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THE "SPECIAL RIGHTS" CANARD IN THE DEBATE OVER LESBIAN AND GAY CIVIL RIGHTS

SAMUEL A. MARCOSSON*

INTRODUCTION

Opponents of civil rights protections for lesbians and gay men have employed a number of strategies in recent years to oppose the extension of anti-discrimination statutes to include sexual orientation as a protected category, and have campaigned to strike such laws where they have passed.¹ They have attempted to portray homosexuals as immoral sinners,² and have claimed that societal disapproval of homosexuality is necessary to maintain the traditional family unit.³ They have argued that

¹ Opposition to gay rights ordinances, statutes, and policies constitutes what might be called the "defensive posture" of anti-gay forces. The most famous example of this tactic is the successful 1977 campaign led by Anita Bryant to persuade voters to repeal Dade County, Florida's gay rights ordinance. See Note, Constitutional Limits on Anti-Gay-Rights Initiatives, 106 HARV. L. REV. 1905, 1908 (1993). More recently, opponents of gay rights have assumed a more offensive stance, going beyond seeking repeal of gay rights laws to affirmatively barring the enactment of lesbian and gay civil rights protections via the normal legislative process. See id. at 1905 (describing Colorado Amendment Two, which "not only repealed existing state laws that protect gay people from discrimination, but also banned all future laws that would recognize such claims by lesbians and gay men") (emphasis in original).

² See id. at 1921 & n.125 (describing "religious motivations" of the sponsors of anti-gay referenda); MICHAEL NAVA & ROBERT DAWIDOFF, CREATED EQUAL: WHY GAY RIGHTS MATTER TO AMERICA 26 (1994) ("In effect, gay men and women are taught that their experience of themselves as decent, productive, loving humans is false, because homosexuality is unnatural and sinful."); cf RICHARD A. POSNER, SEX AND REASON 291 (1992) (describing religious opposition to recognition of gay and lesbian rights in "Western culture since Christ").

³ Note, supra note 1, at 1915 (describing, and refuting, anti-gay argument that "gay people threaten family values"); see also NAVA & DAWIDOFF, supra note 2, at 24 (describing the anti-gay position that "extending civil rights to gays and lesbians . . . would undermine the family," and arguing that this
homosexuals (particularly gay men) are responsible for the spread of sexually transmitted diseases, especially AIDS,\(^4\) and that gays are disproportionately likely to be pedophiles.\(^5\)

These are all social, political and moral arguments, not directly legal ones, though they are meant to influence the substance of the law. More recently, the supporters of measures like Oregon’s Proposition 9 and Colorado’s Amendment 2 have made effective use\(^6\) of the argument that civil rights protections are “special rights” which should not be extended to lesbians and gay men.\(^7\)

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4. Note, supra note 1, at 1915 (anti-gay forces argue that “gay people are a threat to the public health”).

5. Id. (noting argument that “gay people threaten children,” but pointing out that evidence shows that “gay people are no more likely to molest children than are heterosexuals”); NAVA & DAWIDOFF, supra note 2, at 37 (quoting anti-gay group as saying, “The homosexual life-style is based on the recruitment and exploitation of vulnerable young males”).

6. Oregon’s Proposition 9 lost at the polls, while Colorado’s Amendment 2 passed by a margin of 53-47%. See John F. Niblock, Anti-Gay Initiatives: A Call For Heightened Judicial Scrutiny, 41 UCLA L. Rev. 153, 154 & n.5 (1993). Regardless of which side won in either state, it is clear that the “special rights” argument carried considerable weight for the anti-gay forces. See NAVA & DAWIDOFF, supra note 2, at 68 ("the lack of overt bigotry in [Amendment 2's] language, and the insertion of the buzzwords 'quota preferences,' allowed its backers to maintain that the purpose of the law was simply to prevent homosexuals from enjoying 'special rights.' "); Jeffrey S. Byrne, Affirmative Action for Lesbians and Gay Men: A Proposal for True Equality of Opportunity and Workforce Diversity, 11 YALE L. & POL'V REv. 47, 73 & n.110 (1993) (“Though misleading, the rhetoric of ‘special rights’ was used effectively by Amendment 2’s proponents.”). It was, it appears, well-suited to public opinion on questions regarding sexual orientation. Polls have shown that the fault line in public opinion is between “tolerating” gays and lesbians, and “approving” of homosexuality in areas involving “family values,” which most Americans refuse to do. See Poll Finds Voters Unpredictable, WASH. BLADE, May 13, 1994, at 29 (reporting poll showing that over 70 percent of respondents believed gays and lesbians should have access to jobs, housing, and public accommodations, but that 60 percent were opposed to allowing gays to marry or adopt or raise children). Once the rights sought by lesbians and gays are successfully characterized as “special rights,” support for such measures can easily be portrayed as “approving” the so-called “gay lifestyle.”

7. See Note, supra note 1, at 1905 & n.4 (“Recently, rallying against the establishment of 'special rights,' some right-wing, fundamentalist Christian groups have embarked on extensive campaigns to curtail the civil rights of lesbians and gay men.”). This rhetoric resurfaced when Congress opened debate on S. 2238, the Employment Non-Discrimination Act of 1994 (ENDA), a bill introduced by Senator Kennedy to bar discrimination on the basis of sexual orientation. See infra note 11 (describing provisions of ENDA). At a July 29, 1994 hearing of the Senate Labor and Human Resources Committee, one opponent of the legislation argued that gays are members of an "elite whose
This essay will dissect the notion of "special rights." Part I will attempt to define precisely what the anti-gay forces mean when they employ the "special rights" rhetoric, concluding that their only possible rational meaning is that civil rights protections of the type that have been subject to referenda should not be thought of as "rights" at all, but rather are privileges which the majority ought not confer on the basis of sexual orientation.

Part II will examine the extent to which this argument echoes the themes sounded by those who opposed the Civil Rights Act of 1964 on the ground that it conferred "special rights" or "privileges" because it infringed the liberty-based rights of discriminators to choose with whom to associate. Finally, Part III will argue that the best answer to the "special rights" argument is twofold. First, utilizing the same answer to the "special rights" claim given by the sponsors of the Civil Rights Act, advocates of lesbian and gay rights should focus on the nature of the rights protected by an anti-discrimination statute, and argue that the rights to employment, housing, and use of public accommodations are fundamental aspects of full, genuine citizenship that outweigh any claimed freedom to discriminate.

Second, it is also crucial to make the case for extending those rights specifically to gay men and lesbians, and answer the morality-based objections of anti-gay forces. To do so, advocates of gay and lesbian civil rights should argue both that homosexuality is not immoral and that discrimination against gay men and lesbians is immoral, emphasizing for purposes of the latter point the argument that sexual orientation is often an immutable, essential aspect of human personality. These arguments drain the moral force out of the claimed liberty to discriminate. Framing the case in this way demonstrates that the "special rights" claim of anti-gay forces is entirely inconsistent with the modern conception of civil rights in our polity, so much so that the claim must be regarded as an irrational appeal to prejudice.

insider status has permitted it to abuse the political process in search, not of equal opportunity, but of special privilege and public endorsement." Clinton Administration Backs Bill to Ban Job Bias Against Gays, DAILY LABOR REPORT (BNA) No. 145, at A15 (Aug. 1, 1994) [hereinafter DAILY LABOR REPORT]. Another witness argued that protecting lesbians and gay men from discrimination "essentially takes away the rights of employers to decline to hire or promote someone who openly acknowledges indulging in behavior that the employer or his customers find immoral, unhealthy and destructive to individuals, families and societies." Id. (characterizing testimony of Robert H. Knight of the Family Research Council). I will argue that this argument against anti-discrimination laws — that they limit some people's liberty to discriminate in favor of others' right to equal treatment — is the central notion underlying the special rights theme. See infra text accompanying notes 20-23.
I. THE CONTENT OF THE SPECIAL RIGHTS POSITION

Defining precisely what the special rights argument means is somewhat difficult, both because the phrase itself is somewhat opaque, and because its proponents are not always consistent in describing what they mean when they bother with specifics. In broad terms, the word "special" could have two meanings. First, it could imply that only a limited group possesses the right in question; the right is "special" because it is a right not enjoyed by other groups — and hence ought not be conferred. For example, if gay men and lesbians were granted the right to commit murder, that would be a "special right" in the sense that it is not possessed by heterosexuals. Second, they could mean that civil rights protections are by their nature "special rights" and that sexual orientation is not a valid basis for these rights. This argument is twofold: it argues first that the right to be free from employment discrimination is in some way "special," and second that while it is valid to confer this "special right" on the basis of race, sex, or religion, doing so on the basis of sexual orientation is either unjustified or improper.

The first definition may be rejected rather quickly. The problem with it is that no proponent of lesbian and gay rights, and no gay rights ordinance that has been the subject of anti-gay legislation, it does explain the Supreme Court's anti-gay decision in Bowers v. Hardwick, 478 U.S. 186, 190 (1986), where the Court framed Michael Hardwick's case as if he was claiming a specific right to engage in "homosexual sodomy," rather than a general right to privacy common to all Americans. See Thomas B. Stoddard, Bowers v. Hardwick: Precedent by Personal Prediction, 54 U. CHI. L. Rev. 648, 652 (1987) (arguing that the Court "reframed Hardwick, converting it from a 'sexual privacy' case to a 'gay rights' case"). In this way, the Court treated the case as if it claimed a "special right" exclusively for gays. Justice Blackmun's dissent took the majority to task for its sleight of hand. Bowers, 478 U.S. at 199 (Blackmun, J., dissenting) ("This case is no more about 'a fundamental right to engage in homosexual sodomy,' as the Court purports to declare, . . . than Stanley v. Georgia, 394 U.S. 557 (1969), was about a fundamental right to watch obscene movies, or Katz v. United States, 389 U.S. 347 (1967), was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.' Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting.").

8. While this meaning is, as I will shortly discuss, not a rational explanation of the special rights language of opponents of gay rights legislation, it does explain the Supreme Court's anti-gay decision in Bowers v. Hardwick, 478 U.S. 186, 190 (1986), where the Court framed Michael Hardwick's case as if he was claiming a specific right to engage in "homosexual sodomy," rather than a general right to privacy common to all Americans. See Thomas B. Stoddard, Bowers v. Hardwick: Precedent by Personal Prediction, 54 U. CHI. L. Rev. 648, 652 (1987) (arguing that the Court "reframed Hardwick, converting it from a 'sexual privacy' case to a 'gay rights' case"). In this way, the Court treated the case as if it claimed a "special right" exclusively for gays. Justice Blackmun's dissent took the majority to task for its sleight of hand. Bowers, 478 U.S. at 199 (Blackmun, J., dissenting) ("This case is no more about 'a fundamental right to engage in homosexual sodomy,' as the Court purports to declare, . . . than Stanley v. Georgia, 394 U.S. 557 (1969), was about a fundamental right to watch obscene movies, or Katz v. United States, 389 U.S. 347 (1967), was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.' Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting.").

9. Throughout this article, I will use employment discrimination as the paradigm, and discuss forms of discrimination which are specific to employment law, such as a failure to hire. Use of employment discrimination is merely meant to ease discussion; the arguments apply with equal force to housing discrimination, or to discrimination in public accommodations like restaurants and hotels.
repeal efforts, has claimed a particular right exclusively on behalf of lesbians and gays.10 The most typical example is an ordinance banning discrimination on the basis of sexual orientation. Such laws are neutral on their face, in that they bar the use of any person’s sexual orientation — whether it be gay or straight — as a basis for an employment decision.11

10. But see Byrne, supra note 6 (arguing for affirmative action which creates a more open and receptive environment for gay and lesbian employees). Byrne’s proposal, while styled as an argument for “affirmative action,” is actually quite limited in scope. He does not advocate preferences for lesbians and gay men for hiring or promotion, but only steps that would create a work environment where homosexuals can “come out” and flourish on an equal basis with heterosexuals. Id. at 54-56 (discussing the importance of gays and lesbians coming out as a necessary step to eliminating anti-gay intolerance). For example, Byrne says that “it is just and perhaps necessary that employers seeking to remedy the effects of past discrimination, challenge stereotypes and prejudice, and foster workforce diversity affirmatively encourage gay and lesbian employees to come out.” Id. at 65. The most extreme step Byrne calls for is the voluntary adoption of flexible “goals and timetables,” see id. at 51, which he believes would “send the message” that the work atmosphere is gay-friendly, and force employers to create a gay-positive environment in order to attract and keep gay and lesbian employees and hence meet their “goals.” Id. at 66. I accept Byrne’s characterization of his proposal as “affirmative action,” but it is a mild version indeed, with very little in it likely to be seen as rights given to gays and lesbians at the expense of heterosexuals. Byrne himself recognizes that affirmative action for lesbians and gay men (even his modest proposal) would be vulnerable to the charge that it constitutes “special rights” or “preferential treatment.” Id. at 72-73 & n. 109.

11. See, e.g., Mass. Ann. Laws, ch. 151 B, §§ 3-5 (Law Co-op. 1992); Mass. Ann. Laws, ch. 272, §§ 92A, 98 (Law Co-op. 1992) (Massachusetts gay rights law; § 4(1) makes it unlawful for an employer to discriminate, inter alia, on the basis of “sexual orientation,” while § 3(6) defines “sexual orientation” to mean “having an orientation for or being identified as having an orientation for heterosexuality, bisexuality, or homosexuality”). This is also the approach taken in section 3 of ENDA, which provides that employers “shall not — (1) subject an individual to different standards or treatment on the basis of sexual orientation; (2) discriminate against an individual based on the sexual orientation of persons with whom such individual is believed to associate or to have associated; or (3) otherwise discriminate against an individual on the basis of sexual orientation.” See Employment Non-Discrimination Act of 1994 as Introduced June 23, 1994, Daily Labor Rep. (BNA) No. 120, at D1 (June 24, 1994) [hereinafter Daily Labor Report] (containing text of the bill). Section 18 of ENDA defines “sexual orientation” to include “lesbian, gay, bisexual, or heterosexual orientation . . . .” Id. at D3. In addition, Section 5 of ENDA states that it does not provide a cause of action for employment practices that are neutral on their face but have a “disparate impact” on the basis of sexual orientation, and Section 6 bars the use of “a quota on the basis of sexual orientation” and prohibits “give[ning] preferential treatment to an individual on the basis of sexual orientation.” These provisions were tailored to preempt the argument that ENDA would provide “special rights” for lesbians and gay men. See Employment Bill Puts Real Protections to Work, Wash. Blade, July 29, 1994, at 37
It is true that the impetus for passage of these laws is to protect gay men and lesbians from discrimination, and that the primary beneficiaries are homosexuals, for the obvious reason that gays and lesbians are far more often the victims of discrimination owing to their sexual orientation. But the same is true of Title VII of the Civil Rights Act of 1964, and other civil rights laws. Passage of these laws, too, was impelled by a primary evil they were passed to address: race discrimination against a particular racial group, African-Americans, who were (and remain) far more often the victims of race discrimination than are whites.

