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WHAT'S
LEFT
OF
THEORY?
NEW WORK
ON THE POLITICS
OF LITERARY THEORY

Edited by
JUDITH BUTLER, JOHN GUILLORY,
AND KENDALL THOMAS
Gay and lesbian advocates often claim that gay rights are just like rights already established for racial minorities or women by the black civil rights movement and the women’s movement. Particularly when they argue to judges, who are formally if not actually constrained by precedent, and even when they make more general political appeals, advocates are opportunists looking for a simile: “Your honor, this is just like a race discrimination case; this is just like a sex discrimination case.”

And indeed, sexual orientation and sexuality identities have formed important social movements that look like other identity-based movements. Gay men and lesbians, transgendered people, and other sexual dissidents have been able to create legal change and legal controversy on issues falling under almost every traditional rubric of law. Contract, tort, procedure, constitutional law, civil rights, family law, trusts and estates, employment law, housing law, taxation, regulation—sexually identified progressives have legal reform aspirations and achievements affecting all of these areas and more. They have grass-roots and national organizations, including NAACP-like national legal reform offices staffed with full-time lawyers. They also have ferocious opponents convinced that, if they realize any of their reform aspirations, the entire national character will collapse. Sexual orientation and sexuality movements have the look and feel of identity movements of the contemporary sort.

But in important ways, they lack the substance. “Identity politics” is usually waged on assumptions that identity inheres in group members, that group membership brings with it a uniformly shared range (or even a core) of authentic experience and attitude; that the political and legal interests of the group are similarly coherent; and that group members are thus able to draw on their own experiences to discern those interests and to establish the authority they need to speak for the group. I will call these the “coherentist” assumptions about identity politics. Sexual orientation and sexuality identities don’t support those assumptions very well.

Take lesbian identity for an example. One is a lesbian not because of anything in oneself, but because of social interactions, or the desire for social interactions: it takes two women, or at least one woman and the imagination of another, to make a lesbian. Lesbians have a huge range of experience and attitude relating to their sexual orientation: on issues as basic as whether being women makes lesbians really different from gay men, we don’t agree. We are famously unable to agree with one another about what our collective political and legal interests are—for example, we don’t agree about whether access to marriage should be a movement priority—and we are notoriously ready to punish any woman who purports to speak for us.

Similar things can be said about gay men, homosexuals, bisexuals (generic or male and female), transvestite/(pre-op, post-op, and non-op) transsexual/transgendered people, people living with AIDS/HIV, and sexual and gender dissidents of various, always changing, descriptions. Even more complex challenges to the coherentist assumptions about identity politics emerge when attention focuses on the question of the merger, exile, coalition, and secession of these constituencies, one from the other. Are gay men and lesbians “homosexuals,” or, more properly, gay men on one hand, and lesbians on the other? Are bisexuals “homosexuals” or traitors? Is there a single social movement that seeks to relieve the social suffering of women who regard femininity as an engine of repression and transsexuals who identify as “women born in men’s bodies”? Of people with AIDS, notwithstanding differences in
the ways they became infected and in their access to expensive new treatments?

Sexual orientation and sexuality movements are perhaps unique among contemporary identity movements in harboring an unforgivingly corrosive critique of identity itself, and they have launched significant activist and theoretical impulses in the direction of a "post-identity politics." The term "queer" was adopted by some movement participants in part to frustrate identity formation around dissident sexualities. And academic and street-level queer theory challenges the coherentist assumptions about identity politics. The keynote of this critique of identity is deep, strong constructivism. Starting with the finding that modern homosexual identities have emerged only in fairly recent historical times, queer theory suggests that they do not exist prior to, but are instead produced by, their politics. Noting that homosexual identity and heterosexual identity are diacritically related—that each negatively defines and makes possible the social urgency of the other—queer theory suggests that homosexual identities create a necessary condition for the oppression of homosexual people, that is, the existence of a class of heterosexuals anxious to confirm their immunity from the designation "homosexual." Queer theory argues that identity is not the core truth and safe zone of authenticity and authority posited by our most widely shared assumptions about identity politics; instead it suggests that identity may be part of the problem.2

This insight poses ethical questions that are particularly pressing for advocates of identity groups. K. Anthony Appiah states the issue:

Demanding respect for people as blacks and as gays requires that there are some scripts that go with being an African-American or having same-sex desires. There will be proper ways of being black and gay, there will be expectations to be met, demands to be made. It is at this point that someone who takes autonomy seriously will ask whether we have not replaced one kind of tyranny with another. If I had to choose between the world of the closet and the world of gay liberation, or between the world of Uncle Tom’s Cabin and Black Power, I would, of course, choose in each case the latter. But I would like not to have to choose. I would like other options....

It is a familiar thought that the bureaucratic categories of identity must come up short before the vagaries of actual people’s lives. But it is equally important to bear in mind that a politics of identity can be counted on to transform the identities on whose behalf it ostensibly labors. Between the politics of recognition and the politics of compulsion, there is no bright line.3

The coherentist assumptions about identity politics make Appiah’s statement appear merely disloyal. Those assumptions posit that identity preexists its articulation in politics, and thus assume away the constructive power of identity advocacy. They also assume away any difference between what Appiah, "as a" black gay man, might opt to do or become and the script set out for him in the politics of identity. But if advocacy constructs identity, if it generates a script which identity bearers must heed, if that script restricts group members, then identity politics compels its beneficiaries. Identity politics suddenly is no longer mere or simple resistance: it begins to look like power.

Appiah’s challenge rests on the critical insight that power can be exercised not only to make people do things they would not otherwise do, but also to make them become people they would not otherwise be. One important theory of this second function of power was offered by the Marxist political theorist Louis Althusser, who posited that ideology could "recruit[,]" subjects amongst the individuals... or "transform[,]" the individuals into subjects... by that very precise operation which I have called interpellation or hailing, and which can be imagined along the lines of the most commonplace everyday police (or other) hailing: 'Hey, you there!'” Althusser elaborated this notion of "interpellation" further:

Assuming that the theoretical scene I have imagined takes place in the street, the hailed individual will turn around. By this mere one-hundred-and-eighty-degree physical conversation, he becomes a subject. Why? Because he has recognized that the hail was "really" addressed to him, and that "it was really him who was hailed" (and not someone else).4

Althusser’s description of interpellation has often been criticized for its depiction of the "subject" as abject, as completely powerless to resist or
reshape the "hail" issued by ideology. That is an important criticism, but here I want to emphasize that his description is incomplete because it assumes that the interpellative call will always come from above, from a high center of power. Dealing with the challenge of Appiah’s observation, however, requires us to imagine that interpellation, with all its invisible subjections, can come from below, from within resistant social movements.

