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"GAY RIGHTS" FOR "GAY WHITES"?: RACE, SEXUAL IDENTITY, AND EQUAL PROTECTION DISCOURSE

Darren Lenard Hutchinson†

INTRODUCTION

The issue of gay and lesbian legal "equality" remains unresolved and highly contested.[1] Despite the vigorous efforts of gay and lesbian activists and theorists and the recent, apparent broadening of public support for protecting gays and lesbians in formal civil rights structures,[2] the legal status of gay, lesbian, bisexual, and transgendered individuals remains largely unequal and unprotected. For instance, no federal court of appeals has applied heightened scrutiny when hear-

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† Assistant Professor of Law, Southern Methodist University. B.A., 1990, University of Pennsylvania; J.D., 1993, Yale Law School. I have had several opportunities to present earlier versions of this Article, and I am grateful for the helpful comments I received at these forums. Specifically, this Article benefitted from comments received at faculty workshops at Colorado, Southern Methodist, Stanford, and Villanova Law Schools, and from presentations at the 1999 Queer Ethnic Studies Conference at the University of California at Berkeley, the 1999 Latino and Latina Critical Legal Theory Conference, a 1999 DePaul Law School antisubordination conference, and the 1999 Law and Society Annual Meeting. I am particularly indebted to Martha Fineman for inviting me to present a draft at the 1999 Feminism and Legal Theory Workshop at Cornell Law School. The following individuals provided stimulating comments at these forums or otherwise: Michelle Anderson, Elvia Arriola, Paul Brest, William Bridge, Jennifer Gerrarda Brown, Harlon L. Dalton, David Cruz, Richard Ford, Katherine Franke, Clark Freshman, Jeffrey Gaba, Isabelle Gunning, Pamela Karlan, George Martinez, Teemu Ruskola, Daniel Shuman, Terry Smith, and Richard C. Turkington. I apologize to any persons whose input I have neglected to acknowledge. Barbara Nicholas, Michael Smith, and Darlene Woodson provided excellent research assistance. Southern Methodist University provided financial assistance for this project.

1 *See generally* EVAN GERSTMANN, THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS-BASED EQUAL PROTECTION 3-39 (1999) (analyzing the subordinate status of gays and lesbians within equal protection doctrine). By "equality" I refer to the inclusion of gays, lesbians, bisexuals, and transgendered individuals in antidiscrimination law and policy at the state and federal level. I do not, however, limit the term equality simply to notions of formal equality, which is the focus of much antidiscrimination doctrine. Instead, I view the question of equality as a substantive and formal issue.

2 *See* Lisa M. Farabee, Note, *Marriage, Equal Protection, and New Judicial Federalism: A View from the States*, 14 YALE L. & POL'Y REV. 237, 270 (1996) ("Public opinion has . . . become more supportive of gay rights in general."); *see also id.* at 270 n.174 (citing to various polling data indicating increasing public support of gay and lesbian equality). The public, however, is selective about which dimensions of "gay rights" agendas it supports. *See* William A. Henry, III, *Pride and Prejudice*, TIME, June 27, 1994, at 54, 58 (indicating broad public support for antidiscrimination laws protecting gays and lesbians against job discrimination but wide public opposition to efforts to legalize same-sex marriage).

ing sexual orientation-based equal protection claims.[3] The first time the Supreme Court reviewed an equal protection claim brought by gays, lesbians, and bisexuals, it avoided deciding the applicability of heightened scrutiny.[4] The extensive network of federal antidiscrimination laws does not prohibit discrimination on the basis of sexual orientation.[5] Finally, while several states[6] and numerous municipalities[7] have enacted legislation prohibiting private and governmental discrimination on the basis of sexual orientation, such discrimination remains permissible in the vast majority of jurisdictions, and civil rights laws that extend coverage to gays and lesbians have faced significant, and successful, political challenges.[8]

While the resolution of the problem of gay and lesbian inequality will ultimately turn on a host of social, legal, political, and ideological variables, this Article argues that the success or failure of efforts to achieve legal equality for gays, lesbians, bisexuals, and transgendered individuals will depend in large part on how scholars and activists in this field address questions of racial identity and racial subjugation.

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3 *See* GERSTMANN, *supra* note 1, at 60 ("The appellate courts have consistently rejected the argument that gays and lesbians are a suspect class. . . . Every court that has considered the issue has stated that gays and lesbians simply do not meet the criteria for a suspect class."). The Ninth Circuit, in a divided opinion, once held that gays and lesbians constituted a "suspect" class, but that opinion was withdrawn. *See* Watkins v. United States Army, 847 F.2d 1329, 1349 (9th Cir. 1988), *withdrawn*, 875 F.2d 699, 711 (9th Cir. 1989), *cert. denied*, 498 U.S. 957 (1990).

4 *See* Romer v. Evans, 517 U.S. 620, 632 (1996) (holding that a Colorado constitutional amendment that banned state and municipal laws prohibiting discrimination based on sexual orientation lacked a "rational basis").

5 *See* Francisco Valdes, *Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory, and Politics of "Sexual Orientation,"* 48 HASTINGS L.J. 1293, 1335 (1997) (noting that "'sexual orientation discrimination' is not formally prohibited by federal antidiscrimination statutes").

6 The following states prohibit discrimination on the basis of sexual orientation: California, Connecticut, the District of Columbia, Hawaii, Massachusetts, Minnesota, New Hampshire, New Jersey, Rhode Island, Vermont, and Wisconsin. *See* CAL. LAB. CODE §§ 1101, 1102 (West 1999); CONN. GEN. STAT. ANN. § 46a-81c (West 1999); D.C. CODE ANN. § 1-2512 (1999); HAW. REV. STAT. ANN. § 368-1 (Michie 1999); MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 1999); MINN. STAT. ANN. § 363.12(1), (2) (West 1999); N.H. REV. STAT. ANN. § 354-A:6-8 (1999); N.J. STAT. ANN. § 10:5-12 (West 1999); R.I. GEN. LAWS § 28-5-7 (1999); VT. STAT. ANN. tit. 21, § 495 (1999); WIS. STAT. ANN. § 111.31, 111.36 (West 1999).

7 *See, e.g.*, Lambda Legal Defense and Education Fund, *Summary of State, Cities, and Counties Which Prohibit Discrimination Based on Sexual Orientation* (visited Mar. 8, 2000) <http://www.lambdalegal.org/cgi-bin/pages/states/antidiscri-map> (listing city and county antidiscrimination ordinances).

8 *See, e.g., Romer*, 517 U.S. at 632 (invalidating statewide proscription of laws protecting gays and lesbians from discrimination); *see also* Equality Found. of Greater Cincinnati, Inc. v. Cincinnati, 128 F.3d 289, 301 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998) (upholding municipal ban on laws protecting gays and lesbians from discrimination, despite *Romer* decision); Carey Goldberg, *Maine Voters Repeal a Law on Gay Rights*, N.Y. TIMES, Feb. 12, 1998, at A1 (reporting voter repeal of Maine law that banned discrimination on the basis of sexual orientation in housing, employment, credit, and places of public accommodation).

Commonly, these scholars and activists currently discuss race by use of analogies between "racial discrimination" and "sexual orientation discrimination," or between "people of color" and "gays and lesbians." On one level, the "comparative approach" to race and sexuality may have some validity because it can create empathy with the oppression experienced by gays and lesbians. It also might help link the question of gay rights to existing equal protection precedent and civil rights laws that emerged from a context of racial subjugation and resistance.[9] Ultimately, however, this approach impedes the quest for gay and lesbian equality.[10]

Specifically, the comparative approach marginalizes (or treats as nonexistent) gays and lesbians of color, leading to a narrow construction of the gay and lesbian community as largely upper-class and white.[11] Such a comparative discussion of race and sexuality in pro-gay and lesbian discourse reflects a broader marginalization of persons of color (and women and the poor) who are excluded from essentialist queer theories and politics.[12] Opponents of gay and lesbian

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9 *See, e.g.*, Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation, in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 115, 121 (David Kairys ed., 1998). Professor Halley notes that

> seeking to find room under the aegis of these key equality precedents, gay and lesbian advocates often find themselves saying that sexual orientation is like race, or that gay men and lesbians are like a racial group, or that anti-gay policies are like racist policies, or that homophobia is like racism.