Nevertheless, Title VII's bar on race discrimination does not provide "special rights" to African-Americans. If they benefit more from the protection, it is only because they are more often the victims of the discrimination that made the protection necessary. The same is true of laws banning sexual orientation dis-

(article by coalition of civil rights leaders supporting ENDA, explaining that by "neutralizing [the special rights] claim, ENDA is immeasurably strengthened").

12. See S. 2238, 104th Cong., 2d Sess. § 2 (1994) (findings of Congress, including specific findings that "historically, American society has tended to isolate, stigmatize, and persecute gay men, lesbians, and bisexuals," and that "the continuing existence of employment discrimination on the basis of sexual orientation denies gay men, lesbians, and bisexuals equal opportunity in the workplace"), reprinted in DAILY LABOR REPORT, supra note 11, at D1.


14. This is not true of the Americans with Disabilities Act, which does not bar "mirror image" discrimination. Title VII bars race and gender discrimination, and the Supreme Court has made abundantly clear that this means discrimination against whites as well as blacks. See McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976) (holding that Title VII permits claim of race discrimination against whites). The Supreme Court has also recognized that Title VII prohibits discrimination against men as well as women. Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987) (treating claim of sex discrimination against men as valid under Title VII, but rejecting claim in particular case). But the ADA bars discrimination only against a "qualified individual with a disability." 42 U.S.C. § 12112(a) (1988). This language has been interpreted not to provide a cause of action to an individual who is discriminated against because she is not disabled. See Appell v. Thornburgh, No. Civ. A. 90-2112-Ifo, 1991 WL 501641 (D.D.C., May 10, 1991) (under Rehabilitation Act, whose language protects only "individual with handicaps," person may not challenge alleged discrimination against him because he was not handicapped); Ortner v. Paralyzed Veterans, 2 A.D. Cases (BNA) 241, 242-43 (D.C. Super. Ct. 1992) (D.C. Human Rights Act protects only people with disabilities, because it does not use "neutral" language like "race" or "sex," but defines the covered class to include "only those who have a physical impairment.").

15. See H. REP. No. 914, 88th Cong. 1st Sess., at 18, reprinted in LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964 2018 (1968) (noting that the "[m]ost glaring" form of discrimination "is the discrimination against Negroes which exists throughout our Nation").
criminal. It is hardly a convincing argument for opponents of gay rights laws to say that a sexual orientation civil rights law amounts to "special rights" for lesbians and gays because only they are discriminated against in the first place.16

For this same reason, even if a statute was phrased to bar discrimination against homosexuals, rather than using the neutral phrasing which bars the use of sexual orientation as a basis, it would not confer "special rights" not enjoyed by heterosexuals. Similar terminology is found in the Civil Rights Act of 1866, which guarantees to all persons "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."17 Obviously, this language provides no rights to white citizens; the right it confers necessarily is bestowed upon non-whites exclusively. That is, it would make no sense to say that white citizens are granted the "right" to enjoy the same rights as white citizens. Granted, the substance of the right involved cannot be considered preferential for non-whites, since it is by its terms only the right to be treated on a par with whites. Nevertheless, at that time there was no need for whites to be assured of the right to make and enforce contracts, since "whites simply did not face parties who were unwilling to contract with them because of their

16. Nevertheless, Professor Richard Duncan has argued that "when proponents of homosexual rights legislation argue that they are seeking nothing more than the same civil rights everyone else has, they are wrong," essentially because homosexuals "already have the same right everyone else has, i.e., the right to be protected against discrimination on the basis of their race, gender, religion, and other protected categories." Richard F. Duncan, Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom, 69 NOTRE DAME L. REV. 393, 400 (1994). The flaw in Duncan's simplistic argument is obvious. The reason for an anti-discrimination law is that members of a given group face discrimination on a particular basis; the fact that they have protection from discrimination on other bases is irrelevant to the need (or justification) for adding the proposed basis. Professor Duncan's argument is just as true applied to African-Americans in the days before the Civil Rights Act of 1964: they had the same right to be free of racial discrimination as whites — to wit, no right at all. The point, however, was that the absence of the protection had a far different effect on African-Americans, because they actually faced the discrimination. Professor Duncan distinguishes race from sexual orientation as a valid basis for anti-discrimination protection because race "is a morally neutral characteristic." Id. at 403. I address morality-based opposition to civil rights protections for lesbians and gay men in Part III–C; see infra text accompanying notes 80-108.

race." In short, only non-whites were being granted anything new. The same would be true of a statute barring anti-gay discrimination, whether it was worded to prohibit sexual orientation discrimination in general, or discrimination against homosexuals in particular. The point would be to create a level playing field in which neither gays nor straights would be discriminated against on the basis of their sexual orientation.

In conclusion, the intended meaning of the "special rights" rhetoric is not to claim that gays and lesbians are seeking rights of a type or scope beyond those enjoyed by other Americans. Rather, if anything more than sloganeering is intended, it must be the second possible meaning: that anti-discrimination laws generally confer "special rights," and that they should not be extended to lesbians and gay men.

II. CIVIL RIGHTS AS SPECIAL RIGHTS: REFIGHTING AN OLD WAR

Hence, it is necessary to turn to the second meaning of "special rights" - that civil rights protections are "special" by their nature, and that sexual orientation is not a basis upon which they should be extended. The first part of this argument is really an old claim, revived for application to a new era. The second part, as discussed in Part III, is the real heart of the battle over civil rights for lesbians and gays.

The idea that anti-discrimination laws confer "special rights" is not new. To the contrary, opponents of prior civil rights legislation have argued consistently that, in granting a right to be free of discrimination on a particular basis, such laws infringe on the

18. See Livingston & Marcosson, supra note 17, at 963 & n.62.
19. Perhaps this line of reasoning gives too much credit to the anti-gay forces utilizing the special rights rhetoric. It may be that they truly mean to suggest that citizens ought to reject statutes barring anti-gay discrimination because they give preferential treatment to gay men and lesbians, even if the argument is completely false and irrational. And, indeed, they have falsely implied that such laws would require "affirmative action" and "quotas" for homosexuals. See supra note 6. If, however, I am wrong to dispense with this possible interpretation of the intended meaning of the special rights rhetoric, then it is only because its intended meaning is irrational, and I have accomplished my goal of showing that the entire argument does not constitute a rational argument against gay rights laws. Ironically, it is this irrational meaning of the "special rights" rhetoric that may constitute its greatest popular appeal. Certainly, the sections of ENDA which bar "quotas," "preferential treatment" and disparate impact, see supra note 11, implicitly assume is that it is necessary to counter this message of anti-gay forces. While "special rights" rhetoric has political resonance in conjuring up the "hot button" social issues of affirmative action and quotas, it should not be accepted as a rational basis for anti-gay measures.
corresponding freedom of others to engage in that type of discrimination. Because recognizing the right to be free of private discrimination is, under this view, a zero-sum game, the government is choosing to favor the equality-based right of one person over the liberty-based right of another — conferring a “special right” for the former.

20. Essentially the same argument has been made by reference to common law notions such as, in the employment context, the employment-at-will doctrine. See Richard A. Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws 148 (1992) (arguing that “Title VII thus works a major shift from the paradigmatic and most common version of an employment contract, the contract at will”); Duncan, supra note 16, at 400 (framing anti-discrimination laws as “exceptions to the general rule of free choice”). When made in this way, the argument takes a slightly different form, that anti-discrimination provisions confer “special” rights because they depart from common law principles. But the substance of the argument is really the same, because the underlying justification for the at-will doctrine is to preserve the employer’s autonomy (and, at least nominally, that of the worker as well) in employment decisions. Id. at 399. It thus reduces to the same question: whether we will allow discrimination for the sake of preserving the freedom — under the at-will doctrine — to discriminate.

21. See Charles L. Black, Jr., The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421, 429 (1960) (“When the directive of equality cannot be followed without displeasing ... white[s], then something that can be called a ‘freedom’ of ... white[s] must be impaired. If the [Fourteenth Amendment] commands equality, and if segregation violates equality, then the status of the reciprocal ‘freedom’ is automatically settled.”). Judge Robert Bork’s articulation of this view of anti-discrimination laws was one source of criticism of him during the bitter confirmation battle over his nomination to the Supreme Court. He had expressed the “zero-sum” view in a 1963 article opposing the Civil Rights Act, calling the position that whites should be compelled to open their places of business to black customers “a principle of unsurpassed ugliness.” 193 Cong. Rec. 514841 (daily ed. Oct. 22, 1987) (statement of Sen. Kennedy quoting Bork’s article). Although he later recanted his opposition to the Act, Judge Bork expressed the same underlying perspective on civil rights as an infringement on others’ freedom in his testimony before the Senate Judiciary Committee. Id. at 514922 (statement of Sen. Levin quoting from a colloquy between Judge Bork and Senator Simon, and from a 1985 statement by Bork). The only matter about which Judge Bork apparently changed his mind was whether the infringement was justified.

22. This argument has no force, however, when the right asserted is for equal treatment by the government. For example, if a hypothetical anti-gay initiative sought to strip homosexuals of the right to vote, the argument described in the text could not be advanced; no one else’s freedom is circumscribed if lesbians and gays can vote. There are many other rights sought by lesbians and gays, such as the right to marry, to engage in private, consensual sexual conduct, and to adopt children, which also involve only conduct by government vis-à-vis homosexuals, and do not involve the regulation of private conduct motivated by anti-gay bias. Since the immediate target of Colorado’s Amendment 2 was local ordinances barring private anti-gay discrimination, it is plausible that its supporters intended their “special rights” argument to mean that antidiscrimination laws confer “special rights.” It is...
The evidence that this is actually what opponents of gay and lesbian rights laws mean, rather than what they must mean if they have a rational basis at all, is somewhat thin. A recent article by Richard Duncan, however, makes explicit the argument that gay rights should be opposed because they infringe the liberty to discriminate, at least for those with religious beliefs against homosexuality. Insofar as this asserted right to discriminate represents the basis for regarding civil right protections in general as "special rights," Professor Duncan has made the claim important to note, however, that the forward-looking aspect of Amendment 2, which tried to bar the enactment of any future gay and lesbian rights legislation via the normal political process, was an attempt to abridge the right of lesbians and gay men (and heterosexuals who support gay rights measures) to full and equal participation in the political process. Recognizing this fundamental right did not impair any corresponding freedom of those who wished to discriminate. It was on this basis that Amendment 2 was struck down as unconstitutional. Evans v. Romer, 63 Fair Empl. Prac. Cas. (BNA) 753, 759 (Colo. Dist. Ct. Dec. 14, 1993), aff'd, 63 U.S.L.W. 2219 (Colo. Oct. 11, 1994) ("Amendment 2 is unconstitutional as being violative of the fundamental right of an identifiable group to participate in the political process . . . ."). As I note shortly, the "special rights" argument used to oppose the Civil Rights Act of 1964 was not raised against those sections of the Act, such as the voting rights provisions of Title I, which did not limit private citizens' rights to discriminate. See infra text accompanying note 36.

23. Duncan, supra note 16, at 397-98 ("When a legislature acts to protect homosexual behavior under anti-discrimination laws, it elevates homosexual practices to the status of protected activities while at the same time branding many mainstream religious institutions and individuals as outlaws engaged in antisocial and immoral behavior."). It is ironic that Professor Duncan defends religiously-motivated discriminators on the ground that they should not be held to be "engaged in antisocial and immoral behavior," when the whole basis for their discrimination is the desire to brand others as being "engaged in antisocial and inmoral behavior." Similarly, there is rich irony in his statement that government should not force "religiously-motivated individuals . . . merely . . . trying to live out their faith" to refrain from discriminating against gay men and lesbians because "it is illegitimate for a political majority 'to use the power of government to express its moral values by stigmatizing another group.'" Id. at 443 n.220-222 (quoting Kenneth L. Karst, Religion, Sex, and Politics: Cultural Counterrevolution in Constitutional Perspective, 24 U.C. DAVIS L. REV. 677, 729 (1991)). Professor Duncan states that he believes the case "could be made in support of sodomy laws" that "homosexuality is immoral, harmful, or unnatural." Duncan, supra note 16, at 405 & n.42. By citing the "wise observation" that homosexual conduct is outside "'the very core of that morality by which civilization is constituted,'" id. at 405 n.42 (quoting HARRY V. JAFFA, HOMOSEXUALITY AND THE NATURAL LAW 35 (1990)), as a basis for sodomy laws, Professor Duncan does the very thing he terms "illegitimate": he defends the use of "the power of government" to express the "moral values" of the anti-gay "political majority" to "stigmatize another group" — homosexuals. See also infra text accompanying notes 106-08 (discussing anti-gay moral arguments as a "jurisprudence of insult").
with specific reference to the battle over lesbian and gay rights legislation.

In examining the use of this rhetoric by opponents of the Civil Rights Act of 1964, one may fairly question how much is accomplished by showing that the anti-gay arguments of the 1990s closely resemble the anti-civil rights arguments of the 1960s. For one thing, there is evidence that even those who characterize anti-discrimination laws protecting lesbians and gay men as "special rights" intend this less as a rational argument than as a sound bite. It thus might be more useful to engage them on this simplistic level than to parse, analyze, and compare their arguments to earlier, now discredited appeals. Granted that this point has some force, it is also true that the very effectiveness of "special rights" as a sound bite makes it worth debunking and delegitimizing at every possible level.

It is also true that anti-gay forces can respond to the similarity between their arguments and those of the opponents of the Civil Rights Act by saying that the arguments were right, but were simply employed in the wrong cause. In other words, they could say that the moral and/or political case for ending racial discrimination was so strong that it overwhelmed any concerns about whether "special rights" were being enacted, but that does not forever invalidate the "special rights" argument when it is applied to other (read: lesser) causes.

That is completely correct; no matter how crucial the right to a job may be, it is still necessary to justify the basis on which the right is protected. It is, in other words, necessary to show that anti-gay forces are not only wrong about the rights involved, but also about the matter of extending them to lesbians and gay men. However, acknowledging the need to take the second step does not reduce the importance of the first.