As long as law and legal institutions help to build and protect identity-generating social hierarchies, legal reformers must invoke identity. But whenever activists invoke identity in ways that “transform” it, they may approach and even cross the dangerous line that Appiah specifies between advocacy and coercion; they may “interpellate” subjects just as invidiously as Althusser’s imagined cop-in-the-street. How should a critical politics of law think about the possible coercive effects of identity-based advocacy? The features of queer legal movements that make them particularly in apt examples of the coherdentist assumptions about identity politics also make them correspondingly useful for probing this long-deferred question.

SOME PRELIMINARY QUESTIONS

Departing from the coherdentist assumptions about identity politics opens up some new versions of familiar problems. First, the coherdentist assumptions make it important to know whether a given identity claim carries an accurate description of the identity base. But the question of accuracy is much more complex if identity claims have the power to transform the very identities they describe. Then, an identity claim’s accuracy may be the product not of truth telling but of its own social constructive power. So the question of accuracy must be complemented by additional questions, such as: does a description of the movement have the effect of making people see group members to be “like that,” or does it make people see themselves as “like that”? Does a description of the group have the effect of bringing it into existence or repositioning its boundaries? To borrow a telling phrase of Ian Hacking, does a description help to “make up people”?5

Second and third, identity politics is frequently waged as a debate over whether a particular representational act, seen as a strategic move, is either useful or dangerous; and whether the act, seen as a self-interested or self-confirming gesture on the part of the person or subgroup making it, is either ethically acceptable or unacceptable. The first question is the question of strategy; the second is the question of “speaking for others.”6 On the coherdentist assumptions about identity politics, these questions are sometimes framed with great facility because everyone supposedly knows who is being benefited or harmed, and who is being spoken for by whom. But without those assumptions, the questions of strategy and of “speaking for others” bring with them prior questions: useful or dangerous to whom? Ethically acceptable or unacceptable according to what normative view of identification or representation?

Fourth, the coherdentist assumptions about identity politics make it possible to have an extremely rich discourse of loyalty among group members. This is a useful political tool, allowing collective action often at the expense of group-member liberty. The discourse of loyalty encourages group members to believe that they can identify each other readily, to measure the degree to which group members are behaving in a way that fosters the group’s interests, and to punish disidents for disloyalty. The coherdentist assumptions also make it possible to tell when one is speaking to outsiders, and thus support strictures against “washing dirty linen in public.” But without stable assumptions about who belongs to the group and what their interests are, and about who can speak for the group, disloyalty loses much of its sting as an accusation and a new normative project opens up, of intragroup and non-group-based justifications for political action.7

These reframed questions about identity politics are particularly pressing for advocates of identity groups. Movement advocates enact two different meanings of the term “representation.” They represent subordinated groups both in that they function as agents sent by the group on some mission for material change, and in that they manage the discursive rendering of the group. Keeping the second function of advocates in mind puts critical pressure on an important new branch of writing about the ethical obligations of lawyers representing disempowered social groups.8 It posits that lawyers acting for subordinated social groups have a duty to strive for transparency in representing them. Lawyers for social groups should take the client group as they find it in the social world, defer if at all possible to its selection of goals
and strive to “speak for” it only by saying what it would say itself if it were embodied as a lawyer. They are bound not only by the duties of loyalty normally imposed on lawyers representing clients, but the thicker and more culturally nuanced duties of loyalty imposed by coherentist identity politics—up to and possibly including a duty to withdraw from representation if the lawyer is not a bona fide member of the identity group. But as William H. Simon argues, lawyers’ decisions to represent one client and not another, and to resolve conflicts within and between client groups, will “affect the contours of organizational power” among the disempowered.9 Lawyers not only have special power to affect the goals and strategies of social groups10—they can do things that alter the social definition of the group itself. They can “make up people” in ways that weak constructivist views of group formation ignore.

To probe this form of power we need an ethics of representation that always keeps in focus the double meaning of “representation.” This ethical inquiry has to be conducted, I think, on an assumption that asking the advocates of gay, women’s, or disabled peoples’ rights to give up “like race” similes would be like asking them to write their speeches and briefs without using the word “the.” “Like race” arguments are so intrinsically woven into American discourses of equal justice that they can never be entirely forgone. Indeed, analogies are probably an inescapable mode of human inquiry and are certainly so deeply ingrained in the logics of American adjudication that any proposal to do without them altogether would be boldly utopian and is certainly beyond my aim here.11 The following pages suggest that only some “like race” arguments are unjustifiably coercive; others, even though inescapable, join sexual constituencies to race constituencies in a shared exposure to danger that identity politics cannot even apprehend, that identity-based coalition politics can at least address, and that may cause us to seek identity-indifferent norms of distributive justice for adequate terms of analysis.

IDENTITY AS IMITATION

The imitative relationship between gay rights and sexuality movements and the women’s rights movement has been vexed in the extreme, and warrants sustained ethical and strategic attention. In this essay, I defer that examination for a while, in order to focus on the problems raised by “like race” arguments.

The central legal achievement of litigation waged on behalf of the black civil rights movement was a historic succession of equal protection holdings: state-sponsored segregation was declared a violation of the Constitution, and the Court began to test its presumption (first announced in a case unsuccessfully challenging the Japanese-American internment) that other forms of race discrimination would also be found unconstitutional.12 Seeking to find room under the aegis of these key equality precedents, gay and lesbian advocates often find themselves saying that sexual orientation is like race, or that gay men and lesbians are like a racial group, or that anti-gay policies are like racist policies, or that homophobia is like racism.

Thus early antidiscrimination briefs filed by the ACLU Lesbian and Gay Rights Project sought heightened scrutiny by arguing that homosexuals are like racial minorities: they derived from the race discrimination cases four or five “indicia of suspectness” and then argued that homosexuals as a group shared them.13 The analogies appear in lawyers’ political rhetoric as well: during the 1993 debates over Clinton’s backfire effort to reform military anti-gay policy, one prominent gay legal advocate called the exclusion of homosexuals from the military “the apartheid of the closet”14 and movement activists urged Clinton to imitate President Harry Truman’s executive order banning racial discrimination in the military by abolishing anti-gay policy with a Trumanesque “stroke of the pen.”15

To be sure, the “like race” analogy is not the handiwork of lawyers only. At about the same time that national gay rights litigators were presenting “indicia of suspectness” similes to courts, activist/theoretical work argued that homosexuals should understand themselves to constitute a community similar to those based on minority ethnicity.16 And there are forms of imitation that seem almost unconscious, as if they were so deeply embedded in our culture of reform activism that they are repeated unthinkingly. For example, every time gay, lesbian, bisexual and transgendersed communities stage a massive demonstration in Washington, D.C., they not only imitate the black civil rights movement’s great 1963 March on Washington, but they do so in
dichotomy exists in speech and thought because it exists in reality[.]"²²

Strikingly, minoritizing understandings of sexual orientation tend to be realist and universalizing ones tend to be nominalist.

These framings reflect not merely a range of descriptive options: people have self-understandings tied to minoritizing and universalizing, to realist and nominalist, models of sexual orientation. This is in part why these matters have such sharp ethical bite.

