ABSTRACT. Existing accounts of early gay rights litigation largely focus on how the suppression and liberation of gay identity affected early activism. This Note helps complicate these dynamics, arguing that gay identity was not just suppressed and then liberated, but substantially transformed by activist efforts during this period, and that this transformation fundamentally affected the nature of gay activism. Gay organizers in the 1950s and 1960s moved from avoiding identity-based claims to analogizing gays to African-Americans. By transforming themselves in the image of a successful black civil rights minority, activists attempted to win over skeptical courts in a period when equal protection doctrine was still quite fluid. Furthermore, through this attempted identity transformation, activists replaced stigmatizing medico-religious models of homosexuality with self-affirming civil rights-based models. This identity transformation through analogy cemented gay rank-and-file perception of the social treatment they faced as unjust, and helped determine what remedies gays would seek. For example, defensive gay litigation of the 1950s soon gave way to the affirmative impact-type litigation of the civil rights movement. Similarly, in the image of the 1960s racial justice movement, 1970s gays began to pursue legal acceptance of gay marriage rather than first seeking intermediate relationship recognition. Thus, analogies and identity claims can be useful tools for perceiving and remedying oppression. They should, however, be tools that unite, not divide groups: gays and blacks, especially, should recognize their (contingent) commonalities, created as gays remade themselves in the image of blacks.

AUTHOR. J.D. expected 2010, Yale Law School; M.Phil. (History) 2007, University of Cambridge. Thanks are owed to Professor Reva Siegel and Mark Shawhan for reading several earlier drafts. Thanks also to Professors Douglas NeJaime, Robert Leckey, Nicholas Parrillo, and Claire Priest for extremely helpful comments. This Note was the co-recipient of the Yale Law School Joseph Parker Prize in Legal History (2008-2009).
NOTE CONTENTS

INTRODUCTION 318

I. A NOTE ON THEORY: GAY IDENTITY AND HISTORY 324

II. DENYING GAY "IDENTITY" 328
   A. Early Gay Activists and the Denial of Identity 329
      1. A False Start 329
      2. Eliding Group-Based Arguments: Due Process and First Amendment Claims 331
      4. Modern vs. Contemporary Theoretical Perspectives 337
   B. Judicial Responses 338

III. CREATION: CONSTRUCTING LEGAL IDENTITY THROUGH THE RACE ANALOGY IN COURTS 340
   A. Choosing a Bounded Identity Model 342
   B. Shared Harms—Shared Context 344
   C. Constructing New Self-Perceptions 346
   D. Doctrinal Developments and the Stabilization of Identity 352
      1. Doctrinal Developments: A Formal Minority Group 352
      2. A Gay Movement 354
      3. The Failure of Analogies 355

IV. THE RACE-SEX ANALOGY 357
   A. Family Rights: An Area of Disanalogy 358
   B. Family Rights as Marriage Rights and the Race-Sex Analogy 360
   C. The Continued Reliance on Analogies in Marriage Litigation 364
      1. Stereotyping vs. Subordination vs. Classification 365
      2. Private/Fundamental Issues vs. Public/Secondary Issues 367

CONCLUSION 370
INTRODUCTION

In today's battle over gay rights, combatants draw upon powerful social and cultural discourses to frame gays in diametrically opposite ways. Opponents of gay rights use traditional religious understandings of sexuality and gender roles. Supporters, in turn, utilize language of civil rights that constructs gays as a legal minority group, both to gain judicial solicitude and to sway broader audiences.

This Note suggests that the construction of gay identity, to a large extent, determines the extent of rights that individuals attracted to the same sex enjoy. Theorists have noted, put simply, that a major function of individual identity is to establish the relationship between the individual and society. An individual's self-perception helps determine where she thinks she fits within society, and the role she plays in it; the way society perceives the identity determines which roles will be granted her, and which denied. That gays are now able to use legal minority group identity to mediate their relationship with society, rather than rely on medicine or religion (which construct gay identity in very different ways), has completely resituated gays within society, both to themselves and, increasingly, to the general public. It has affected which rights gays have sought and the ways in which they have sought these rights.

While the use of law to suppress identity generally has been explored, the relationship between the substantive development of, and alteration in, elements of minority identity (whether suppressed or not) and litigation strategies bears further discussion. Gay rights history readily lends itself to


2. The relationship between identity and litigation has thus far focused on the use of law to suppress and liberate identity. Professor William Eskridge, the foremost legal historian on gay rights, has covered legal and doctrinal developments in gay rights litigation across its history, see, e.g., WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET (1999) [hereinafter Eskridge, Gaylaw]; William N. Eskridge, Jr., Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981, 25 HOUSTON L. REV. 817 (1997) [hereinafter Eskridge, Challenging], and has developed a theory on the doctrinal trajectory that minority movements take, see WILLIAM N. ESKRIDGE, JR., Channeling: Identity-Based Social Movements and Public Law, 150 U. PA. L. REV. 419 (2001) [hereinafter Eskridge, Channeling]; William N. Eskridge, Jr., Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century, 100
this analysis, given a rich theoretical literature on the subject of sexuality and identity. This Note specifically addresses the analogy between race and sexuality made by midcentury gay rights activists, which played a major role in altering gay identity (perceived from within and without the community) and thus gay litigation methods. While the Note focuses on the race analogy, other legal developments have, of course, also played roles in developing the way we think of today's gay community.

As Part II of the Note indicates, the debate over the race analogy has raged since the beginning of the gay rights movement. As gay urban enclaves grew in the post-World War II era, greater visibility led to greater societal suppression, which in turn led to greater gay mobilization.3 Using the analogy, a few early gay organizers argued that gays, like African-Americans, are a minority, that discrimination against them should bear the same stigma as racial discrimination, and that judges should be as attentive to gay rights as they are to racial justice. However, the mid-century “homophiles” who ran the first modern gay rights organizations initially challenged the analogy between race and sexuality.4 At the same time, these leaders needed new ways to articulate the relationship between homosexuals and society as a whole in order to aid mobilization efforts. Thus, in their litigation, they resisted allusions to homosexual “identity” and attempted to disrupt group status altogether. Using new scientific models, they argued that homosexuality consisted simply of certain acts, urges, and experiences that were common to all human beings, rather than to one identifiable group of individuals.

Courts and politicians, however, continued to rely on traditional psychiatry and religion to identify gays as a group and emphasized the perverse,

---

3. See Eskridge, Gaylaw, supra note 2, at 57-59.
4. Homophile is the term that many homosexuals in the 1950s and 1960s used to refer to themselves.
homosexual identity of these organizations. Gays themselves internalized many of these claims. Unable—and often unwilling—to dissolve the separate homosexual group identity bestowed upon them, activists responded to the majority’s construction by creating their own, kinder version of a gay identity, analogizing themselves to African-Americans. This analogy provided a way for gays to articulate an identity which explained how they fit into society and their belief that, while differences existed between homosexuals and heterosexuals, they were not significant. The similarity of the contexts of oppression that blacks and gays faced ensured that the analogy resonated for much of the homosexual, and some of the heterosexual, audiences. Slowly, the identity model that grew from the analogy, combined with other sociocultural events, took root and transformed the way gays saw themselves, from medical patients and outcasts into a legal minority in search of civil rights. In the process, Part III concludes, gay identity began to stabilize on its own terms. While the race analogy continued to be used to transform public perceptions, gays were no longer required to invoke racial identity to describe themselves as a legal minority—they began to be understood as such in their own right.

Even as the race-sexuality analogy diminished in importance in the early 1970s, historical developments during the same period solidified dependence on a race-sex analogy in litigation, as Part IV describes. The racial justice movement initially provided no purchase for the family rights concerns of gays. Its focus remained on the right of whites and blacks to intermarry. Gays, in turn, rejected marriage as a desirable relationship form in the 1950s. However, at the end of the following decade, as the women’s rights movement gained momentum, its advocates began analogizing the position of women to that of racial minorities for the first time. This led to a sudden change in the approach to relationship rights in the gay movement. Gays, who less than two decades earlier scorned the idea of gay marriage, now drew both from the racial justice movement’s focus on intermarriage and the women’s movement’s use of the race-sex analogy to argue that prohibiting individuals from marrying based on their sex was as impermissible as similar prohibitions based on race. The race-sex analogy allowed, and perhaps encouraged, gays to leapfrog demands for incremental same-sex relationship benefits (such as domestic partnership rights) and focus on the issue of marriage. Finally, the Part concludes by

5. William Eskridge describes these methods of activists as moving from a “politics of protection,” concealing their identity, to “a politics of recognition,” adopting their identity. Eskridge, Some Effects, supra note 2, at 2161-79.

6. It is unclear whether gays in the early 1970s had already changed their minds on the issue of marriage, whether they focused on marriage because it was the only relationship form that fit neatly into the race-sex analogy, or some combination of the two.
explaining why activists continue to rely on the race-sex analogy in litigation, even as the race-sexuality analogy has diminished in importance, and describes how courts challenge the race-sex analogy.

The insights gained from this historical discussion of the origins and development of the analogy also help address criticism that the analogy has more recently attracted along at least two significant lines. The first line of criticism identifies certain characteristics of gays that purportedly differentiate them from African-Americans. According to this argument, for example, unlike blacks, gays choose and are able to conceal their minority status (that is, their sexuality) and are politically powerful.7 Events in November of last year brought this critique into the mainstream, when a majority of African-American Californians voted to amend the state constitution to ban gay marriage.8 The day after the election, a gay Huffington Post blogger castigated these African-American voters, suggesting that gays were a minority group analogous to blacks, in a post entitled African-Americans vs Gay Americans?9

7. See, e.g., Marc A. Fajer, A Better Analogy: “Jews,” “Homosexuals,” and the Inclusion of Sexual Orientation as a Forbidden Characteristic in Antidiscrimination Laws, 12 STAN. L. & POL'Y REV. 37, 37-39 (2001) (cataloguing criticisms of the race-sexuality analogy that argue that unlike gay Americans, blacks do not choose their minority status, that discrimination has less severe economic and social consequences for gays, and “that although race is usually revealed by appearance, people can choose not to reveal their sexual orientation, and thus les/bi/gay people can avoid discrimination in a way that most African-Americans cannot,” and suggesting that other, religion-based, analogies should be used to gain gay rights). But see EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE'S RIGHT TO MARRY 164-68 (2004) (describing and criticizing arguments against the race-sexuality analogy); Odeana R. Neal, The Limits of Legal Discourse: Learning from the Civil Rights Movement in the Quest for Gay and Lesbian Civil Rights, 40 N.Y.L. SCH. L. REV. 679, 681-83 (1996) (noting criticisms of the race-sexuality analogy, but arguing that the African-American civil rights movement has lessons for the gay rights movement); Angela Onwuachi-Willig, Undercover Other, 94 CAL. L. REV. 873, 875-76 (2006) (arguing that concealment of sexuality is as great a burden as the displaying of race). Those discussions that do specifically focus on historical analogies ignore the historical development of the race-sexuality analogy. See DAVID A.J. RICHARDS, IDENTITY AND THE CASE FOR GAY RIGHTS: RACE, GENDER, RELIGION AS ANALOGIES 39-83 (1999).

8. See Susan Ferriss & Phillip Reese, Black Voters Helped Prop. 8 Passage, SACRAMENTO BEE, Nov. 7, 2008, at 1A (“The Obama people were thrilled to turn out high percentages of African Americans, but (Proposition 8) literally wouldn't have passed without those voters ....” (quoting Gary Dietrich, President of Citizen Voice)).

The nation's leading LGBT news magazine, *The Advocate*, echoed this argument the next month. Upon its cover in big white letters against a black background was the slogan: "Gay Is the New Black: The Last Great Civil Rights Struggle." Opponents of this view, including many from the African-American gay community, challenged the analogy, pointing to the generally privileged socio-economic status of gays and the lack of interaction between African-American communities and gay civil rights leaders; these commentators defended the African-American vote.

This Note, however, demonstrates that gays as a group constructed an important component of their identity through interaction with and lessons from the African-American community. The racial justice movement and the harms and inequalities it targeted colored what gays saw as harmful to them and the appropriate methods and strategies to remedy these harms. Thus, while many differences between gays and African-Americans do exist socially and otherwise, the rights both groups seek are similar precisely because gay activists targeted many rights that the civil rights movement vindicated. This interlinked past may help both critics and supporters of the race analogy to understand the interplay between the movements—supporters should understand that the similarities between groups were in some cases carefully constructed by activists, while critics may find that the groups are more alike than they recognize precisely because of these constructed similarities. Ultimately, gay rights as we understand them today would make very little sense without a fundamental reliance on concepts and arguments formed through reliance on the racial justice movement.

The second critique links the race analogy discussion to the act-versus-identity debate, which has been a central feature of sexuality studies at least

---


since Michel Foucault’s History of Sexuality. For queer theorists, sexual acts should not inform or create sexual identity categories for the actor (for example, presuming, or creating, a “gay” identity for an individual who engages in same-sex sexual acts). Harvard law professor Janet Halley therefore attacks the race analogy for hardening legal identity categories. Furthermore, as racial identity is itself constructed, this analogy allows activists to bring already unstable and problematic identity categories from racial justice litigation into sexual rights litigation. This forces individuals to perform and act according to these identities, ultimately limiting their range of sexual freedom.

The historical narrative set out in this Note shows that the gay legal “identity” that queer activists criticize was indeed historically “constructed” and therefore contingent. Yet, as the dynamics I explore demonstrate, this construction was a necessary—and somewhat successful—strategy for early gay activists to both mobilize themselves and counter opponents.

This Note also suggests how another concern and criticism of queer activists regarding the gay movement—the focus on marriage—is also connected to the race analogy. By analogizing themselves to blacks, gays saw their harms and forged remedies based on the goals and successes of the racial justice movement. Thus, these remedies often reflected the extent to which the original (African-American) identity had already been altered to conform to mainstream (white) standards. Marriage, in particular, into which blacks had only fully assimilated in the previous century, became an important aim for the gay rights movement. Thus, reliance on the claim that gay identity is like

14. See Janet E. Halley, Gay Rights and Identity Imitation: Issues in the Ethics of Representation, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 115 (David Kairys ed., 3d ed. 1998). The act-identity critique permeates queer theory and has been made by other post-identity/identity-deconstructing authors in related contexts. See, e.g., Judith Butler, Imitation and Gender Insubordination, in INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES 13, 13-14 (Diana Fuss ed., 1991) (“[I]dentify categories tend to be instruments of regulatory regimes, whether as the normalizing categories of oppressive structures or as the rallying points for a liberatory contestation of that very oppression. This is not to say that I will not appear at political occasions under the sign of lesbian, but that I would like to have it permanently unclear what precisely that sign signifies.”).
15. Halley, supra note 14, at 140.
16. See Katherine M. Franke, Becoming a Citizen: Reconstruction Era Regulation of African American Marriages, 11 YALE J.L. & HUMAN. 251, 253 (1999) (arguing that “African Americans did not enter civil society on their own terms and accompanied by their own values, but rather did so on the non-negotiable terms set by the dominant culture” and therefore had to subscribe to a white vision of “legal marriage”); Onwuachi-Willig, supra note 7, at 884 (“[T]he bind of choosing between the socially constructed concepts of ‘The Good Black
black identity enabled and encouraged marriage-based relationship recognition models and linked the act-identity debate itself with the debate over whether gay marriage is an appropriate aim for the movement.