Id. Professor Rush argues that

> equal protection analysis revolves around comparing different types of discrimination to race or sex discrimination. At present, then, advocates for gay men and lesbians who attempt to secure heightened scrutiny for sexual orientation discrimination cases are pursuing both possibilities of comparing sexual orientation to sex and race.

Sharon Elizabeth Rush, *Equal Protection Analogies–Identity and "Passing": Race and Sexual Orientation*, 13 HARV. BLACKLETTER J. 65, 76 (1997).

10 *See* Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 624-34 (1997) [hereinafter Hutchinson, *Out Yet Unseen*] (discussing problems that arise from comparisons of "race" and "sexual orientation"); *see also* Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 40-44 (1999) [hereinafter Hutchinson, *Ignoring the Sexualization of Race*] (same); Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 315 (1994) (arguing that race-sexuality analogies neither serve "the cause of gay civil rights, nor of civil rights in general").

11 *See* Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 10, at 42 (arguing that "comparisons between oppressed groups" incorrectly "treat their subject populations as mutually exclusive groups, thus erasing the experiences and compounding the invisibility of persons with multiple subordinated statuses"); *see also* Mary Eaton, *Homosexual Unmodified: Speculation on Law's Discourse, Race, and the Construction of Sexual Identity, in* LEGAL INVERSIONS: LESBIANS, GAY MEN AND THE POLITICS OF LAW 46, 62 (Didi Herman & Carl Stychin eds., 1995) ("'Black homosexual' is . . . an oxymoron in an analogical comparison of blacks and homosexuals.").

12 *See generally* Hutchinson, *Out Yet Unseen*, *supra* note 10, at 563-64 n.12 (citing numerous sources on gay, lesbian, bisexual, transgender of color subjectivity).

equality employ a similarly narrow construction of the gay and lesbian community in political discourse and judicial opinions; scholars, activists, and jurists contest the "morality" and necessity of extending civil rights protections to gay and lesbian citizens by depicting the gay and lesbian community as largely white, privileged, and unharmed by any discrimination they face.[13] In addition, antiracist theorists, whether avowedly heterosexist or not, help perpetuate a white-normative portrait of gay, lesbian, bisexual, and transgendered identity. These theorists invariably fail to examine the racial effects of heterosexism on people of color; they exclude gays, lesbians, bisexuals, and transgendered individuals from antiracist discourse; and they often view the inclusion of progressive gay and lesbian politics within civil rights theory as a threat to antiracism and of secondary importance to racial justice.[14]

Thus, pro- and anti-gay discourses and antiracist theory collectively contribute to a white-normative construction of gay, lesbian, bisexual, and transgendered identity—a narrow, racialized construct that hinders gay and lesbian equality efforts. In order to counter this harmful trend, law and sexuality scholars should adopt a multidimensional lens to analyze sexual subordination claims and to portray gay and lesbian experience. A multidimensional analysis of heterosexism and homophobia—one that examines the various racial, class, gender, and other dimensions of gay, lesbian, bisexual, and transgendered identity and the diverse effects of heterosexism—can destabilize the "gay as white and privileged" stereotype and offer a more productive approach to secure gay and lesbian equality.

My argument proceeds in four parts. Part I situates my discussion of the synergistic relationship among race, class, gender, and sexuality within a broader body of research on the "intersectionality" of systems of oppression and of identity categories. Part I then examines how my scholarship attempts to advance this literature both substantively and conceptually. Part II expounds my claim that the comparative and essentialist treatment of race and sexuality within pro-gay and lesbian theory and politics marginalizes gay, lesbian, bisexual, and transgendered persons of color and constructs and reinforces the notion that the gay and lesbian community is uniformly white and privileged. Part II then examines how anti-gay theorists and activists deploy the "gay as white and privileged" stereotype in their arguments that gays and lesbians, as a privileged class, do not merit the protection of existing equality frameworks. Part II concludes by discussing how antiracist discourse contributes to the harmful white-normative construction of gays and lesbians through its heteronormative assump-

13 *See* Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 10, at 69-74.

14 *See id.* at 7.

tions about both racial subordination and people of color. Part III analyzes the emergence of the white-normative construction of gays and lesbians in equal protection doctrine. Part III then argues that jurists invoke this stereotype to justify their refusal to apply heightened scrutiny to claims of discrimination brought by gay, lesbian, bisexual, and transgendered individuals. Part IV proposes a multidimensional framework for analyzing race within gay and lesbian equality discourse that more accurately depicts the injuries of anti-gay and lesbian discrimination and that refutes the "gay as white and privileged" stereotype. It is my hope that a multidimensional approach to the question of gay and lesbian equality—one that treats race, class, and gender as integral components of gay, lesbian, bisexual, and transgendered identities and experiences—will lead to stronger legal protection of gays and lesbians from discrimination and subordination.

I
"INTERSECTIONALITY," "MULTIDIMENSIONALITY," AND THE COMPLEXITY OF SUBORDINATION

My scholarship on the relationship between race, sexuality, class, and gender[15] arises out of an impressive body of literature in feminism and critical race theory. This scholarship has criticized feminist and antiracist theorists, courts, and policymakers for their failure to recoguize the "intersectionality" of patriarchy and racial oppression and for proposing theories and policies that do not provide for the often unique ways in which women of color experience subordination.[16] Intersectionality critics have persuasively counseled against efforts to analyze systems of oppression as isolated phenomena[17] and

15 *See* Darren Lenard Hutchinson, *Beyond the Rhetoric of Dirty Laundry: Examining the Value of Internal Criticism Within Progressive Social Movements and Oppressed Communities*, 5 MICH. J. RACE & L. 185 (2000) [hereinafter Hutchinson, *Dirty Laundry*]; Darren Lenard Hutchinson, *"Claiming" and "Speaking" Who We Are: Black Gays and Lesbians, Racial Polities, and the Million Man March*, *in* BLACK MEN ON RACE, GENDER, AND SEXUALITY: A CRITICAL READER 28, 28-31 (Devon W. Carbado ed., 1999); Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 10, at 6; Hutchinson, *Out Yet Unseen*, *supra* note 10, at 563-64 nn.12-13.

16 *See, e.g.*, Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 371-76; Kimberlé Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991); Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (Or Other -Isms)*, 1991 DUKE L.J. 397, 401-10; Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory out of Coalition*, 43 STAN. L. REV. 1183, 1184 (1991). For a compilation of literature on this subject, see CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 1997).

17 *See, e.g.*, Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1090 (1996) ("It is crucial to recognize that various forms of oppression . . . are intertwined. Oppressions of gender intersect with other oppressions, including those of race, sexuality, class, and ethnicity."); Matsuda, *supra* note 16, at 1189 ("As

have revealed the ways in which antisubordination theories and policies typically draw on the life experiences of classes of individuals who, though victims of oppression, occupy a relatively "privileged" space within critical discourse and politics.[18] Focusing exclusively on the exclusion of women of color from antiracist and feminist discourse, the intersectionality scholars have vigorously unveiled and challenged the privileged status of men of color and white women in progressive theory and civil rights jurisprudence.[19]

While the theory of intersectionality has greatly influenced my own scholarship on subordination, I have sought to expand and develop this literature in order to overcome some of its substantive and conceptual limitations.[20] My work makes a *substantive* contribution to the intersectionality literature because intersectionality theorists have generally failed to examine the relationship between heterosexism and other forms of oppression, such as racial subordination.[21] Instead, intersectionality has addressed primarily, if not exclusively, the synergistic relationship between patriarchy and racial subordination.[22] Nevertheless, an embryonic intellectual and artistic movement that explores the relationship among heterosexism, gender hierarchy, and racial subjugation has emerged largely among artists, scholars, and activists outside the legal community.[23] Unquestionably, the movement is a highly relevant extension of intersectionality; unfortunately its extralegal character renders it insufficient as a normative position about how the fusion of racism and heterosexism should affect legal theory and policy. By examining the relationships among class, race, gender, and sexual hierarchies and the impact of these relationships on law

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we look at . . . patterns of oppression, we may come to learn, finally and most importantly, that all forms of subordination are interlocking and mutually reinforcing.").