Ontologies of race are similarly understandable as either universalizing or minoritizing, as either realist or nominalist. When gay advocates turn to legal argumentation, and particularly to equal protection rights-claiming, their "like race" arguments tap into a deeply universalizing model of race, the integrationist ideal. Martin Luther King's famous invocation of race indifference in his "I Have a Dream" speech exemplifies the universalism of much civil-rights-era activism. His prayer-like invocation of a future in which "my four little children will one day live in a nation where they will not be judged by the color of their skin, but by the content of their character" is shocking to left sensibilities now only because the political meaning of race universalism has become so much more ambiguous since 1963.²¹

Arguments that anti-gay policies are like racist policies often maintain this universalizing representation of race. Thus Ninth Circuit Judge William A. Norris, in his brave 1997 speech attacking the military "Don't Ask, Don't Tell" policy, likened it to de jure racial segregation (it was "nothing more than another variation on the theme of invidious discrimination"), likened resistance to it to the black civil rights movement (crediting "all the countless gay men and lesbians . . . who have had the fortitude to expose themselves to the forces of bigotry, just as the Little Rock Nine did 40 years ago on the steps of Central High [in Little Rock, Arkansas]")", and predicted that society and even federal judges would soon say of it—as Arkansas governor Michael Huckabee had recently said of racial segregation at Central High—"Today, we come to say, once and for all, that what happened here 40 years ago was simply wrong. It was evil. And we renounce it."²² This is very moving and very constructive, in part because it claimed only that the moral violation at Central High was like the moral violation of military anti-gay policy—not that blacks and gays are alike.

But often pro-gay advocates draw minoritizing models out of the
legal representations of race groups, invoking a pictorial resemblance between racial minorities and gay men, lesbians, and bisexuals. I will consider below the ethical implications of the bid to shift our understanding of race implied in these “like race” similes. But first it seems necessary to observe the way in which these gestures operate within and among sexual orientation constituencies. The fact that minoritizing understandings of homo/heterosexual difference are so adaptable to the “like race” approach to advocacy means that pro-gay lawyers will be more likely to use them, and maybe also more likely to respond with indifference, obtuseness, and even hostility when universalizing models are proposed. At the same time, the utility to lawyers of minoritizing models makes those models more salient, more widely diffused, and more likely to take the shape of an identity “script” than they would otherwise be. The questions of accuracy, strategy, “speaking for others,” and loyalty are all implicated in the resulting dynamics.

Consider two pictorialist “like race” arguments that have been particularly controversial: the arguments that gay men and lesbians are like racial minorities because they share an “immutable characteristic” or are a “discrete and insular minority.” Immutability was one of the “indicia of suspectness” derived by gay rights litigators from judicial opinions treating legislation disadvantaging race groups and women as presumptively invalid—as “suspect.” Some courts, in the course of justifying this aspect of equal protection doctrine, had observed that race and sex were “immutable characteristics,” and pro-gay advocates argued that homosexual orientation was one too. In a related move, gay advocates looked to “the most famous footnote in constitutional law,” Footnote Four of the Supreme Court’s 1938 decision in United States v. Carolene Products. In this footnote Justice Stone laid out a new vision of the judicial role in enforcing the equal protection clause. The proposal was that courts were particularly obliged to protect minority groups that are chronically vulnerable in the political process, and that a good way of limiting the resulting judicial interference with political decisionmaking would be to accord special protection only to groups that were “discrete and insular”—paradigmatically race, national, and religious minorities.23 Pro-gay advocates argued that homosexuals were similarly discrete and insular, and thus similarly vulnerable to exclusion and domination by legislative majorities.

Neither Footnote Four nor the many courts that observed that race and sex are immutable characteristics supplied their logic. The idea behind discreteness and insularity seems to have been that visually identifiable, socially and geographically isolated minorities were particularly susceptible to exclusion from or domination in the hurly-burly of pluralistic bargaining. The idea behind immutability must have been that race discrimination was particularly invidious because its victims could do nothing to sidestep it: blacks could not change the color of their skin, and thus come into compliance with the majority’s preference for whiteness.

Major criticisms can be launched against these theories of subordination. For example, Bruce Ackerman very cogently used organization theory to argue that anonymous and diffuse groups (homosexuals were his prime example) can be just as subject to chronic exclusion from the political process as discrete and insular ones;24 and an unexamined, and bizarre, premise of the “immutable characteristic” justification for heightened judicial protection seems to be that, if blacks could change the color of their skin, white majorities would be more justified in asking them to do so and punishing them with discrimination if they didn’t. (To jump ahead a bit, query whether gay advocates should have done anything to weave this twisted concept of racism’s wrongs deeper into the fabric of American law.) “Like race” pictorialism is, moreover, bad coalition politics because it concedes that groups that aren’t “like race” have no claim to courts’ equal protection solicitude;25 and it is bad for the development of equal protection theory, among judges and elsewhere, because it promotes the idea that the traits of subordinated groups, rather than the dynamics of subordination, are the normatively important thing to notice. The coherentist assumptions about identity politics may make it hard to see that group traits—like discreteness, insularity, a perception of immutability, a focus on closetedness—are often the effect rather than the predicate of subordinating dynamics; they certainly have worked to obscure Footnote Four’s primary focus on invidious majoritarian prejudice, and the immutability cases’ persistent, primary concern with the irrelevance of the purportedly immutable trait to legitimate state concerns. The critique of coherentist identity politics, and simple good equal protection doctrine, merge here in a rejection of “like race” pictorialism.
The ethics of representation adds another layer to this critique. To be sure, it was a bold move for gay rights advocates to say that homosexuals were marked by an “immutable characteristic,” inasmuch as a considerable proportion of anti-gay discrimination (unlike racial discrimination) is animated by a desire to convert lesbians and gay men to heterosexuality or to prevent gay people from coming into existence in the first place. And it was very much a part of the bold new outreach of post-Stonewall gay communities in the Castro and Greenwich Village to claim that gay men and lesbians lived in discrete and insular enclaves (like racial and ethnic communities). But these representations could work oppression, like Appiah’s “scripts.” The “like race” similes very much took the minoritizing view of homo/heterosexual definition, and tended to suppress, hide, or outright deny universalizing ones. This tendency reached its apogee when gay-rights advocates claimed that some very preliminary and equivocal scientific studies suggesting that human sexual orientation might have some biological components proved decisively that homosexuality was a biological trait (supposedly like race). The coherist criticism of these arguments would be that they are inaccurate. But they may have been worse than that: they may have “made up people” in the sense that they persuaded gay men and lesbians that they were “like that.” I think they did. In fact, I think they created a demand for gay gene experiments, which, in turn, did a great deal of interpellating of their own.