I do not ultimately seek to resolve any debates. Under the first line of criticism, both sides will find support in this Note—that gays were made to appear similar to African Americans means that as a result of these efforts, today, there are similarities (which supports one side), but also that these similarities are contingent and constructed (which supports the other). Similarly, queer theorists may conclude that even with gays' strategic dependence on the racial justice movement, the use of the race analogy should be limited in the future. They may feel that the fact that gay marriage claims were partially constructed by the race analogy makes limiting the use of the analogy all the more important. Ultimately, though, the analogy undergirds the successes of the gay movement, both in terms of the self- and public perception of gays. Thus, before reaching any conclusions, we must consider the historical context, dynamics, and consequences of the analogy.

I. A NOTE ON THEORY: GAY IDENTITY AND HISTORY

While various characteristics are attributed to gays as a group today, they are commonly seen as a legal minority in search of civil rights, which has not always been the case. This Note provides a historical account of elements in the development of this aspect of gay identity. At the outset, it is important to model what one means by gay identity and understand how its elements may be historically created.

Homosexual identity is an umbrella concept that brings together many elements and categories that are contingently and historically (as opposed to...
analytically or inherently) related. For example, David Halperin non-exhaustively identifies five coexisting elements—effeminacy, active sodomy, male love, passivity, or inversion, and the “category” of homosexuality (that is, the notion of homosexual identity). These elements come together to form aspects of gay identity, each being emphasized to different degrees in different contexts. They do not have an analytic link with each other. Rather, we discover their relationship only by studying each of their genealogies, their development through time, and ultimately their incorporation into the category of homosexuality. Similarly, many in the modern United States recognize and identify homosexuals as a politico-legal minority group fighting for civil rights. This Note isolates and genealogizes this particular element of gay identity. Halperin and Eve Sedgwick suggest that these coexisting identity categories can be contradictory and context-dependent. Activists often successfully deployed this model of gay identity using incompatible arguments, attempting to simultaneously emphasize the insular minority status of gays and their assimilability into the mainstream.

Before gays could debate what group identity should be attributed to themselves, and engage in creating this identity, they first formed groups, congregating in American cities at the turn of the twentieth century. At this time, the boundaries between this “deviant” minority and the majority were drawn by “[a] society hostile to homosexual expression.” Judeo-Christian religious traditions and medical models developed by sexologists defined the “homosexual.” Through these paradigms, the elements that Halperin identifies


18. Halperin notes that the difference between effeminacy and inversion is a “blurred” one and describes it further. Halperin, supra note 17, at 123.

19. See id. at 109-10.

20. See id. at 47.


22. D’Emilio, supra note 21, at 13.
became artifacts of a medicalized homosexual “identity.” 23 This identity helped police the boundaries between normalized heterosexuality and perverse homosexuality. While state reaction to the homosexual menace in the first half of the twentieth century through legislation, police enforcement, and adjudication was far more intense than that of the medical profession, 24 its definitions of homosexuality as impure and psychopathic were drawn from medicine and religion. 25 Individuals sexually attracted to the same sex often internalized these early accounts. 26

As the ranks of these individuals swelled in post-World War II cities, service-based organizations began to appear. Rather than engage in political mobilization and affirmative litigation, as their activist successors would, these organizations created the first homophile magazines, provided lists and reviews of homophile novels and poetry, and supplied information for rank-and-file individuals in case of entrapment and arrest. The earliest of these organizations generally did not attempt to replace existing accounts of gay identity. 27 Rather,

23. Id. at 15-19; see also infra Subsection II.A.4.
24. See ESKRIDGE, GAYLAW, supra note 2, at 24.
25. Susan R. Schmeiser, The Ungovernable Citizen: Psychopathy, Sexuality, and the Rise of Medico-Legal Reasoning, 20 YALE J.L. & HUMAN. 163 (2008) (providing the best recent account); see also D’EMILIO, supra note 21, at 14 (“Colonial legal codes, drawn either directly from the Bible or from the theologically influenced English buggery statute of 1533, prescribed death for sodomy . . . .”); ESKRIDGE, GAYLAW, supra note 2, at 23 (providing a history of the medicalization of homosexuality and noting that before World War I, “[m]edical and press accounts of sexual and gender deviation triggered social responses” and vice squads); id. at 36-37 (describing the new legal definitions of homosexuality, largely drawn from medical vocabulary). In his discussion of the post-World War II period, Eskridge argues that the association of homosexuals with clinical psychopaths grounded further legal hysteria. Id. at 57-97; see also Margot Canaday, “Who Is a Homosexual?”: The Consolidation of Sexual Identities in Mid-Twentieth-Century American Immigration Law, 28 L. & SOC. INQUIRY 351, 353 (2003) (“[G]overnment officials . . . anchor(ed) homosexual status in psychiatric definitions.”).
26. See D’EMILIO, supra note 21, at 21; id. at 37 (describing Kinsey’s influence on gay individuals but suggesting that the influence was ultimately counterproductive in broader society); see also DENNIS ALTMAN, HOMOSEXUAL OPPRESSION AND LIBERATION 17 (N.Y. Univ. Press 1993) (1971) (suggesting that homosexuals “allowed themselves to be defined by” society in the 1950s and 1960s). Dana Rosenfeld conducted numerous interviews with elderly gays who explain how they internalized the existent homophobic medico-social discourse on homosexuals. DANA ROSENFELD, THE CHANGING OF THE GUARD: LESBIAN AND GAY ELDERS, IDENTITY, AND SOCIAL CHANGE 26-33 (2003). As Rosenfeld notes, “because images of gay men and women that challenged their stigmatized ‘nature’ were . . . nonexistent before the mid- to late 1960s, accredited [that is, non-stigmatized] identities were simply unavailable before then.” Id. at 63.
27. See, e.g., 2 ENCYCLOPEDIA OF HOMOSEXUALITY 781 (Wayne R. Dynes ed., 1990). The Mattachine “wanted only collaboration with the professionals—established and recognized
in their litigation, which consisted of attempts to defend the right to provide services (rather than to affirmatively change the law), and primarily involved cases implicating rights of association and speech, gays unsuccessfully attempted to question the coherence of religious and medical identity categories in order to disrupt these identities.28 Furthermore, those arguments made to outsiders were somewhat ingenuous. In their internal operations, these organizations effectively continued to rely on stigmatizing identity models to understand their relationship to society. One interviewer notes that while gay organizations and gay life existed, “gay life . . . was . . . collectively . . . organized around stigma.”29 However, as new activists, familiar with the racial justice struggle, entered the homophile movement, gays began to take a hand in producing their own identity categories to replace old ones, which

28. This is typical for low-status groups. See Huddy, supra note 17, at 135 (“[O]ne option available to members of low-status groups, especially groups in which membership is permeable, is to deny one’s group membership or identify with an alternative higher status group.”).

29. ROSENFELD, supra note 26, at 63.
helped them reconceptualize their role in society. They layered a new “legal” meaning of gay identity upon self-understandings of gays as a group through analogy with African-Americans as a defined minority group seeking equal rights under the law. This identity clearly affected self-perception of gays in social and other contexts—it is, however, appropriate to refer to it as a legal identity, insofar as the analogy is dependent upon legal, rights-seeking frames and contexts for its power and origins. That said, legal minority identity did not completely replace methods eschewing reliance on identity categories, which gays continued to use and exploit in various contexts.

This Note does not attempt to provide an exhaustive description of historical developments in the LGBT movement during this period. This account does not exhaust all of the new “accredited,” nonstigmatized, identity categories gay individuals began creating during this period, but rather, only that category which developed through argument based on the race analogy. Second, given this limitation, it is hardly surprising to find that my protagonists are generally white, privileged, middle-class members of the movement, who had the greatest access to the social and legal resources which helped lay the ground for this new identity through litigation and media dissemination. Generally speaking, perspectives that may have been held by marginalized groups within the movement, such as low-income individuals, racial minorities, and transsexuals, do not figure prominently in originating this new account of gay identity.

II. DENYING GAY “IDENTITY”

The arguments of early gay activists elided, and often explicitly denied, the existence of gays as a separate legal minority group both within and without the courtroom. These activists thus attempted to erode the notion of a gay legal identity, especially in the First Amendment and due process claims they made. Section II.A. describes these arguments. As Section II.B. explains, however, courts and the legal mainstream refused to accept such claims; their continued conception of gays as a distinct (and reviled) minority group forced gay advocates to consider different strategies.

30. Cf. Huddy, supra note 17, at 139 (“[G]roup identification increases in strength with the sense that . . . group membership is voluntary.”).
31. See infra Part IV.
32. See, e.g., ROSENFELD, supra note 26, at 64-67 (describing the affirming identity adopted through Radicalesbians, a group of radical lesbian feminists, and sexual liberation).
A. Early Gay Activists and the Denial of Identity

1. A False Start

Communities of people attracted to the same sex congregated in cities following World War II. A vibrant subculture sprang up in many cities, with bars and other establishments catering to these individuals. Two individuals that figure prominently in the history of the gay rights movement began to treat this new group as a distinct minority fighting for civil rights. These individuals worked independently of each other, but both were influenced by events in the racial justice movement, nationally and internationally.

In 1950, Edward Sagarin pseudonymously published his seminal work, *The Homosexual in America*, which would be widely read by homophile audiences in the succeeding decade. In this work, he explained that, like those united by "the color of [their] skin," homosexuals had an "important trait in common that not only unites them to each other, but differentiates them from the rest of society." That differentiation made homosexuals a minority group with their own history, culture, argot, and identity, undergoing the same dynamics of oppression as other groups. Accordingly, for the first time in the United States, the proposition appeared in print that "the parallel [with racial minorities] is inescapable," for "[t]here is no Negro problem except that created by whites; no Jewish problem except that created by Gentiles. To which I add: and no homosexual problem except that created by the heterosexual society."

33. ALLAN BÉRUBÉ, COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO 244-79 (1990); D’EMILIO, supra note 21, at 23-39; ESKRIDGE, GAYLAW, supra note 2, at 59.
35. Id. at 5.
36. Barbara Gittings & Kay Lahusen, The Rabble Rousers, in MAKING HISTORY: THE STRUGGLE FOR GAY AND LESBIAN EQUAL RIGHTS, 1945-1990: AN ORAL HISTORY 104 (Eric Marcus ed., 1992). Martin Duberman, in one of the few, and arguably the best, discussions of Sagarin’s work, explains that while Harry Hay, the pioneering gay radical, himself often called the father of the movement, expressed the same notion that homosexuals were a minority, Sagarin’s book was the first to give the “minority” concept wide circulation, becoming the cornerstone for identity or the “Ur-text” for politics in the gay movement. Martin Duberman, The “Father” of the Homophile Movement, in LEFT OUT: THE POLITICS OF EXCLUSION/ESSAYS/1964-1999, at 59, 68-69, 71 (1999).
37. CORY, supra note 34, at 10-25 (basing his argument on the idea of stereotype and majority insecurity).
38. Id. at 228.
In 1951, Harry Hay organized the Mattachine Society, the first major "homophile" group in the nation, and for many years, the only group with national affiliates. Like some of his co-founders, such as Chuck Rowland, Hay was an ardent communist and organized the Mattachine as communist-like cells with anonymous members. His political background provided him with ready analogies. In 1938, the Comintern had drawn up five principles of what constituted a minority group, which were based on racial status. As Hay explained to his biographer, he explicitly invoked the race-sexuality analogy based on these principles in much of his thinking, writing, and speeches at the time. Hay made other analogies as well, arguing that the "Guilt of Androgyny [the manner in which he referred to homosexuality] BY ASSOCIATION, equally with guilt of Communist sympathy by association, can be employed as a threat against any and every man and woman in our country . . . to insure thought control and political regimentation." Soon, however, the Mattachine Society was accused of being a communist organization. In response, fearful of further investigation, the Mattachine revolted against Hay. They called for a public declaration against communism and threatened to turn the names of defectors over to the FBI. They also

39. JAMES T. SEARS, BEHIND THE MASK OF THE MATTACHINE: THE HAL CALL CHRONICLES AND THE EARLY MOVEMENT FOR HOMOSEXUAL EMANCIPATION 151 (2006) ("The original founders of the Mattachine were Marxists and . . . were going to marry Marxism and homosexuality."); STUART TIMMONS, THE TROUBLE WITH HARRY HAY: FOUNDER OF THE MODERN GAY MOVEMENT 144 (1990); see also SEARS, supra, at 166 (illustrating the founding members' communist sympathies); TIMMONS, supra, at 177 (same).


42. TIMMONS, supra note 39, at 136; see also id. at 151 (describing Hay's use of the analogy); KATZ, supra note 40, at 409 (same).

43. D'EMILIO, supra note 21, at 75-81 (discussing the accusation, published in a Los Angeles newspaper, and the subsequent witchhunt).

44. Id. at 85; see also SEARS, supra note 39, at 198.
rejected Hay's and Rowland's comparison of gays to the racial minority group as unacceptably "making 'niggers' out of them." After the 1953 shake-up, the Mattachine moved away from the notion that gays constituted a discrete and subordinated minority group with a common experience of discrimination, of whose rights courts should be solicitous. Rather, the new spokesmen for the Mattachine sought to disrupt homosexual identity and group status, portraying homosexuality as a difference too slight to warrant treating homosexuals as a separate group or attributing a marginalized identity to them. Instead, they sought the right to perform certain acts, divorced from any notion of homosexual identity. Simultaneously, the Mattachine moved away from any organized political and legal activism, preferring instead to focus on services to LGBT individuals, such as counseling, and on public education efforts.