The history lesson on which this article intends to embark is also worthwhile for a number of other reasons. First, advocates

24. See Note, supra note 1, at 1909 n.35 (quoting letter by board member of Colorado for Family Values stating, "I believe 'No Special Privileges' is a good motto for the amendment's public campaign, but I fear the possible legal ramifications if it is included in the amendment itself.").

25. See Employment Bill Puts Real Protections to Work, supra note 11 ("One of the most potent weapons in the arsenal of those who oppose equal rights for Gay people is that bills like ENDA accord Gays 'special rights.'").

26. See infra text accompanying notes 110-39 (urging use of the argument that sexual orientation is an immutable characteristic in arguing for laws against anti-gay discrimination).

27. See infra text accompanying notes 46-51 (explaining why the answer provided by Civil Rights Act proponents to the "special rights" position is useful in the debate today).
of civil rights for lesbians and gay men have been accused of appropriating — or misappropriating — the African-American experience by comparing the case for gay civil rights to that of the racial civil rights movement. It is thus worth showing that the opponents of civil rights protections for gays are using the same arguments as the opponents of the Civil Rights Act, for it validates the use of the successful responsive rhetoric employed by the Act's proponents.

Second, it is true that the mere fact that an argument was used at one time in the service of a now-unpopular cause does not make the argument itself illegitimate. Nevertheless, the fact that it was used in that time and place, and in that cause, is instructive of the assumptions and mindsets reflected in the argument. That is, it surely is not irrelevant that the diehard opponents of the Civil Rights Act, the Russell Longs and the Strom Thurmonds, conceptualized the freedom from discrimination as a "special right" and as an assault on the treasured "right" to discriminate. The burden should be on those who would, today, conceptualize gays' and lesbians' freedom from discrimination in the same way to explain why they are not merely the Longs and Thurmonds of today. If they object to the association because the cause for which those men fought is now considered illegitimate and even offensive, perhaps they should rethink their cause, and consider how their arguments will be viewed thirty years hence.

Finally, examining the rhetoric of both sides in the 1964 debate provides a fresh insight into the extraordinarily different perspective regarding the nature of rights that each side brought to the argument. The sponsors of the Civil Rights Act offered the nation a rich, full vision of what it means to be a citizen and the extent of the rights citizenship affords. Articulated today, this vision can add a powerful voice to the debate over discrimination against gays and lesbians.

28. See, e.g., NAVA & DAWIDOFF, supra note 2, at 19-20 (acknowledging the "common feeling that the gay and lesbian movement — and other aspiring civil rights movements — are appropriating [the black civil rights movement's] rhetoric and moral claim," but arguing that "the special character of race within this society and of the civil rights movement that grew out of it cannot preempt other movements for civil rights"). I respond to this accusation infra note 77. Joe Rogers, Spare Us the Comparisons Between Gays and Blacks, WASH. TIMES, July 29, 1994, at A21 (arguing that "[t]he comparison has been made so often that when talking about the subject, one almost always hears 'discrimination against homosexuals is no different than discrimination against blacks.'").

29. See infra text accompanying notes 46-67 (advocating use of arguments made by sponsors of the Civil Rights Act).
Opponents of the Civil Rights Act of 1964 argued that it would "infringe[ ] upon the rights of private property and the rights of American citizens to choose their associates." Still more strikingly parallel to today's anti-gay rhetoric were Senator Hill's comments:

Under a misleading banner labeled "equal opportunity," proponents of H.R. 7152 would have the Congress enact what in fact and substance is "the Special Privilege Act of 1963." For rights won at the expense of others' rights are not rights at all, but special privileges . . . . History aptly demonstrates that special privilege for one group can but result in a limitation of liberty and a denial of rights for others.

The Southern Senators filibustering the Act opposed Title VII as an illegitimate exercise of government power to curtail employers' freedom to hire whomever they like for a job, and criticized Title II (the public accommodations provision) for infringing on the right of operators of hotels and other such facilities to accept or reject customers on whatever basis they chose, and to associate with whomever they chose.

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31. Id. at 4760 (statement of Sen. Hill). See also id. at 5007 (statement of Sen. Ellender that the public accommodations provision would "make it the special right of one class of citizens to have their interests looked after by the Federal Government, and . . . take away from other classes the right to associate with persons of their own choosing").
32. Id. (statement of Sen. Hill that Civil Rights Act would cost business owner the loss of "the right to hire and fire whom he pleases in his own business"); id. at 4762 (statement of Sen. Hill that "I am opposed to telling businessmen how they may use their private property and whom they may hire and fire"); id. at 4764 (statement of Sen. Ervin that Title VII "rob[s] the employer . . . of the right of determining how he can best assign his own employees to the performance of the work which they were employed to do"); id. at 5093 (statement of Sen. Robertson that Title VII "would be an unwarranted invasion of private enterprise and private property rights").
33. Id. at 4762 (statement of Sen. Hill that public accommodations provision would "stifle the very spirit of the American free enterprise system" because it would "deny the owners of these establishments the right to choose their own customers . . . . [and] deny to owners of business establishments the right to use their own private property as they desire"); id. at 4818 (statement of Sen. Stennis that, under the Civil Rights Act, property owners "would be divested of their long-recognized right to enjoy and utilize their private property as they see fit and of their right to serve or refuse to serve whomsoever they please," and that these rights "are fundamental and they cannot be destroyed or impaired by the Federal Government under the guise of protecting the real or fancied rights of other individuals"); id. at 4825 (statement of Sen. Stennis that "[t]he bill is a direct invasion of personal, individual and human rights"); id. at 4853 (statement of Sen. Sparkman that..."
timents appear in the minority views sections of the relevant House committee report. Clearly, today's anti-gay "special rights" rhetoric is not a new phenomenon, but an echo of past opposition to civil rights.

Title II is "the most far-reaching attempt to repeal the constitutional concept of individual liberty that has been proposed since the cruel period of Reconstruction"); id. at 4854 (statement of Sen. Long that "the right of a citizen to choose those with whom he associates . . . [is] one of the basic and fundamental freedoms of an individual"); id. at 5007 (statement of Sen. Ellender that "title II represents a massive assault on the private enterprise system and the concurrent rights of private property that have made it possible for this Nation to be developed into the strongest in the world"); id. at 5085 (statement of Sen. Robertson that "what we are considering is the human rights of the owner of property to use it to promote his own interests, as compared with the human rights of another individual who does not own property but wants to use it against the interests of the man who does"); id. at 5230 (statement of Sen. Long that "every man of white Caucasian heritage has a perfect right to protect those institutions in his society which allow him the freedom to associate with people of his own race"); id. at 5248 (statement of Sen. Talmadge that Title II attacked "that conduct of man which falls outside the realm of law and comes instead from his right to be master of his own life and property").

Along with defending the right of the owner of the business to choose his customers, opponents of Title II also spoke of the right of customers to choose to patronize a segregated restaurant or hotel, a right they could no longer exercise if no such facilities were permitted. See id. at 4766 (statement of Sen. Hill defending right of "Mr. Smith . . . to select a restaurant serving only a single race," and decrying Title II because it "would deprive Mr. Smith and his friends and millions of Americans this choice and their freedom of association"); id. at 4826 (statement of Sen. Long that, under Title II, "would not the whites be denied the privilege of being served with others of their own kind — assuming that is what they would like?"); id. at 5231 (statement of Sen. Long that Title II "forces the social presence of the Negro race upon scores of millions who object to it and those constitutional rights of privacy and property are being totally disregarded and trampled upon"); id. at 5466 (statement of Sen. Long that "[i]f the law is so written that a person has nowhere else to go where he can be among his own kind, as a practical matter, has he not been denied association with people of his own kind?").

34. See H.R. REP. No. 914, supra note 15, at 64-65, LEGISLATIVE HISTORY at 2064-65 (arguing that "the bill, under the cloak of protecting the civil rights of certain minorities, will destroy civil rights of all citizens of the United States who fall within its scope"). The Minority Report also explicitly advanced the "zero-sum" view of civil rights, saying that "it must be remembered that when legislation is enacted designed to benefit one segment or class of society, the usual result is the destruction of coexisting rights of the remainder of that society. One freedom is destroyed by governmental action to enforce another freedom." Id. at 2068.

35. That is why, as Professor Jane Schacter has pointed out, "the very rhetoric of special rights is heavily coded with the most powerful symbols and ideas of backlash against all civil rights law." Jane S. Schacter, The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents, 29 HARV. C.R.-C.L. L. REV. 283, 300 (1994). The concepts that underlie the "special rights" notion
Significantly, however, the "special rights" and "special privileges" rhetoric was absent during debate over Title I, the voting rights section of the Civil Rights Act. Since guaranteeing a citizen's right to vote, or fully participate in the political process, does not directly impinge on any reciprocal freedom of other citizens, opponents confined their remarks to making a federalism argument, defending the rights of the states against federal usurpation.  

The civil rights-as-special rights position has also been reflected, in a slightly different context, in judicial opinions. For example, in Peterson v. Greenville, which raised the question of whether there was state action underlying the exclusion of African-American diners from segregated, privately-owned restaurants; Justice Harlan's opinion explained his view of the in the public mind — especially affirmative action and quotas as remedies — do not apply only to gay rights laws; they are just as applicable, and thus just as much a threat, to every application of the anti-discrimination principle. Id. at 302 ("The concept of 'special rights' is potent precisely because it appeals to the deepest public fears about civil rights law and remedies.... [The term] reflect[s] a deep reservoir of antagonism toward civil rights laws and, in turn, reify[es] and intensify[es] that antagonism.").

Beyond the "special rights" parallel, there is another way in which the anti-gay arguments of today bear no small resemblance to the anti-civil rights arguments of 30 years ago. As I have noted, the religious right has relied extensively on the notion that homosexuality is "unnatural" and/or "immoral." See supra text accompanying notes 2-5; see also NAVA & DAWIDOFF, supra note 2, at 46-47 (arguing that the religious anti-gay characterization of homosexuality as unnatural is "a way of authenticating their own views about proper human behavior"). Similarly, in 1964 opponents of the Civil Rights Act spoke of "natural law" as teaching that separation of the races is correct and appropriate, intimating that integration and non-discrimination is "unnatural." See, e.g., 110 CONG. REC. 5299 (1964) (statement of Sen. Long that "[m]any of us believe that racial preference, racial separation, and racial segregation are part of the law of nature that has come down through the centuries"). Evidently, it is not enough for opponents of a group's civil rights protections simply to argue that they are right on policy grounds; they must also demonize the group, or association with the group, as "unnatural."

36. See, e.g., 110 CONG. REC. 4997-5005 (1964) (remarks of Sens. Ellender and Ervin); id. at 4852 (statement of Sen. Sparkman that "Congress is not authorized to prohibit literacy or other tests which apply to all voters. This is the right of the States and not the Congress."); id. at 5083 (statement of Sen. Robertson that "[t]he Federal Government should not be injecting itself into an area which has historically and logically been the sole function of the several States").

37. 373 U.S. 244 (1963).

38. Justice Harlan concurred in the result in Peterson, and dissented in each of its companion cases, in which the evidence of what he believed was sufficient state action was lacking. See Peterson, 373 U.S. at 249 (Harlan, J., concurring in the result).
importance of maintaining the strict state action requirement for finding a violation of the Fourteenth Amendment:

This limitation [to state action] on the scope of the Fourteenth Amendment serves several vital functions in our system. Underlying the cases involving an alleged denial of equal protection by an ostensibly private action is a clash of competing constitutional claims of a high order: liberty and equality. Freedom of the individual to choose his associates or neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference. This liberty would be overridden, in the name of equality, if the strictures of the Amendment were applied to governmental and private action without distinction.39

Nor has this argument been completely consigned to the scrapheap of yesteryear's intellectual musings and judicial concurrences. Professor Richard Epstein has argued that employment discrimination laws should all be repealed as an undue interference with the autonomy principle underlying the freedom of contract.40 The "free association" argument as a defense of the right to discriminate, so prominent in the arguments of the southern opponents of the Civil Rights Act, is echoed in Epstein's rhetoric.41 Importantly, however, Epstein concedes that in advancing this argument he swims against a powerful tide of social consensus which regards the basic norm of anti-discrimination — putting to one side more controversial extensions of the principle such as affirmative action and disparate impact — as fundamental.42 As he puts it, "In this book I advance a position that is well outside the mainstream of American political thought."43

39. Id. at 250 (Harlan, J., concurring in the result).
40. Epstein, supra note 20, at 3 (explicitly urging "outright rejection of the anti-discrimination principle in private employment" and "repeal of Title VII of the 1964 Civil Rights Act").
41. Id. at 505 ("The root difficulty of the statute is that it maintains that a qualified norm of forced association is better than a strong norm of freedom of association.").
42. Id. at 3-5 (describing the "unchallenged social acceptance of the anti-discrimination principle," and noting that none of even the most controversial Supreme Court decisions in 1989 seen as limiting employment discrimination rights "challenges, or even questions, the basic anti-discrimination principle, now embodied in Title VII of the 1964 Civil Rights Act").
43. Id. at 6.
"Special rights" rhetoric is not unique to the anti-gay campaigns of the 1990s. It was a primary element of the opposition to the Civil Rights Act,\textsuperscript{44} and remains as a fundamental premise of those who are still unconvinced of its merits. Obviously, however, this view did not carry the day in 1964.\textsuperscript{45} The questions,

\begin{itemize}
\item Given the clarity of this rhetoric, it is perplexing that Richard Mohr claims that, in the debates, "no one advanced arguments of a libertarian stripe: no one claimed that it was not a proper function of government to coerce what business might do by limiting their ability to decide whom to hire and serve." RICHARD D. MOHR, GAYS/JUSTICE 138 (1988) (footnote omitted). As I have shown, many Southern Senators made precisely this claim. Mohr is correct that the argument "was inconsistent with the obstructionist states' rights ploy, which implied that states might indeed properly pass such laws, just not the federal government." \textit{Id.} Nevertheless, the inconsistency between their "special rights" argument and their support of state and municipal laws requiring segregation did not keep Civil Rights Act opponents from making the "libertarian" argument. They were, in fact, challenged on the inconsistency. \textit{See}, e.g., 110 \textit{CONG. REC.} 4767-68 (Senator Humphrey asking Senator Hill whether, if the Civil Rights Act "would be an infringement on the economic freedom of the individual," it would also be true that "a law which provided that the facilities in a restaurant [must] be segregated" was also "an infringement on his freedom"). When challenged, they usually conceded that it was no more legitimate for states or cities to require discrimination than it was for the federal government to prohibit it. \textit{See id.} (Sen. Hill responding that "the owner or operator of the restaurant should be free to operate it as he thought best for himself").
\item A somewhat more sophisticated version of the "special rights" position would essentially combine two different arguments made by opponents of gay rights laws. This argument would posit (at least implicitly) that the bundle of liberty rights possessed by individuals in their private decision-making has already been significantly reduced by existing civil rights laws. \textit{See supra} text accompanying notes 20-23 (articulating zero-sum vision of civil rights protections). Given this status quo, the claim would be that we should be especially wary of any additional equality-based infringements on liberty, because the trade-off has now tilted (or is in danger of tilting) inappropriately over to the equality side. In economic terms, the marginal utility gained in equality is outweighed by the loss in the few (and therefore precious) remaining liberty rights we possess. In practice, this argument would either (1) roll back anti-discrimination protections, as Professor Epstein suggests, \textit{supra} text accompanying notes 40-43, (2) "freeze" anti-discrimination protections at their current levels, or (3) at the very least require any "new" group seeking anti-discrimination protections to show that its claim is as strong as other, already protected groups — a showing anti-gay forces have already argued lesbians and gays cannot make. \textit{See supra} note 28 and \textit{infra} note 77 (discussing argument that case for gay and lesbian civil rights is not as strong as the case for African-American civil rights).
\item My basic answer to this argument is twofold. First, the substantive rights protected by anti-discrimination laws are so central to our modern conception of full citizenship that we do not, and should not, accord legitimacy to the competing claim to infringe those rights. \textit{See infra} text accompanying notes 52-67 (discussing citizenship-based arguments of advocates of Civil Rights Act of 1964 and their application to gay rights movement). Returning (for a moment) to the economic jargon, the importance of these rights gives them sufficient
then, are what proved to be an effective answer to the "special rights" claim, whether that answer can be utilized as effectively today, and whether additional answers can and should be brought to bear.