Second, how should we think about the problem of “speaking for others” involved in the selection of minoritizing representations for legal advocacy? The questions of strategy and “speaking for others” are linked here. Gay advocates who used these “like race” similes often did so because they believed they might work, might secure significant legal advances for gay men and lesbians across the board and relieve widespread suffering imposed on them by state-sponsored discrimination. “It doesn’t matter that the simile is a little inaccurate,” they would say; “judges fall for it, and once we secure some legal rights no one will remember the rhetoric we used to obtain them.” This justification balances material benefits against “merely” symbolic harms. That framing of the “like race” debate carries with it coherist assumptions about pro-gay identity politics, however, and sidelined the critical twist on the question: useful for whom? If the immutability argument had become the predicate for a legal victory, for instance, the resulting antidiscrimination case law could have left bisexuals out in the cold: after all, they can switch. And this was not merely a risk of future harm: the decision to run it displaced bisexuals as outsiders, nonmembers of the constituency on whose behalf gay and lesbian advocates spoke. This is a particularly striking case of interpellation from below, of representation working not only as service but also as power.

One way to avoid the ethical dilemmas posed here is to ask the question of loyalty. Here is a dangerous point in intra-group politics. When group members promote a duty of loyalty they implicitly ask internal dissenters to fall silent. But in this case, as in the case of double binds generally, the question of loyalty is a wash. Where pro-gay activists stake their arguments in universalizing forms, anti-gay activists can coopt them, saying homosexuality is a mere choice, or a mere set of acts from which one can abstain; anti-gay discrimination emerges in this formation as an effort to prevent the “spread” of homosexuality. But where pro-gay activists stake their arguments in minoritizing forms, anti-gay activists can coopt them too, representing homosexuals as pathological deviants who should be cured, killed, aborted, or at least hidden from view. Under these circumstances, it seems clear that the strategic move is not to ensure the ascendancy of one model or the other, but to inhabit their cross-cutting vulnerabilities more consciously.

So the ethical weight of advocates’ minoritizing representations must be gauged. The preferences of critical theory are pretty clear: lawyers should not impose minoritizing representations on the lively insubordination of queer politics. In stating that preference, critical theory has my deepest sympathies. But what about sincerely minoritized group members, and their desires for representation? What about the fact that sometimes minoritizing representations do work in the sense that they facilitate actual legal reform? (Imagine trying to argue a lesbian co-parent adoption case without making any reference to immutability.) And what about the note of communalism that sounds in so many critical appeals for universalizing, minoritizing representations? The current, wild race-to-the-courthouse individualism is disturbing precisely
because it lacks any mechanism for intra-communal dialogue; but if such a dialogue were possible, who would be invited to join in it, and how could it be conducted without coercion? However hard those questions are, they can be stated more clearly, and understood more simply, if we bracket, or pretermite, “like race” similes when we deal with them.

Between sexual orientation and racially identified constituencies

To be blunt, “like race” similes have caused considerable friction between gay constituencies and race constituencies. “To equate homosexuality with race is to give a death sentence to civil rights,” says Martin Luther King’s niece Alveda Celeste King.27 The African-American host of a call-in radio show objects to gay-rights ordinances, saying: “A lot of blacks are upset that the feminist movement pimped off the black movement. Now here comes the gay movement. Blacks resent it very much, because they do not see a parallel, nor do I.”28 Colin Powell, then Chairman of the Joint Chiefs of Staff and perhaps the most prominent African-American in mainstream politics, fought vigorously to maintain the military’s anti-gay practices, and specifically objected to “like race” similes: “Homosexuality is not a benign . . . characteristic, such as skin color or whether you’re Hispanic or Oriental. . . . It goes to one of the most fundamental aspects of human behavior.”29 These arguments go beyond criticizing particular “like race” analogies, like the immutability argument, to claim civil rights legalism as peculiarly dedicated to racial justice and to resist quite broadly the overall effort of gay constituencies to frame their justice claims in civil rights terms. What is at stake here? How should gay-friendly analysis understand these challenges and respond to them?

These questions suggest that the question of loyalty is a dangerous device for unpacking the ethics of representation. When the question is “loyal to whom?,” the coherently assumptions about identity politics make it easy to respond with glib composure: “To Us.” But those assumptions were put into question by the very issue whether bisexuals belong to the group of homosexuals, and are quite demonstrably useless in the face of black resistance to gay “like race” arguments.

The controversy over “like race” arguments surely turns in part on obligations that pro-gay advocates owe to people who suffer not, or not only, sexual orientation discrimination, but race discrimination. I take it as axiomatic that pro-gay advocates should do everything they can to pursue racial justice. And so a key question emerges: how is identity imitation a way of becoming involved, indirectly but materially, in racial struggles, and how should we understand the resulting representational opportunities and normative tensions? And attached to that question is a deeper one, which I believe is an unacknowledged threat to identity politics generally: does identity imitation provide or block access to deep, identity-indifferent questions of distributive justice?

The intermovement ethics of representation posed by “like race” claims has been articulated in several ways, and I will try to tackle each approach in turn: first, the assumption that African-American criticism of these arguments can only be homophobic, on the one hand, or that it is authoritative because of the social epistemology of its speakers on the other; second, the argument that civil rights for gay men and lesbians are a natural right which can’t be tampered with by an ethics of representation; third, the argument that gay civil rights claims should be muted because the stigma attached to same-sex sexuality, indeed to sexuality, might contaminate civil rights law for other constituencies; and fourth, the argument that gay “like race” articulations threaten either to transfer civil rights resources from racial minorities to gay constituencies or to transfer civil rights meanings between the groups in ways that will put racial justice claims in jeopardy.

1. To the challenge that gay “like race” arguments “pimp[ ] off the black movement,” coherently identity politics has two immediate answers, one amenable to gay coherentsists, the other amenable to black coherentsists. The former decry black criticism of gay “like race” arguments as manifestations of unregenerate anti-gay sentiment, while the latter call for deference to it as an authoritative expression by those in a position to know what is and is not “like race.” Neither response is any more adequate than the coherently assumptions upon which it is founded.

2. Believers in natural or formal rights have another answer: if gay rights are required by abstract justice, there can be no intelligible ethical
constraint on their assertion. That is, if rights are natural, primordial entitlements, they cannot justifiably be encumbered at all, ever. We have heard this argument in the marriage debates, when proponents of the gay marriage campaign assert that individual gay men and lesbians have a justice-based right to marry that supersedes any obligations arising from less primordial normativities (like the feminist critique of marriage, for instance). I take some satisfaction in the fact that, having left this boomerang, gay marriage campaigners encounter it again when individual gay men and lesbians defend their decisions to sue to obtain marriage licenses even though their cases would likely produce bad law because of bad timing or bad venue. As this dismal series of exchanges indicates, the natural rights argument is deeply tautological: in the absence of any agreed-upon metaphysics of formal rights, it merely posits that rights are definitional entitlements that trump all other claims. It is a deeply individualist, deeply foundationalist argument, just as hostile to collective approaches to law reform as it is to any political, historical, or institutional analysis of rights discourse. Finally, no one on the left believes the natural rights argument except when he or she seeks immunity from strategic or communal criticism: those who assert it in support of gay marriage would probably be unwilling to say that Thurgood Marshall was wrong to craft a strategic run-up to Brown v. Board of Education and to suppress opportune litigation when he could; and critical race theorists who defended rights discourse against the attack mounted by critical legal studies did so not in terms of formal rights but in terms of a rhetorically alert pragmatism.