2. **Eliding Group-Based Arguments: Due Process and First Amendment Claims**

In the 1950s and early 1960s, those who challenged government action against gays did so under two main theories. First, those arrested or otherwise

---

45. Rowland had incited ire among the dissidents at a 1952 meeting, arguing that "[w]e must disenthral ourselves of the idea that we differ only in our sexual directions and that all we want or need in life is to be free to seek the expression of our sexual desires ... [T]he fact is we are a minority with a minority culture ... and interests." SEARS, supra note 39, at 182 (quoting a 1952 speech of Chuck Rowland to the Mattachine Society).

46. TIMMONS, supra note 39, at 151; cf. Toni M. Massaro, Gay Rights, Thick and Thin, 49 STAN. L. REV. 45, 47 (1996) (advocating, based on Romer v. Evans, 517 U.S. 620 (1996), a program of appealing to judges' empathy and rationality, rather than using "thick doctrinal arguments that alter existing legal categories, extend the upper echelon tiers of review, or construct gay rights as such").

47. At least, it did so in its legal arguments. See Meeker, supra note 27 (discussing, in contrast to D'Emilio, the radical activities of the Society in other areas). John Tehranian interestingly suggests that "[t]he availability of covering (and passing and conversion) strategies makes organization as a group less likely. ... [T]he much wider latitude of covering options available to both the gay and Middle Eastern populations might explain why both groups have been relative latecomers to the civil rights movement." John Tehranian, Selective Racialization: Middle-Eastern American Identity and the Faustian Pact with Whiteness, 40 CONN. L. REV. 1201, 1224 (2008).

48. Statements such as the following were typical: "The Lesbian ... [has the] attributes of any other woman. ... Her only difference lies in her choice of a love partner." Editorial, The Positive Approach, THE LADDER, Nov. 1956, at 8.

targeted as homosexual challenged governmental action for violating procedural due process requirements, frequently claiming that statutes that failed to specifically define homosexuality or sodomy were void for vagueness. Second, bars and publications targeted as homosexual used First Amendment freedom of speech arguments to vindicate their rights. Activists did not use or need the rhetoric of minoritization for either argumentative strategy. Two cases in particular received a high level of publicity in the few homophile publications of the time; neither case focused on gays as a legal minority.

The Mattachine took on the first case in 1952 under Hay's leadership. This case involved a due process claim: one of the Mattachine's original members, Dale Jennings, was arrested through police entrapment in a public park for public solicitation and vagrancy, admitted to being homosexual, pled not guilty—and won his case. It was the first time that a gay individual who was arrested on these charges became the center of an organized fundraising campaign and claimed, in what some refer to as the entrapment defense, that even if he had committed the alleged acts, the policy of entrapment violated procedural privacy protections.

In general, when defending against sodomy prosecutions, activists put their emphasis on solely procedural claims, both in and out of court. No one argued that the police action unfairly targeted homosexuals as a group, or pointed to the general oppression homosexuals faced. Similarly, when gay leaders turned their attention to sodomy laws in their publications, the privacy rights of all Americans, rather than minority persecution, formed the theme. Ultimately, as John D'Emilio explains, the Mattachine itself was worried about becoming

---

50. William Eskridge similarly notes that the first round of gay rights litigation relied on a politics of “protection,” that is, on arguments that downplayed the minority status of gays. This approach is in contrast to the later use of a politics of “recognition” as a homophile minority that they later adopted. Eskridge, Some Effects, supra note 2, at 2161-69.

51. D'EMILIO, supra note 21, at 70-71.

52. ESKRIDGE, GAYLAW, supra note 2, at 87.


too visible;\textsuperscript{55} after the success of the Jennings trial, gay organizers voted to avoid litigation that would make them visible as a distinct minority to prevent “hysteria.”\textsuperscript{56}

The second case involved defensive First Amendment challenges brought in order to preserve the right to provide publication services.\textsuperscript{57} In the mid-1950s, two homophile publications, \textit{ONE} and \textit{The Ladder}, were started and slowly gained a significant readership. While subscribers had been afraid that their identities would be revealed since publication began,\textsuperscript{58} matters came to a head when the United States Postal Service seized \textit{ONE} on obscenity charges. The ensuing litigation went up to the Supreme Court. The short brief for the petitioners in \textit{ONE} was completely lacking in detail that, if provided, would have brought into relief the “homophile” nature of the magazine. Instead, petitioners argued that the magazine engaged in “a free[] discussion of human and social problems”\textsuperscript{59} that have “plagued the human race through the centuries.”\textsuperscript{60} Similarly, \textit{The Ladder}, which catered to a lesbian readership, argued, “The basic problem herein presented [in \textit{ONE}] is not whether the homophile press shall continue to exist but rather \textit{whether a free press can continue to exist.}\textsuperscript{61}

Likewise, in other briefs submitted to the Supreme Court, gays avoided making group-based claims. Plaintiffs generally pled not guilty to being homosexual, unlike Jennings, and once more, focused on the procedural violations of the state in the investigation and of the district court during trial.\textsuperscript{62}

\textsuperscript{55} D’EMILIO, supra note 21, at 70. The reaction to the case and the increase in membership, see id. at 75, may well have resulted in a different strategy had Hay been able to stay on. However, the Mattachine’s deposing of Hay ensured a conservative legal strategy.

\textsuperscript{56} MARTIN D’EMILIO, \textit{SAME-SEX MARRIAGE, LEGAL MOBILIZATION, \& THE POLITICS OF RIGHTS }17-18 (2002).

\textsuperscript{57} ESKRIDGE, \textit{GAYLAW}, supra note 2, at 93-97; Eskridge, \textit{Some Effects}, supra note 2, at 2161-68.

\textsuperscript{58} See \textit{The Law of Mailable Material}, ONE, Oct. 1954, at 4 (trying to quell fears of the early readers of the magazine who were worried that ONE was unlawful).


\textsuperscript{60} Id. at 8.


3. Disrupting Identity: Manual Enterprises and Boutilier

If activists were content to avoid group-based arguments in the early 1950s cases examined in detail above, in the 1960s one can begin to see signs not just of avoidance, but of group disruption. In Manual Enterprises v. Day and Boutilier v. INS, the plaintiffs challenged the coherence of the term "homosexual" and argued that homosexuality was not restricted to a small minority group at all.63

The petitioner in Manual Enterprises, soft-core pornographer Herman Womack, had challenged the Postal Service's seizure of his material once before in Womack v. United States.64 In Womack, both the unfavorable lower court opinion and the government's opposition to certiorari emphasized the homosexual nature of the publications that had been confiscated.65 Womack's cert petition, however, avoided the "homosexual issue," noting the "female touch-ups" that were in the publication and focusing on procedural arguments.66 In discussing the particular images referred to in the government brief, Womack simply argued that they were not of an undue sexual nature—since, for example, no two male nudes appeared together in photographs—and that the audience was simply "art students and teachers." The discussion eschewed any reference to homosexuals altogether.67 The Court denied certiorari.

In Womack, the petitioner had more or less ignored the government's implicit treatment of homosexuals as a group. The brief for the petitioner in Manual Enterprises, on the other hand, attacked this argument directly, arguing that "[t]here is, in truth, no definitely definable and distinct group of human beings

---

65. Cf. Womack, 294 F.2d at 205; Brief of the United States in Opposition at 4, Womack, 365 U.S. 859 (No. 717) ("[W]e don't have to kid each other, we know who is interested in magazines and pictures of that type . . . homosexuals.").
66. Petition for Writ of Certiorari at 11, Womack, 365 U.S. 859 (No. 717) (arguing that the government in a "prejudicial maneuver" "twisted" certain "letters . . . to throw a homosexual issue into the case which the petitioner was forced to answer").
67. Id. at 12.
classifiable as ‘homosexuals’ set apart from the rest of the population.” Rather, citing Alfred Kinsey’s work, the petitioner claimed that “‘homosexual’ is not a characteristic of a small, isolated, group of people, but is a type of sexual activity or propensity which directly affects and [o]ccurs in the lives of vast proportions of our population.”

Furthermore, it was supposedly questionable whether Manual Enterprises had any relation to homosexual propensity at all. Rather, this magazine was sold to the “hundreds of thousands of people in the United States interested in physical development and body building.” The petitioner would only “admit” that this bodybuilding group was a “by number . . . minority,” rather than a minority by identity. Finally, even if some minoritized homosexual interest could be identified, this interest was “analogous to a so-called heterosexual male person purchasing a nude pin-up photograph of Marilyn Monroe.”

Boutilier v. INS, in turn, was one among many immigration cases that the Supreme Court was asked to decide in which various plaintiffs challenged INS action taken because of their alleged sexual orientation. In 1963, when Clive Boutilier applied for citizenship, he volunteered that he had been arrested for sodomy in New York. The INS determined that as a homosexual, he fell under the definition of “psychopathic personality” and was therefore excludable under the Immigration and Nationality Act. The Board of Immigration Appeals agreed, noting that “‘psychopathic personality is a term of art . . . that includes an alien upon mere proof that he is a homosexual.” After the Second Circuit upheld the BIA’s determination, Boutilier appealed.

The outcome was uncertain. In a previous case, Fleuti v. Rosenberg, the Ninth Circuit had ruled that the INS could not deny a homosexual petitioner’s

---

69. Id. (citing ALFRED KINSEY, SEXUAL BEHAVIOR IN THE HUMAN MALE 616-17 (1948)).
70. Id. at 28; see also Petition for Writ of Certiorari, supra note 66, at 8 (referring to Womack’s other bodybuilding magazines).
71. Brief of Appellant, supra note 68, at 29.
72. Id. at 28.
73. 387 U.S. 118 (1967).
74. See Canaday, supra note 25.
77. Boutilier v. INS, 363 F.2d 488 (2d Cir. 1966).
reentry to the United States after an afternoon visit to Mexico, as the term "psychopathic personality" was unconstitutionally vague. The Supreme Court affirmed on the different ground that a return from a short visit to Mexico could not be deemed an "entry" for the purpose of the statute.

Relying on *Fleuti*, the lawyers in *Boutilier* made several different arguments. First, they again claimed that the term "psychopathic personality" violated constitutional prohibitions on vague statutes. As in previous immigration-related cases, they questioned whether Boutilier's homosexual acts made him psychopathic. They challenged whether the INS had proven that Boutilier had performed the acts described. Finally, they also argued that, since the statute only authorized expulsion based on evidence that would have allowed the INS to deny him entry in the first place and that Boutilier's sodomy charge postdated his entry, the INS had therefore invalidly targeted him based on postentry acts.

However, the Ninth Circuit *Fleuti* decision suggested a new, intriguing line of argument that would lead to the *Boutilier* litigants attempting to disrupt the very notion of homosexuality. The Ninth Circuit, curiously, raised the question of whether Fleuti's homosexuality was "compulsive [or] a matter of choice." Arguing that it was a matter of choice, the court claimed that Fleuti was "substantially prejudiced" by the vagueness of the term "psychopathic personality," since if he knew the term targeted homosexuality, he could have avoided homosexual acts. Thus, the Ninth Circuit destabilized homosexual identity—in dicta.

Significantly, while the immigration statute at issue never used the word "homosexual," the petitioner in *Boutilier* went out of his way to discuss—and disrupt—the term. "Who is a homosexual?" Boutilier's brief demanded. "If, as Dr. Kinsey estimated in his Sexual Behavior in the Human Male, at least 37% of the American male population have had homosexual experiences, are they all people who would be excludable were they aliens seeking entry here! . . . [T]he statute as thus interpreted . . . could apply to persons engaging in both

---

78. 302 F.2d 652 (9th Cir. 1962).
81. Canaday, supra note 25, at 369, 373.
82. Petition for Writ of Certiorari, supra note 80, at 5-7.
83. Id.
84. Id. at 33-35.
85. Fleuti v. Rosenberg, 302 F.2d 652, 656 (9th Cir. 1962).
86. Id.
heterosexual and homosexual experiences alike . . . ." Ultimately, on this view, the line between heterosexual and homosexual was simply not tenable.

4. Modern vs. Contemporary Theoretical Perspectives

Modern queer activists who draw from the arguments of Michel Foucault may well applaud the arguments of these early litigators. Foucault argued that creating an "identity" around acts allowed a "new specification of individuals" and acts. In brief, Foucault and his successors argue that the acts we now term homosexual were forbidden in medieval times but without a definition being applied to them. The individuals who performed them were not socially branded with any particular identity. After a definition was applied to these acts, and they were characterized as homosexual, the individuals who performed them were given a homosexual identity. This enabled mechanisms of control, discrimination, and hierarchy to form around these acts and individuals in their daily social existence, creating the boundaries that made them a marginalized minority. This dynamic, commentators argue, was apparent in the post-World War II antihomosexual hysteria that swept the nation. For example, Nan Hunter describes laws that were amended to target a certain "psychological type" instead of specific acts. Thus, the performance of certain acts created an identity, the possessor of which would be controlled by the state.

It bears noting that, though they were working before Foucault wrote, these early activists appeared attuned to these social dynamics. By attempting to delink homosexual acts from homosexual identity and homosexuals as a class, the activists potentially struck at the very basis of social control over those who perform same-sex acts. Yet, ironically, as the historical dynamics I describe above demonstrate, from a contemporary point of view, activists were conservative, attempting to dissolve their identity not as a move towards radicalism, but rather, in an attempt to hide their identity from the law. As we

87. Petition for Writ of Certiorari, supra note 80, at 9; see also id. at 6 ("There is no indication by either the respondent or the [lower] court what is meant by a homosexual; whether it includes one who engages in both homosexual and heterosexual acts as the petitioner did . . . whether it applies to someone who has engaged in it once in his life, once a year, four times a year, or constantly . . . ").


see, these strategies did not work, because of resistance from courts and because they did not reflect gay individuals' social reality.

**B. Judicial Responses**

Courts ignored these activists' attempts to disrupt homosexual identity and group status, relying on existing models of homosexuality to understand the issues before them.\(^{90}\)

As contemporary government behavior illustrated, homosexual identity was the basic means used to police sexuality. In the 1950s, the entrapment defense was rarely a successful one.\(^{91}\) In general, the defense only worked if the defendant could prove that he had no “predisposition” to sodomize, that is, he was not identified as homosexual, even if he had committed the act.\(^{92}\) Many courts allowed evidence to be admitted, from incriminating evidence regarding past homosexual acts\(^{93}\) to exculpatory evidence from psychiatrists and family members that supported the defendant's claims of heterosexuality.\(^{94}\) Other government bodies, such as the INS, also targeted “gay” as descriptive of a personality type, rather than of an act, by connecting acts to identity.\(^{95}\) As Foucault suggests, the overarching umbrella of identity became the primary mechanism of control, which could not easily be relinquished. This becomes apparent in the First Amendment context, where speech and association, rather

---

90. For more on how these constructions did ultimately control sexuality, see JAY HATHEWAY, THE GILDED AGE CONSTRUCTION OF MODERN AMERICAN HOMOPHOBIA (2003); LEILA J. RUPP, A DESIRED PAST: A SHORT HISTORY OF SAME-SEX LOVE IN AMERICA 79-129 (1999); and sources cited supra note 21.