III. The New (and Real) Battleground: Sexual Orientation as a Basis for Civil Rights Protections

A. The Need to Understand History's Answer to the "Special Rights" Strategy

Before examining the answer given to the "special rights" argument of the 1960s, a brief explanation of why this is a useful strategy may be in order. After all, as discussed earlier, the fact that the "special rights" argument was rejected in favor of the rights recognized in the Civil Rights Act does not establish that it should also be rejected in favor of recognizing those rights where sexual orientation is concerned. Taking that step requires an answer to the anti-gay argument that sexual orientation is not a valid basis for civil rights protections because homosexuality is evil — an argument that proponents of ending racial discrimination obviously did not face.

Nevertheless, the 1960s answer to "special rights" is relevant because it "raises the stakes" of the debate. That is, in order to effectively counter the "special rights" rhetoric, essentially two points need to be made. The claim that gays and lesbians in particular are entitled to protection from discrimination is the second of these. Before that case is made, however, advocates of lesbian and gay civil rights must lay the foundation by reestablishing the profound importance of the rights that are at stake. For this first task, the rhetoric of the sponsors of the Civil Rights Act could not be more well-suited.

There is also another, more general reason to utilize the rhetoric of the Civil Rights Act's sponsors, which is that the arguments made thus far against the "special rights" position have not been persuasive. To the contrary, anti-gay forces have often succeeded in their efforts either to block legislative measures designed to end anti-gay discrimination or to repeal those laws when they have passed. The horrendous outcome of the fightutility that the value of protecting them against any particular type of discrimination outweighs the value we accrue from permitting ourselves the liberty to discriminate. Second, it is not necessary to compare infringements in order to justify extension of civil rights laws. These arguments are set forth more fully later; see infra note 77 and accompanying text.

46. See supra text accompanying notes 25-27.
over gays in the military, the success of Colorado's Amendment 2, the repeal of the Austin, Texas, domestic partner ordinance, and the Hawaii legislature's passage of a bill disavowing the Hawaii Supreme Court's decision to force the state to provide a compelling interest in barring same-sex marriage — these and other events demonstrate the need for something more. Since the arguments made by the proponents of the Civil Rights Act remain the most cogent and compelling case for limiting the rights of one group in favor of those of another, it seems to me that we can only profit by reminding ourselves of the content of that case.

B. Hubert Humphrey and the Meaning of a Fuller Citizenship

Thus we return to the 1964 debates, this time to examine the arguments marshalled by the proponents of the Civil Rights Act, especially its leading champion in the crucial battle to break the Senate filibuster, Hubert Humphrey. Their argument against the "special rights" position was quite clear: the rights

47. Lest anyone continue to regard the "don't ask, don't tell" policy as progress, the early returns show that vesting commanders with discretion whether to initiate investigations of persons suspected of being gay or engaging in homosexual acts has had the predictable result of providing a firm basis for the witch hunts which were supposed to be eliminated by the change. See Eric Schmitt, Gay Troops Say the Revised Policy is Often Misused, N.Y. Times, May 9, 1994, at A1 ("[A]dvocates for homosexual rights and homosexual service members interviewed around the country say a number of commanders are misusing the broad new authority granted under the policy to ferret out homosexuals."); Lincoln Caplan, "Don't Ask, Don't Tell" — Marine Style, Newsweek, June 13, 1994, at 28 (describing Marine Corps enforcement of new policy, including pressuring soldiers to "name other marines rumored to be gay," as showing that "the new rules are not much different from the old ones").

48. See Sam H. Jerhover, Texas Capital Ends Benefits For Partners, N.Y. Times, May 9, 1994, at A8 (reporting vote by a 62-38% margin to repeal policy providing health insurance benefits to "domestic partners" of homosexual and other unmarried city employees).


51. On the other hand, other recent news from the political battleground is more encouraging. Of ten statewide drives that were underway to collect signatures to put anti-gay initiatives on ballots for the November 1994 elections, only two, in Oregon and Idaho, were successful. See Only Two States Will Be Battling Ballot Measures, Wash. Blade, July 15, 1994, at 1. Perhaps more importantly, both of these measures were defeated in close votes. See Lisa M. Keen, Initiatives in Oregon, Idaho Appear Defeated, Wash. Blade, Nov. 11, 1994, at 1. Still, the closeness of these votes indicates the need for a more effective response to the anti-gay message, especially since the proponents of these initiatives continue to emphasize the "special rights" rhetoric—to the point of distributing an anti-gay video in Idaho entitled "Gay Rights/Special Rights." Id.
not to be denied a job, or a place to sleep at night while on the road, are not "special rights" at all, but fundamental rights that should be guaranteed by law to all Americans. In other words, the sponsors of the Act asked America to treat the right to a job, to purchase a home or rent an apartment, and to utilize public accommodations, as fundamental elements of a citizen's full participation in civic life, to which they were entitled because of their status as citizens.

Recognizing the importance of these rights provides the best answer to the zero-sum conception of civil rights which underlies the special rights claim. While it is possible, as Professor Black understood, to always interpose a "freedom" to infringe any right as trumping the right, there are some rights considered so crucial that we do not conceive of, or at least we accord no legitimacy to, a claim of someone else's freedom to infringe. Take, for example, the right to vote. That right is so fundamental to an individual's ability to participate equally and fully in our society that no one would assert a private right to prevent others from voting on the basis of their race (or even their sexual orientation).

52. See 110 Cong. Rec. 4755 (1969) (statement of Sen. Javits arguing that Congress should give a "just and fair answer" to civil rights demonstrators, that "they have the right to go into a store or a hotel or a motel with full protection of the law" because "[t]hat is what the Constitution says [and] [t]hat is what we must satisfy"); id. at 4757 (statement of Sen. Humphrey that Civil Rights Act was needed to redress "the suffering and the indignity of second-class citizenship; a citizenship gap in this country that is indefensible"); id. at 4826 (statement of Sen. Hart, responding to the suggestion by Sen. Stennis that "everyone was happy" when each race ate at separate counters at a restaurant by asking, "If the Federal Government sent a draft notice to a young Negro man in Michigan . . . put him in uniform, and sent him to a town in Mississippi; if in that town he could not get a cup of coffee unless he went to the back door of the restaurant, does the Senator from Mississippi think that man could be happy?"); id. at 13079-80 (statement of Sen. Clark that Title VII would assure "that no American, individual, labor union, or corporation, has the right to deny any other American the very basic civil right of equal job opportunity," which "to a man or woman whose education has . . . been completed, . . . is the most important civil right of all").

53. See NAVA & DAWIDOFF, supra note 2, at 70 ("Typically, anti-discrimination laws do no more than prevent gays and lesbians from being fired from their jobs and denied housing or medical care because they are gay. These can be deemed 'special rights' only if a job, food to eat, a place to live, and medical attention are unusual demands.").

54. See supra text accompanying notes 20-23.

This was not always so, of course. At one time, there was a vigorous defense of the "white primary," in which ostensibly "private" Democratic parties in the South barred African-Americans from voting to select the party's nominee, who was then assured of winning the election, effectively disenfranchising even those few African-Americans who were able to register to vote. But the Supreme Court, in a move that can readily be seen as reflecting the magnitude of the right to vote and an unwillingness to recognize the legitimacy of competing claim of whites' freedom not to associate with blacks, reasoned that such "private" organizations were in fact performing a government function, and hence found the necessary state action to declare segregated primaries a violation of the Equal Protection Clause.

Congress in 1964 made the same decision with regard to the rights to a job, a home, and a hotel room or restaurant: these equality rights are so crucial that we will accord no legitimacy to the competing claim to freedom. To put the point another way, the Civil Rights Act reflects a social policy at once defining what full citizenship means in our polity, and providing, as a matter of right, all citizens the full measure of that citizenship status.

In a 1964 televised debate between Hubert Humphrey and Strom Thurmond, Senator Humphrey defended the public accommodations title with explicit reference to the citizenship status of those it was intended to protect:

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56. The Court has manifested this special concern over abridgements of the right to vote and to fully participate in the political process in the context of referenda which seek to limit or bar future enactment of certain types of laws. Because such limitations infringe the right to petition government of those who would advocate enactment of the barred laws, the Supreme Court has declared them unconstitutional. See Hunter v. Erickson, 393 U.S. 385, 393 (1969) (holding unconstitutional a charter amendment requiring voter approval of any future city ordinance dealing with certain forms of housing discrimination). For the same reason, Colorado's Amendment 2 was struck down on the ground that it impaired the fundamental right to participate in the political process. See supra note 22 (discussing decision in Evans v. Romer, 63 Fair Empl. Prac. Cas. (BNA) 753 (Colo. Dist. Ct. Dec. 14, 1993)).


58. See Norman C. Amaker, Quittin' Time?: The Antidiscrimination Principle of Title VII vs. The Free Market, 60 U. Chi. L. Rev. 757, 779-80 (1993) (arguing that "[o]ne purpose of Title VII was to help make citizenship for blacks a reality"). According to Professor Amaker, this conception of the antidiscrimination principle as reflecting a certain view of what it means to be a citizen was first suggested to him by Professor Charles Black; see id. at 779, once again demonstrating Professor Black's rare insight into the heart of what "equal protection" really means.
I've often wondered, Senator, why it is that we're so anxious to keep good American citizens, who pay their taxes, who defend their country, who can be good neighbors, out of a place like a restaurant, and yet we will permit people who may be very unsavory characters — people that have a little or no good reputation — people who come from a foreign country — to come into the same place?\textsuperscript{59}

The freedom fully to participate in public life, then, is not a matter of "special rights" at all, but one which is fundamental to what it means to be a citizen, and which impacts directly upon the exercise of constitutional rights. That, at least, is the lesson of the nation-altering decision we made some 30 years ago, and it is a lesson which opponents of gay rights have not yet learned.

In general, reviewing the central principle that was articulated in support of the Civil Rights Act — that enjoyment of these rights was a fundamental aspect of full citizenship — shows how strong is the application of this principle to the fight for lesbian and gay civil rights. For example, as Senator Humphrey put it:

\begin{quote}
[W]e hope we can establish by law the protection of certain rights that are supposed to be guaranteed by the Constitution... I do not think we can ignore the fact that today many millions of people in this land of freedom and liberty are no longer to be told, "That is your place, and you have no choice in the matter." At least, not in a country that we say is united. It cannot be. All this bill intends to do is to give all Americans a choice of what their place will be.\textsuperscript{60}
\end{quote}

Senator Humphrey's description of what African-Americans were seeking in the Civil Rights Act also captures this idea, and is equally applicable to the demands of lesbians and gay men:

The American Negro does not seek to be set apart from the community of American life. He seeks to participate in it. He does not seek separation. Instead, he seeks participation and inclusion. These Americans want to be full citizens, to enjoy all the rights and privileges, and to assume the duties and burdens. Surely Congress can do nothing less than to permit them to do their job, to be

\textsuperscript{59} 110 CONG. REC. 6429 (Mar. 26, 1964) (reprinting transcript of the debate). See also supra note 52.

\textsuperscript{60} 110 CONG. REC. at 5816-17 (Mar. 20, 1964) (statement of Sen. Humphrey).
parts of the total community, and to be parts of the life of this Nation.\textsuperscript{61} Not to extend these protections to lesbians and gay men is, then, to confine homosexuals to status as less-than-equal citizens.\textsuperscript{62}

Indeed, the stakes involved in permitting discrimination against homosexuals are even higher because of the impact anti-gay discrimination has on the ability of lesbians and gay men to exercise yet other rights guaranteed to all Americans. This is because, as Richard Mohr has argued, gay men and lesbians are an "invisible minority," "whose members can be identified only through an act of will on someone’s part."\textsuperscript{63} A gay man denied full participation in civic life — if he may lose his job, for example, if his homosexuality is known — is coerced into keeping silent. Such coerced silence has obvious, and significant, implications for the exercise of constitutional rights. It deprives him of the rights due any citizen from his government, such as the right to secure the protections of the criminal justice system if he is the victim of anti-gay violence.\textsuperscript{64} Similarly, a lesbian afraid of losing her job, home, or children may forego the exercise of a large measure of her First Amendment rights on issues relating to sexual orientation, because speaking out, lobbying her legislature, or associating with a gay rights group would expose her to some or all of those risks.\textsuperscript{65}

This point provides a complete answer to the argument of some opponents of gay and lesbian civil rights that there is no need for such measures because “homosexuals may pass through life and selectively shield themselves from criticism, praise, negative attitudes or other perceptions, in any given situation, simply because people are unaware of... their sexual preferences one way or another.”\textsuperscript{66} This argument ignores the profound effect of

\begin{thebibliography}{99}
\bibitem{62} NAVA & DAWIDOFF, \textit{supra} note 2, at 135-39 (discussing the “real gay agenda,” under which lesbians and gays want “our rights as citizens,” which include doing “the things that need to be done to protect gay Americans and integrate them into the society”).
\bibitem{63} MOHR, \textit{supra} note 44, at 84.
\bibitem{64} RICHARD D. MOHR, \textit{A MORE PERFECT UNION} 85-86 (1994) (positing hypothetical in which two gay men are the victims of a gay-bashing, but neither can come forward because one would lose his job as a teacher, and the other would stand to lose visitation rights with his children, as well as his apartment).
\bibitem{65} \textit{Id.} at 87-89 (absent civil rights protections, a lesbian with strong incentives not to have her lesbianism widely known "is effectively denied all political power — except the right to vote," and "she will be denied the freedom to express her views in a public forum and to unite with or organize other like-minded individuals in an attempt to compete for votes").
\bibitem{66} Rogers, \textit{supra} note 28, at A21.
\end{thebibliography}
private discrimination on the ability of members of a "hidden minority" to exercise their constitutional rights. To speak of the "choice" some lesbians and gay men have to hide their status so as to avoid discrimination is to ignore the immense personal toll exacted by confinement in the closet.\textsuperscript{67} The fact that some gays have the "option" to stay there should be of little consequence in the debate over civil rights protections.