18 *See, e.g.*, Katherine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 874 (1990) ("A theory that purports to isolate gender as a basis for oppression . . . reinforces other forms of oppression."); Grillo & Wildman, *supra* note 16, at 401 (arguing that feminist theory "perpetuates patterns of racial domination" by, among other things, centralizing "white issues" and "rendering women of color invisible").

19 *See* Crenshaw, *supra* note 16, at 1252 ("[R]acism as experienced by people of color who are of a particular gender—male—tends to determine the parameters of antiracists strategies, just as sexism as experienced by women who are of a particular race—white—tends to ground the women's movement.").

20 *See* Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 10, at 9-17 (discussing differences and similarities between multidimensionality and intersectionality); Hutchinson, *Out Yet Unseen*, *supra* note 10, at 640-41 ("[M]ultidimensionality is not a wholly alternative paradigm. Rather it can be seen as drawing upon, extending, and developing intersectionality . . . [through] a 'more multidimensional' understanding of social identity categories and subordination.").

21 *See* Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 10, at 11-12.

22 *See id.* at 3 & n.9 (citing and discussing intersectionality literature focusing on patriarchy and racial hierarchy).

23 For an extensive compilation of these works, see Hutchinson, *Out Yet Unseen*, *supra* note 10, at 562-63 n.9.

and legal theories, my work has sought to push antisubordination theory and politics beyond the substantive limitations of both the race-gender intersectionality scholarship and the nonlegal race-sexuality literature.[24]

My scholarship also marks a *conceptual* expansion of intersectionality because it analyzes multidimensional subordination as a universal concept; as such, multidimensionality is not limited to particular classes of oppressed individuals who are currently excluded from or marginalized by equality discourse.[25] In constrast, traditional intersectionality scholarship suggests that the phenomenon of complex subordination is unique to certain discrete groups, particularly women of color, who suffer "intersecting" oppressions.[26] Accordingly, intersectionality theorists have almost invariably refrained from critically engaging the complex experiences of individuals who experience intersecting privilege and subordination (e.g., heterosexual men of color, wealthy white women).[27]

The historical and social context in which interesectionality emerged explains, in part, its emphasis on the "multidimensional" experiences of women of color.[28] The intersectionality paradigm developed as a response to an absence of theoretical or doctrinal approaches to the multilayered and particularized subordination endured by women of color.[29] Thus, this early work on the complexity of oppression made vital contributions to both the substantive and

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24 *See* Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 10, at 11-12.

25 *See id.* at 12-16.

26 *See, e.g., id.* at 12 n.37 (discussing the views of several intersectionality theorists).

27 Some intersectionality theorists have *acknowledged* that white women and men of color have "intersectional" experiences. *See, e.g.*, Crenshaw, *supra* note 16, at 1252 (arguing that the "specific raced *and* gendered experiences [of white women and men of color], although intersectional, often define as well as confine the interests of the entire group"); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 608 (1990) ("This sense of a multiplicitous self is not unique to black women, but black women have expressed this sense in ways that are striking, poignant, and potentially useful to feminist theory."). The intersectionality literature, nonetheless, has not significantly unveiled or engaged these complex experiences. Nor has this scholarship explored the significance of universal complex subordination. *See* Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 10, at 12 ("The idea that 'intersecting' systems of oppression only affect limited categories of individuals is implied by statements in several writings in the race and gender line of analysis."); Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257, 1275 (1997) ("[S]traight white maleness arguably is a multiple identity, but intersectionality theorists would resist the claim by straight white males that theirs is an intersectional subjectivity."). Thus, much of the literature subtly equates gender with "female" status and race with "person of color" status.

28 *See* Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 10, at 14.

29 *See id.*

conceptual aspects of antisubordination theory and (subsequently) doctrine.[30]

Despite the sociological and historical impetus behind the intersectionality movement, its conceptual limitations may restrict its instrumental value by permitting scholars who are skeptical or unappreciative of the complexity of subordination and identity to question the very need to create a de-essentialized equality jurisprudence.[31] For example, several white gay male commentators have explicitly rejected arguments that sexuality theorists and activists should explore the feminist and antiracist implications of heterosexist subordination and have actively resisted entreaties to form coalitions with racial and feminist civil rights groups.[32] Some prominent critics of intersectionality and related theories contend that such efforts are "wasteful"[33] and that they "Balkanize"[34] and hobble[35] "gay rights" theory and activism. Yet, if complex subordination only implicates the lives of individuals burdened by intersecting subordination (as the intersectionality paradigm suggests), then these claims evince a limited—yet troubling—logic. Under this rationale, the formation of a multifaceted sexual politics, one attuned to the racial and gender dimensions of heterosexist structures, might indeed seem wasteful to individuals who do not personally experience intersectional subordination.[36]

Theorizing multilayered subordination and identity as universal phenomena, however, allows for a more nuanced examination of identity and oppression and pushes advocates of essentialized politics and theory into a precarious position.[37] For example, my recent analysis of the role of sexuality in the legal and social marginalization of heterosexuals of color (by means as diverse as lynching and immigration policy) and the antiracist response to such "sexualized racism" challenges the discounting of progressive gay and lesbian concerns

30 *See generally id.* at 14 (recognizing that "by centering their analyses on women of color, the intersectionality scholars filled (and continue to fill) a tremendous void in civil rights jurisprudence").

31 *See id.* at 14-15.

32 *See id.* at 15; Hutchinson, *Out Yet Unseen, supra* note 10, at 620-22.

33 RICHARD D. MOHR, GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW 328 (1988) (arguing that efforts to integrate feminist and antiracist politics within gay rights agendas "will not work and [are] not necessary and so [are] a wasteful drain on the movement").

34 BRUCE BAWER, A PLACE AT THE TABLE: THE GAY INDIVIDUAL IN AMERICAN SOCIETY 37 (1993) (describing creation of a "queer people of color media production company" and the publication of an "anthology of lesbian, gay & bisexual Asian/Pacific American writers" as "constricting" and as "Balkanization" (internal quotation marks omitted)).

35 *See* MARSHALL KIRK & HUNTER MADSEN, AFTER THE BALL: HOW AMERICA WILL CONQUER ITS FEAR AND HATRED OF GAYS IN THE '90s at 180 (1989) (characterizing feminist, poverty and antiracist concerns as "superfluous" to gay and lesbian liberation).

36 *See* Hutchinson, *Ignoring the Sexualization of Race, supra* note 10, at 15.

37 *See id.* at 17.

within contemporary antiracist discourse.[38] If antiracist theorists and activists can vigorously respond to racism in its heterosexual forms, then they can also actively challenge the sexualized oppression of gay, lesbian, bisexual, and transgendered people of color and can embrace progressive gay and lesbian political theories and activism.[39] Similarly, by considering how "whiteness" and "maleness" inform gay, lesbian, bisexual, and transgender studies, my work attempts to unveil the inconsistent arguments of gay and lesbian theorists who reject antiracist and feminist analyses yet readily articulate theories reflective of white gay male experience.[40] Thus, my theory of multidimensionality, which argues that complex subordination is a universal concept, uncovers the inherent fallacies of arguments supporting essentialist theories and opposing intersectionality and multidimensionality: while many progressive theorists and activists reject the intersectionality line of criticism on the grounds that it is fragmenting, inefficient, and impure, these same critics often posit or embrace essentialist theories and politics based on the multilayered experiences of those groups that presently exercise a privileged or dominant voice within oppressed communities and among equality theorists.[41] Under the multidimensionality rubric, the discriminatory and essentialist rejection of the "internal critiques" of progressive social movements becomes problematic.[42]

Multidimensionality, moreover, complicates the very notions of "privilege" and "subordination." For example, people of color have historically suffered sexualized racism, centered around heterosexual identity and practice.[43] For instance, the heterosexual stereotype that men of color, particularly black males, are violent sexual threats to white women has been offered to justify violent racial marginalization, including the "institution" of lynching.[44] Similarly, history has portrayed women of color as heterosexually promiscuous, and laws and social practices have reduced them to sexual property in a variety of contexts, including the legally sanctioned sexual abuse of female

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38 *See id.* at 79-100.