91. William Eskridge notes that “[t]he Jennings case is the only one [he] ha[s] found where the defendant won with an entrapment defense . . . .” ESKRIDGE, GAYLAW, supra note 2, at 88.

92. Id.

93. While not presented as part of an act-identity dynamic, Eskridge provides several such examples. Id. at 89-92.

94. Id.

95. See Canaday, supra note 25, at 377 (“In the final view of the Court, homosexuals were a type of people, not a set of free-floating practices from which no conclusions about identity could be drawn.”); Hunter, supra note 89, at 1698 (describing the shift “from a brain disease model to a developmental personality model” in the military and Congress). Notably, Justice Douglas’s dissent, while quoting Kinsey and appearing to problematize the notion that homosexuals comprised a distinct group on one hand, also unproblematically referred to the homosexual as “the product of an arrested development.” Boutilier v. INS, 387 U.S. 118, 127 (1967) (Douglas, J., dissenting). The resulting, very confused, opinion left commentators with the impression that “he kept finding quotes that he wanted to slap into his work.” MURDOCH & PRICE, supra note 76, at 123; see also id. at 123-30 (describing the many contradictory quotes and views Justice Douglas took in earlier drafts).
than sodomy charges, were at issue. Homosexual identity sexualized the speech and association at issue, even where no sex was involved.

For example, in *ONE*, where the Court sided with the appellants without an opinion, the magazines were themselves nonsexual—a clerk for Chief Justice Warren noted that they were “far less offensive than the average ‘men’s’ magazine . . . [and were] no more descriptive of sexual practices than dozens of magazines” like “[Women’s] Home Journal.” Accordingly, it would appear, there was no homoeroticism to brand the magazines as homosexual.

However, behind a discussion of homosexuals was the specter of the sexual act. Thus, Justice Douglas’s law clerk queried whether homosexual matters were similarly situated to heterosexual issues, because of the criminalization of sodomy and because homosexual “practices differ from those of the ‘normal’ person.” Homosexuality as an identity, therefore, was inherently sexual because of the acts with which it was associated. In turn, the identity sexualized otherwise nonsexual acts. The clerk for Chief Justice Warren admitted that, “Were the contributions dealing with heterosexual matters, it is doubtful the community would find them prurient,” and considered the possibility that because of their homosexual nature, “a stricter standard [would be] available even under *Roth*.” Accordingly, even in a case without a sexual act or eroticism at issue, the mechanism of homosexual identity was ever present as a means to control sexuality.

We see a similar dynamic in activists’ engagement with nongovernment actors. Early gay organizers, for example, suggested that their readers dress and behave in gender-appropriate ways to minimize their differences from the mainstream. Ultimately, even those who applauded this strategy suggested that this would make little difference to those who targeted homosexuals. As an African-American reader of *The Ladder*, responding to the exhortations to dress and behave well, noted:

---

96. *MURDOCH & PRICE*, supra note 76, at 43.
97. *Id.* at 42-44 (discussing a memo from Justice Douglas’s law clerk).
98. *Id.* at 43 (emphasis added). This by itself, though, would be insufficient to make the magazine “obscene.” *Id.*
99. *Id.* Similarly, the lower court’s opinion identified a “particular group of individuals constituting a small segment of the population [whose] . . . moral standards are far below those of the general community. Social standards are fixed by and for the great majority and not by or for a hardened or weakened minority.” *ONE*, Inc. v. Olesen, 241 F.2d 772, 777 (9th Cir. 1957).
As one raised in a cultural experience (I am a Negro) where those within were and are forever lecturing to their fellows about how to appear acceptable to the dominant social group, I know something about the shallowness of such a view as an end in itself. . . . Ralph Bunche with all his clean fingernails, [and] degrees . . . could still be insulted, denied a hotel room or meal in many parts of our country.\footnote{Id.}

She thus acknowledged the majority contention that “one is different.” The trick is to somehow construct and shape this difference, so that it is not “‘wrong’ or ‘bad’ somehow.”\footnote{Id.} A new group of activists would take on this challenge.

This Part opened by discussing the medico-religious basis of homosexual identity. This definition drew a dividing line between a homosexual minority and a mainstream majority. Activists attempted to deny this identity by challenging the existence of the division itself—the majority, they claimed, had been incorrect in defining them into minority status in the first place. Yet gay individuals often relied on these medico-religious definitions to understand themselves. Combined with the growing number of bars, publications, and nascent organizations catering specifically to the homosexual minority, this reliance would have made these disrupting efforts hard to sell within the gay community. Courts certainly did not buy the identity-disrupting claims. Thus, despite the efforts of activists, publications like \textit{ONE} and \textit{The Ladder} were clearly identified as homosexual—to their readers and to courts. Accordingly, if the boundary dividing gays from straights could not be erased, the only way to engage with the majority would be to graft on new meanings within existing boundaries.

\section*{III. Creation: Constructing Legal Identity Through the Race Analogy in Courts}

By the 1960s, the racial justice movement had won several significant victories in courts and in public opinion. Activists from other minority groups therefore found analogizing themselves to blacks useful both in legal and extralegal contexts. An activist who took up the cause for gay rights in the 1960s, Franklin Kameny, took the lead in introducing the race-sexuality

\footnote{Id. She ends with the utopian vision, “I have long since passed that period when I felt personal discomfort at the sight of an ill-dressed or illiterate Negro. . . . Someday, I expect the ‘discreet’ Lesbian will not turn her head on the streets at the sight of the ‘butch’ strolling hand in hand with her friend in their trousers . . . . [F]or the moment, it still disturbs.” Id.}
analogy into gay advocacy, as well as the racial justice movement's legacy of activism and litigation.

This was a remarkable move. Other minority groups, most famously women, analogized themselves to blacks during this period. While the race-sex analogy led to much debate within the women's and racial justice movements, in the gay rights movement, however, the use of a civil rights analogy between the situations of gays and blacks heralded an even more fundamental shift in strategy. The feminist movement had always accepted that women constituted a legal minority, treated unequally with respect to the political majority, men. The race-sex analogy was made precisely to reinforce this already existing point. As this Part explains, gays instead came to be perceived as a legal minority seeking civil rights through the use of the race-sexuality analogy.

When Franklin Kameny was dismissed from his position as a government astronomer in 1957, he took his case all the way to the Supreme Court. Though other litigation on sexual orientation issues at the time focused on identity- and group-disrupting arguments, Kameny relied on the race-sexuality analogy. Section III.A. closely analyzes Kameny's pro se brief. I suggest that the analogy-based identity model in the brief helped gays engage with the majority, based on the shared premise that gays were different, by providing a distinct, bounded, minority identity and reframing this difference in a nonthreatening manner. The contexts in which race discrimination and discrimination based on sexual orientation occurred were often similar, giving greater resonance to the analogy, as Section III.B. explains.

After the Supreme Court denied certiorari, Kameny engaged with the gay rights movement. He emphasized the race-sexuality analogy outside courts, writing in magazines and giving impetus to the formation of activism- (rather than service-) oriented organizations. Section III.C. examines these efforts, showing that the identity that the race analogy elaborated was legitimating and activism-inducing, and briefly discusses early reactions to it. As Section III.D. explains, the 1970s saw both social and legal developments which further established this identity and made the self-perception of gays as a legal minority group independent of the race analogy in homosexual—and increasingly, popular—consciousness. As a result, it was no longer necessary to invoke the analogy to race every time gays were discussed as a legal minority.

---

103. See Mayeri, supra note 12.
104. See id. at 1052-53.
105. In fact, as Mayeri describes, the race-sex analogy was made as far back as the antebellum period. See id. at 1052-55.
While the comparison to blacks would continue to be made for rhetorical reasons, the analogy was no longer central to this identity, and gays became a minority group on their own terms.

A. Choosing a Bounded Identity Model

The instability of equal protection doctrine in the 1960s prevented contemporary activists from understanding how exactly they needed to make their claims. Essentially, they were in a double bind, needing to present themselves on the one hand as assimilable and nonthreatening, in order to appear sympathetic and deserving, and on the other as different and marginalized, in order to gain judicial protection. Frank Kameny’s petition to the Supreme Court, usually considered the first attempt to invoke a “politics of recognition” for homosexuals in the legal realm, notes this problem—“[t]he government [wa]s acting vigorously and properly to secure to the Negro his civil rights”—but without articulating the particular formal characteristics of blacks that made them a deserving minority. Thus, the petition took blacks themselves as the lodestar: it conceded the existence of certain, harmless, differences between gays and heterosexuals that were analogizable to the black experience in similar contexts in order to construct gay identity, while concealing other differences that would make the identity appear intimidating.

The “Preamble to Arguments” section opened by presenting gays as a separate minority group, analogizing the number, and level of persecution, of “homosexuals” to that of the “Negro,” “Catholic,” and “Jewish minorit[ies].” This claim simultaneously accepted the majority claim that homosexuals are a different group and neutralized this claim using the analogy. After a factual and


107. Eskridge, Some Effects, supra note 2, at 2169.


109. The debate about whether it was desirable for blacks themselves to proclaim a separate black identity—nationally and internationally—was ongoing even as these developments took place. For example, criticizing the “Negritude” movement, an attempt by members of the Pan-African Congress to develop a distinct black identity, Wole Soyinka wrote, “A tiger does not proclaim its tigritude, he pounces.” JANHEINZ JAHN, A HISTORY OF NEO-AFRICAN LITERATURE 265-66 (Oliver Coburn & Ursula Lehrburger trans., 1968).

procedural discussion,\textsuperscript{111} the petition turned to the validity of the regulation itself and defended homosexuality from the point of view of “those choosing voluntarily to engage in homosexual acts, [for whom] such acts are moral . . . good, right, and desirable.”\textsuperscript{112} Here, for the first time, Kameny transported the subjective experience of individuals engaging in sexual activities with those of the same sex into the legal arena.\textsuperscript{113}

As if to limit this separate and foreign identity, Kameny immediately retreated from this identity creation in three ways. First, he reverted to the early activist focus on acts rather than identity, by claiming that the moral standards used to judge certain acts were too vague to pass constitutional muster.\textsuperscript{114} Second, he began the longest section of the petition by emphasizing the assimilability of homosexuals, informing the Court that gays to a large extent look much like heterosexuals. The Kameny petition, like the Manual Enterprises brief, emphasized the numerosity of homosexuals, and then noted that the “most dominant characteristic [of homosexuals] is their utter heterogeneity.”\textsuperscript{115} Finally, Kameny used the race analogy to clinch this difference-minimization argument: he noted that “stereotype” often makes a homosexual, like a “Negro and . . . [a] Jew,” appear more different from the mainstream than they actually are. This causes the prejudiced to inaccurately attribute to gays stereotypical threatening identity characteristics such as an “effeminate physique and mannerism.”\textsuperscript{116} In reality, he argued, these differences are spurious: “[t]he average homosexual is as well-adjusted in personality as the average heterosexual.”\textsuperscript{117} Indeed, in some ways, homosexuals are a “group” that is much less cohesive as a minority than are racial minorities: “[i]n character traits, homosexuals, once again, are not a group . . . . [T]hey have no more in common than have red-heads outside their red-headedness, or six-footers outside their six-footedness.”\textsuperscript{118} Therefore, gay identity is not so different that gays should be denied the benefits of the “policies, practices, aims and goals of the nation, as well as . . . the most fundamental precepts of

\textsuperscript{111} Id. at 19-25.
\textsuperscript{112} Id. at 26.
\textsuperscript{113} Such subjective perspectives were rare in self-presentations of gays to outsiders. See BÉRUBÉ, supra note 33, at 209-10, for some of the earliest such presentations to army interrogators.
\textsuperscript{114} Petition for a Writ of Certiorari, supra note 108, at 26-30.
\textsuperscript{115} Id. at 36.
\textsuperscript{116} Id. at 36-37 (emphasis added).
\textsuperscript{117} Id. at 37.
\textsuperscript{118} Id. at 38.
human and individual freedom and liberty.” Thus, in the first well-known exposition of a gay legal identity, deploying the race analogy helped both to create and limit this identity. This petition provides the best exposition of the race analogy, but was, as we shall see, only one manifestation of the analogy in the movement. Ultimately, the invocation of race gave form to homosexuality as a new gay legal identity for both courts and activists, with important consequences.

B. Shared Harms – Shared Context

In making the race-sexuality analogy, early activists generally focused on those issues where the law discriminated against both blacks and homosexuals. For example, the first problems gay litigants began to address involved discrimination in employment, procedural due process, and First Amendment violations. In these areas, they were able to rely on well-established precedents in race discrimination cases. To some extent, activists had no choice: as noted above, between 1950 and 1970 it was unclear from what harms the Equal Protection Clause could protect minorities, or in what areas it could ensure equality. Activists could only rely on doctrine from—and form analogies with—cases arising from the racial justice movement. Yet focusing on those areas in which gays were discriminated against in similar ways as blacks in particular also gave additional resonance to the analogy.

Kameny's lawsuit, involving employment discrimination, is one such example. Similarly, in the area of First Amendment protections, the right of association was established in NAACP v. Alabama ex rel. Patterson, where the Court held a subpoena of NAACP membership lists to be invalid. It reaffirmed this right in Gibson v. Florida Legislative Investigation Committee, which overturned a lower court decision holding the Miami NAACP in contempt for refusing to disclose the names of its members to the Johns Committee of Florida. Activists used these decisions to reassure members of gay rights

---

119. Id. at 55.
120. Eskridge, Some Effects, supra note 2, at 2161-69.
121. Siegel, supra note 106, at 1484-89.
124. Eskridge, Challenging, supra note 2, at 866. The Johns Committee (formally the Florida Legislative Investigation Committee) was a committee of the Florida Legislature established in 1956. Like the U.S. Senate Permanent Subcommittee on Investigations chaired by Senator McCarthy, the purpose of the Johns Committee was to target communists, homosexuals, and subversives in state government, public education, and elsewhere. See
organizations who used pseudonyms within their organizations, as well as the regular readership of the various homophile magazines, who feared public disclosure of their names. Finally, most important for the rank-and-file gay man or African-American were the procedural due process protections that the Court began to demand of the police. Interestingly, often it was individuals who belonged to both racial and sexual minorities that were targeted by the police, as William Eskridge has described.