While the idea of full citizenship is of even greater weight in the gay rights debate than it was in 1964, not every argument marshalled by the proponents of the 1964 Act can be used as effectively by the gay and lesbian rights movement. Most critically, sponsors of the 1964 Act pointed to overwhelming evidence of the vast economic impact of employment discrimination on African-Americans, in terms of poverty, unemployment, lower wages, and fewer prospects for advancement.\textsuperscript{68} There is much less evidence of such devastating economic consequences of discrimination against lesbians and gay men.\textsuperscript{69} This does not mean,
however, that discrimination on the basis of sexual orientation is rare. Rather, it simply reflects the avoidance strategies used by gay men and lesbians to lessen some of the economic effects of discrimination, such as self-selecting into professions in which they believe discrimination is unlikely, or staying in the closet. In other words, the career choices of gay men and lesbians are severely constrained by the threat of discrimination, which forces gays to stay in the closet and/or vastly limits their career options. This, in turn, reinforces anti-gay stereotypes about certain professions and about gays in general. And this is not an irrational fear; discrimination against gays is, in fact, wide-

See Gay Workers Earn Less in Same Job, University of Maryland Study Finds, DAILY LABOR REPORT (BNA), No. 156, at A9 (Aug. 16, 1994) (quoting Dr. Lee Badgett, author of study on gay and lesbian earnings, that studies showing "gay prosperity [are] based on marketing surveys of gay magazine readers and people attending gay events," and that these surveys "are biased toward people with higher incomes"). Dr. Badgett's study, which is forthcoming in the Industrial and Labor Relations Review, id., shows that, when other factors are controlled for, gay men and lesbians are less affluent than comparable straight men and women. See Employment Non-Discrimination Act, 1994: Hearings on S.2238 Before the Senate Committee on Labor and Human Resources, 104th Cong., 2d Sess. at 5 (July 29, 1994) [hereinafter Hearings] (statement of Mary Frances Berry, Chairperson of the U.S. Commission on Civil Rights, citing study by Dr. Badgett which controlled for race, sex, education, experience, geographic location and occupation, and found that "gay and bisexual men earned 11 percent to 27 percent less than otherwise similarly situated heterosexual men" and "[l]esbian and bisexual women . . . earned from 5 percent to 14 percent less than heterosexual women"). Nevertheless, these differences are less severe than the pre-1964 economic harm done to African-Americans by the racial caste system marked by state-sponsored segregation and private discrimination.

70. See Mohr, supra note 44, at 146-47 & n.17 (discussing evidence of "the breadth of discrimination against [gays and lesbians] and . . . its evil effects"). See also Hearings, supra note 69, at 4 (discussing studies showing that gay physicians and lawyers have frequently suffered discrimination, and reporting review of 21 surveys showing that between 16 and 46% of respondents "reported having experienced some form of discrimination in employment — in hiring, promotion, firing, or harassment").

71. Mohr, supra note 44, at 146-47 & n.17 (because of rampant discrimination in academia, "[i]t comes as no surprise . . . that virtually all gays and lesbians in academe . . . are deeply in the closet").

72. Mohr, supra note 64, at 81-82 (the career choices of gays made in "response to prospective discrimination" have caused "many small businesses or dead-end occupations [to] . . . become so closely associated with homosexuality . . . "). I would, however, resist Mohr's characterization of certain jobs as "dead-end" occupations.

73. Id. at 82 (noting that the stereotype of certain professions as "gay" is so strong that "nongays who might otherwise go into these lines of employment do not do so out of fear that they will be socially branded as gay").
spread, including significant workplace harassment of the sort that has been the subject of recent high-profile allegations of sex discrimination.

Nevertheless, the economic impact of anti-gay discrimination has been, as opponents of ENDA have already begun to argue, substantially less catastrophic than the impact of American apartheid on African-Americans. It is thus important to frame the debate by remembering that the rights provided by the Civil Rights Act are not "special rights" but instead are elements of full and complete citizenship. To deny them to gay men and lesbians on the basis of sexual orientation requires more of a justification than the anti-gay forces have provided with their "special rights" rhetoric.

C. The Moral Status of Homosexuality and of Anti-Gay Discrimination

Once the fundamental nature of the rights at stake is established, the next step in overcoming the "special rights" canard is to establish that there is no more legitimacy to anti-gay discrimination than there is to racial, gender, or religious discrimination. This is not to say that they are the same, but

74. Mohr, supra note 44, at 155 & n.29 (quoting from NIMH study showing that 1 in 6 "gay people in this country have employment problems and over 9 percent lose their jobs solely because of their sexual orientation"). If anything, the incidence of discrimination against gays and lesbians is underreported, for many of the reasons I have already discussed, see supra text accompanying notes 63-67, regarding the coerced silence of closeted gays. See Hearings, supra note 69, at 4 ("Available statistics underrepresent the actual incidence of discrimination based on sexual orientation... The fear of discovery or retaliation if they file a complaint has been cited in many accounts as the reason that [gay men, lesbians, and bisexuals] are reluctant to report discriminatory acts, even in jurisdictions that prohibit such acts.").

75. See Samuel A. Marcosson, Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII, 81 Geo. L.J. 1, 1-2 (1992) (describing the vicious sexual harassment visited upon two men because they were, or were perceived to be, gay).

76. See Daily Labor Report, supra note 7, at A15 (testimony of Joseph Broodus that gays are "highly educated" and "highly paid").

77. This also helps to answer the real difficulty with "comparing" oppression which permits opponents of gay and lesbian rights to accuse the movement of usurping the rhetoric and moral arguments of the black civil rights movement. See supra note 28. The point is not which kind of discrimination is worse, or which people are most victimized. Lesbians and gays need not show that their claim to civil rights is as strong as that of African-Americans, or women, or any other protected group, but only that it is stronger than the claim of those who assert the right to discriminate. The model which pits the claims of discrimination victims against one another presupposes that proponents of anti-discrimination protections must show that there is a
that anti-gay bias is no more legitimate or worthy of deference from society.\footnote{78}

legitimate basis for ending anti-gay discrimination, thus naturally spurring comparisons to other instances where such a basis has been found to exist, such as racial discrimination. But this model is flawed; what must be shown is that there is no legitimate basis for the discrimination.

Even if the comparison between the equality interests of gays and African-Americans is a valid one, and even assuming that homosexuals' claimed right to non-discriminatory treatment is not as strong as that of African-Americans (because, for example, anti-gay discrimination is less pervasive today than was racial discrimination in 1964), that also must count on the other side of the equation: if the smaller incidence of anti-gay discrimination attenuates the equality interest, then there is also a lesser liberty interest to be asserted on the part of would-be discriminators. This entire argument, of course, assumes that a wholesale perspective is appropriate. Looked at from an individualist perspective, the liberty interest of the single individual who claims the right to discriminate against gays and lesbians is no weaker than that of the single individual who would like to discriminate on the basis of race. But adopting that individualist perspective on the liberty side requires us to do the same — assess the individual's right to equal treatment — on the equality side, rendering the frequency of anti-gay discrimination compared to other forms of discrimination irrelevant. We must, in short, weigh the individual gay man or lesbian's claim to equal treatment against the liberty right of the discriminator, \textit{not} against another, unrelated claim to equal treatment.

Professor Jane Schacter has recently advanced a sophisticated and persuasive argument against the claim that gay rights advocates must show that anti-gay discrimination is "equivalent" to another form of discrimination that is already illegal. \textit{See} Schacter, supra note 35, at 296-300 (arguing that it is inconsequential that '[d]iscrimination against gay men and lesbians as a group has not mirrored the discrimination suffered by other groups protected under civil rights laws," because '[t]he experience of these protected groups have themselves . . . been far from identical").

\footnote{78. Professor Duncan argues that laws barring discrimination against homosexuals (and their resulting infringement on the liberty to discriminate) are less justified than laws barring racial discrimination because "[w]hen an employer or landlord makes a distinction based on a person's sexuality, he is making a judgment about the content of that individual's character." Duncan, superscript note 16, at 405. The difficulty with this reasoning is that, prior to the passage of the Civil Rights Act of 1964, the same argument could have been (and was) advanced in favor of the right to discriminate on the basis of race: employers who refused to hire African-Americans did so not merely on a whim, but because they were acting on judgments about the character of African-Americans — that they could not be trusted, were not responsible, were lazy workers, etc. We rejected permitting the use of such gross and stereotyped generalizations, even though those who held these opinions believed they were accurate and could form the basis for judgment. In other words, when racial discrimination was outlawed, race was, like sexual orientation today, "morally controversial" in the sense that many felt it was a \textit{legitimate} basis for deciding how to treat people. Moreover, it was certainly a "sincerely held religious or moral belief," \textit{id.}, of opponents of the Civil Rights Act that, even if blacks were no less moral than whites, that \textit{mixing} of the races was "unnatural" and that, for this reason, discrimination and segregation were morally good. \textit{See supra} note}
Answering the question of whether it is permissible to discriminate on the basis of sexual orientation requires an examination of what makes use of a particular criterion permissible. Many criteria used in an employment decision (say, a hiring decision) are not barred. Some of these we do not prohibit for the obvious reason that they are directly related to the position: an applicant may be rejected based on her lack of qualifications. Others, though unrelated to the job (e.g., red hair), are still not placed off-limits to the decision-maker, essentially because, even if we believe she is acting irrationally, we value her autonomy and wish to minimize interference with it.

The first category, relevant criteria, may be taken out of the discussion by assuming that sexual orientation is virtually always irrelevant to the position in question. This leaves the issue of whether sexual orientation is more like those irrelevant criteria whose use is not permitted, such as race and gender, or those whose use is permitted, such as the alphabetical order of the last names of all job applicants.

Anti-gay forces, however, say that sexual orientation as a factor in employment decisions is acceptable, even admirable, because homosexuality is not like either set of irrelevancies, the permissible or the impermissible, because it is bad, immoral, or sinful, and hence should be discouraged. Sponsors of the

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35 (describing Senator Long's appeal to natural law in arguments against the Civil Rights Act). Finally, Professor Duncan's reliance on Dr. King's teaching that people should be judged by the "content of their character," Duncan, supra note 16, at 402, also ignores the point that while the right to make and hold private judgments about another person's character is absolute, the right to act on those judgments in the public sphere can be circumscribed. See infra text accompanying notes 93-97 (describing distinction between absolute right to believe and the limited right to act on one's beliefs). That is why employment decisions based on generalized or stereotyped judgments about members of certain races or religions — even judgments about character — are not permitted under Title VII. Professor Duncan cannot therefore simply rest on the assertion that judgments about homosexuality are, perforce, judgments about the character of gay men and lesbians. See also infra note 110 (arguing that immutability of sexual orientation makes judgments about the "character" of homosexuals irrational).

79. This assumption would be made explicit legislative policy by Section 2 of ENDA, which finds that "an individual's sexual orientation bears no relationship to the individual's ability to contribute fully to the economic and civic life of society." See DAILY LABOR REPORT, supra note 11, at D1.

80. See Duncan, supra note 16, at 415 (arguing against gay-rights legislation because "we all do not demand that our sins be recognized as civil rights"); see supra text accompanying notes 2-5.

81. See infra notes 126-28 and accompanying text (discussing argument that anti-gay bias is justified to encourage young people of "wavering" sexuality to select heterosexuality).
Civil Rights Act did not face the argument that blacks were inherently bad and therefore did not merit protections that would otherwise be justified, and for obvious reasons opponents did not assert that deterring others from becoming black was a reason to permit (or even encourage) discrimination against blacks.

The directly anti-gay argument — unlike the “special rights” rhetoric that seeks to camouflage anti-gay animus in the guise of a neutral objection to unwarranted rights for anyone — is at least honest, in the sense that it offers policy-makers and voters a clear picture of the real basis for opposition to protecting lesbians and gay men from discrimination. While some of the premises for these arguments are deceptive and misleading, such as the notion that the Bible unequivocally condemns homosexuality as a mortal sin, the argument itself honestly expresses the motives of its proponents, and it puts the focus squarely onto morality-based arguments.

1. The Significance of Religion in the Moral Debate

Part of the issue in responding to these anti-gay positions is what to do about the fact that much the basis for them consists of fundamentalist religious beliefs that condemn homosexuality. Some supporters of lesbian and gay rights have criticized reliance by anti-gay forces on these religious principles, saying that

[o]ne of the guiding principles of society, enshrined in the Constitution as a check against the government, is that decisions affecting social policy are not made on religious grounds. . . . If the real ground of the alleged immorality [of homosexuality] invoked by governments to discriminate against gays is religious . . . then one of the major commitments of our nation is violated.

While the specific message of anti-gay forces is undemocratic and dangerous because it is intolerant and does not respect the core values of individual autonomy and privacy, it should be opposed on these grounds and not because its basis is religious.

82. See NAVA & DAVIDOFF, supra note 2, at 105-11 (discussing considerable theological dispute about Biblical teaching). See also infra note 88 (noting differing religious attitudes towards homosexuality).

83. See supra note 2; see also Hearings, supra note 69, at 1 (testimony of Robert H. Knight opposing ENDA in part because the “great religions of the world condemn homosexual behavior in their scriptures”).