3. An argument against “like race” assertions that may carry more weight worries about contagion that homosexual stigma could bring to other areas of the law. It is, after all, entirely plausible that the stigma attached to homosexuals would facilitate legal regression harming racial minorities. Full-time gay rights litigators often comment that, when they say “Your Honor,” they are often giving the judge his or her first opportunity to meet an openly gay person. Judicial homophobia is out there, and seriously affects the outcome of cases. What if the resulting bad law is worse than anything that would have emerged in a race discrimination case, but is cited and followed in later race discrimination cases?

Case law, because of its analogical developmental style, is apt for mediating such movement-to_movement harms. Indeed, the danger seems to have materialized in Bowers v. Hardwick (1986), aside from Romer v. Evans (1996) the most important Supreme Court decision on a gay-rights issue to date. Michael Hardwick was engaged in fellatio with another man in the bedroom of his own home when a police officer came into the room to serve an arrest warrant on him. (There are good reasons to think that this intrusion was part of a campaign of anti-gay harassment that the Atlanta police were conducting against gay men generally and against Hardwick in particular.) Prosecutors obtained a second indictment, this time on a charge of consensual sodomy. With the help of the ACLU of Georgia, Hardwick challenged the sodomy charge, claiming that Georgia’s statute violated his rights to privacy under the U.S. Constitution. The privacy theory he invoked depended on cases that women’s rights lawyers had won in their decades-long effort to establish rights to reproductive autonomy, particularly contraception and abortion. When the Supreme Court rejected Michael Hardwick’s claim that constitutional privacy rights protected him from arrest for a private, consensual act of same-sex sodomy, they did so in shockingly harsh and dismissive terms that involved the Court in an ugly display of homophobia. The majority opinion derided arguments upon which Hardwick had prevailed in the Court of Appeals as “facetious,” and the concurring opinion of Chief Justice Burger gratuitously cited Blackstone to describe same-sex sodomy as “the infamous crime against nature,” “an offense of deeper malignity” than rape, a heinous act “the very mention of which is a disgrace to human nature.”

As disastrous as this defeat was for pro-gay legalism, it was at least as ominous for women’s rights to reproductive freedom: Hardwick so deeply undermined the foundation of Roe v. Wade (1973) that abortion rights advocates seriously faced the possibility that the Supreme Court could overturn it. In hindsight, it seems at least possible that some justices welcomed Hardwick onto their docket because its association with a stigmatized group gave them a chance to slam the door hard on privacy doctrine, and to put Roe in jeopardy.

If this is what happened—of course no one can say for sure whether it did or not—the gay rights litigation campaign set the stage for a crisis in the women’s reproductive freedom campaign. But if women’s
rights advocates had approached Michael Hardwick and his lawyers when they were considering whether to “make a federal case of it,” and had argued that the stigma associated with male-male fellatio was dangerous for the continued stability of reproductive rights that were crucial to women, they would have implicitly asked him to accept that stigma as a premise for his action. It was entirely appropriate to argue that his case should not be framed as a privacy claim because that misrepresented the public nature of the harm inflicted on him, or to argue that he should not file a lawsuit because the law in his district was not ripe to support his claim, or even to argue that fitting his claim to the existing structure of reproductive rights distorted them, but to ask him to forgo a claim because its overlay of stigma might injure others is to ask him to cooperate with—indeed, by his silence to reaffirm—a profound insult to his dignity. Asking homosexuals to modify their justice claims precisely because they are exposed to acute and almost autonomic vilification is to ask them to accommodate, even accept—indeed, through the “speech act of a silence,” to endorse—that condition. That’s asking too much.

4. The gravest argument against “like race” claims, and civil rights imitation generally, is that they may exhaust or divert civil rights resources—hard resources like jobs or funds for police retraining, or soft ones like a social/cultural appetite for antidiscrimination—away from the traditional constituencies of civil rights law to new constituencies that need it less. This is, I think, what some African-American critics apprehend when they object to gay rights legislation because it would “steal away the civil rights from under our very noses,” when they worry that “the civil rights bandwagon is getting so full that it’s not moving anywhere.” It seems extremely plausible to me that gay men and lesbians—who, relative to African-Americans, are whiter and far more likely to be economically just fine, thank you—don’t need antidiscrimination protection as acutely as racial minorities but are more likely to get it. If antidiscrimination protection is a zero sum, moreover, we will not only get it, but take it away from people of color.

Particularly where hard resources are involved, it is alarmingly easy to see that winner-take-all civil rights contests can take shape. Affirmative action programs are rife with such contests, which pit one recognized civil rights constituency against another. For instance, in minority business enterprise programs, blacks and latinos have had ample opportunity to observe white women speed ahead of them in contests for finite resources. Increasingly, we must tackle the problem as a question about whether a particular racial group with a unique history of racial disadvantage should take resources earmarked for affirmative action away from another racial group with a quite different history of racial disadvantage: for instance, magnet schools can become so attractive that their admissions policies are fraught with multiracial conflicts in which the position of Asian-Americans is deeply anomalous.

If we maintain coherency assumptions about identity groups, the problems are hard enough. We have about three choices, then: we could engage in a crude exercise in ranking oppressions, or undertake a distributive justice analysis borrowed from liberal theory, imagining the contesting groups as big, homogeneous individuals, or (the perennial cop-out of left multiculturalism) object to the size of the pie and go home. But two kinds of problems can make it hard to keep neat fences around resource disputes. First, a group seeking to engage in a zero-sum contest might not already have a civil rights identity, so the question whether it should be construed in identity terms needs to be answered first. Should learning disabilities be understood to be “like race” such that allocating educational resources to LD children is done through an antidiscrimination paradigm? Here distributive justice meets identity politics, and the hardest problem is dealing with their analytic incommensurability. And second, the resource at stake might not be hard, like a finite public school budget, but might involve malleable cultural tolerances. Was the “chonics” controversy about budget allocations dedicated to bilingual education or about respect and recognition? Here distributive justice meets critical theory, and the encounter throws up another range of problems sounding in analytic incommensurability. African-American objections to gay “like race” claims, understood sympathetically, involve both challenges.

To be sure, black critics of gay “like race” claims often challenge the amenability of sexuality to any antidiscrimination identity. But the argument that homosexuality is not a “status” “like race” but a
classification based on conduct is deeply mistaken. This is not because the converse is true. Homosexuals do engage in homosexual acts (praise be). Rather, the distinctive danger attached to people currently designated homosexual arises because the relationships between sexual orientation identity and homosexual conduct are so slippery that they are always capable of becoming the vehicle for homosexual panic. 42 This doesn't make sexual orientation "like race," but it is (I think) a fully sufficient reason to invoke antidiscrimination norms to protect those harmed when vilified conduct and identity pinch.