Furthermore, activists and organizations agitating for gay rights were familiar with the civil rights movement and the harms blacks faced. For example, the ACLU became involved in LGBT issues after Kameny organized discussions between the ACLU and gay rights activists. Its reports describing procedural irregularities specifically discussed the problems of blacks and gays within the same publication. Edward Sagarin himself had long been acquainted, politically and otherwise, with the difficulties of black Americans. In 1933, the radical National Student League sent him, with two classmates, to observe the Scottsboro trial in Alabama. Similarly, in 1950, a year before the publication of The Homosexual in America (under the pseudonym of Donald Webster Cory), Sagarin co-authored The Negro in American Business, focusing on issues of discrimination African-Americans faced in employment, the concept of separate versus integrated economic models, and other areas.

Other key activists such as Randy Wicker and Barbara Gittings had a history in

---


125. Eskridge, Challenging, supra note 2, at 866 n.211.

126. Cf. Mayeri, supra note 12, at 1067-68, 1070 (discussing employment and jury service as concrete contexts in which women and blacks were discriminated against).


128. See id. at 832-36.

129. See, e.g., ACLU OF GA., POLICE PROCEDURES IN ATLANTA (1966) (on file with author).

130. Duberman, supra note 36, at 61; see also Stephen O. Murray, Donald Webster Cory (1913-1986), in BEFORE STONEMEAL: ACTIVISTS FOR GAY AND LESBIAN RIGHTS IN HISTORICAL CONTEXT 333, 336 (Vern L. Bullough ed., 2002) (discussing Cory’s numerous affairs with African-Americans, which some have concluded made him especially sensitive to their plight).

131. ROBERT H. KINZER & EDWARD SAGARIN, THE NEGRO IN AMERICAN BUSINESS: THE CONFLICT BETWEEN SEPARATION AND INTEGRATION (1950); Duberman, supra note 36, at 66; Murray, supra note 130, at 334. The book shows familiarity with analogizing blacks to other minorities, among other characteristics that would appear in Cory/Sagarin’s book the following year. See, e.g., KINZER & SAGARIN, supra, at 155-36.
the racial justice movement.\textsuperscript{132} Seeing the similarities of the harms suffered by both gay and black individuals, it was easy for these individuals to analogize the claims of both groups.

Finally, some commentators of the period concentrated not on the harms of the minority, but rather on the "harms" the majority was forced to suffer in the name of equal protection: enabling African-American rights, for example, harmed whites' right to associate freely.\textsuperscript{133} While the majority could be forced to forego some privileges in the name of equality, it was unclear how large a sacrifice the law could demand. Accordingly, activists touched on the fact that the burdens the majority would have to bear in the name of gay rights were minor compared to those it bore for racial justice to justify their claims. Kameny, for example, characterized the social harms caused by the acceptance of homosexuality as less than those of preventing racism, noting that while the "force of Federal troops" overwhelmed "the public . . . in Little Rock" over the issue of integration, "[t]here will be no riots in the streets if homosexuals are no longer fired from the government service; no government buildings will be blown up[,] . . . no need to call out troops[,] . . . no mass resignations or boycotts . . . ."\textsuperscript{134}

While the harms gays faced were similar to those of blacks, they were not identical. Accordingly, the like-race analogy limited gay claims—it would be unconvincing for gays to claim protections based on their similarity to blacks if that protection was from a set of harms that blacks did not experience. Thus, as we shall see in Part IV, the race analogy not only determined the extent to which gays admitted their difference from the majority, and the way they portrayed this difference, but also what harms they could claim protection from.

C. Constructing New Self-Perceptions

The audience for the race-sexuality analogy was not just courts. Ultimately, the force of the analogy was felt, not through litigation, which was limited by a lack of activism in the community, but rather in its ability to invoke the activist legacy of the racial justice movement for new leaders and rank-and-file gays and lesbians. The verisimilitude of the analogy altered individual gay self-perceptions from that of religious outcasts and medical case studies to those of members of a political minority seeking legal rights. Slowly, Mattachine-like

\textsuperscript{132} See infra Section III.C.

\textsuperscript{133} See Siegel, supra note 106, at 1484-89.

\textsuperscript{134} Petition for a Writ of Certiorari, supra note 108, at 51.
service-oriented models of organization gave way to activism-oriented rights-seeking organizations. The formation of these organizations, in turn, paved the way for new conceptions of homosexuality in popular consciousness.

After deposing Hay, the new Mattachine eschewed legal action for service and education, relying on existing models of homosexuality. However, readers of the contemporary gay magazines were familiar with the activist nature of the civil rights movement and the status of blacks as a legal minority. Kameny began contributing to these magazines after the Supreme Court rejected his challenge, and exploited this familiarity to encourage activism and help reformulate gay identity. He began by criticizing other writers’ focus on science and education. Psychiatry was irrelevant as “[gays] ha[d] been defined into sickness.” Unlike the gay movement so far, “[t]he Negro is not engrossed in questions about the origins of his skin color, nor the Jew in questions of the possibility of his conversion to Christianity.” Similarly, we must “start off with the fact of the homosexual and his homosexuality and his right to remain as he is,” just “as a Negro and as a Jew” have the right to retain these qualities.

This argument led to a fiery response from Florence Conrad, who was prominent among the older generation of lesbian leaders. Discussing a recent resolution by the Mattachine Society of Washington (MSW) which stated that homosexuality was not a disease, she argued that advocates should avoid “militant and unsupported assertions” in areas in which the public “do[es] NOT consider the homophile movement as experts.” Rather, strategies by which researchers are brought “into informative personal contact with a broader cross-section of homosexuals” were desirable to educate both them and the public. Kameny responded by insisting that this research was pointless and that explicit positions needed to be taken: he noted that blacks, for example, had not benefited from medical research on equality between the races, but had rather done a “superb job of ‘selling’!” their equality. Similarly,
instead of relying on medical research regarding homosexuality, “a group like the Washington Mattachine which considers itself a civil liberties organization in major part . . . MUST have a formal position” that homosexuality is not a disease.\footnote{Kameny, \textit{supra} note 140, at ii.}

Kameny continued by inventing new slogans such as “Gay is Good” in deliberate counterpoint to “Black is Beautiful.”\footnote{Kameny, \textit{supra} note 140, at 2.} By framing gay rights as similar to racial justice, Kameny tapped into the activism of the civil rights movement to end an exclusive focus on “education” and “social services” in favor of legal action.\footnote{KAY TOBIN \& RANDY WICKER, \textit{THE GAY CRUSADES} 89 (1972); see also Claud Anderson \& Rue L. Cromwell, \textit{“Black Is Beautiful” and the Color Preferences of Afro-American Youth}, 46 J. NEGRO EDUC. 76 (1977) (studying how the “Black is Beautiful” slogan affected perceptions within the African-American community).}

In doing so, he provided a whole new perspective to other activists. As Barbara Gittings, one of the most well known leaders of the movement, noted:

My thinking didn’t change until Frank Kameny came along and he said plainly and firmly and unequivocally that homosexuality is no kind of sickness or disease or disorder or malfunction . . . . Whew, that knocked me for a loop. He said, “The hell with their research, the hell with their causation theories . . . . Our problem is we need our rights, let them do the research if they are so concerned about it. We shouldn’t be helping them with it. We have to go out and get our rights.” And it was a revelation. This was a whole new philosophy.\footnote{Franklin E. Kameny, \textit{Speech to the Mattachine Society of Washington} 2 (May 1, 1964) (on file with author).}

These activists, such as Gittings, Ernestine Eckstein, and Randy Wicker, frequently with backgrounds in the racial justice movement, aided Kameny in

\begin{quote}
The Negro’s claim to equality—which incidentally I accept wholeheartedly—is not nearly as well bolstered by research findings as Miss Conrad implies. This is not to say that research findings show inequality, just that not nearly as much research has been done to show equality as most people believe. What \textit{has} been done is a superb job of ‘selling’!
\end{quote}

\textit{Id.} Kameny was specifically responding to others in the movement who objected to his methods. Kameny here arguably anticipates Sedgwick’s movement of the debate from constructionism/essentialism (that is, the causes of identity) to universalizing/minoritizing models. SEDGWICK, \textit{supra} note 17, at 40.
the task of making gays self-consciously seek to change the law as a minority movement. \(^{145}\)

Simultaneously, as many writers note, organizations that were activist, rather than service-oriented, began to take root and replace existing groups. \(^{146}\) For example, Kameny created and mobilized the Mattachine Society of Washington as the first organization to perform litigation on behalf of the “homosexual community.” \(^{147}\) Along with the ACLU, the MSW would aid in the fight for gay rights, in a similar context to that of black rights. Similarly, organizations such as Lambda Legal, which formed soon after \(^{148}\) and whose

---

145. *See* Roxanna Thayer Sweet, *Political and Social Action in Homophile Organizations* 63 (1975) (“[L]eaders and members of the [homophile] organizations belong to a wide variety of other organizations dedicated to... the advancement of some oppressed minority...” (citations and quotations omitted)); id. at 121-22 (noting how organizations founded to prevent police abuse of gays most often helped racial minorities); *see also* D’Emilio, *supra* note 21, at 172 (noting the civil rights connections of early gay rights mobilizers). Eckstein, in fact, had worked at the NAACP. *Id.*

146. *See* Elizabeth A. Armstrong, *Forging Gay Identities: Organizing Sexuality in San Francisco, 1950-1994*, at 46; *id.* at 52 (charting the growth of identity-based homophile organizations in this period); Sweet, *supra* note 145, at 45 (“[O]lder organizations, which pioneered in the formation of the movement, were forced to change to fit in with the new ideas, or they ceased to receive the active support... of homosexuals.”). Other methods of organization and communication were also borrowed from the racial justice movement. Direct action and confrontational methods, for example, while less directly connected to the law, also affected gay self-perception as a minority group. *See* Altman, *supra* note 26, at 117-62. Elizabeth Armstrong and Steven Seidman suggest that these direct action, sexual liberation models sought identity-disrupting paradigms. Elizabeth Armstrong, *Crisis Collective Creativity and the Generation of New Organizational Forms*, in 19 Research in the Sociology of Organizations 361, 369, 372, 383 (Michael Lounsbury & Marc J. Ventresca eds., 2002); Steven Seidman, *Identity and Politics in a “Postmodern” Gay Culture: Some Historical and Conceptual Notes*, in *Fear of a Queer Planet* 105, 110 (Michael Warner ed., 1993). The accounts of Altman and Sweet, however, suggest that many of the direct action models relied upon the race analogy and upon identity-affirming paradigms such as Black Power (this despite the fact that Altman’s own project wished to disrupt identity). *See* Altman, *supra* note 26, at 128, 140-41; Sweet, *supra* note 145, at 64; *see also* Jeffrey Escoffier, *Sexual Revolution and the Politics of Gay Identity*, *Socialist Rev.*, July-Oct. 1985, at 119, 145, 149 (pointing to “public identity” as a basis of the liberation movement and to the “internal conflict[s]” within the movement—between identity affirmation and disruption—that other authors ignore).


charter was based on the Puerto Rican Defense Fund, \(^{149}\) understood themselves as "seek[ing] to function for gay people in the same way the NAACP Legal Defense and Educational Fund, Inc. has functioned for black people."\(^{150}\) In a detailed contemporaneous organizational study, Roxanna Thayer Sweet similarly pointed to a myriad of other new organizations that took root at the time, connecting them to the legacy of the racial justice movement.\(^{151}\) These organizations also reached audiences beyond legal actors: they not only litigated, but also created publicity that encouraged debates over gay rights in legitimacy-enhancing legal terms. Thus, even though no legal action followed a raid upon a gala held by the Council on Religion and the Homosexual in 1965 as all charges were dismissed, historians point to the publicity surrounding the event as significant.\(^{152}\)

As Elizabeth Clemens notes, "[A]s a group . . . adopts a specific model of organization, it signals its identity both to its own members and to others. Models of organization are part of the cultural tool kit of any society and serve expressive or communicative as well as instrumental functions."\(^{153}\) Several authors have noted that public interest organizations in the early 1970s were well respected—their activities possessed a perceived legitimacy, both in the legal profession and beyond.\(^{154}\) Not every group, however, could take

---


\(^{150}\) Brief for Lambda Legal Defense and Education Fund, Inc. as Amicus Curiae, in Support of Petition for Certiorari at 2, Enslin v. North Carolina, 425 U.S. 903 (1975) (No. 75-897); see also Thom, 301 N.E.2d at 545 (noting that Lambda's petition was "substantially identical to that of Puerto Rican Defense Fund").

\(^{151}\) Sweet notes that activist gays in San Francisco, for example, had begun to define themselves as "members of a minority group" analogous to racial groups during this period. Sweet, supra note 145, at 47.

\(^{152}\) Cain, supra note 149, at 55-56.


advantage of this model and the legitimacy it produced: as Clemens notes, "[c]ultures have rules about who should organize in what way and for what purposes; consequently, the choice of a conventional model by an unconventional group may [not] produce . . . efficacy." Using the race analogy, gay rights activists were able to frequently claim the right to utilize these organizational forms. In turn, these organizations engaged in activism, which to some onlookers both within and outside the gay community resembled racial justice advocacy and contributed to the changing perception of homosexuals. These groups helped reinforce gays' affirming self-perceptions and arguably even had an influence on mainstream perceptions of the gay movement.

A series of wide ranging interviews that Dana Rosenfeld has carried out with elderly gay individuals lends support to the connection between the race analogy and self-accepting models of homosexuality among nonactivists. Rosenfeld's interviewees explain that before the 1960s, homosexuality was perceived critically, by themselves and others, through the models of religion and medicine. They date the availability of "accredited" rights-based models of homosexual identity to the mid- to late 1960s, when Kameny first wrote. The sole exception among her interviewees, Leonard, dates his self-acceptance based on an individual rights concept of homosexuality to the 1950s, which he connected with his involvement in the racial justice movement.

The fora where the analogy was discussed were therefore frequently nonlegal. Through the use of the race analogy, however, Kameny and others sought (and, as we now know, were able) to make gays see themselves as a

---

_Clemens, supra note 153, at 770._

_This was seen in the legal battle over the approval of Lambda Legal's charter, where the analogy to the Puerto Rican Defense Fund drew the ire of the Appellate Division of the New York State Supreme Court. CAIN, supra note 149, at 60._

_ARMSTRONG, supra note 146, at 53-54._

_ROSENFELD, supra note 26, at 63. While Rosenfeld does mention one exception where another individual developed an "accredited" identity through interaction with the civil rights movement in the 1950s and analogized himself to the oppressed blacks of his acquaintance, _id._ at 68, 70, she notes the irrelevance of this individual perspective for the collective identity of the group, _id._ at 72. Sweet, whose work was written in 1968, SWEET, supra note 145, at i, dates the "homophile movement" to 1964-1965, when gays "increasingly began to define themselves as members of a minority group [comparable to] other minority groups of ethnic or racial bases," _id._ at 45._

_ROSENFELD, supra note 26, at 68, 70._

---
group fighting for legal rights in the image of African-Americans, rather than as individuals trying to understand themselves and educate others through medical and theological research. Ultimately, this would encourage activism within the community.