84. MOHR, supra note 64, at 9-10. See also NAVA & DAVIDOFF, supra note 2, at 76 (arguing that the “disestablishment clause” of the First Amendment “protects the state from the warring religious interests that have bloodied history” by “fostering religious freedom for all without ascendancy for any”).
In other words, the more general belief that religious principles do not have a significant place in public debate is misguided. For one thing, as Nava and Dawidoff recognize, it would be impossible to keep them out even if, in an ideal world, they should be kept out, because "[m]ost Americans believe in a God . . . and the majority subscribe to particular religious traditions or denominations." Nor should religion be kept out of the marketplace of ideas; a major and effective element of the 1960s civil rights movement was that it emerged from black churches and was led, in part, by ministers. We cannot welcome the infusion of religion into the body politic only when we happen to approve of its message. In addition, those whose views on political issues are theologically-based have free speech rights, and they cannot be barred from basing their speech on religious principles.

Most important, advocates of gay and lesbian rights should not shrink from making the case that basic religious tenets, including tolerance, community, and family, support the cause of barring discrimination on the basis of sexual orientation. Fighting to keep religion out of the debate — a battle which is futile in any event — makes it appear that the case for gay rights is contrary to religious values, when in fact it, like other campaigns against other forms of bigotry, is deeply consistent with them.

Nava and Dawidoff are correct, however, that religiously-based arguments are entitled to no greater respect or deference

85. *Id.* at 79.
86. *See* ADAM FAIRCLOUGH, *TO REDEEM THE SOUL OF AMERICA: THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE AND MARTIN LUTHER KING, JR.* 13 (1987) (during bus boycotts throughout the South in mid-1950s, "[p]reachers were indeed moving into the vanguard of black protest in the South," and afterward the SCLC "became a dynamic force within the civil rights movement and one of the most effective political pressure groups in American history").
87. *See* Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521, 534 (1989) (urging that a homosexual right to privacy should be defended on the same ground that marital privacy was found to exist in Griswold v. Connecticut, 381 U.S. 479, 486 (1965), because "like marriage, homosexual union may also be ‘intimate to the degree of being sacred . . . a harmony in living . . . a bilateral loyalty,’ an association for a ‘noble . . . purpose’").
88. *See* Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 214-18 (arguing that "the dominant attitude of mainstream Protestant and Jewish thought is one of pluralistic tolerance toward homosexuality;" that "[s]ome religious groups and thinkers have gone beyond a civil rights position that urges state tolerance [and] additionally affirm the humanity of homosexuals and emphasize the need to create a religious community that welcomes them;" and that "some religious teaching goes beyond both tolerance and community to celebrate the affirmative good that is possible in homosexual, as well as heterosexual, relationships").
in political debates simply because they are religious. For this reason, any claims that criticism of anti-gay arguments amounts to “religion bashing” should be dismissed; a bigot is not immune from the charge of bigotry merely because she asserts a religious basis for her position. The reply to the anti-gay forces that “we reject your argument because it is religious” lends credibility to the religion bashing charge. The alternative reply, “We reject your argument, regardless of its religious basis, because it is bigoted, intolerant, and wrong, and here is why,” cannot fairly be called religion bashing, because it responds to the substance of the anti-gay argument.

Responding to the religious basis for opposition to gay-rights laws also requires an answer to the argument that those religious beliefs confer a right to engage in the discrimination — and that

89. Id. at 88 (“Religious-based values are not banned from the public arena, but they are not vested with any greater moral force than competing viewpoints, nor are they exempt from rational examination simply because they originate in someone’s notion of the divine. The religious origin of opinion does not, in our system, give the opinion any special status in public debate.”).

90. Professor Duncan tells the interesting story of his experience attending a screening, at a panel discussion, of the film STOP THE CHURCH (Altar Ego Productions 1990), which deals with the “illegal disruption of Mass at St. Patrick’s Cathedral by a group of homosexual and abortion activists.” Duncan, supra note 16, at 440-41. Duncan describes the movie — which is decidedly sympathetic to the protestors and hostile to the Catholic Church — as filled with “hatred and blasphemy,” id: at 441, and he recounts being “ashamed of my University that evening for sponsoring this ‘documentary,’ but [being] even more ashamed for those in the audience who so thoroughly enjoyed this angry, hateful, Christophobic film.” Id. What Professor Duncan draws from this experience is not entirely clear. If he means to criticize the tactic of disrupting a church service, I entirely agree with him. If he means to go further, and criticize the film (and, by implication, the audience) for defending such conduct, he may also have a point. I believe, however, that Professor Duncan intends something more than a statement about one specific tactic. He seems to believe that there is something disturbing about harsh, even virulent, disagreements with the Catholic Church and its positions on homosexuality, and that such disagreements are a threat to the ideal of religious freedom. Id. at 442. If that is what he means, I disagree. Having involved itself in controversial issues of public policy, the Catholic Church’s position is not entitled to deference or respect merely because it comes from a religious institution. In other words, I do not share Professor Duncan’s “shame” at the underlying anti-Catholic attitudes expressed by the protestors. For me, these criticisms are simply the opposition that comes naturally when anyone — even the Catholic Church — exercises free speech rights. The positions a church takes should not be criticized merely because it is a church that is speaking, but neither would I refrain from criticizing those positions just as vigorously as I would criticize the same positions coming from Pat Buchanan or Richard Duncan. If the Catholic Church expects a “free pass” from criticism for its positions because it is a church, it is expecting far more deference than the Free Exercise Clause provides.
this religious freedom should not (or even may not) be infringed.\textsuperscript{91} This argument, however, is merely the zero-sum argument all over again, this time recast from a generalized liberty-based right to discriminate to a specific religious liberty-based right to discriminate. As I have shown, however, a purported liberty to discriminate (whether based on assertions of economic freedom, or the right to free association, or the right to discriminate in accordance with moral and religious principles), has always been asserted in opposition to proposals to recognize an equality-based right to be free of discrimination.\textsuperscript{92} To the extent that these assertions, if recognized, would infringe upon fundamental aspects of other individuals' citizenship, we have correctly rejected them.

Moreover, freedom to act on religious beliefs is not, as Professor Duncan apparently believes, absolute. His argument that gay rights legislation is unconstitutional as applied to discrimination practiced pursuant to anti-gay religious beliefs\textsuperscript{93} cannot be taken seriously. Once religious beliefs are removed from the sacrosanct realm of the conscience and brought out into the world of commerce and business, they are subject to regulation just like other business practices.\textsuperscript{94} Congress may choose to provide a religious exemption — as it did for religious employers in Title VII,\textsuperscript{95} and as is contained in ENDA\textsuperscript{96} — but it is not constitutionally required to do so.\textsuperscript{97}

\textsuperscript{91.} See Duncan, \textit{supra} note 16, at 414 ("Persons who believe the homosexual lifestyle is sinful, immoral or destructive of traditional family values are given a Hobson's choice under homosexual rights laws — either reject these deep personal beliefs as a code of business ethics, or get out of business.").

\textsuperscript{92.} See \textit{supra} text accompanying notes 20-23 and 30-35 (describing zero-sum argument and its use in opposition to Civil Rights Act of 1964).

\textsuperscript{93.} Duncan, \textit{supra} note 16, at 438-39.

\textsuperscript{94.} \textit{Cf.} EEOC \textit{v.} Townley Engineering \& Mfg. Co., 859 F.2d 610, 619 (9th Cir. 1988), \textit{cert. denied}, 489 U.S. 1077 (1989) (rejecting assertion by manufacturer of mining equipment that it is a "religious employer" permitted to discriminate on the basis of religion by Title VII). The Ninth Circuit rejected the free exercise claim of Townley's owners, who professed their belief that "the Bible and their covenant with God require them to share the Gospel with all of their employees." \textit{Id.} at 620 (holding that the impact on the Townleys' beliefs of requiring exemption for employees who object to mandatory religious services would not "be unreasonable and extreme").


\textsuperscript{96.} See \textit{Daily Labor Report}, \textit{supra} note 11, at D1 (Section 7 provides that "this Act shall not apply to religious organizations").

\textsuperscript{97.} Professor Duncan argues that a gay rights statute would not be a law of "neutral and general application" within the meaning of Employment
2. The Morality Of Homosexuality: John Finnis and the Jurisprudence of Insult

There is, of course, a traditional argument — based primarily but not exclusively on Catholic views of sexual morality — that homosexuality is wrong and hence can be the basis of societal

Division v. Smith, 494 U.S. 872, 879 (1990) (holding that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)'"), if it has religious exceptions that limit its coverage. Duncan, supra note 16, at 424-25 (arguing that an "across-the-board prohibition of all employment and housing discrimination . . . should pass the test of formal neutrality," but that where there is a religious exemption, it must be "all or nothing" to be "neutral" and save the statute from the need to show a compelling justification).

Similarly, Professor Duncan argues that the law is not "generally applicable" if it has "unequal exemptions," even if they are entirely unrelated to religion. Id. at 429. Under this analysis, Title VII would not be a law of "neutral and general application" because it has only a limited religious exemption, see supra note 95 and accompanying text, and various unrelated exemptions, but this is obviously wrong. The flaw in Duncan's analysis is that he uses the presence of exceptions to justify subjecting the underlying law to heightened scrutiny, when all that exceptions require is a justification for the exception.

For example, Professor Duncan makes the genuinely silly argument that because California's law barring anti-gay housing discrimination contains an exception for dwellings "containing not more than four units," id. at 428, and that religious renters with more than four units cannot take advantage, the law is not "generally applicable" since "religious exercise is restricted while some other interests are not." Id. at 429. But the exception is generally applicable where religion is concerned: it exempts all buildings with four or fewer units, regardless of the religious or secular basis upon which the owner would like to discriminate. Professor Duncan is comparing apples and oranges. As to religious exemptions like the one contained in Title VII, Duncan is correct that these distinguish between institutions based on whether they meet a certain definition qualifying them as "religious." However, this is a definitional necessity; any exemption for religion, even that represented by the Free Exercise Clause itself, requires some basis for distinguishing between religious and non-religious entities. See Walz v. Tax Commission, 397 U.S. 664, 675 (1970) ( exempting religious organizations "occasions some degree of involvement with religion"). Of course, the entire question of the meaning of Smith is somewhat moot, since, as Professor Duncan notes, its analysis has been superseded by the Religious Freedom Restoration Act of 1993. 42 U.S.C. § 2000bb (Supp. V 1993). Duncan, supra note 16, at 439-40. He is wrong, however, that the RFRA would bar application of a gay rights law like ENDA to anyone who happens to have a religious reason for wanting to discriminate. The RFRA restores the pre-Smith Free Exercise Clause analysis, and that standard had never been held to constitutionally require an exemption to anti-discrimination statutes for people with a religious desire to discriminate. If any exemption were constitutionally required, ENDA's exemption for religious institutions, supra note 96, would suffice.
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opprobrium and, at least in certain circumstances, sanction. 98

John Finnis argues that only heterosexual conduct within a mar-
tal relationship can be moral, because of the "insuperable double
goods of [heterosexual] marriage — as a union not of mere
instinct but of reasonable love, and not merely for procreation
but for mutual help, goodwill and cooperation for their own
sake." 99 In his view, only intercourse "between spouses enables
them to actualize and experience . . . their marriage itself, as
a single reality with two blessings (children and mutual
affection)." 100

Professor Finnis' implicit assumption that the qualities of
"reasonable love," "mutual help," "goodwill" and "cooperation"
are necessarily absent from homosexual relationships is based on
stereotyped misconceptions, 101 while his assumption that these
qualities are present in heterosexual marriages is based on the
arguments of Plato, Plutarch, Aquinas, and the Catholic Church
in general, 102 which defend an idealized conception of hetero-
sexual marriage that very often does not describe its reality.
Neither he, nor his sources, offers any evidence that homosexual
and heterosexual relationships actually differ in these ways.

98. I take as my text for this claim a recent article by Professor John
Finnis. John M. Finnis, Law, Morality, and "Sexual Orientation", 69 NOTRE DAME
L. REV. 1049 (1994); see also Duncan, supra note 16, at 403-04 & n.40 (arguing
that "[s]exual conduct and preferences are fraught with moral and religious
significance"). While Finnis does not specifically link his argument to the claim
that laws barring anti-gay discrimination constitute "special rights," the implicit
link is there, as demonstrated by Finnis' approval of "laws, regulations and
policies [that] discriminate (i.e. distinguish) between heterosexual and
homosexual conduct adversely to the latter." Finnis, supra, at 1049. Professor
Finnis attempts to provide a moral justification for state action that not only
permits private discrimination, but which itself discriminates. To the extent
that the anti-gay forces employing the "special rights" rhetoric embrace the
moral justification for viewing gay rights claims as "special rights" claims, it is
important to answer such attempts at moral suasion.

99. Id. at 1063.

100. Id. at 1064. See also Duncan, supra note 16, at 404 & n.40 (describing
the "natural law tradition" which "condemns homosexual practices such as anal
intercourse as an unnatural perversion of reproductive and digestive organs").

101. If Professor Finnis truly doubts that gay and lesbian relationships are
possessed of these qualities, my best suggestion for him (and others who may
share his ignorance) is to read one of two works by Paul Monette about his
relationship with his longtime partner, Roger Horwitz. The first is Monette's
account of caring for Horwitz as he slowly died of AIDS. PAUL MONETTE,
BORROWED TIME: AN AIDS MEMOIR (1988). The second is a series of elegies
Monette wrote in his grief after Horwitz died. PAUL MONETTE, LOVE ALONE:
EIGHTEEN ELEGIES FOR ROG (1988). Both display, in abundance, the deep love
and devotion that Finnis cannot conceive existing between partners of the same
sex.

Perhaps that is why the real linchpin of Finnis' argument appears to be that only heterosexual intercourse can result in procreation, so that homosexuals' "sexual acts together cannot do what they may hope and imagine[, ...] because their activation of one or even each of their reproductive organs cannot be an actualizing and experiencing of the marital good ..."108 It is true that only heterosexual couples can produce children entirely without the involvement of any third party. But it is difficult, at best, to understand why this difference between homosexual couples and heterosexual couples could ever justify discrimination in jobs, housing, and public accommodations.104 It is particularly difficult to understand the force Finnis supposes this distinction has for modern purposes, when such third-party involvement (e.g., artificial insemination; surrogacy) in procreation is now not only possible, but common, for couples both homosexual and heterosexual who wish to raise children but who, for whatever reason, cannot have a child by "normal" methods.105

Professor Finnis believes that the fact that genital intercourse, alone among sexual acts, can produce children, together with the relational elements he supposes are exclusive to heterosexual marriage, make for some sort of equation: heterosexual conduct (with and because of the possibility of procreation) +

103. *Id.* at 1066 (emphasis in original).