A deeper challenge arises in the second problem, the claim that gay rights claims reallocate resources away from racial minorities that desperately need them. While it is quite possible that they may do so, in two important settings where this criticism was raised—the gays in the military fracas, and the conflict over gay rights ordinances—the impact of gay rights claims on black civil rights is better understood not as a struggle over a concrete zero-sum resource, but as a linguistic process in which black and gay civil rights constituencies, having become signs of one another, interact to shape soft limits affecting both constituencies.

Gay advocates sought a repeal of military anti-gay regulations in expressly "like race" terms. It would be possible to see this effort as a bid for hard resources. The analysis would posit repeal as a way to increase the number of white people eligible for a limited supply of government subsidized jobs. It would anticipate that white decision-makers in the military would feel more social solidarity with white gay troops than with black ones of any sexuality, and would promote the former more readily than the latter. Seen in this way, "lifting the ban" would have transferred a public resource from racial minorities to a new group of eligible whites.

This is an easy argument to make, so it is particularly striking that virtually no one made it. 43 A different justification for military anti-gay policy—"unit cohesion"—won the day, and it carries a subtler racial meaning. Apparently, the integration of women into the military, combined with the energetic sexual controversy provoked by the 1993 debates over military anti-gay policy, contributed to an upsurge in the number of sex harassment complaints. In those complaints black men have been disproportionately accused. 44 It seems at least likely that this disproportion emerges because black men are perceived by white women as sexually threatening in a way that white men are not. That is to say that disruptions in the male homosocial environment of the military has increased the level of sexual hostility there; and that sexual hostility in the U.S. defaults so readily to racialized tropes that (especially) black men in uniform face heightened danger.

I can't prove it, but I think that Colin Powell put in his ferocious defense of military anti-gay policy—a defense in which "unit cohesion" was the centerpiece—on something like this reasoning. But note that this is not a resource allocation problem. To make it look like one, you would have to say that the "good" of safety in the sexual culture is a finite resource that gay advocates implicitly propose to appropriate from black men in particular. But sexual tranquillity is not a finite resource: everyone could have it just as easily as no one. Under these circumstances it seems more direct to say that the ethics of "like race" arguments need to be worked out on a hypothesis that racial and sexual meanings are interconnected in complex discursive webs. Perhaps the best heuristic for understanding ethical challenges to "like race" arguments, then, is not the zero-sum competition between divergent coherentist identity groups, but the dynamics of language.

How those dynamics might work is suggested by a second controversy in which African-American critiques of gay "like race" claims were even more salient: the furor over gay rights ordinances and their attempted repeal through state-constitutional amendments. The centerpiece of anti-gay resistance here was a claim that "gay rights are special rights." It is conventional to read this claim to say "not like race," As Jane Schacter and Margaret M. Russell have amply documented, 45 conservative activists running Special Rights campaigns amplified the voices of African-American critics who said, "Gays were never declared three-fifths of human by the constitution," "I can't go into a closet and hang up my race when it's convenient," and "We say, 'No.' We will not agree to them saying they're just like us." 46 But more covertly the Special Rights campaign deployed a "like race" claim which mediated race and sexual orientation as indicators of each other, and which created rather than allocated a zero sum of antidiscrimination commitment.

The key is the rich range of signification packed into the term "special
The pro-gay ordinances that gave rise to the struggle I am describing added "sexual orientation" to a list of grounds already declared out of bounds for employers and public accommodations to consider. These grounds included race, ethnicity, and national origin—the classic civil rights grounds—and a hodgepodge of additional grounds that many civil rights laws now specify, from disability to marital status to veteran status and so on. The idea was to add "sexual orientation" to this list.

"Special rights" fundamentally misdescribed these reforms. Civil rights legislation bans especially bad treatment based on race, sex, and other specified grounds, and provides remedies and thus deterrence designed to bar victims of discrimination on a level playing field with everyone else. It is formally neutral—men can sue for sex discrimination, whites can sue for race discrimination. Traditional civil rights legislation is "special" only in the sense—held by almost nobody— that it invidiously removes a few arbitrarily distrusted grounds of decision from the free marker. But there are three versions of antidiscrimination enforcement, all of them associated historically with very specified attention to racial minorities, women, and disabled people, that are more or less accurately described as "special treatment."

First, the entire "suspect classification" and "tier of scrutiny" edifice built in Supreme Court doctrine under the equal protection clause recognizes that blacks are more likely to be hurt by race discrimination than whites, that women are more likely to be hurt by sex discrimination than men. This approach moves beyond formal equality to anti-subordination and is, in one sense, "special": when considering any given axis of discrimination, it gives the chronically subordinated group particularized attention.

A second deviation from formal equality appears in arguments that equality requires accommodations to the particular needs of a protected group. These arguments are historically associated with efforts to integrate women and disabled people. And they involve "special treatment": when we say that women's equality rights include the right to pregnancy leave or that a wheelchair user's equality rights include the right to a ramp, we are saying that there is something particular, something distinctive, something special about their situation that requires attention. (The sophisticated justification for special rights of this kind is to point out that they are necessitated by norms that are special in themselves: workplaces that appear neutral but really assume male workers, public spaces that appear universally accessible but actually assume ambulatory users. But that justification only intensifies the specialness of this form of special rights.)

At the time of the ordinance struggles, both of these takes on antidiscrimination were controversial, but a third take—affirmative action—was the subject of a racial-justice firestorm. Like antisubordination models of antidiscrimination, affirmative action notices that blacks not whites need special assistance in a racially stratified society, that women not men are likely to be bypassed when higher-paying jobs are being distributed. And like "special accommodation" models of antidiscrimination, affirmative action goes beyond prohibiting discrimination to require affirmative steps to alleviate its effects. Affirmative action is "special treatment," then, in the sense that it undertakes positive steps for particular groups. Of course, by no stretch of historical accuracy is it a "special right": mainstream and constitutional law debates over affirmative action have stalled on the question whether it is permissible, never having gotten to the question whether it is legally mandatory. But it is a special remedy in several senses of the term.