D. Doctrinal Developments and the Stabilization of Identity

Soon, however, activists no longer needed to invoke the race analogy every time they wished to speak of gays as a legal minority. As doctrine developed, minority groups more broadly became understood both formally and actually in general terms, as evincing certain indicia of suspectness such as trait-immutability, political powerlessness, and histories of discrimination. The lodestar became these categories, rather than racial identity, though African-Americans remained the quintessential suspect class. Simultaneously, extralegal developments in the gay rights movement consolidated its members' sense of minority status independently of the racial justice movement, as briefs from this period demonstrate. Also, while blacks and gays were often burdened in similar ways, there were also points of disanalogy which discouraged a focus on the analogy. Finally, courts themselves were not receptive to the race-sexuality analogy, which further discouraged exclusive reliance upon it.

1. Doctrinal Developments: A Formal Minority Group

Serena Mayeri has pointed out that as the women's movement progressed, it became clear that women's interests were implicated in contexts untouched by the civil rights movement. Furthermore, as the Court began to limit the remedies available for race-based discrimination, women's rights activists began to decrease their dependence on the race analogy. Accordingly, women's rights activists did not always rely on direct, rhetorical comparisons of sex discrimination to racial discrimination in court. Rather, in the foundational sex discrimination case of Reed v. Reed, the plaintiffs, represented by Ruth Bader Ginsburg, described minority status using "abstract" factors such as trait-immutability, political powerlessness, and

160. Mayeri, supra note 12, at 1076-77 ("[R]acial analogies became hazardous to feminists when the racial baseline legal remedy did not comport with their conception of appropriate remedies for sex discrimination in a particular case. . . . [ACLU Women's Rights Project (WRP)] briefs [in 1970s cases after Frontiero] relied upon arguments independent of the race parallel, stressing the Supreme Court's new sex discrimination jurisprudence without making an explicit bid for the recognition of sex as a suspect classification.").

histories of discrimination. Formally, these characteristics were independent of the race analogy. In actual fact, however, they were firmly based in a comparison with race, since their significance lay in their being attributed to African-Americans. Soon, however, they gained formal significance in Supreme Court doctrine on their own terms. Groups (including blacks) were not legally recognized minorities because of their resemblance to another group; technically, they were minorities because they possessed the relevant characteristics. This would lay the groundwork for gay activists’ reliance on these categories rather than directly on the analogy.

While women’s rights activists proffered formal criteria of suspectness to the Court in a bid to extend the logic of antidiscrimination to areas untouched by the racial justice movement (but before the Court had accepted this argument), those considering gay equality suggested similar criteria in an academic context and stopped focusing on the race analogy. A Yale Law Journal note and a Journal of Family Law comment on gay marriage, for example, advocated that the Court use a formal characteristics approach. Like women’s rights advocates, the authors were unsure how the Court would approach an area of litigation untouched by the racial justice movement. As of 1973, as the articles note, the Court did not always apply the reasoning of the race cases to other areas. Furthermore, family rights were not a typical locus for racial justice litigation.

Thus, while the articles suggested that it would be desirable for the Supreme Court to apply strict scrutiny to antigay discrimination, they did not rely on the direct rhetorical comparison between blacks and gays that Kameny used. Instead, they engaged in a doctrinal construction of what constituted a suspect class, based on the familiar notions of immutability, control over

162. Mayeri, supra note 12, at 1075.
166. Note, supra note 164, at 575; Silverstein, supra note 165, at 611-15.
167. This is so even though they were unsure what the criteria would be. The Yale Law Journal note explains, “The Supreme Court has never explicated its grounds for declaring certain classifications to be inherently suspect,” and instead based its analysis on Justice Marshall’s dissent from Dandridge v. Williams, 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting). Note, supra note 164, at 575. The brief in an early marriage case appears to agree with the
classification, history of discrimination, and lack of political power. Even if the locus of discrimination involved (family rights) was not rhetorically comparable to the areas in which African-American litigants generally filed suit, groups possessing the formal characteristics deserved protection. Instead of relying on the similarity of contexts and loci of discrimination described above,\textsuperscript{168} or a point-by-point comparison to a particular group, the authors suggested that the comparison be mediated through abstract legal categories. Later in 1973, the Court formally endorsed this approach.\textsuperscript{169} Since then, other academic writers have similarly focused on the formal criteria of suspectness, ignoring or deemphasizing the race analogy.\textsuperscript{170} This emphasis on abstract criteria rather than analogies aided gay litigants in the bid for an independent identity, without reliance on the race analogy.

2. A Gay Movement

These developments were significantly aided by social changes. The uprising at the Stonewall Inn consolidated the gay activism that Kameny had encouraged and deepened its sense of community; a new generation of activists came to the fore. As gays became more secure in their group status and their legal and political activism, the use of the race analogy declined in litigation—not a single brief related to gay issues filed with the Supreme Court in the early 1970s referred to the analogy.\textsuperscript{171} While it had been politic for gay activists to

\textsuperscript{168} See supra Section III.B.

\textsuperscript{169} See supra note 163.


\textsuperscript{171} In addition to the brief in \textit{Nelson}, see Jurisdictional Statement, supra note 167, and the petitioners' brief in \textit{Enslin}, see Petition for Writ of Certiorari, Enslin v. North Carolina, 425 U.S. 903 (1975) (No. 75-897) (standing in contrast to the Lambda amicus, see supra note 150), see also Petition for Writ of Certiorari, Singer v. U.S. Civil Serv. Comm'n, 429 U.S.
develop a narrative of an independent minority status distinct from the mainstream, they soon understood this status on its own terms without continued reliance on the race analogy.

Thus, in briefs filed to the Supreme Court in the 1970s, mini-histories of the discrimination that homosexuals as a group had experienced since time immemorial became regular. In ACLU litigation, references to the ban on sodomy in Justinian’s Code to establish this history, for example, became almost perfunctory. Thus, activists articulated their relationship with the heterosexual majority independently, without looking to that between blacks and whites. In *Baker v. Nelson*, petitioners advanced “hypotheses” for earlier forms of discrimination by the majority due to their “fear and ignorance,” not of minorities in general, but of “all sexual matters.” Simultaneously, they criticized this majority outlook from the point of view of “psychiatr[y] and sociolog[y],” which were bringing about a change in the majority’s “attitude.” Thus, the appellants implied, since the ignorance of the majority regarding sexuality and homosexuals had decreased, gays deserved marriage rights, whatever the situation of other minorities. Thus, gays acknowledged that the causes of homophobia were different from and independent of the origins of racism and that the status of gays as a minority group was therefore not contingent on that of blacks.

3. The Failure of Analogies

Race-based analogies had generally failed in courts, discouraging activists from within and outside the gay rights movement from emphasizing the analogy. In the context of the race-sex analogy discussed further below, courts often discounted direct comparison between race and sex, relying more upon formal categories. Equal protection cases such as *United States v. Virginia* demonstrate the refusal to rely on a direct analogy. The majority opinion

---


172. The *Nelson* and *Schlegel* briefs in fact use the same language. Jurisdictional Statement, supra note 167, at 8-9; Schlegel Cert Petition, supra note 171, at 6-7.


174. Id. at 8-10.
mentions "race" four times in its main text. The Court uses it to highlight the disanalogy between race and sex claims. The Court in Virginia instead relied heavily on the formal, doctrinal bases of Reed and Frontiero.

Furthermore, while women's activists may have made what initially appeared to be a successful bid for the creation of formal categories, to avoid being limited by the areas that racial justice had touched, it appears that ultimately they were unsuccessful. In spite of the formal reliance on the categories in the cases after Reed and Frontiero, which avoid explicit analogical argument, Mayeri suggests that courts still allow the Equal Protection Clause to protect women only from harms similar to those blacks faced. Harms to women lacking a ready racial analogue, such as reproductive control, have been thus siphoned off into doctrinal areas where the primary focus was not equal protection or race analogies. Equal protection arguments in those contexts have arisen only in the context of academic writing and dissenting opinions.

To conclude, doctrinal developments, the development of a grassroots gay movement, and court reactions acted as interlocking, and mutually reinforcing, factors, which helped ultimately to make gay identity independent of the race analogy. For example, the basic elements of abstract equal protection doctrine—a focus on trait-immutability, political powerlessness, and histories of discrimination—reinforced the notion of a stable, separate identity,

175. It is mentioned once more in a footnote to explain that even strict scrutiny is not "fatal in fact." United States v. Virginia, 518 U.S. 515, 532 n.6 (1996) (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 237 (1995)).

176. Id. at 525 ("[I]t is extremely important to [colleges and universities] deal with faculty, staff, and students without regard to sex, race, or ethnic origin." (quoting United States v. Virginia, 976 F.2d 890, 899 (4th Cir. 1992) (alterations in original) (internal quotation marks omitted)).

177. The disanalogy is based on "inherent differences" which exist between the sexes. Id. at 533 (internal quotation marks omitted).

178. See, e.g., Geduldig v. Aiello, 417 U.S. 484 (1974) (holding that pregnancy discrimination is not the same as sex discrimination); Roe v. Wade, 410 U.S. 113 (1973); Mayeri, supra note 12, at 1078 n.160 (discussing Geduldig).

179. See, e.g., Reva B. Siegel, Siegel, J., Concurring, in WHAT ROE V. WADE SHOULD HAVE SAID 63 (Jack M. Balkin ed., 2005).

independent of a race analogy.\textsuperscript{181} Similarly, a movement that confidently self-identified as gay strengthened doctrinal abstraction by decreasing reliance on concrete analogies in litigation.

However, by suggesting that later litigation provided tools to allow gay identity to stand separate from race analogies, tools which activists frequently took advantage of, I do not suggest that the use of analogies ended. Even where analogies were not explicitly present, they lurked beneath the surface of activists' arguments: as activists invoked formal criteria of suspectness, the judges, their opponents, and the activists themselves were aware of the racial justice movement's role in producing the formal categories. Because of this, even while applying abstract categories, litigants and courts even today often ultimately refer to race as an example of these categories.\textsuperscript{182} Similarly, nonlegal arguments, lacking the formal boundedness of legal claims, often engage with the analogical reasoning that underlay these indicia of suspectness.\textsuperscript{183} Yet, even though proponents and opponents continue to use race analogies, their direct invocation became increasingly superfluous to the gay self-conception of being a distinct legal minority.

**IV. THE RACE-SEX ANALOGY**

Even as the gay rights movement began somewhat to detach itself from the race-sexuality analogy in the early 1970s, it became firmly reliant on the race-sex analogy. Section IV.A describes the birth of the race-sex analogy in the gay rights movement. It points to the limited relevance of the race-sexuality analogy to family rights issues concerning gays in the 1950s and 1960s which curtailed activism in that area. However, by comparing interracial and same-sex relationships, the race-sex analogy soon allowed gays to make claims for relationship rights, as Section IV.B explains. Yet activists still had to analogize their claims to the specific form of relationship rights at stake in the debate over interracial relationships, namely, marriage. Thus, the race-sex analogy specifically enabled litigation for gay marriage, rather than other forms of relationship recognition. Section IV.C explains why the race-sex analogy remains a potent force, despite judicial resistance.

\textsuperscript{181.} See, for example, the reliance on histories of discrimination, *supra* note 172, to characterize gays as a group.

\textsuperscript{182.} Most recently, see, for example, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); and *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

\textsuperscript{183.} The Proposition 8 debate indicates this point.
A. Family Rights: An Area of Disanalogy

The racial justice movement largely failed to engage with issues involving family rights, thus depriving gay activists of a ready analog in that area. As I suggest in Subsection III.B., in contexts where the race analogy had limited relevance it was often rejected and ignored: activists curtailed litigation efforts in these areas due to the lack of a racial analog. Accordingly, the gay rights movement focused upon "sexual liberty" and other concerns of generally male plaintiffs in the public sphere such as employment, and overlooked the demands of gay women relating to family issues and gender equality. While sexism contributed to this imbalance, another cause for the shortcoming was the limited legal language made available to the gay rights movement by the racial justice movement.

Early gay male activists were hostile to the notion of family rights, suggesting that capitalism, which underlay the institution of heterosexual marriage, was responsible for antihomosexual sentiment. This hostility reflected a broader, antimarriage sentiment among gay men that lasted through the early 1950s.

.ONE magazine first touched on the issue of gay marriage in 1953 in an article by a contributing author. The author asked, "We have a greater freedom now (sub rosa as it may be) than do heterosexuals and any change will be to lose some of it in return for respectability. Are we willing to make the trade?" The issue of gender roles was not lost upon him, causing him to ask what the implications of one of the partners being "kept" or being expected to reproduce would be. Even though the article merely considered the question of marriage, without unequivocally supporting it, the article received an overwhelmingly negative response from gay readers. One such reader suggested that it was desirable that "the deviate [homosexual] . . . be able to evolve institutions which suit his needs. I doubt if marriage will do that. What is marriage? It is an heterosexual concept buttressed and blessed by the Church and State." Several other letters and at least one article noted that because of promiscuity and the lack of procreation in gay relationships, marriage would be

---

184. See Eskridge, Channeling, supra note 2, at 827.
185. Katz, supra note 40, at 394.
186. E.B. Saunders, Reformer’s Choice: Marriage License or Just License?, ONE, Aug. 1953, at 10, 12.
187. Id. at 12.
188. Id. at 11.
an unsuitable institution for gays. Marriage, in the only major homophile publication in 1953, had been rejected.

Later in the decade we find a slow movement towards discussions on domestic issues in both ONE and The Ladder. In 1961, discussions were held at ONE's Midwinter Institute on issues gay couples faced in the limited contexts of insurance, taxes, and adoption and custody of biological children. However, no legal action was contemplated; demands remained limited and untranslatable into the language of a civil rights movement that had not incorporated such "domestic" concerns. There were certainly no public calls for gay marriage.