104: Professor Finnis does not defend the most extreme version of an anti-gay policy: discriminating against lesbians and gay men merely on the basis of "a psychological or psychomatic disposition inwardly orienting one towards homosexual activity." *Id.* at 1053 (emphasis in original). Instead, he focuses on homosexual conduct, which he argues the state may prohibit and/or punish because (to put it tersely) the conduct is immoral. Oddly, Finnis confuses the matter somewhat by writing of "public activities intended specifically to promote, procure and facilitate homosexual conduct." *Id.* at 1054 (emphasis in original). It is not clear what he means by "public activities," but it is clear that he does not mean to argue only that the state may regulate homosexual conduct in public places (a fairly unremarkable proposition), since the remainder of the article is spend arguing that any homosexual conduct — even that which goes on in private, between consenting adults who are life partners — is immoral and may properly be regulated by the state, and that those who engage in such conduct should not be protected by antidiscrimination laws. See *id.* at 1055 (arguing that "explicit or implicit judgments ... about the evil of homosexual conduct" can "be defended by reflective, critical, publicly intelligible and rational arguments").

105. This is why Professor Finnis' comment that homosexuality "disposes the participants to an abdication of responsibility for the future of humankind," *id.* at 1069, is, at best, outdated — assuming, of course, that prior generations of homosexuals who lacked modern means to have children were "abdicing responsibility for the future of humankind" simply because they did not themselves reproduce.
marriage (with and because of aspects of mutual devotion) = moral behavior.\textsuperscript{106} Finnis fails on two levels, however. First, he completely fails to explain why this one aspect of (certain) heterosexual conduct — that it has the potential for procreation — is not merely relevant to, but is determinative of, the morality of the conduct. He makes the leap from the truism that homosexual sex acts cannot be intended to procreate to the conclusion that "in reality, whatever the generous hopes and dreams and thoughts of giving with which some same-sex partners may surround their sexual acts, those acts cannot express or do more than is expressed or done if two strangers engage in such activity to give each other pleasure . . . ."\textsuperscript{107} Professor Finnis' assumption that if a sex act cannot be an expression of procreative potential it cannot be an expression of anything besides sexual pleasure ignores the extent to which the sex act can be an expression of the emotional bonds and commitment two people — regardless of their gender — can share, bonds which are a "reality" differentiating homosexual partners from "two strangers," even if Finnis cannot comprehend this reality or chooses to ignore it.

Professor Finnis' equation of a long-term, loving gay or lesbian relationship with sex between two strangers is also profoundly insulting, to an extent that deserves emphasis. He begins by asserting that the lovemaking of homosexual life partners who share a lifetime of devotion to one another, who may raise children together, who care for one another in times of crisis and illness — that their sexual life together has more in common with a sexual liaison between total strangers than with the sexual union of a married couple. That is insulting enough. But Finnis goes still further, asserting that the homosexual couple's...

\textsuperscript{106} \textit{Id.} at 1067 ("[S]exual acts are not unitive in their significance unless they are marital . . . and . . . they are not marital unless they have not only the generosity of acts of friendship but also the procreative significance . . . at least as being, as human conduct, acts of the reproductive kind.").

\textsuperscript{107} \textit{Id.} (emphasis in original). Finnis apparently intends to emphasize the child that can be produced by genital intercourse as the tangible "reality" that distinguishes heterosexual and homosexual conduct. The "hopes and dreams and thoughts" that may be part of homosexual partners' sexual acts are not a sufficient reality for Finnis. This is ironic, given that Catholic doctrine teaches that one's intangible belief in Christ as personal savior—rather than a tangible "reality" such as good acts during life, which have only derivative significance as an indication of an individual's acceptance of Christ's teachings—is the exclusive path to salvation. See ALAN SCHRECK, CATHOLIC AND CHRISTIAN: AN EXPLANATION OF COMMONLY MISUNDERSTOOD CATHOLIC BELIEFS 17-24 (describing conscious, personal commitment to Jesus Christ as the only way a person can be saved). One cannot help but wonder why beliefs and attitudes are dismissed as unreal and of no moral consequence in the one case, but are considered determinative of the fate of the soul in the other.
lovenaking not only is quite like sex between strangers, but that it expresses *nothing more at all* than is expressed between two total strangers engaged in the prototypical "one-night stand." Such belittling of the dignity of other human beings' lives, offered as the basis for law and policy-making, is unworthy of genuine consideration, much less deference, notwithstanding its estimable, Thomist pedigree.

Second, even assuming that there is a connection between procreative potential and morality which makes marital heterosexual conduct morally good, Professor Finnis fails to explain why its absence in other sexual conduct, including homosexual conduct, makes such behavior *immoral*, rather than simply morally neutral.

So long as the comparison is fairly made — not comparing promiscuous homosexuality with monogamous heterosexuality, or vice-versa — the moral arguments against homosexual conduct and relationships are unconvincing. Professor Finnis' attempt to articulate out of anti-gay Catholic doctrine a moral basis for legal disadvantaging of gay men and lesbians merely demonstrates the extent to which that doctrine is, at best, based on stereotypes about homosexuals and their lives. At worst, it is a jurisprudence of insult rather than of reason.

3. The Morality of Anti-Gay Discrimination

The special rights claim posits two different, though related, morality-based arguments against laws barring sexual orientation discrimination. The first is that homosexuality is immoral, and that sexual orientation is therefore not a valid basis for anti-discrimination protection. In the immediately preceding section, I have addressed that claim. The second, related point is that it is not wrong to discriminate against homosexuals — primarily because their conduct is immoral — and that such discrimination should therefore not be banned. Justifying sexual orientation as a basis for civil rights protections in the face of the special rights position thus requires not only an answer to the claim that homosexuality is immoral, but also an affirmative argument that it is discrimination against homosexuals that is immoral.

108. To the extent that this position reflects mainstream contemporary Catholic theology — and it is my understanding that it closely resembles the position of the Church — it should help to explain to Professor Duncan the resentment and hostility many lesbians and gay men feel toward the Catholic Church that was shown in the documentary *STOP THE CHURCH*. See supra note 90 (discussing Duncan's experience attending a screening of the film).
Most of the arguments about the immorality of denying gay men and lesbians their rights based solely on sexual orientation have been made — exhaustively, eloquently, and persuasively — elsewhere, and there is little need to add to those thoughts already expressed quite well enough.\textsuperscript{109}

One aspect of this debate merits additional attention, however, because it has become a matter of great controversy among advocates of gay and lesbian rights: the argument that discrimination against lesbians and gay men is immoral because heterosexuality is immutable. This seems to be the most compelling argument that anti-gay discrimination is immoral. It is thus a crucial element of a persuasive answer to the "special rights" rhetoric. The force of the immutability claim, and the importance of advancing it, seem to be self-evident; the moral force of the principle underlying the immutability argument — that people should not be ill-treated based on a characteristic or status they are unable to change — speaks largely for itself.\textsuperscript{110}

Nevertheless, vigorous and sophisticated arguments have recently been advanced in favor of abandoning immutability. In

\textsuperscript{109} See generally \textsc{NAVA \& Dawidoff, supra} note 2, at 23-27 (arguing that the campaign for gay rights is based upon the fundamental notion of "individual rights"); \textsc{Mohr, supra} note 44, at 140-61 (arguing that regulation of private discrimination against gay men and lesbians is justified by "the values of dignity, self-determination, and individual flourishing"). See also \textit{supra} notes 87-88 (describing the positions of Michael Sandel and Sylvia Law regarding moral argumentation in debates over gay and lesbian rights).

\textsuperscript{110} See \textsc{Mohr, supra} note 44, at 39 ("It is generally conceded that if sexual orientation is something over which an individual . . . has virtually no control, then discrimination against gays is deplorable . . . because it holds people accountable without regard for anything they themselves have done."). The immutability of sexual orientation is a sufficient answer to Professor Duncan's attempt to distinguish sexual orientation discrimination from racial discrimination because, he claims, the anti-gay discriminator "is making a judgment about the content of [the homosexual's] character." Duncan, \textit{supra} note 16, at 405. Even to the extent that the anti-black discriminator is not doing the same thing, \textit{see supra} note 78 (arguing that racial discrimination also involves making judgments about character), the problem with this defense is that if sexual orientation is immutable, it is both irrational and wrong to form judgments about character on that basis, and such judgments are entitled to no deference or credit in the debate over sexual orientation laws. Professor Duncan attempts to disarm the immutability point by arguing that "the immutability of race is [not] the reason that racial discrimination is anathema in our society and under our laws." Duncan, \textit{supra} note 16, at 402. It is certainly true that the immutability of race is not the only reason our laws bar race discrimination. Hence, Duncan is correct that if race were suddenly made mutable by ingestion of a drug, we would not take seriously the argument "that civil rights laws should not cover blacks who declined the drug and thereby chose to remain black." \textit{Id.} However, immutability is one of the reasons why discrimination is wrong.
particular, Professor Janet Halley has urged gay rights litigators not to advance the immutability argument in cases challenging the constitutionality of governmental discrimination against gays and lesbians.\footnote{Halley, The Politics of Biology, supra note 111, at 507-14; Halley, The Politics of the Closet, supra note 111, at 923-92. Suffice it to say that I believe it is more important than Halley reckons as a \textit{factor} in the decision whether strict scrutiny should be applied, but I agree with her that it is, by itself, neither a necessary nor a sufficient condition for strict scrutiny. For now, my point is that from the perspective of the gay and lesbian civil rights movement as a whole, immutability has rhetorical, political, and moral force that makes it virtually indispensable. For this reason, and because it accurately characterizes the experience of millions of lesbians and gay men (see infra note 119 and accompanying text), we should make the argument — and for consistency's sake, if nothing else, it should also be used in constitutional cases.}{Halley, The Politics of Biology, supra note 111, at 928 (emphasis in original).} In light of these arguments, it is worth pointing out the significance of immutability in the \textit{moral} equation. Professor Halley errs badly in focusing entirely on the constitutional question, missing the force of immutability in the debate over the legitimacy of private anti-gay discrimination.\footnote{Halley, The Politics of Biology, supra note 111, at 928 (emphasis in original).} Halley suggests that in constitutional terms, immutability is really a surrogate for irrationality, reflecting the “determination that statutes attempting to deter people from bearing immutable characteristics are often \textit{irrational}.\footnote{Halley, The Politics of the Closet, supra note 111, at 923-32. Suffice it to say that I believe it is more important than Halley reckons as a \textit{factor} in the decision whether strict scrutiny should be applied, but I agree with her that it is, by itself, neither a necessary nor a sufficient condition for strict scrutiny. For now, my point is that from the perspective of the gay and lesbian civil rights movement as a whole, immutability has rhetorical, political, and moral force that makes it virtually indispensable. For this reason, and because it accurately characterizes the experience of millions of lesbians and gay men (see infra note 119 and accompanying text), we should make the argument — and for consistency's sake, if nothing else, it should also be used in constitutional cases.}{Halley, The Politics of Biology, supra note 111, at 507-14; Halley, The Politics of the Closet, supra note 111, at 923-92. Suffice it to say that I believe it is more important than Halley reckons as a \textit{factor} in the decision whether strict scrutiny should be applied, but I agree with her that it is, by itself, neither a necessary nor a sufficient condition for strict scrutiny. For now, my point is that from the perspective of the gay and lesbian civil rights movement as a whole, immutability has rhetorical, political, and moral force that makes it virtually indispensable. For this reason, and because it accurately characterizes the experience of millions of lesbians and gay men (see infra note 119 and accompanying text), we should make the argument — and for consistency's sake, if nothing else, it should also be used in constitutional cases.} She believes we should therefore simply focus on rationality rather than immutability.

To begin with, Professor Halley is wrong that immutability is really just a way to say that the deterrence justification is irrational. It is \textit{wrong} to treat people badly based on an immutable characteristic, regardless of whether it is also irrational to do so for the purpose of deterrence, or for any other purpose.\footnote{Indeed, one can envision conditions under which it would not be irrational to discriminate against individuals based on an immutable characteristic, even for the purpose of deterring it. See infra text accompanying notes 118-28 (discussing implications of premise that sexual orientation may be...}{Indeed, one can envision conditions under which it would not be irrational to discriminate against individuals based on an immutable characteristic, even for the purpose of deterring it. See infra text accompanying notes 118-28 (discussing implications of premise that sexual orientation may be...}
But even if Halley were correct that, in constitutional terms, the immutability argument is simply another way of saying that discriminatory conduct is irrational, it still leaves us with the choice of how best to frame the argument. We can say, as Professor Halley would apparently suggest (if immutability is to be used at all), that discrimination against gays and lesbians is irrational because, *inter alia*, it seeks to deter an immutable characteristic that is not voluntarily chosen. Alternatively, we can say, as Halley urges us not to, that sexual orientation is immutable, from which flows the conclusion (among others) that it is irrational to seek to deter people from choosing one particular sexual orientation.

These formulations may seem little different at first, but the difference is of great significance outside the context of constitutional litigation, when the focus turns to private discrimination. When litigating a constitutional claim, the plaintiff wins if she shows that a discriminatory governmental action or policy was irrational. In the private context, however, it is not enough to show that a decision was made for irrational reasons. Since permitting even irrational decisions can be justified out of respect for a private decision maker’s autonomy, something beyond a showing that anti-gay discrimination is irrational is needed. The first formulation, suggested by Professor Halley’s approach, begins and ends with irrationality, with immutability reduced to the status of an underlying reason. As such, it does not justify laws barring private anti-gay discrimination.

The second formulation, however, makes the point that immutability is one reason why it is irrational to discriminate against lesbians and gay men, while leaving room for the additional showing, necessary when it comes to private discrimination, that it is not just irrational, but also wrong, to discriminate against people based upon a characteristic they did not choose and cannot change.

Halley does much more than dispute the force of the immutability argument in equal protection doctrine. She also challenges the premise that sexual orientation is immutable. She opens this challenge by observing that people sometimes “become” gay or recognize their homosexuality relatively late in life. Professor Halley’s point, true though it may be, does not defeat the immutability argument. Note the phrasing of the immutability point: it is wrong to discriminate against people

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115. See *supra* text accompanying notes 77-79.

based upon a characteristic they did not choose and cannot change. Something "they cannot change" is quite different from something that "never changes." Specifically, the difference is whether mutability is within the individual's control. If change is not voluntary, then the characteristic is, for moral purposes, immutable. Thus, the fact that in some cases sexual orientation either changes, or is discovered, later in life is not an adequate answer to the moral force of immutability.