39 *See id.* at 15-16, 96-98.

40 *See* Hutchinson, *Out Yet Unseen*, *supra* note 10, at 620-22.

41 *See* Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 10, at 97 ("Anti-racists . . . have confined their responses almost exclusively to those forms of sexualized racial oppression that appear heterosexual in nature . . . ."); Hutchinson, *Out Yet Unseen*, *supra* note 10, at 621-22 ("Although [essentialist theorists] contend that race, class, and gender detract—or are separate—from gay politics, the political vision they prescribe rests firmly upon racial, class, and gender privilege.").

42 For a discussion of the rejection and potential rejection of "internal critiques" of progressive theory, see Hutchinson, *Dirty Laundry*, *supra* note 15.

43 *See* Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 10, at 17, 79-96 (discussing the discriminatory nature of essentialism and the history of sexualized racism of African Americans, Latinos, and Asian Americans).

44 *See, e.g.*, *id.* at 83.

slaves by men of any race, particularly by white slaveowners or their agents interested in breeding revenue-generating slaves.[45] Hence, heterosexual identity and practice have sexually marginalized persons of color.[46] This observation makes the case for multidimensionality even stronger: if heterosexual status, typically a privileged category, has not shielded people of color from a legacy of sexualized racism and has, in fact, helped to justify and facilitate their domination, then homosexual identity and practice, which are socially stigmatized, can also serve (perhaps more potently) as instruments of racial domination.[47] Yet, while antiracist theorists and activists have thoroughly analyzed and countered heterosexual forms of racial domination, they have not sufficiently challenged "homophobic racism," and several antiracist theorists have, in fact, questioned the validity of antiheterosexist politics.[48] My analysis of intertwined privilege and subordination (a departure from intersectionality) highlights the internal inconsistencies and discrimination of essentialist "progressive" theories.[49]

Finally, multidimensionality destabilizes the concept of "intersecting subordination" that undergirds intersectional theories. Intersectionality typically posits women of color as subordinate and men of color and white women as privileged within progressive discourse and politics.[50] Including sexuality within multidimensional analyses, however, destabilizes even discrete classes such as women of color, who admittedly endure intersecting oppressions.[51] A more complex analysis of heterosexism, for example, can reveal the differences in power possessed by heterosexual women of color and lesbians of color. An exploration of heterosexuality, alongside race, gender, and class, moreover, calls into question the construction of men of color as privileged, relative to women of color. Gay and bisexual men of color, for example, occupy a marginalized space within antiracist theory and political activism. Multidimensionality, by examining a variety of sources of subordination and extending the notion of complex oppression to all marginalized persons, uncovers the instability of both privilege and subordination.

Multidimensionality is therefore distinct from and related to intersectionality literature. It expands this work by examining sexual

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45 *See, e.g., id.* at 84-85.

46 *See id.* at 79-96.

47 *See id.* at 98 ("If heterosexual status can become stigmatized and an instrument of racial oppression, then it is logical and, indeed, likely that gay, lesbian, bisexual and transgender identities (which are generally marginalized social categories) can also serve as sources of racial oppression and disadvantage.").

48 *See generally id.* at 7, 79-81, 97 (discussing the "glaring disparity" between antiracists' treatment of heterosexual racism and homophobic racism).

49 *See id.* at 97.

50 *See id.* at 12-14.

51 *See id.* at 17.

identity (together with race, gender, and class) and the complex experiences of individuals who currently dominate antisubordination theory and politics. Multidimensionality, nevertheless, furthers the objective of intersectionality and related scholarship by resisting the traditional temptation to analyze systems of oppression and identity categories as separate and essential entities. Multidimensionality seeks to reveal the "host of interlocking sources of advantage and disadvantage" that sustain the "various institutions of oppression" and corresponding identity categories.[52] Utilizing the multidimensionality framework, the remainder of this Article analyzes how equality discourse, in the context of legal theory, political activism, and equal protection litigation, racializes gays and lesbians as white and upper-class in order to deny them the protection of constitutional and statutory civil rights structures.

II

RACE, SEXUAL IDENTITY AND EQUALITY THEORY

A. Pro-Gay and Lesbian Discourse

Race is often invoked by pro-gay and lesbian scholars who make comparisons between people of color and gays and lesbians. Scholars have criticized such comparisons for treating "people of color" and "gays and lesbians" as mutually exclusive groups, omitting gays and lesbians of color from analysis, and therefore implying a population of white gays and lesbians and heterosexual people of color.[53] The race-sexuality analogies also distort differences in power between oppressed groups. For example, they obscure the effects of racial subordination when they equate the experiences of white gays and lesbians with those of persons of color. By focusing exclusively on the sexually subordinate position of white gays and lesbians, the analogies mask the pervasive racial privilege that supplies social benefits to white individuals regardless of their sexual identity and practice.[54]

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52 *Id.* at 10; *see also* Hutchinson, *Out Yet Unseen*, *supra* note 10, at 640 ("Multidimensionality exposes the various layers of social power that inform heterosexism and homophobia. Multidimensional analysis also reveals the multiple dimensions of social identity categories and offers a comprehensive framework for conceptualizing sexual subordination that neither 'destroys' nor 'fragments' our lives." (citation omitted)).

53 *See* Eaton, *supra* note 11, at 62 ("The possibility of cross-identification or consubstantial oppression is utterly unintelligible in a mode of reasoning that depends upon separation between identities or oppressions. 'Black homosexual' is therefore an oxymoron in an analogical comparison of blacks and homosexuals.").

54 *See* Hutchinson, *Ignoring the Sexualization of Race*, *supra*, note 10, at 42-44 ("[C]laims by white gays and lesbians that they are 'the same' as blacks masks the operation of racial privilege in white gay and lesbian experience."); Hutchinson, *Out Yet Unseen*, *supra* note 10, at 631-32 (arguing that analogies between slavery and homophobia "ignore a legacy of racial and class hierarchy"); Schacter, *supra* note 10, at 297 (arguing that race-sexuality analogies "erase[ ] 'vertical' differences within a group" and "'horizontal' differences

The race-sexuality analogies reflect a broader failure to include racial, class, ethnic, and gender diversity within gay and lesbian discourse. Gay and lesbian essentialism, as a budding intellectual movement observes,[55] has led to the proposal of inadequate pro-gay policies. In particular, gay and lesbian political activism focuses much of its resources on securing formal equality rather than on pursuing substantive equality, or a more even distribution of material resources, for gay, lesbian, bisexual, and transgendered individuals. The prominence of same-sex marriage and military integration debates in gay and lesbian discourse evinces the extraordinary weight given to formal equality over material betterment.[56] While the achievement of formal equality will undoubtedly benefit all members of an oppressed class, individuals who face structural barriers to social resources (e.g., institutionalized racism and poverty) require much broader social reform, including policies that eradicate the pervasive material conditions of inequality.[57] As several scholars have observed, extreme poverty, subtle and systemic discrimination, and other current effects of historical subordination limit the benefits that a formal equality framework can deliver to oppressed classes.[58] "Privileged" members of oppressed groups, however, may more readily take advantage of opportunities created by the achievement of formal legal equality.[59]

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across the spectrum of legally protected groups"); *see also* Margaret M. Russell, *Lesbian, Gay and Bisexual Rights and the "Civil Rights Agenda,"* 1 AFR.-AM. L. & POL'Y REP. 33, 37 (1994) (recognizing that race-sexuality analogies may obscure potency of racism and marginalize gays and lesbians of color).

55 *See* Hutchinson, *Out Yet Unseen*, *supra* note 10, at 563-64 n.12 (listing emergent works on the relationships between racial and sexual identities).

56 *See generally* ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT SEXUALITY 169-87 (1995) (defending marriage and military politics as necessary components of a neutral state). State recognition of marriage, however, is not a neutral act because it privileges one form of intimate relations. *See* Bradley P. Smith, *No, I'll Categorize* You, 105 YALE L.J. 2025, 2030 (1996) (book review) (criticizing Sullivan's arguments on the grounds that "[g]overnment recognition of any marriage is an inherently nonneutral act, as it encourages binary, exclusive coupling through a variety of economic incentives," and further asserting that "[m]arriage also infuses a variety of public rights and duties into the most private of human relationships").