The "special rights" campaign against gay rights ordinances was designed to free-rise on a strong anti-affirmative action backlash, and on milder backlashes against antisubordination and special accommodation models of antidiscrimination, that were primarily about white resentment of race-based redistribution, less acutely about male resentment of sex-based redistribution, and probably only marginally about accommodations for physical and other disabilities. In that sense, "special rights" subliminal "like race" analogy harmed gay men and lesbians, rather than helping them. At the same time, four elements of the "special rights" campaign hurt racial minorities and women. First, the association of homosexuals with various special-treatment backlashes united social conservatives with libertarian conservatives, facilitating a formidable coalition. Second, to the extent that the three forms of "special treatment" antidiscrimination focus primarily on racial and gender justice, the latter were under an unacknowledged subtextual attack. Third, the stigma attached to homosexuality made for an easy
identification of the “queer”—“differing in some odd way from what is usual or normal: strange, . . . peculiar”—with the “special,” and muffled pro-gay activists when they tried to defend the ordinances as “normal” civil rights law. And fourth, possibly most damaging, the “special rights” accusation generated popular confusion about the relationship between formally neutral civil rights laws and affirmative action: if people could be convinced to vote against the former thinking they were the same as the latter, the very ideal of civil rights legislation was undermined.

This episode amply justifies African-American alarm about gay civil rights “like race” claims. But note that the question is not “will gay men and lesbians steal the civil rights from under African-Americans’ very noses?” but “will an unholy alliance of social and libertarian conservatives do so?” The danger arises not because blacks and gays are alike or different, but because they can be flashed as signs of each other in a discourse that operates so smoothly it can remain virtually silent. And antidiscrimination fatigue is not the exogenous starting point of this operation, but its product. This pattern doesn’t support ethical constraints on gay men and lesbians deciding whether to make civil rights claims, though it does suggest that imagining a rights-claiming project without anticipating or resisting the racial resignifications it may produce is to fail to imagine it well at all.

At the “intersections”

We have become accustomed to thinking of the intersections between sexual orientation and race as instantiated in persons—the black gay man, the Latina lesbian—who inhabit a subordinated position in two (or three) categorical systems and who are thus particularly affected by anything said about their interrelations. But if my reading of “like race” claims in the gays-in-the-military debate and the Special Rights campaign is right, the seams joining and dividing sexual orientation and race are everywhere.

In a contribution to the “intersectionality” literature that expressly addresses feminist “like race” arguments, Trina Grillo and Stephanie M. Wildman discourage white women from using “like race” analogies to illuminate sexism. They note that “Analogizing sex discrimination to race discrimination makes it seem that all the women are white and all the men African-American. The experiential reality of women of color disappears.” Two ontological claims about racial and gender categories underlie this critique, and I would suggest that the ethics of intersectional representation are better understood without them. First, Grillo and Wildman posit that “To analogize gender to race, one must assume that each is a distinct category, the impact of which can be neatly separated, one from the other.” But it seems to me that the chief dangers of intersectionality arise not because the categorical systems are supposed to be independent, but because they are understood to impinge quite immediately on one another. And second, Grillo and Wildman posit that it is the reality of women of color that is obscured; similarly, Jane Schacter warns that “[t]he categorical lines drawn in the discourse of equivalents around protected groups erase or distort the identities of people who are part of more than one group.” For all their critique of feminist essentialism, these and many other “intersectional” formulations retain a strong ontological commitment to real identities. But it seems to me that “like race” arguments pose hard ethical challenges at intersections because they place the ontology of identity itself at risk in ways that are differently controversial in racial and sexual orientation discourses. To see this we need to shift from persons to discourses, from coherentist identity politics to critical theory.

If intra-gay identity wars can be roughly described as a tension between universalizing and minoritizing and between realist and nominalist understandings, so can disagreements about the ontology of racial differences. Minoritizing understandings emerge in ethnic solidarity, politics-of-recognition multiculturalist, and nationalist discourses of race; and universalizing understandings emerge in integrationist, hybridizing, mestiza, and strong-social-constructivist models. I will describe the related, less notorious tensions between realist and nominalist understandings in a moment; for now I’ll simply note that they are implicated here just as they are in the framing of sexual orientation. My proposal is that gay “like race” arguments can tighten or loosen these tensions within racial discourse, and that this meta-intersectionality, if you will, is possibly more “political” than the face-to-face, largely phenomenological intersections emphasized by Grillo and Wildman and others. Moreover, the interpellative
difficulties that vex intra-gay ethics of representation are recapitulated here across a broader range of differences.

To put it simply, a “like race” argument that A is like B also implicitly claims that B is like A. Operating meta-intersectionally, “like race” claims can create interpellative links between gay nominalizing representations and racial universalizing ones; or, almost but not quite conversely, between gay nominal representations and racial realist ones.

Consider an example of the former case. When gay rights advocates began to invoke the “immutable characteristic” simile, they were working from a set of scattered, sketchy rationales occurring at happenstance in the race and sex discrimination cases. By translating these “immutable characteristic” references into an “indicia of suspectness” checklist, and implying that its items were not merely sufficient but necessary conditions for heightened judicial protection, they invited judges to “harden up” the law in this area. Which is just what judges did: federal district courts increasingly stipulated for immutability not as a mere factor but as a prerequisite for heightened scrutiny, even as they persistently concluded that sexual orientation was not an immutable characteristic. This development has made it harder for groups distinguished by theoretically mutable characteristics—fat people, for instance—to make antidiscrimination claims (why don’t they just lose weight?). Moreover, the “immutable characteristic” rationale is springloaded to harm racial minorities: its hidden assumption that racial discrimination would be morally acceptable if blacks could change the color of their skin leaps into prominence when employers tell black women on their payrolls that they can’t wear braids, or Latino employees that they can’t speak Spanish (why can’t they just conform to white cultural norms?). Gay advocates making the immutability argument, then, bear some responsibility for a legitimation of universalizing understandings of race and a delegitimation of—indeed, a constriction of the social space for—minoritizing ones.

Almost but not quite conversely, there is a subtle tension between queer nominalism and a certain tendency of critical race representational choices to hew to realism. It seems to me that racial realism is not the sole property of nationalist and other minoritizing racial understandings; it appears also in hybridizing/mestiza/strong-social-constructivist versions of race-universalism. To look at just one example, in a coda “On Categories” to her book *The Alchemy of Race and Rights*, Patricia J. Williams makes a series of nominalizing gestures: “while being black has been the most powerful social attribution in my life, it is only one of a number of governing narratives or presiding fictions by which I am constantly reconfiguring myself in the world.” “[T]erms like ‘black’ and ‘white’ do not begin to capture the rich ethnic and political diversity of my subject.” So far so nominalist. But Williams concludes: “I prefer ‘African-American’ in my own conversational usage because it effectively evokes the specific cultural dimensions of my identity, but in this book I use most frequently the term black in order to accentuate the unshaded monolithism of color itself as a social force.” These are the last words in this important strong-constructivist, racial nominalist book. I suppose that we could all agree that they bring in a certain realism.

Queer theory, on the other hand, is notoriously ready to abandon realism in its enraptured embrace with nominalism. The result in legal argumentation is a shift away from “like race” pictorialism and toward remedial theories that focus on the distinctive social and discursive dynamics of gay injury. My own argument that equal protection arguments should forefront not “who we are but how we are thought,” Kendall Thomas’s argument that sodomy laws should be understood to violate not a right to privacy but a right to be free from cruel and unusual punishment; Lisa Duggan’s recommendation that “like race” arguments be replaced with like-the-relationship-between-the-state-and-religion; Toni Massaro’s argument that equal protection claims should forgo “thick” social description and go “thin”—all of these are crafted to make room for universalizing, particularly queer, understandings of sexual orientation in civil rights discourse.