Admittedly, sexual orientation may not be immutable for all gay men and lesbians. The point is that the testimony of countless people regarding their perceptions of their sexual orientations, together with emerging evidence of a link between biology and sexual orientation, makes it clear that at least for many gays, sexual orientation is immutable, and an essential aspect of self. While Professor Halley recognizes the autobio-

117. It also does not matter if a characteristic is biologically determined, a matter to which Professor Halley devotes considerable attention. See Halley, The Politics of Biology, supra note 111, at 529-46. While I agree with her that the scientific evidence of a biological basis for sexual orientation is thus far tentative (although I disagree with some of her criticisms of the studies, see infra text accompanying notes 134-37), it would not matter even if it were proven that there is no biological cause if sexual orientation were shown to be immutable regardless of its cause. In other words, a characteristic need not be biologically-based to be immutable. See Plyler v. Doe, 457 U.S. 202, 220 (1982) (finding that status as the child of an illegal alien is, for the child, "a legal characteristic over which children can have little control"). For other reasons, Halley suggests that supporters of the immutability argument are compelled also to claim that homosexuality is "biologically determined," but her reasoning on this point is unconvincing. See infra text accompanying note 128.

118. See Daniel R. Ortiz, Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity, 79 Va. L. Rev. 1833, 1836 (1993) (arguing that the conflict between essentialism and constructivism as explanations of gay identity is largely false because "gay identity, like most forms of human identity, is too variegated, contested, and complex for any single term to capture").

119. See, e.g., NAVA & DAWIDOFF, supra note 2, at 73 (expressing the belief that "homosexuality is not a choice but innate" and resting that claim on "thousands of books by gays and lesbians about their lives and the lives of others . . . [a] body of work [that] represents the testimony of those who have the most knowledge of homosexuality, and lesbians and gay men consistently speak of their homosexuality as something in their natures over which they exercise no control"); MOHR, supra note 44, at 39-40 (explaining that the "experience of coming out to oneself [i.e., the realization and acceptance of one's sexual orientation] has for gays the basic structure of discovery, not the structure of a choice") (emphasis in original).

120. See infra notes 135-36.

121. I recognize and agree with Daniel Ortiz's point that whether sexual orientation is "essential" is different from whether it is immutable. See Ortiz, supra note 118, at 1837 (distinguishing debate between "essentialists" and "constructivists" from the "determinism/voluntarism debate"); cf. supra note 117 (distinguishing questions of biological basis for homosexuality and of
graphical evidence of many gay men and lesbians' life experience,\textsuperscript{122} she minimizes it because “other people who experience anti-gay discrimination tell quite different stories,” and “understand themselves to have chosen the form of their desire or the ways in which they structure their lives.”\textsuperscript{123} In other words, Halley implies, little weight should be given to the stories of those who experience their sexual orientation as essential and immutable because others do not experience their sexuality in the same way.\textsuperscript{124}

\begin{itemize}
\item I also agree with Ortiz that whether being gay is “essential” depends on what one means by “gay.” See Ortiz, \textit{supra} note 118, at 1845-46 (arguing that an essentialist believes that “[g]ay people . . . are simply those who experience same-sex desire” while a constructivist “describes gay people primarily in terms of their social roles and their relationship to other features of social life”). I mean “gay” in the first sense used by Ortiz — persons whose sexual desires are primarily directed at members of the same sex. I am, in other words, discussing the basic orientation and not the social trappings associated with gay men and lesbians in our culture. Given this understanding of the terms, it is my view that much homosexuality is both essential, in the sense that “gayness is an intrinsic property, one that does not vary across history and culture,” \textit{id.} at 1836, and immutable.
\item \textit{Id.} (citation omitted). Although I believe that sexual orientation (gay, straight, or bisexual) is most often not chosen, I reject Richard Mohr’s dismissive view of those who say they chose their sexual orientations. \textit{See Mohr, \textit{supra} note 44, at 41-42} (rejecting stories of lesbians who claim to have made a “politically motivated” choice of their sexual orientation because “this claim simply overlooks the psychobiological truth . . . that one’s sexual arousals are not subject to the blandishments of one’s will”) (citation omitted): I am skeptical of any one narrow “psychobiological truth” that seeks to explain all human sexual experience (even if it happens to fit my own), especially one that is contrary to the stories of many people who have experienced their sexuality as a matter of choice. I see no reason why some people might have an immutable sexual orientation while others could have chosen theirs. Indeed, given the variety of tastes, desires, and experiences in all other sexual matters, it seems inherently more plausible that human beings would vary in this respect than that we would all fit one model.
\item Professor Halley also rejects the testimony of gays and lesbians whose experience does not fit her model “because it obscures the historical, institutional, and political processes that produce identity.” Halley, \textit{The Politics of Biology}, \textit{supra} note 111, at 527. In other words, Halley rejects the stories of those who experience their sexual orientation as a natural (and, yes, essential) aspect of their self as false consciousness resulting from a socially constructed identity. It is arrogant for Halley — or others who form the “strong currents in the pro-gay movements [who] critique the very impulse to organize around gay and lesbian identity” — either to suppose they know best the nature of other peoples’ sexual identities, or (worse yet) to argue that the identities they claim are false. \textit{Id.} The same is true of “pure” essentialists like Mohr, who reject even
The answer to this is simple: the force of the immutability argument does not depend on all gays being immutably homosexual. Even assuming that sexual orientation is not always immutable, the right of "immutable" lesbians and gay men to be treated fairly is enough to justify making the argument, both in the moral debate and in constitutional litigation. At worst, this would mean that "mutable" lesbians and gay men may benefit from establishing legal rules that treat "immutable homosexuality" in a manner consistent with the treatment of other immutable characteristics — a side-effect not directly supported by the immutability argument, but which is justified by the many other ways in which it is wrong to discriminate even against "mutable" gays and lesbians.\textsuperscript{125}

It is true that anti-gay forces have attempted to cite the presence of some "mutable" gays to justify an anti-gay program.\textsuperscript{126} It is chilling that anti-gay polemicists are willing to "'condemn youngsters, who from earliest memories know themselves to be gay,'"\textsuperscript{127} in order to affect others whose sexuality is less certain.

the possibility that some people could have chosen their sexual identities. See \textit{supra} note 123.

\textsuperscript{125} See \textit{supra} note 109 (describing moral arguments advanced against anti-gay discrimination).

\textsuperscript{126} See Halley, \textit{The Politics of Biology}, \textit{supra} note 111, at 520-21 (noting the argument justifying anti-gay policies because "even if only some children are sexual orientation 'wavering,' social policy must 'give [them] clear, repeated signals as to society's preference' that they elect heterosexuality") (quoting E.L. Pattullo, \textit{Straight Talk About Gays}, \textit{COMMENTARY}, Dec. 1992, at 24.).

\textsuperscript{127} Id. (quoting E. L. Pattullo, \textit{Straight Talk About Gays}, \textit{COMMENTARY}, Dec. 1992, at 24.). An alternative response to the immutability point is to argue that, even if orientation is immutable, the choice still exists to engage in the behavior, and it is homosexual conduct which (a) distinguishes sexual orientation from other characteristics that are the basis for antidiscrimination protections, see, e.g., Duncan, \textit{supra} note 16, at 401-05 & nn. 34-35, and (b) is immoral and can be the subject of policies aimed at deterring it. See \textit{supra} note 104 (describing Finnis' argument that homosexual conduct, rather than the orientation, is immoral). These claims, captured in Professor Duncan's argument that "even if biology determines the inclination, as human beings capable of moral reasoning homosexuals remain free to choose whether to act on the inclinations," Duncan, \textit{supra} note 16, at 402 n.35, miss the point of the immutability argument. Immutability makes "moral reasoning" irrelevant to behaviors that naturally flow from a particular orientation. Human beings are, in significant part, sexual creatures, for whom sexual conduct is a fundamental part of a complete life. I cannot fathom the "moral reasoning" that holds, for those for whom same-sex sexual desires are an essential and immutable fact of their sexual nature, that the price of equal treatment is involuntary life-long abstinence from sex. Or, if I can fathom the reasoning, I find it indescribably cruel and alien to American values of privacy, individual autonomy, limited government, and fairness. Consider, for example, the reaction that would follow if, in response to widespread discrimination against heterosexuals, a
However, most Americans would agree that it is immoral to punish one group of people for something they did not choose in the hope of influencing another group's choices; hence the importance of advancing the immutability argument. Professor Halley is wrong that essentialists are forced to "claim that homosexuality is . . . biologically determined" to respond to anti-gay forces who favor "a program of discrimination actually tailored to prevent people who can choose to become homosexual from doing so in the first place."\footnote{128} Claiming that such a program cannot work because homosexuality is biologically determined is not the best answer. Rather, the best answer is to argue that a program of discrimination such as Pattullo recommends is corrupt even if it would influence some people, because of the immoral manner in which it treats those who could not have been influenced. It would be little different from punishing the children of interracial couples (who cannot change their status in this regard) in order to discourage others from entering into interracial relationships. Even if this were not impermissible race discrimination, it would be wrong to punish the children who made no choice in order to influence the future choices of others.

Perhaps Halley's most disturbing claim is that the repression of lesbians and gay men that keeps so many in the closet helps to prove that homosexuality is not immutable — because the different behavior in which closeted gays and lesbians engage (different, that is, from how they would have behaved if they were openly gay) "is a change . . . [in the] \textit{representation} of sexual orien-

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  \item A different, but in my view equally powerful, critique of the argument that sexual orientation has a behavioral component that makes it different from race and other protected characteristics, is offered by Professor Schacter, who argues that "[p]roviding legal protection only to attributes perceived as involuntary reduces civil rights laws to codes of conformity and implicitly stigmatizes difference." Schacter, \textit{supra} note 35, at 307 (footnote omitted). She also points out that many different "behaviors" associated with a protected characteristic are, in fact, protected by civil rights laws, and thus that homosexual orientation and corresponding homosexual conduct do \textit{not} differ in this regard. \textit{Id.} at 308.
  \item 128. Halley, \textit{The Politics of Biology}, \textit{supra} note 111, at 521.
\end{itemize}
tation available for social interpretation.” Although she concedes that “what has changed is not the supposed essence of sexual orientation,” this is not a significant concession in light of Professor Halley’s skepticism of essentialism. She concludes that because repression alters behavior (and for other reasons), the orientation is not essential, and not immutable. To my mind, whether people hide being gay to avoid discrimination has nothing to do with whether they are gay or even with what it means to be gay.

In addition, Professor Halley makes the tendentious argument that some studies showing a genetic link to homosexuality are flawed because the researchers asked subjects to identify a sexual orientation, and thus “they have simply assumed [the] bipolar model of sexual orientation.” Any study of the issue may be rejected as invalid if one assumes that there are no genuine categories of sexual orientation to examine. But studies showing a correlation between a physical reality like genes or brain structure and sexual self-identification are powerful evidence that the category itself, in John Boswell’s words, “exists

130. Id. (emphasis in original).
131. See id. at 934-37 (discussing recency of the “idea that homosexuality is a fixed propensity that fundamentally characterizes individuals,” and favorably noting the view that there is no “pure and natural ‘essential homosexuality’ [that] can be posited for study”). See also Janet E. Halley, Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick, 79 Va. L. Rev. 1721, 1723 & n.3 (1993) (explicitly adopting a constructivist view of sexual identity).
132. The most troubling aspect of Halley’s argument is the power it hands to anti-gay forces to define gay men and lesbians by the force of their oppression. This is, in fact, a recurring problem in Professor Halley’s work, as she acknowledges. See Halley, The Politics of Biology, supra note 111, at 525 n.84 (conceding that “this article . . . is ripe for misappropriation by anti-gay constructivists willing to distort its central points”).
133. Cf. Ortiz, supra note 118, at 1835 (“The questions of how a person comes to have same-sex desire and of how that person is viewed are completely independent.”).
135. See Halley, The Politics of Biology, supra note 111, at 532-34 (describing study by Dean Hamer “suggesting that male homosexuality might be genetically transmitted through the mother”).
136. See id. at 534 (describing study by Simon LeVay which “found that a group of cells in a certain portion of the brain . . . was larger in men he classified as heterosexual than in men he classified as homosexual”). I agree with Halley that there were significant flaws in the method by which LeVay classified his subjects. See id. at 535-37.
because humans perceive a real order in the world and name it."  

Finally, Professor Halley attributes great significance to the fact that the modern Western understanding of homosexuality is a relatively recent phenomenon, which for her is evidence that the category itself is a social construct, not an essential part of some peoples' identities. To the contrary, the emergence of this conception tells us much more about the ebbing authority of cultural and religious forces which in the past repressed the expression of same-sex desire, and hence the concept of homosexual identity, while at the same time keeping much evidence of gay men and lesbians' lives out of the historical record.

Thus, the immutability argument, tied to the idea that homosexuality is an essential aspect of many lesbians and gay men's personalities, has great moral weight. Persuasively articulated by gays and lesbians, it provides the rest of the answer necessary to the "special rights" rhetoric. Once it is understood that the antidiscrimination rights are crucial aspects of full citizenship, the battle is half won. Gay rights advocates can add to that case the compelling moral arguments that (a) homosexual conduct is not per se immoral, and (b) in fact, it is immoral to deny civil rights to lesbians and gay men because (among other reasons) sexual orientation is, at least in many cases, immutable.

IV. CONCLUSION

Anti-gay forces have, to this point, had great success using the "special rights" claim to convince voters to repeal laws protecting gay men and lesbians from discrimination. This success need not, and should not, continue. Use of the answers that car-

137. John Boswell, Revolutions, Universals, and Sexual Categories, in HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST 17 (Martin Duberman et al. eds., 1989). It seems clear that Professor Halley would accept (and tout) the result of a study that showed no correlation between any discernible physical reality and sexual orientation as proof that the categories themselves are mere social constructs. But if a study does show a correlation, Halley wants to reject it anyway because she claims the categories are invalid, despite the correlation. In effect, if the game comes out the wrong way, Halley simply takes the ball and goes home.


139. Einstein's theory of relativity was also not articulated until this century. The fact that we only lately gained this appreciation of the nature of the physical universe does not make it any less accurate. The same is true of Darwinism; the recency of the theory of evolution does not show that it is invalid. It merely shows that cultural and religious conditions had previously prevented us from even considering the theory and perhaps that scientific conditions prevented us from discovering and testing it.
ried the day in 1964, combined with those new ones necessary for our own latter-day fight, can produce the same outcome as 30 years ago.