57 *See* Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1383-84 (1988) ("The removal of formal barriers, although symbolically significant to some, will do little to alter the hierarchical relationship between Blacks and whites until the way in which race consciousness perpetuates norms that legitimate Black subordination is revealed."); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1050 (1978) (arguing that despite the fact that formal racial discrimination has been outlawed in the United States, the existence of a huge disparity between political and economic power of blacks and that of whites does not violate antidiscrimination laws).

58 *See* Crenshaw, *supra* note 57, at 1383-84; Freeman, *supra* note 57, at 1050.

59 *See* Crenshaw, *supra* note 57, at 1384.

The campaign for same-sex marriage has allowed for a rich examination of the inadequacies of formal equality and the pervasiveness of essentialism in gay and lesbian theory and politics.[60] For example, lesbian feminists such as Nancy Polikoff and Paula Ettelbrick have criticized the pursuit of same-sex marriage on the grounds that marriage, as an institution, has facilitated the subordination of women and the replication of rigid and oppressive gender roles.[61] This view of marriage, however, differs from the analysis of some women of color, who have argued that marriage and family life often serve as sites of resistance to and comfort from racial subordination in the larger society.[62] Nevertheless, marriage and family life within communities of color, as among whites, are often marked by patriarchy and heterosexism.[63]

The scattered racial critiques of same-sex marriage have not questioned the advisability of pursuing marriage altogether. Rather, race critics challenge the extraordinary prominence given to marriage (and other formal equality goals) within gay and lesbian politics; race critics have also argued that many (or most) of the benefits from same-sex marriage will accrue to white and upper-class individuals.[64] To support these arguments, my work has pointed to sociological studies of family patterns within communities of color.[65] These data demonstrate that heterosexuals of color, particularly blacks and Latinos, exercise their existing right to marry at rates far lower than those

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60 *See* Hutchinson, *Out Yet Unseen*, *supra* note 10, at 586-602.

61 *See* Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, *in* LESBIANS, GAY MEN, AND THE LAW 401, 402 (William B. Rubenstein ed., 1993) (arguing that marriage is "[s]teeped in a patriarchal system that looks to ownership, property, and dominance of men over women as its basis"); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1536 (1993) (arguing that the "desire to marry . . . betrays the promise of . . . radical feminism").

62 *See* BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER 37 (1984) (arguing that family life and marriage allow black women to "experience dignity, self-worth, and a humanization that is not experienced in the outside world"); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1470-71 (1991) (arguing that family life for women of color is a "site of solace and resistance against racial oppression").

63 *See* HOOKS, *supra* note 62, at 37 (acknowledging that sexism exists within the context of black families).

64 *See* David W. Dunlap, *Some Gay Rights Advocates Question Drive to Defend Same-Sex Marriage*, N.Y. TIMES, June 7, 1996, at A12 ("[T]here [are] several causes 'more fundamental to survival' for gay men and lesbians." (quoting black lesbian activist)); *id.* (reporting view of Keith Boykin, executive director of the National Black Gay and Lesbian Leadership Forum, that same-sex marriage movement is "marching down the wrong path and running a disastrous course," given, among other things, the pervasiveness of other forms of discrimination against gays and lesbians).

65 *See* Hutchinson, *Out Yet Unseen*, *supra* note 10, at 592 ("Moreover, substantial sociological, historical, and anthropological research demonstrates that Africans, American blacks, and other non-white cultures place tremendous importance on 'extended families,' rather than rigid nuclear bodies, as a means of social organization and child rearing." (citations omitted)).

of whites. Sociologists attribute these differences to cultural norms among persons of color that place greater importance on extended, rather than nuclear, family arrangements and to economic hardships that diminish the financial incentives traditionally associated with marriage.[66] Thus, economic and cultural realities may render marriage less attractive and less financially advantageous for gay, lesbian, bisexual, and transgendered persons of color and the poor. Furthermore, because women, people of color, and the poor within gay and lesbian communities experience subordination from gender, racial, and economic hierarchies, in addition to heterosexism, the achievement of formal sexual equality, including the right to same-sex marriage, will not completely insulate them from oppression[67] or place them within "society's mainstream."[68] Instead, these individuals will remain subordinated by interwoven race, gender, class, and sexual hierarchies. Consequently, the right to marry would likely generate

66 *See* WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 91 (1987); WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR 104 (1996); Lisa Catanzarite & Vilma Ortiz, *Family Matters, Work Matters? Poverty Among Women of Color and White Women, in* RACE, CLASS, AND GENDER: AN ANTHOLOGY 149-60 (Margaret L. Andersen & Patricia Hill Collins eds., 1998) (arguing that poverty diminishes the economic benefits of marriage for women of color); *see also* Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. 1505, 1546 (1996) (arguing that "'shared parenting responsibilities among kin' predominate in many Caribbean, African, and African American contexts, in long-standing cultural patterns, and as a hedge against poverty" (citation omitted)).

67 *See* Nitya Duclos, *Some Complicating Thoughts on Same-Sex Marriage*, 1 L. & SEXUALITY 31, 51 n.75 (1991) ("Lesbians and gay men who are oppressed because of their race, culture, and/or disability will probably not find that the respectability marriage confers is adequate to ameliorate these kinds of discrimination."); Ettelbrick, *supra* note 61, at 404 ("[M]ore marginal members of the lesbian and gay community . . . are less likely to see marriage as having relevance to our struggles for survival. After all, what good is the affirmation of our relationships . . . if we are rejected as women, black, or working class?"); Hutchinson, *Out Yet Unseen*, *supra* note 10, at 591 ("Because most gays and lesbians of color remain invisible and marginalized within the larger gay and lesbian community, it is extremely unlikely that a marriage license will close much of the gulf between them and the center of a heterosexual society that is stratified by race, class, gender, and sexuality.").

68 William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1490 (1993) ("If . . . dividing practices [including marital discrimination] were to collapse, [gays and lesbians] might tend to meld back into society's mainstream, which does not inevitably strike me as baleful."); *see also* SULLIVAN, *supra* note 56, at 185 (describing same-sex marriage as "ultimately the only reform that truly matters" for gay and lesbian liberation); Thomas Stoddard, *Why Gay People Should Seek the Right to Marry, in* LESBIANS, GAY MEN, AND THE LAW, *supra* note 61, at 398, 400 (describing marriage as "the issue most likely to lead ultimately to a world free from discrimination against lesbians and gay men"); Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 581 (1994) (arguing that state judicial opinion favoring same-sex marriage "shifted the very ground underlying gay people's second-class status, and one of the, if not the major, barriers to our full and equal citizenship has cracked wide open"). For a discussion of how these arguments reflect the whiteness, maleness, and upper-class status of pro-gay and lesbian theorists, see Hutchinson, *Out Yet Unseen*, *supra* note 10, at 589-602.

greater social benefits for race- and class-privileged members of the gay, lesbian, bisexual, and transgendered population.

By excluding persons of color and the poor from pro-gay and lesbian equality discourse, legal and political commentators imply a narrowness of the gay and lesbian community that does not reflect reality. Though perhaps unintended, the clear result of this omission is the construction of the gay and lesbian community as white and economically privileged, given the correlation of race and economic status. The immediate repercussion of this narrow construction of gay, lesbian, bisexual, and transgendered identity is the inadequacy of policies that advocates of gay and lesbian equality propose; these essentialist policies fail to confront the diverse oppressions that shape heterosexism. The racial and class normativity present in pro-gay and lesbian politics and theory has a broader, and perhaps more ominous effect: it lends credibility to a racialized and class-based depiction of the gay and lesbian community by anti-gay theorists, activists, and jurists in their arguments against legal protection of *all* gays and lesbians from discrimination.

