none of the state's business. Gays have been the object of vicious prejudice. But the sex discrimination argument shows that the oppression of gays has destructive effects that reach far beyond the impact on gays themselves. The subordination of the feminine oppresses everyone. A moral assessment of antigay prejudice that excludes this factor is as incomplete as a moral assessment of the miscegenation taboo that forgets to mention racism.⁹⁰

One is still entitled to wonder why the argument has been so often rejected. I would suggest three reasons. One is that the argument is simply not understood. Another is that it has struck observers as a mere trick, one that misses the real issue of discrimination that is in question. The third, and perhaps the most powerful, is that from a political standpoint the argument proves too much. If accepted, the sex discrimination argument would require that *all* laws discriminating against gays, notably marriage laws, must be swept away at a single stroke. Judges are understandably hesitant to begin down that road.⁹¹ Richard Posner persuasively argues that "it is a mistake to suppose

88. I address the distinction in KOPPELMAN, *supra* note 1, ch. 3.

89. This point was clarified in conversation with Douglas Baird and Eric Posner.

90. The Court's opinion in *Loving* mentioned both the statute's reliance on ideas of white supremacy and the law's intrusion on the couple's right to marry. It indicated that either one of these would have been a sufficient ground for invalidating the law. See *Loving v. Virginia*, 388 U.S. 1, 7, 11–12 (1967). Stein's comparison with Herbert Wechsler's critique of *Brown*, see Stein, *supra* note 10, at 503, 515, is inapposite because Wechsler sought to replace a strong equality argument with a very weak freedom of association argument. It is hard to imagine what freedom of association has to do with laws that compel school attendance.

91. Judges were similarly hesitant to condemn the miscegenation laws, and avoided deciding their constitutionality until 1967. See Koppelman, *The Miscegenation Analogy*, *supra* note 7, at 162–64. The concern about backlash that Stein raises on pages 513 to 514 is hardly unique to the sex

that legal reasoning alone can underwrite so profound a change in public policy” as same-sex marriage.⁹²

Such prudential judgments have a long and honorable history. “A universal feeling,” Abraham Lincoln observed, “whether well or ill-founded, can not be safely disregarded.”⁹³ Lincoln was speaking of the feeling against the political and social equality of blacks—a feeling that was certainly more universal in 1854 than the feeling against same-sex marriage is today.⁹⁴ Yet, while his account of universal feeling was probably accurate at the time, the belief that this feeling had no foundation in justice had a corrosive effect upon it, to the extent that today nearly no one will admit to such a sentiment.

discrimination argument. The parallels between the prudential problem presented by interracial marriage and that presented by gay rights are thoughtfully elaborated in Marc Spindelman, *Reorienting Bowers v. Hardwick*, 79 N.C. L. REV. 359 (2001).

92. Richard A. Posner, *Should There Be Homosexual Marriage? And if So, Who Should Decide?*, 95 MICH. L. REV. 1578, 1585 (1997). Posner continues:

Public opinion may change . . . but at present it is too firmly against same-sex marriage for the courts to act. . . . When judges are asked to recognize a new constitutional right, they have to do a lot more than simply consult the text of the Constitution and the cases dealing with analogous constitutional issues. If it is truly a new right, as a right to same-sex marriage would be, text and precedent are not going to dictate the judges’ conclusion. They will have to go beyond the technical legal materials of decision and consider moral, political, empirical, prudential, and institutional issues, including the public acceptability of a decision recognizing the new right. Reasonable considerations also include the feasibility and desirability of allowing the matter to simmer for a while before the heavy artillery of constitutional rightsmaking is trundled out.

Id.

93. Abraham Lincoln, Speech on the Kansas-Nebraska Act at Peoria, Illinois (Oct. 16, 1854), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832–1858, at 316 (Don E. Fehrenbacher ed., 1989).

94. Here is Lincoln’s statement in context:

I think I would not hold one in slavery, at any rate; yet the point is not clear enough for me to denounce people upon. What next? Free them, and make them politically and socially, our equals? My own feelings will not admit of this; and if mine would, we well know that those of the great mass of white people will not. Whether this feeling accords with justice and sound judgment, is not the sole question, if indeed, it is any part of it. A universal feeling, whether well or ill-founded, can not be safely disregarded. We can not, then, make them equals.

Id. The passage invites comparison with Representative Sonny Bono’s very forthright speech on behalf of the Defense of Marriage Act, 28 U.S.C. § 1738C (Supp. V 1999):

I think we go beyond the Constitution here. I think we go beyond all these brilliant interpretations here, and I think we have hit feelings, and we’ve hit what people can handle and what they can’t handle, and it’s that simple. And no matter how you justify what you say legally or whether it represents the Constitution, I think it breaks down to whether you’re able to handle something or whether you’re not able to handle something. I don’t love my daughter any less because she’s gay, and I don’t dislike Barney [Frank, with whom Bono was debating] any more because he’s gay. . . . I simply can’t handle it yet, Barney. . . . I don’t want to justify it because I can’t. You just go as far as you can go . . .

Transcript of Mark-Up Record of the Defense of Marriage Act, House Judiciary Committee (June 12, 1996), in SAME-SEX MARRIAGE, PRO AND CON: A READER 222–24 (Andrew Sullivan ed., 1997).

Moral and legal arguments can change even universal feelings.⁹⁵ That is why I keep talking about the sex discrimination argument. It captures an aspect of the wrong of discrimination against gays that other, more familiar arguments miss. It is important that the argument be repeated and understood. Many people who are otherwise oblivious to the plight of gays do understand what is wrong with sexism.

This is not to say that the other arguments are wrong. Antigay laws reflect a multitude of sins. Their unconstitutionality is overdetermined. One can only enumerate their defects one by one. As one enumerates each, one necessarily neglects the others. The proper response to this situation is not to try to decide which of the various charges is the most serious, but simply to state them all. I have never said, and I have never heard anyone say, that the sex discrimination argument is the only one that should be made. It is one arrow in the quiver. There is plenty of room for, and use for, the others.

95. This is my deepest disagreement with Judge Posner. Cf. Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1998).