The lack of the racial analogue on relationship issues was connected to broader issues within the racial justice movement. The civil rights movement failed to take into account the needs of black (and white) women within the movement and their more "domestic" concerns. As Pauli Murray noted, in spite of black women's broad participation in the civil rights movement, "the aspirations of the black community have been articulated almost exclusively by black males. There has been very little public discussion of the problems, objectives, or concerns of black women." The civil rights movement largely concerned itself with government oppression in the public sphere. Some scholars have hypothesized that this was because African-Americans, both male and female, had often experienced family life as a locus that was free from government interference and oppression. Others suggest that early access to the public sphere was denied to black men and women alike. However, growing exposure of African-American communities to the gendered public sphere enhanced sexism in the racial justice movement. That is, as blacks

---


194. Dorothy E. Roberts, Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy, 104 HARV. L. REV. 1419, 1439-40, 1470-71 (1991) (noting that unlike white women, "[w]omen of color ... often experience the family as the site of solace and resistance against racial oppression"); see also Mayeri, supra note 12, at 1075 ("Unlike the employment and jury service contexts, where race and sex discrimination overlapped in concrete, practical ways, discriminatory estate administration policies and spousal military benefits had no immediately evident racial counterparts.").

195. See Diane K. Lewis, A Response to Inequality: Black Women, Racism, and Sexism, 3 SIGNS 339, 341-43, 349 (1977); see also Constance M. Carroll, Three's a Crowd: The Dilemma of the Black
gained greater access to broader societal public life, the profoundly gendered character of that public life affected the civil rights movement. The racial movement therefore focused only on racial inequality in the public sphere, dismissing women’s rights groups to make claims for rights within the private sphere on their own.196

Moreover, insofar as the racial justice movement did touch on “domestic” issues by targeting antimiscegenation laws,197 the analogy was difficult to make. Antimiscegenation laws prevented blacks from marrying whites. However, heterosexist marriage laws prevented gays from marrying each other. This was not a case of prohibited intermingling between the majority and minority group. Thus, it is hardly surprising to find activists pointing to domestic issues as the one place where gay rights lacked an analogy. As one (probably male) writer noted:

But for some problems besetting the homosexual there is no analogy among other minorities. How does one reply, for example, to the homosexual who wants to know how he can perpetuate his “marriage” with another homosexual? There are no text books on homosexual marriage to which one can go for the answer, and most “authorities”, when confronted with such a question, merely reply that homosexual relations are illegal and degenerate anyway and the best solution lies in marrying a charming young girl and rearing a family.198

Unsurprisingly, those who made the race analogy and emphasized activism often ignored issues involving family rights. Conversely, those who wrote in The Ladder and spoke at the Midwinter Institute on the domestic problems gays faced ignored the race analogy and took a nonlitigation based position.

B. Family Rights as Marriage Rights and the Race-Sex Analogy

Arguments against antimiscegenation laws gained purchase within the gay rights movement in the early 1970s, but through the race-sex, rather than the
race-sexuality, analogy. Until the early 1960s, women's rights groups had refrained from emphasizing the similarities between sex and race discrimination in the civil rights movement. Proninent activists and academics rejected the early discussion of the race-sex analogy. When the issue of sex discrimination was discussed in the mid-1960s, a memo that prominent African-American women's rights activist Pauli Murray had written discussing the analogy was widely circulated. However, during the Title VII debates, the discussions on the Senate floor emphasized the disanalogies between race and sex. ACLU lawyers in the mid-1960s also rejected the analogy.

However, various circumstances led to a revision of opponents' positions by 1970. For example, in 1970, the ACLU reversed its position on the Equal Rights Amendment (ERA). In the same year, Ruth Bader Ginsburg's ACLU amicus brief in Reed v. Reed (and other briefs of amici in the case) were grounded in the race-sex analogy. Simultaneously, in the debate over the Equal Rights Amendment (ERA), women's groups reversed their position on the issue and analogical arguments became common.

200. Id. at 1061-62.
201. Id. at 1064-65.
202. Id. at 1066.
203. Id. at 1071.
205. Brief for Appellant, Reed v. Reed, 404 U.S. 71 (1970) (No. 70-4); Brief for the National Federation of Business and Professional Women's Clubs as Amicus Curiae Supporting Appellant at 8, Reed, 404 U.S. 71 (No. 70-4) ("[S]ex discrimination takes an even greater economic toll than racial discrimination."); Brief of the City of New York as Amicus at 16, Reed, 404 U.S 71 (No. 70-4) ("[T]he net effect of sexual, like racial classifications is the same."); Joint Brief of Amici Curiae American Veterans Committee and NOW Legal Defense & Education Fund at 10-12, Reed, 404 U.S. 71 (No. 70-4) ("Because sex and race discrimination are so similarly based and motivated, they deserve similar constitutional scrutiny and treatment."). For a full discussion, see Mayeri, supra note 12, at 1073.
206. See Hearings Before the S. Comm. on the Judiciary on S.J. Res. 61 and S.J. Res. 231, 91st Cong. 74-75 (1969) (statement of Professor Paul A. Freund); Mary Eastwood, The Double Standard of Justice: Women's Rights Under the Constitution, 5 VAL. U. L. REV. 281, 313 (1971); Rita E. Hauser, Address at the Annual Meeting of the American Bar Association (Aug. 10, 1970), in Symposia: Edited Proceedings of the Annual Meeting Program of the Section of Individual Rights and Responsibilities, HUM. RTS., July 1971, at 54, 62 ("I also believe that the proposed Amendment, if adopted, would void the legal requirement or practice of the states' limiting marriage, which is a legal right, to partners of different sexes.").
The newly popular race-sex analogy suddenly allowed the gay rights movement to gain purchase on the limited intersection between the racial justice movement and domestic issues. As ERA opponents pointed out, if *Loving v. Virginia* stood for the proposition that formally equal prohibitions on racial intermarriage were unconstitutional discrimination, and if the ERA made it clear that sex discrimination was as impermissible as racial discrimination (even if formally applied equally to both sexes), then sex discrimination in the case of marriage was impermissible, and one could not force an individual to marry someone of the opposite sex. Thus, when Matthew Stark, an ACLU Board Member, asked the Board in 1970 to litigate what would be the first same-sex marriage case, on behalf of University of Minnesota Law School student body president Jack Baker, the race-sex analogy would ultimately undergird the case.

Yet, the "relationship" recognition that activists in the racial justice movement sought was of a particular kind. As Ariela Dubler notes, the ultimate goal was always to validate interracial marriage, even when the particular law being challenged prohibited only interracial cohabitation (as in *McLaughlin v. Florida*). Thus, marriage epitomized the meaning and legacy of the push for interracial relationship recognition — *Loving* ultimately became its symbol, for courts and commentators. For gay litigants, *Loving* and the race-sex analogy were the only vehicles that could carry forward formal arguments for gay relationship recognition. However, they inevitably carried these arguments towards claims for marriage. It is unclear whether the litigation context created and channeled activists' preferences and perceptions about relationships towards marriage or whether it merely provided a means to argue for existing (though recently created) preferences for marriage rather than less formal relationships. Either way, while later activists sought incremental benefits, litigation in the early 1970s was aimed at gay marriage.

---

207. 388 U.S. 1 (1967).
208. See supra note 206.
209. Stark was also Board President and later the Executive Director of the Minnesota ACLU. The National ACLU rejected Stark's proposal, but the MCLU went forward. Telephone Interview with Matthew Stark (Apr. 21, 2009).
211. 379 U.S. 184 (1964).
212. This incremental litigation, often though not always aimed to attain marriage, was suggested by later commentators. See Craig W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a "Simulacrum of Marriage"*, 66 FORDHAM L. REV. 1699, 1711 (1997) (detailing similar calls for gradualism, though not always to gain marriage);
By 1973, cases seeking marriage recognition were filed in Kentucky, Minnesota, New York, and Washington, four law review pieces were (independently) written, and a cert petition was filed with the Supreme Court. The arguments of these early cases and much of the commentary were squarely based in the race-sex analogy. As the relationship recognition movement gained traction in subsequent decades, these cases and arguments set the stage for later activism around family rights issues. Furthermore, as the events in California discussed in the Introduction indicate, the race-sex analogy becomes further reinforced by the race-sexuality analogy on the marriage issue: marriage rights have become part of the gay rights movement just as Loving made them part of the racial justice movement. Ultimately, while many today see the focus on marriage as a serious blow to the movement, it is important


213. Stark notes that after all these years, the race analogy issue “melded” in his mind with the more tangible benefits of marriage in the litigation. Telephone Interview with Matthew Stark, supra note 209.


215. In addition to Note, supra note 164; and Silverstein, supra note 165, see also James W. Harper & George M. Clifton, Heterosexuality: A Prerequisite to Marriage in Texas?, 14 S. Tex. L. Rev. 220 (1972), which primarily addresses the voidability of a mistakenly performed same-sex marriage and considers the issue of what constitutes marriage from a policy and law-as-preference-shaping perspective; and Ian McColl Kennedy, Transsexualism and Single Sex Marriage, 2 Anglo-Am. L. Rev. 112 (1973), which discusses gay marriage from a policy perspective. Other law review articles that followed, such as Catherine M. Cullem, Note, Fundamental Interests and the Question of Same-Sex Marriage, 15 Tulsa L.J. 141 (1979); Case Comment, Homosexual “Marriage”: The Definition of Marriage Precludes Permitting Marriage of Same-Sex Couples. Singer v. Hara, 11 Wn. App. 247, 522 P.2d 1187, cert. denied, 84 Wn. 2d 1008 (1974), 10 Gonz. L. Rev. 292 (1974); Comment, Homosexuals’ Right To Marry: A Constitutional Test and a Legislative Solution, 128 U. Pa. L. Rev. 193 (1979); and Leo Sullivan, Note, Same Sex Marriage and the Constitution, 6 U.C. Davis L. Rev. 275 (1973), rely upon the criteria for suspect scrutiny that the Court announced in Frontiero v. Richardson, 411 U.S. 677 (1973); and San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), which were unavailable to those who filed their lawsuits in 1971 and 1972 and are therefore irrelevant for a discussion of their strategies.


217. See Yoshino, Covering, supra note 2, at 848 & n.426. See also Katherine Franke’s “fear[s] that Lawrence and... gay rights organizing... have created a path dependency that privileges privatized and domesticated rights... while rendering less viable projects that advance nonnormative notions of kinship, intimacy, and sexuality.” Katherine M. Franke, The Domesticated Liberty of Lawrence v. Texas, 104 Colum. L. Rev. 1399, 1414 (2004).
not to lose sight of these early litigation dynamics that helped establish this focus in the first place.

C. The Continued Reliance on Analogies in Marriage Litigation

Activists today still use the race-sex analogy in marriage litigation, and, like their 1971 counterparts, generally enjoy limited success in doing so. The reliance in 1971 on the analogy in the face of judicial unresponsiveness is perhaps understandable. The lack of an independent ERA or sex discrimination jurisprudence at the time meant that the reach of sex discrimination constitutional law tracked that of race discrimination law. Accordingly, both women's rights activists and litigants who argued for same-sex marriage based on a sex discrimination argument were committed to the race-sex analogy.

Since then, however, legal doctrine has established the unconstitutionality of sex discrimination on its own terms, independent of the analogy. Given this fact, the sex discrimination inherent in prohibitions on gay marriage should be unconstitutional in its own right. Thus, the grounds for this dependence and the grounds of judicial rejection of the analogy invite further exploration. Modern reliance on the Loving analogy is based primarily on two factors. First, gay plaintiffs use Loving to emphasize that they are denied the benefit that was granted in Loving, namely marriage. Second, the analogy is the only effective way to rebut the equal application argument. According to this argument, laws prohibiting interracial marriage applied equally to whites and blacks, and therefore did not violate equal protection principles. The Supreme Court famously rejected this argument in Loving, establishing the case as a fundamental piece of racial justice jurisprudence. Other areas of equal protection doctrine involving race have been formalized.

suggests that "Lawrence offers us no tools to investigate 'kinds of intimacy [and sex] that bear no necessary relation to domestic space, to kinship, to the couple form, to property, or to the nation.'" Id. at 1416 (alteration in original) (quoting Lauren Berlant & Michael Warner, Sex in Public, 24 CRITICAL INQUIRY 547, 558 (1998)).


219. In Singer, a state ERA had actually been passed. Commentators who opposed the Washington state ERA did raise the specter of gay marriage, a fact that the plaintiffs raised in their case as evidence of legislative intent favorable to gay marriage. The Washington Supreme Court rejected their argument. Singer, 522 P.2d at 1190-91 & n.5.

220. See Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971); Hernandez v. Robles, 855 N.E.2d 1, 28 (N.Y. 2006); Singer, 522 P.2d at 1187.
into, for example, criteria of suspectness; yet in *Loving*, the Court did not formalize its rejection of the equal application argument as an abstract principle such as “arguments that the equal application of a rule within each class upholds equal protection will always be rejected.”

Gay activists must therefore depend on the circumstances and specific example of *Loving* itself, rather than on formal rules or categories, to make their claims. Yet judges have consistently refused to accept this parallel: they have found against gay marriage claims based on what they take to be differences between the dynamics of race and sex and disanalogies between *Loving* and gay marriage cases. Their rejection of the analogy and the equal application argument can be traced to two main issues.

1. **Stereotyping vs. Subordination vs. Classification**

   By the 1970s, opponents of affirmative action had begun to argue that the Constitution prohibited both classification and subordination on the basis of race. However, several commentators have suggested the primary thrust of the race discrimination opinions in the 1950s and 1960s such as *Loving* was that the subordination of one race to the other violated equal protection principles. Others have argued that in the sex discrimination context, the antisex-stereotyping principles form the analog to antisubordination principles from

---

221. Readers will note that I do not discuss two recent cases in which gay activists gained heightened equal protection scrutiny, namely *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), and *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (Conn. 2008), as these cases rely on the “legal categorical abstractions” of doctrine referred to earlier, rather than upon the race analogy per se. I also do not detail recent marriage cases that do not add to the argument of this Note; for them, see Widiss et al., *supra* note 218, at 461.

the race context: rules that stereotype, rather than simply classify, are particularly problematic.\(^\text{223}\)

Therefore, Deborah Widiss and her co-authors have recently argued that to rely on *Loving*, whose opinion was based on antisubordination concerns, activists must emphasize anti-stereotype arguments. Today's legal arguments in favor of gay marriage implicitly include both anticlassification and antistereotyping arguments. Anticlassification arguments were present in the original *Nelson* brief, which claimed that "restrictive marriage statutes facially discriminate on the basis of sex" by classifying individuals seeking to marry based on their sex.\(^\text{224}\) The sex stereotyping argument explains that "the rationales offered as justifications for the sex-based classifications in these statutes [prohibiting homosexual marriage] rely upon sex stereotypes" such as heteronormative parental roles and modeling of appropriately gendered behavior.\(^\text{225}\) Widiss, Rosenblatt, and NeJaime observe that the anticlassification argument, especially in its reliance on *Loving*, "draws normative strength from, and vindicates values associated with, the sex stereotyping argument"; they suggest coordinating the two arguments in legal briefs, to "strengthen[] the analogy between the sex discrimination argument in these cases and the race discrimination argument in ... *Loving*.\(^\text{226}\)

However, herein lies the problem. Judges do appear to realize that *Loving* was based on antisubordination principles. However, they have declined to equate racial subordination and sex stereotyping. In *Hernandez v. Robles*, which declined to extend marriage rights to gay couples in New York, for example, the court held that the parallel between race discrimination and marriage laws as sex discrimination was inapt, because women are not subordinated "as a class."\(^\text{227}\) Similarly, in *Baker v. State*, the court suggested that discriminatory marriage laws simply do not subordinate an identifiable group sufficiently as a class based on sex. It noted that "[i]t is one thing to show that long-repealed marriage statutes subordinated women to men within the marital relation. It is quite another to demonstrate that the authors of the marriage laws excluded same-sex couples because of incorrect and discriminatory assumptions about


\(^{224}\). Cf. Widiss et al., *supra* note 218, at 462 (describing the arguments).