B. Anti-Gay Politics: "Gay Rights" as "Special Rights"

Activists and theorists opposed to gay and lesbian equality also depict gays and lesbians as white and privileged. Commonly, the narrow racial and class construction of gays and lesbians in the anti-gay context appears in the "special rights" rhetoric,[69] which anti-gay advocates employ to depict the gay and lesbian community as affluent, well-educated, privileged, and, therefore, undeserving of civil rights protection.[70] The special rights rhetoric asserts that gays and lesbians are simply using their disproportional "political power" to control the civil rights machinery in states and municipalities in order to secure "special protection" of their lifestyle.[71] Though it is sometimes facially neutral with respect to race, the special rights discourse actually racializes gay, lesbian, bisexual, and transgendered individuals as white, privileged, and upper-class. This racialization occurs in at least three ways.

First, the special rights rhetoric racializes gays and lesbians through the explicit comparison of "gays and lesbians" and "person of color." Users of the rhetoric claim that gays and lesbians, unlike

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69 For a more extensive explication of the racial and class dimensions of the "special rights" rhetoric, see Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 10, at 68-74.

70 *See* Schacter, *supra* note 10, at 293-94 (discussing these elements of special rights rhetoric); *see also* Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 10, at 69 (same).

71 *See* Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 10, at 69-70 (observing that anti-gay forces claim that gay and lesbian civil rights will give protection to a powerful group, protection previously reserved for the "truly disadvantaged"); Schacter, *supra* note 10, at 291-93 (same).

blacks and other persons of color, are wealthy and privileged and, therefore, peculiar candidates for statutory or constitutional antidiscrimination protection.[72] This comparative dimension of the special rights rhetoric, like the comparative analysis of race and sexuality in the pro-gay context, imagines persons of color and gays and lesbians as separate populations, thereby excluding gays and lesbians of color from examination and constructing the gay and lesbian community as white and upper-class.[73]

The special rights rhetoric constructs gays and lesbians as white, upper-class, and privileged in a second way—by citing racially- and class-biased data purporting to demonstrate gay wealth.[74] Scholars have criticized several popular surveys that purport to show that gays and lesbians are disproportionately wealthy because these polls typically survey openly gay and lesbian individuals, persons who subscribe to political magazines, and donors to gay and lesbian political organizations whose names appear on these groups' mailing lists.[75] Empirical research suggests that the individuals represented in these samples are disproportionately wealthy and white. Individuals who donate money to political organizations or subscribe to magazines, for example, typically possess greater wealth than the larger population, irrespective of sexuality.[76] Furthermore, to the extent that racial and class subordination impair the ability of gays and lesbians of color and the poor to express openly their sexual orientation (for fear of further marginalization), samples of "out" gays and lesbians will incorrectly portray the gay and lesbian population as largely white and upper-class.[77] In addition, some scholars have recently begun to document

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72 *See* Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 10, at 72-73; Schacter, *supra* note 10, at 291-92.

73 *See* Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 10, at 72-73.

74 *See id.* at 70-72.

75 *See* URVASHI VAID, VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION 252-55 (1995); M.V. Lee Badgett, *Beyond Biased Samples: Challenging the Myths on the Economic Status of Lesbians and Gay Men*, *in* HOMO ECONOMICS: CAPITALISM, COMMUNITY AND LESBIAN AND GAY LIFE 65, 65-71 (Amy Gluckman & Betsy Reed eds., 1997); Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 10, at 70-71; Hutchinson, *Out Yet Unseen*, *supra* note 10, at 605-08; Samuel A. Marcosson, *The "Special Rights" Canard in the Debate Over Lesbian and Gay Civil Rights*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 137, 160 n.69 (1995).

76 *See* VAID, *supra* note 75, at 254 (citing study finding income levels of periodical subscribers exceed national average); Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 10, at 70-71 (same); Hutchinson, *Out Yet Unseen*, *supra* note 10, at 606 (same).

77 *See* VAID, *supra* note 75, at 256 (arguing that "middle-class and wealthy gay people are far more likely to be visible than are working-class and poor queers"); Hutchinson, *Out Yet Unseen*, *supra* note 10, at 608 (arguing that gays and lesbians of color often do not reveal their sexual orientation "because they fear the 'horrible risk . . . [of] further disenfranchise[ment].'" (ellipses and bracketed text in original (citation omitted))); Marcosson, *supra* note 75, at 160 n.69 (arguing that open gays and lesbians "are those who are in a position of relative comfort and security, and not those in a position of relative economic insecurity, for whom the loss of their job or home if their sexual orientation became known would be most catastrophic").

the economic harm of sexual orientation discrimination.[78] Their work has set in motion the important project of dissecting the "gay wealth" surveys, which create a popular, inaccurate and, ultimately, negative picture of the gay and lesbian community as disproportionately white, upper-class, and privileged.

Finally, the special rights rhetoric racializes gays and lesbians as white by attempting to disaggregate racial subjugation from heterosexism. Proponents of the "special rights" rhetoric argue that heterosexism does not warrant the attention of the statutory and constitutional civil rights apparatus because heterosexism is not as injurious (if it is injurous at all) as racism.[79] This argument, however, does not consider the ways in which racism and homophobia interact to shape subordination, particularly the subordination of persons of color who are also gay, lesbian, bisexual, or transgendered. For these individuals, racial subjugation and heterosexism are not neatly separable.[80] Indeed, the racially subordinate position of gays and lesbians of color informs their experiences in a variety of contexts, including their ability to express publicly their sexual identity, their vulnerability to oppressive violence[81] and the frequently inadequate response to such violence by law enforcement, and their access to medical care in an era of AIDS and HIV.[82] By treating questions of racial oppression as separate from, and more important than, questions of heterosexism, proponents of the special rights rhetoric assume a population of individuals unaffected, collectively or synergistically, by both forms of subordination. Clearly, the experiences of gays and lesbians of color refute this essentialist assumption.

The racialized special rights discourse has colored many political disputes over gay and lesbian equality. For instance, during the campaign to pass Amendment 2 to the Colorado Constitution—a now invalidated[83] provision that repealed (and banned the future enactment of) state and local laws protecting gays and lesbians from discrimination—proponents of the amendment frequently claimed that ex-

78 *See* Badgett, *supra* note 75, at 69-70.

79 *See* Schacter, *supra* note 10, at 291 (observing that opponents of gay rights depict "comfortable gay and lesbian lives against which the 'true' disadvantage of existing protected groups is dramatically juxtaposed").

80 Similarly, questions of race and sexuality are not neatly separable for white gays and lesbians. The racial issue that shapes the experiences of whites, however, is racial privilege, rather than racial subjugation.

81 Because terms such as "*hate* crimes" or "*bias* crimes" distort the systematic, structural, and political dimensions of acts of violence against members of socially subordinate groups, I refer to such crimes as acts of "oppressive violence." *See* Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 10, at 17-20.

82 *See id.* at 100-01.

83 *See* Romer v. Evans, 517 U.S. 620 (1996) (invalidating Amendment 2 as violative of equal protection).

tending civil rights protection to gays and lesbians would afford them special rights. One organization, the Traditional Values Coalition, employed a strategy that blatantly racialized the gay and lesbian community as white. This group developed a video entitled "Gay Rights/ Special Rights"[84] that contained footage of largely white gay and lesbian festivals, juxtaposed with footage from predominantly black 1960s protest marches (for instance, the March on Washington).[85] The voiceover contrasted gay experience with black experience by listing the abuses blacks have suffered historically and arguing that gays do not share this history. The video was distributed to black churches and black politicians in order to mobilize black support for the amendment. Thus, the Traditional Values Coalition explicitly depicted gays and blacks as separate populations with separate histories and needs and sought to generate black support for Amendment 2 by fueling black fear that whites would receive civil rights protection, appealing to black homophobia, and stoking racial tensions between heterosexual blacks and white gays and lesbians.[86] As this example demonstrates, unless law and sexuality theorists adopt a multidimensional analysis of heterosexism, their analyses will not adequately counter the manipulation of race by anti-gay activists.