For reasons known only to themselves, a majority of the Supreme Court in 1996 issued a favorable gay rights decision, *Romer v. Evans*. This important decision adopts an extreme form of nominalism. Holding Colorado’s Amendment 2—which had barred the state in any of its subdivisions and agencies from entertaining any “claim of discrimination” based on “homosexual status”—unconstitutionally irrational, the Court persistently refused to base its decision on any social description of the group harmed by the challenged law. It describes and populates
the class under consideration in a self-consciously nominal gesture: "the named class, a class we shall refer to as homosexual persons or gay men and lesbians[.]" This is a "single named group" defined by "a single trait." "Homosexuals, by state decree, are put in a solitary class": the Amendment "classifies homosexuals . . . to make them unequal to everyone else"; "It is a classification of persons undertaken for its own sake" and in that sense it is a "status-based enactment". 

It remains uncertain whether Romer's nominalism will appear in other equal protection decisions. But it is clear that, if it appears in the context of race discrimination, it will be inflicted by an important racial trope that has no counterpart in the constitutional discourse of sexual orientation: the maxim drawn from Justice Harlan's dissent in <i>Plessy v. Ferguson</i>, that "our Constitution is colorblind." If understanding the distinctive dangers of race requires attention to "the unshaded monolithism of color itself as a social force," a queer shift toward nominalism could contribute, perhaps dangerously, to its doctrinal erasure. It seems to me that this is an ethical problem for gay advocates to consider, and that to do so we will have to make simultaneous use of distributive and critical tools that are not now designed to work well together.

**CONCLUSION**

When we say that something is "like race," we imply that we know what race is like. But do we? Ever since the Supreme Court's decision in <i>Adarand Constructors v. Pena</i>, which held that race-based affirmative action could be subjected to the same degree of judicial scrutiny that courts must apply to acts of overt anti-black racism, there has been a strong strategic reason for equal protection rights-claims to take a new form, "not like race." As Stuart Minor Benjamin indicates in a fascinating article on Native Hawai'ian rights claims, the considerable edifice of special programs now dedicated under federal law to federally recognized mainland Indian tribes and under Hawai'ian state law to Native Hawai'ian cultural preservation could be erased from the landscape if native groups were understood to be "like race." This reversal in the normative content of intra-group comparisons could hardly have been anticipated twenty years ago, but it is now part of the context of any "like race" claim.

In a situation this volatile, in which so many different kinds of social harms are so finely connected, it seems important to exercise considerable caution. Working within coherentist identity constituencies is not enough: forming coalitions across them, though crucial, is also not enough. When identity can be deployed to harm its own subjects, the search for equal justice also requires that we move beyond identity politics altogether.

**NOTES**

1. The best survey of this broad effort for legal change is the excellent monthly newsletter Lesbian/Gay Law Notes, ed. Arthur S. Leonard, New York Law School, 57 Worth St., NY, NY 10013.


7. For a fascinating examination of loyalty to an identity group, see Ronald Garrett, "Self-Transformability," <i>S. Cal. L. Rev. 121</i> (1991). David B. Wilkins provides a rigorous examination of how a group member who affirms loyalty to the
group should respond when group-based demands come into conflict with his individual ethical commitments; see "Should a Black Lawyer Represent the Ku Klux Klan?", 63 Geo. Wash. L. Rev. 1030 (1995).


13. Under the Equal Protection Clause, courts recognize some classifications as "suspect" because their use in legislation or regulation always raises a judicial suspicion that invidious discrimination is at work. State action disadvantaging members of a "suspect classification" is subject to heightened judicial scrutiny. The "indicia of suspectness" were group traits that courts had often noted when holding that race groups and women were differentiated by "suspect classification." For a gay rights brief hypostatizing these traits, see Brief of Amici Curiae Lambda Legal Defense and Education Fund, Inc., et al., in Watkins v. United States Army, No. 85–4006 (9th Cir.) (Aug. 30, 1988).


20. Ibid. at 19.


30. For discussion of a case in which a judge dismissed a domestic violence complaint involving a lesbian couple with disparaging remarks about "your funny relationships," another in which, in ruling against a gay plaintiff challenging the military’s anti-gay policy, the judge referred to him as a "homo," and another in which the judge sentenced the murderers of a gay man to a less-than-life sentence saying he didn’t "care much for queens," see David S. Buckel, "Unequal Justice for Gays in Hostile Courtrooms," National L.J., August 18, 1997, at A20.


37. Moore, "King’s Niece" (quoting Alveda Celeste King).
43. The closest thing I’ve found is the strangely feteful prediction that “lifting the ban” might increase the appeal of military service to black gay men and lesbians and to low-income white homosexuals and thus change the demographics of the armed services, of John Sibley Butler, "Homosexuals and the Military Establishment," *31:1 Society* 13 (1993).
44. Steve Komarow, "Army Forced Rape Charges, Women Say," *USA Today*, Mar. 19, 1997, at 1A (reporting NAACP’s charges that, in all thirteen criminal sex harassment investigations at the Navy’s Aberdeen Proving Ground, defendants were black men and accusers were white women).
46. Williams, "Blacks Rejecting." Social conservatives have encouraged African-Americans to regard gay civil rights claims with alarm. In his notorious "What Homosexuals Do" speech to Congress, then-Representative William Dannemeyer warned that "The road to Selma did not lead to the right to sodomy... The freedom train has been hijacked." 135 Cong. Rec. H. 3511, 3512 (June 29, 1989). In the gays-in-the-military debate of 1993, the Reverend Lou Sheldon, head of the evangelical Christian Traditional Values Coalition, repeated the simile: "The freedom train to Selma never stopped at Sodom." Cindy Loose, "Gay Activists Summon Their Hopes, Resolve," *Washington Post*, Apr. 18, 1993, at A1. The degree to which African-American alarm was indigenous, and the degree to which it was fomented by white conservatives, is unclear: I’ll suppose it was some of both.
47. For a discussion of the attenuation of this strand of libertarianism in the U.S., see Kelman and Lester, 200–201, 298–99 nn.32–35.
49. For an examination of the extent to which this was an explicit goal of the conservative attack on "special rights," see Karen Engle, "What’s So Special about Special Rights?" *75 Denver U. L. Rev.* 1265–1303 (1999).
57. Thomas, "Beyond the Privacy Principle."
61. Romer at 1628.
62. Romer at 1628.
63. Romer at 1625.
64. Romer at 1629. See also id. at 1625 ("change in legal status"; "The change that Amendment 2 works in the legal status of gays and lesbians in the private sphere").