\(^{225}\). Id.

\(^{226}\). Id. at 462, 479-84.

\(^{227}\). 855 N.E.2d 1, 11 (N.Y. 2006).
gender roles or anxiety about gender-role confusion." After all, "[p]laintiffs have not demonstrated that the exclusion of same-sex couples from the definition of marriage was intended to discriminate against women or lesbians and gay men, as racial segregation was designed to maintain the pernicious doctrine of white supremacy." The refusal to equate stereotype with subordination is the first point of judicial pushback.

2. Private/Fundamental Issues vs. Public/Secondary Issues

Second, judges suggest that Loving dealt solely with race discrimination, a public phenomenon, and did not reach the private sphere of marriage and any sex discrimination therein.

The litigants, and thus the courts, in the movement to end laws against miscegenation took traditional forms of marriage for granted. Katherine Franke has discussed in some detail how Reconstruction-era African-American communities adopted traditional hetero-patriarchical marriage forms to gain public social status. The litigants in the movement to end miscegenation laws a century later inherited this orientation towards conventional marriage forms. As a result, these litigants (and as a result, the courts that heard their cases) effectively separated and publicized the racial overtones of the marriage laws they challenged from other, more intimate, established characteristics, which they did not question. These characteristics of the institution—for example, the formalization of intimacy, or gender hierarchies—remained uninterrogated and unexposed. For example, as Ariela Dubler notes, there was

---

228. 744 A.2d 864, 880 n.13 (Vt. 1999).
229. Id. at 887 (arguing that Loving showed subordination of a sort not demonstrated in the case).
230. Katherine Franke suggests that the focus on marriage in the African-American rights movement, accompanied with a rejection of the radically different kinship structures which resulted from slavery, was strategic:

Many African-American leaders were quite aware that white northerners and southerners alike used marriage as a barometer of their people's fitness for freedom, and they urged poor blacks to adopt the domestic patterns common among elite whites. This, they argued, would help convince the nation that ex-slaves deserved the rights and privileges of freedom.

Franke, supra note 217, at 1422 (quoting LAURA F. EDWARDS, GENDERED STRIFE AND CONFUSION: THE POLITICAL CULTURE OF RECONSTRUCTION 56 (1997)). Indeed, "it was not uncommon for 'respectable' members of the community to turn in their erring brothers and sisters to white legal authorities if they were known to be cohabitating without marrying, maintaining more than one spouse, or violating the obligations of marital monogamy." Id. at 1423.
no question that McLaughlin v. Florida, a case of cohabitation rather than of marriage, was merely a stepping stone to the brass ring of marriage in Loving—actors did not even stop to question the value of the cohabiting relationship in its own right or the value of seeking the right to intermarry as an ultimate goal.\(^{231}\)

The antimiscegenation cases, therefore, ironically reinforced divisions between what was considered private and axiomatic about marriage, and its more public elements, which are up for debate—for example, race discrimination in the institution. Thus, contemporaries argued that Loving did not bring into question fundamental "domestic" tenets of the marital relationship that implicated issues of sex. "In Loving and Perez," said the Washington Court of Appeals in Singer, "the parties were barred from entering into the marriage relationship because of an impermissible racial classification."\(^{232}\) The race of the individuals was not a quality intrinsic to the marital definition, however; nor would that definition be altered by ending prohibitions on interracial marriage.\(^{233}\) In "Loving . . . [the] [C]ourt[] did not change the basic definition of marriage as the legal union of one man and one woman . . . . [T]he Fourteenth Amendment did not require any change in the definition of marriage . . . ."\(^{234}\)

\(^{231}\) See, e.g., Dubler, supra note 210, at 1169 (discussing the orientation toward Loving and away from McLaughlin as evidence of "law's generally myopic view of marriage as the only form of sexual intimacy tied to one's place in the public, constitutional order"); id. at 1180. Tucker Culbertson argues that Loving was wrongly decided because instead of destroying marriage, it simply modified it. Tucker Culbertson, Arguments Against Marriage Equality: Commemorating & Reconstructing Loving v. Virginia, 85 WASH. U. L. REV. 575 (2007). He argues:

[T]he Supreme Court should have condemned Virginia's homoracial Heterosexual civil marriage laws as an infringement not upon the fundamental right to marry, but rather upon the Lovings' rights to the ends of marriage—such as erotic pleasures and communities of care, which for ease I refer to as the rights to sex and family. Doing so would avoid the nearsighted and naturalizing defense of marriage as such, which mistakes a governmental means for a constitutional end, and thus perpetuates and legitimates discrimination against those whose forms of sex and family remain unrecognized and/or prohibited by civil marriage regimes. Id. at 577.


\(^{233}\) Id.

\(^{234}\) Id. at 1192 n.8. Certainly, marriage between whites and blacks was recognized as interracial marriage, however illegitimate, for centuries. See Peter W. Bardaglio, "Shamefull Matches": The Regulation of Interracial Sex and Marriage in the South Before 1900, in SEX, LOVE, RACE 112, 114 (Martha Hodes ed., 1999) (noting the rare existence of interracial marriages in the seventeenth century). The question as to whether these were marriages appears never to have been raised.
Similarly, courts today treat Loving as a case that, in retrospect, is part of the broader legacy of racial justice that was being discussed in the public sphere. As the court in Hernandez explains:

This country fought a civil war to eliminate racism’s worst manifestation, slavery, and passed three constitutional amendments to eliminate that curse and its vestiges. Loving was part of the civil rights revolution of the 1950’s and 1960’s, the triumph of a cause for which many heroes and many ordinary people had struggled since our nation began.235

Loving was a piece of a grand historical narrative, taking place on the public stage of the nation, not within its relationships and homes. Other hierarchies or forms of discrimination were therefore not brought into question by that case.

Thus, judges continue to reject the idea that the private stereotypes of sex and marriage discrimination are analogous to the public classification or subordination implicit in race discrimination. Sexual hierarchies within the family, perpetuated through marriage, are ultimately a private matter.

Thus, while race-sexuality analogies are not directly applied to link discrimination on the basis of race and sexual orientation today, race analogies continue to affect the gay rights movement. Yet, even as courts ignore and sidestep the analogy—the reader will note that gay activists have been unsuccessful in making “like race” claims and were more successful in cases emphasizing assimilation, discussed in Part II, rather than the disassimilationist cases in Part III—the disassimilationist notion of gays as a legal minority with civil rights claims has stabilized and stuck within the gay community.

235. 855 N.E.2d. 1, 8 (N.Y. 2006). Few other unsympathetic courts explain the differentiation from Loving. Nelson simply stated that “there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex.” 191 N.W.2d, 185, 187 (Minn. 1971). Similarly, Andersen v. King County relies on the fact that most other states had rejected the race analogy, 138 P.3d 963, 977 (Wash. 2006), and on Nelson and Baker v. State, id. at 989, for its rejection of the equal protection (as distinguished from due process) analogy to Loving. Jones v. Hallahan, 501 S.W.2d 383 (Ky. 1973), did not discuss the analogy. Lewis v. Harris, 908 A.2d 196, 210 (N.J. 2006), merely refers us to the “fact-specific background” of Loving. Other grounds that have been identified include the lack of intent to discriminate based on sex. See Conaway v. Deane, 932 A.2d 571, 601-02 (Md. 2007); Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 975 (Mass. 2003) (Spina, J., dissenting); Baker v. State, 744 A.2d, 864, 880 n.13 (Vt. 1999); Craig M. Bradley, The Right Not To Endorse Gay Rights: A Reply to Sunstein, 70 IND. L.J. 29, 32-33 (1994).
CONCLUSION

This "legal" identity, created over time, coexists with other dynamics within the movement, rather than wholly replacing them. Even in the decades after the race analogy became "abstracted," courts generally remained unwilling to reward gays with the heightened scrutiny sought by those putting forward equal protection arguments. Activists responded by combining minority-based arguments with assimilationist due process arguments redolent of the early phase of the gay rights movement: these arguments claim a denial of the right to perform certain acts, without claiming minority group status. This trend continued into the 1980s, with litigants in cases such as Bowers v. Hardwick completely avoiding equal protection claims, relying purely on privacy-based analysis; those same arguments later became the basis for the victory in Lawrence v. Texas.

The legal audience to such claims slowly became more receptive: during the consideration of Bowers, one of Justice Marshall's clerks observed in a memo to the Justice, in striking contrast to Chief Justice Warren's clerk in ONE, "THIS IS NOT A CASE ABOUT ONLY HOMOSEXUALS . . . ALL SORTS OF PEOPLE DO THIS KIND OF THING." A complete discussion

---


237. The brief for the respondent in Bowers concentrates completely on the due process argument, invoking the backing of "society whose constitutional traditions have always placed the highest value upon the sanctity of the home against governmental intrusion or control." Brief for the Respondent at 4, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140). Of the LGBT impact litigation groups that filed amicus briefs (including Lambda Legal, GLAD, GLAAD, etc.), only the National Center for Lesbian Rights used the equal protection argument. Compare Amicus Curiae Brief on Behalf of the Respondents by Lambda Legal Defense and Education Fund, Inc. et al., Bowers, 478 U.S. 186 (No. 85-140), with Brief Amicus Curiae for Lesbian Rights Project, Women's Legal Defense Fund, et al., Bowers, 478 U.S. 186 (No. 85-140).


239. See supra note 99 and accompanying text.

of this trend is beyond the scope of this Note.\textsuperscript{41} Suffice it to say that federal appellate courts have begun to show greater receptiveness to heightened scrutiny arguments, not through minoritizing equal protection arguments, but through due process arguments flowing from \textit{Lawrence}.\textsuperscript{42}

The legacy of the analogy, in aiding the creation of a gay identity as members of an independent minority group, has, however, remained alive and well. It is thus important to remember, even when criticizing the race-sexuality analogy analytically, that gay legal identity is historically constructed largely around black legal identity. Gays began to fight against discrimination in similar contexts as blacks. Ultimately, developments in the racial justice movement affected how gays saw the harms they suffered, placing them on the road to marriage equality. To be sure, the analogy has its limitations, which have been explored by courts and commentators. However, it may be critical for the success of the gay rights movement in the immediate future for those invested in the struggle for gay—and racial—equality to at least understand, if not approve of, the historic connections of the gay rights and racial justice movements. This Note has sought to create a better understanding of this analogy's past to help others analyze how future use of the analogy may affect the movement.

Second, we should realize that the creation of a gay legal identity was neither a whim nor an accident, but a deliberate effort to enter into dialogue with a majority that had already constructed, and engaged gays within, a certain stereotype of homosexuality. To castigate the creation of a gay "identity" is perhaps theoretically understandable, but historically problematic. Gays had to carefully construct a gay identity, limiting it along the lines of the racial analogy in order to mobilize themselves and engage the majority in the first place, even if in so doing they limited the harms they were able to address. Even if gay reliance upon the race analogy in courts declined\textsuperscript{43} as gay identity stabilized on its own terms, and as equal protection doctrine formalized and became more hostile to racial analogies, its use in legal and public activism outside the courts has continued.

Third, as racial litigation extended to new areas, gays initially used it to initiate litigation in domestic rights. However, the only litigation the analogy would support was marriage litigation, resulting in a focus on marriage rights.

\textsuperscript{41} For a fuller treatment, see, for example, Eskridge, \textit{Some Effects}, supra note 2, at 2169-75.

\textsuperscript{42} Cook \textit{v.} Gates, 528 F.3d 42, 51-58 (1st Cir. 2008) (explaining that equal protection arguments guarantee only rational basis scrutiny, but due process arguments demand heightened scrutiny); Witt \textit{v.} Dep't of the Air Force, 527 F.3d 806, 813 (9th Cir. 2008) (same).

\textsuperscript{43} Indeed, gay use of the equal protection progeny of the race analogy has itself declined in favor of due process arguments.
This focus has continued in recent years, along with a reliance on the race analogy, sometimes with disappointing results. However, the historical context in which marriage litigation began must be remembered, even as it is criticized.

Finally, this Note began by pointing out tensions between the African-American and gay communities. Hopefully, this Note’s demonstration that gay reliance on the race analogy has not been simply opportunistic and cynical, but an undertaking that has created and transformed gay understanding of themselves as a minority group and of the harms they face, will cause non-gay critics of the analogy to view it, and the gay rights movement, more favorably. Similarly, gays must be cautious about seeking to cast blame upon the African American community for recent events. The Advocate reminds us that “African-American leaders . . . worked hard on our behalf” in the battle over Proposition 8, “even though white gay people have never, en masse and in force, showed up to support them and their issues.” However, the inspiration and support the racial justice movement has provided gays goes further. Like “[t]he work of our black allies,” the racial justice movement itself “created an immense reservoir of opportunity and possibility for [our] movement going forward. [This alliance] should not be squandered for the cheap satisfaction of finding a scapegoat.”

Ultimately, group identity plays a major role in a group’s relationship with and utilization of the law. Many groups have internalized social stigma: they fail to recognize oppression, and, not realizing there is anything to say, keep silent in the face of injustice. The use of the analogy helped modify gay identity to make us want to take action, to seek rights, and most importantly, to recognize our self-worth. Furthermore, for every difference that critics point to, early activists have demonstrated that there are many similarities between blacks and gays: we must therefore recognize and remember it as a manifestation and demonstration of our common humanity. Thus, even if analogical and identity based arguments channel preferences, limit options, and must ultimately be discarded, they should also be valued as a means for initially providing a voice to those that we, as a society, have constructed and stigmatized into anesthetized silence.

245. Id.