C. Heteronormative Antiracist Discourse

Antiracist theory and activism also marginalize gays, lesbians, bisexuals, and the transgendered of color and contribute to the construction of the harmful "gay as white and privileged" stereotype. Antiracists racialize gays and lesbians as white primarily through their heteronormative depiction of racial subjugation and people of color. This depiction occurs in at least two ways. First, antiracist scholars and activists treat racial subjugation and heterosexist oppression as separate forces and thus fail to address the often unique subordination endured by gays, lesbians, bisexuals, and the transgendered of color. Second, antiracists, like avowedly anti-gay activists, compare gays and lesbians and persons of color in order to undermine efforts to protect gays and lesbians from discrimination.[87]

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84 Videotape: Gay Rights/Special Rights (Traditional Values Coalition 1993).

85 For discussions of different interest groups' manipulation of race to further anti-gay agendas, see, for example, Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 10, at 72-73; Russell, *supra* note 54, at 48-49; Schacter, *supra* note 10, at 292; Farai Chideya, *How the Right Stirs Black Homophobia*, NEWSWEEK, Oct. 18, 1993, at 73, 73; Sara Diamond, *Watch on the Right: Change in Strategy*, HUMANIST, Jan. 1994, at 34, 34-36; Nadine Smith, *Homophobia: Will It Divide Us?*, ESSENCE, June 1994, at 128, 128.

86 *See* Russell, *supra* note 54, at 49.

87 For a fuller examination of heteronormativity in antiracist discourse, see generally Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 10, at 40-100.

In previous writings, I have examined how racism, patriarchy, poverty, and heterosexism interact to shape the subordination of gay, lesbian, bisexual, and transgendered people of color. Using empirical, journalistic, and other research, my work has considered the ways in which these intersecting systems of oppression create racial patterns of victimization in areas as diverse as oppressive violence,[88] health care (particularly in the context of AIDS and HIV infection and treatment), employment, cultural expression, and political organizing.[89] Despite these "sexualized" patterns of racial discrimination and subordination, antiracists have not proposed significant theories that adequately respond to the synergistic relationship of racism and heterosexism. Indeed, as this Article discusses below, several antiracist scholars have explicitly questioned the need to protect gays, lesbians, bisexuals, and the transgendered from discrimination. Nevertheless, these scholars have not refused to recognize or challenge all manifestations of sexualized racism; rather, they have limited their theories to sexualized racism in its heterosexual forms.[90] For instance, a diverse body of antiracist scholarship has analyzed the ways in which racialized notions of the heterosexual practices and desires of persons of color have historically constructed them as deviant. Further, as this antiracist work reveals, racialized notions of heterosexual practices have provided a "justificatory" rhetoric to legitimize acts of brutality and other injustices against all people of color.[91] The historical legacy of sexualized racism, which has engendered a substantial amount of antiracist activism, should place antiracist theorists on notice that they need to analyze the heterosexist dimensions of racism. For if heterosexuality, typically a privileged category, can facilitate racial subjugation, then homosexuality, a socially stigmatized category, can also serve, possibly more potently, as a site of racial domination.[92] The omission of responses to homophobic racism by antiracist theory creates a discriminatory, heteronormative model of racial justice in which heterosexual status qualifies individuals as subjects for antiracist activism and analysis.[93] This narrow, essentialist vision of racial justice, moreover, marginalizes and renders invisible gays, lesbians, bisexuals, and transgendered people of color and therefore reinforces the

88 *See supra* note 81.

89 *See* Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 10, at 100-01.

90 *See id.* at 79-96 (citing sources).

91 This work has examined the lynching of black males, the sexual assault of black women during and after slavery, the "importation" of Asian women to satisfy male sexual desire, the sexual abuse of Latinas during American imperialist conquest, sexualized and gendered brutality against Asian and Latino males, and the complicity of legal authorities with all of these forms of sexualized racial subordination. *See id.*

92 *See id.* at 98.

93 *See id.* at 97.

popular, harmful notion that all gays and lesbians are white, upper-class, and privileged.

Antiracist scholars also construct heteronormative racial theories when they question or reject arguments for including gays, lesbians, bisexuals, and transgendered people within existing civil rights structures. The most prevalent antiracist rejection of antiheterosexist politics has occurred in comparisons of gays and lesbians with persons of color or racism with heterosexism. Antiracists have juxtaposed race and sexuality to counter the use of race-sexuality analogies by advocates of gay and lesbian equality. Many persons of color have challenged the analogies for their obfuscation of white gay and lesbian racial privilege. While this antiessentialist critique of the race-sexuality analogies follows from critical theory, the antiracist and person of color retorts impede progressive projects because they often reinforce heterosexism and, like the comparative approach to race and sexuality used by pro- and anti-gay forces, further marginalize gay, lesbian, bisexual, and transgendered people of color.[94]

For example, in response to gay and lesbian race-sexuality analogies, several antiracist theorists have argued that anti-heterosexism cannot fit within the existing civil rights framework because "homosexuality" is "behavioral," "chosen," and may be concealed, while racial status is an immutable, visible, "physical" trait that triggers inescapable subjugation.[95] This argument obscures the social dimensions of race and the harms that result from the "closet." It also constructs the gay and lesbian community as white.[96] The race-sexuality critics of the analogies assume that gays and lesbians and persons of color are separate communities and that the subordination of the former is less severe because gays and lesbians can "pass"—or conceal the "chosen" ground of their oppression. This logic, however, depends upon the invisibility of gays and lesbians of color. Although it is important to analyze the privilege possessed by certain members of

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94 *See id.* at 44.

95 For a collection of antiracist and person of color responses to the race-sexuality analogies, see John Sibley Butler, *Homosexuals and the Military Establishment*, 31 SOCIETY 13, 18-21 (1993); Lynne Duke, *Drawing Parallels–Gays and Blacks: Linking Military Ban to Integration Fight Stirs Outrage, Sympathy*, WASH. POST, Feb. 13, 1993, at A1; Susan Feeney, *Echoes from the Past: Sides at Odds over Parallel of Military Integration, Gay Ban*, DALLAS MORNING NEWS, May 23, 1993, at J1; David Lightman, *To Congressman, Military's Gay Ban Not Like Racial Bias*, HARTFORD COURANT, Aug. 16, 1993, at A1; Joe Rogers, *Spare Us the Comparisons Between Gays and Blacks*, WASH. TIMES, July 29, 1994, at A21; Lena Williams, *Blacks Reject Gay Rights Fight as Equal to Theirs*, N.Y. TIMES, June 28, 1993, at A1; Larry Witham, *Black Clergy Balk at Gays Sharing Rights Umbrella*, WASH. TIMES, Jan. 23, 1993, at A3. Not all of the responses were negative. *See* Holly Morris, *Civil Rights Leaders Back End to Military's Gay Ban*, ATLANTA J. & CONST., July 1, 1993, at C8; Williams, *supra*, at A1 (noting support of gay rights by Coretta Scott King, Jesse Jackson, and NAACP and reporting survey indicating greater black than white support for end of military's homophobic practices).

96 *See* Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 10, at 71-74.

subordinate communities, the analogy critics assume that the white gay community is monolithically advantaged and that people of color are monolithically subordinated.

The actual position of gays, lesbians, bisexuals, and transgendered people of color belies the critics' portrait. Because heterosexism marginalizes gays and lesbians of color and privileges heterosexuals of color, it stratifies the population of "people of color" by sexual identity and practice. Thus, in dismissing gay rights, antiracist critics who resist the race-sexuality analogies deny the existence of gay, lesbian, bisexual, and transgendered people of color, ignore the ways in which heterosexism both oppresses and creates privilege within communities of color, and thus help perpetuate the notion that gays and lesbians are uniformly privileged, upper-class, and white.[97]

III
EQUAL PROTECTION ANALYSIS

The theoretical backdrop to anti-gay and lesbian rights discourse is an image of gays and lesbians as a wealthy, white, privileged class, who, unlike traditional "minorities," do not merit legislative civil rights protection or heightened judicial review of their claims of governmental discrimination. Ironically, pro-gay and lesbian advocacy does not deconstruct, but rather reinforces, this harmful stereotype of gay privilege. Moreover, this same discourse and particularly the portrayal of gay rights as special rights, has been invoked by judges and parties in constitutional litigation. Two important federal cases, *High Tech Gays v. Defense Industrial Security Clearing Office*[98] and *Romer v. Evans*,[99] illustrate how the racialized special rights discourse can impede the quest for gay and lesbian equality in constitutional litigation.

A. *High Tech Gays*

In *High Tech Gays*, a group of gays and lesbians challenged a Defense Department policy of conducting expanded investigations into the backgrounds of gay and lesbian applicants for federal employment security clearance.[100] As a result of the discriminatory background investigations, the government routinely denied gays and lesbians clearance on the ground that they allegedly posed height-

97 For a critique of the essentializing nature of the antiracist and person of color retorts to the race-sexuality analogies, see *id.* at 41-58; Hutchinson, *Out Yet Unseen*, *supra* note 10, at 625-34.

98 895 F.2d 563 (9th Cir. 1990).

99 517 U.S. 620 (1996).

100 *See High Tech Gays*, 895 F.2d at 565.

ened security risks due to the potential for blackmail and other problems.[101]

The plaintiffs argued that the policy violated the equal protection component of the Due Process Clause of the Fifth Amendment.[102] Although the district court found that gays and lesbians were a quasi-suspect class and, applying intermediate scrutiny, invalidated the policy, a panel of the Ninth Circuit Court of Appeals reversed.[103] The reasoning of the Ninth Circuit parallels the special rights discourse: it explicitly compares "gays and lesbians" and "persons of color" and characterizes gays and lesbians as a "powerful" social group.[104]

The Ninth Circuit invoked the Supreme Court's suspect class doctrine to consider heightened scrutiny for governmental discrimination against gays and lesbians.[105] Specifically, the court inquired whether gays and lesbians have endured a "history of discrimination," whether they possess "obvious, immutable, or distinguishing characteristics that define them as a discrete group," or whether they are "politically powerless."[106] This framework arises out of the Court's exacting analysis of racial classifications and the development of the process-based heightened scrutiny framework anticipated in footnote four of *United States v. Carolene Products Co.*[107]

The Ninth Circuit found that governmental discrimination against gays and lesbians does not warrant the application of heightened scrutiny. The court held that while gays and lesbians have suffered a history of discrimination, they do not possess the other indicia of suspect status. The court justified this decision on two grounds. First, the court reasoned that "[h]omosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes."[108] The invocation of immutability in gay and lesbian equal protection analysis is problematic from various doctrinal and social perspectives as scholars such as Janet Halley have argued.[109] Other vulnerable groups, such as "permanent resi-

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101 *See id.* at 568-69.

102 *See id.* at 569.

103 *See High Tech Gays v. Defense Indus. Sec. Clearing Office*, 668 F. Supp. 1361 (N.D. Cal. 1987), *rev'd*, 895 F.2d 563 (9th Cir. 1990).

104 *See High Tech Gays*, 895 F.2d at 573-74.

105 *See id.* at 573.

106 *Id.*

107 304 U.S. 144 (1938). *See* GERSTMANN, *supra* note 1, at 24 ("The modern formulation of suspect classifications emerged from a synthesis of perhaps the single most famous case and the single most famous footnote in constitutional history: *Brown v. Board of Education* and footnote 4 of *United States v. Carolene Products Co.*" (footnotes omitted)).

108 *High Tech Gays*, 895 F.2d at 573.

109 *See* Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 563-68 (1994); *see also* Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"*

dents" and "non-marital children," do not have to make similar immutability demonstrations.[110] Furthermore, describing race and sex as immutable "traits" distorts the socially constructed nature of these categories.[111] Finally, a doctrinal requirement of immutability compels homogeneity. Rather than questioning the legitimacy or value of discriminatory practices, it demands that oppressed people "change" to fit within a presumably "valid" social structure that, in reality, embraces oppressive hierarchies.

The immutability analysis also illustrates the centrality of the comparative discussion of race and sexual identity in gay, lesbian, bisexual, and transgendered equal protection claims. The Ninth Circuit, like anti-gay political activists, searched for similarities between gays and lesbians and persons of color (and other suspect classes whose "suspect" statuses emerged from a context of race-based equal protection cases). After claiming to find no parallels between race and sexuality, the court denied judicial solicitude to gays and lesbians.

Second, the court found that gays and lesbians failed to demonstrate that they were politically powerless. This finding echoes anti-gay claims that gays, lesbians, bisexuals, and the transgendered are a politically powerful class. The court reasoned that

> [l]egislatures have addressed and continue to address the discrimination suffered by homosexuals on account of their sexual orientation through the passage of anti-discrimination legislation. Thus, homosexuals are not without political power; they have the ability to and do attract the attention of the lawmakers as evidenced by such legislation.[112]

While the court did not explicitly describe the gay and lesbian community as white, wealthy, and privileged, its citation of state statutory protection of gay and lesbian status as reflective of gay and lesbian political power echoes the racialized and class-based special rights discourse,[113] which characterizes civil rights protection of gays and lesbi-

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108 YALE L.J. 485, 520-38 (1998) (describing the "illogic of the immutability and the visibility presumptions").

110 *See* Halley, *supra* note 109, at 507-16; Yoshino, *supra* note 109, at 490-93.

111 *See* Yoshino, *supra* note 109, at 493-500.

112 *High Tech Gays*, 895 F.2d at 574 (internal quotation marks omitted).

113 A reasonable alternative interpretation of the *High Tech Gays* decision would not link the holding to the special rights rhetoric. Instead the outcome of the case could arguably rest on *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), in which the Court held that the "mentally retarded" do not constitute a quasi-suspect class because they are not politically powerless. *Cleburne*, 473 U.S. at 445 ("[T]he legislative response, which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers."). In *Cleburne*, the Court cited scattered congressional enactments protecting the "mentally retarded" from discrimination in order to justify its conclusion that this class possessed political power. *See id.* The *High Tech Gays* opinion explicitly relies upon *Cleburne* in its similarly narrow analysis of gay and lesbian

ans an an unfair advantage for a privileged, politically powerful, and influential class that manipulates the legislative process to its advantage.[114]

B. *Romer v. Evans*: Justice Scalia's Dissent

A more comprehensive version of the racialized special rights rhetoric appears in Justice Scalia's dissenting opinion filed in *Romer v. Evans*.[115] While the majority applied rational basis review and invalidated Amendment 2, Justice Scalia contested this result, and his dissenting opinion invoked the special rights rhetoric that colored the political discourse surrounding the passage of Amendment 2. Scalia argued that:

> Because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, have high disposable income, and of course, care about homosexual rights issues much more ardently than the public at large, *they possess political power much greater than their numbers, both locally and statewide. Quite understandably, they devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality.*[116]

"political power." *See High Tech Gays*, 895 F.2d at 574 ("Moreover, legislatures have addressed and continue to address the discrimination suffered by homosexuals on account of their sexual orientation through the passage of anti-discrimination legislation. Thus, homosexuals are not without political power; they have the ability to and do 'attract the attention of the lawmakers,' as evidenced by such legislation." (citing *Cleburne*, 473 U.S. at 445)). Despite the potential doctrinal overlap between these two cases, there are important differences in their outcomes. First, although the Court in *Cleburne* failed to recognize mental retardation as a classification warranting heightened scrutiny, it, nevertheless, applied a "strong" rational basis review and invalidated the discriminatory policy at issue. *See* Cleburne, 473 U.S. at 450 (invalidating policy under a purported rationality review because "requiring the permit . . . appears to . . . rest on an irrational prejudice against the mentally retarded"). The Ninth Circuit, by contrast, was exceedingly deferential in its analysis of the governmental interests. The court justified its extraordinarily deferential review on the fact that the case involved a challenge to an executive branch policy over questions of classified information. *See High Tech Gays*, 895 F.2d at 577 ("Special deference must be given by the court to the Executive Branch when adjudicating matters involving their decisions on protecting classified information . . ."). In any event, the potential doctrinal similarities between *Cleburne* and *High Tech Gays* do not preclude the operation of special rights considerations in the latter case, given the pervasive association of gays and lesbians with political power in contemporary legal and political discourse.

114 This position is inconsistent with how civil rights law treats "other" protected groups. For example, each group has privileged members, yet civil rights law provides a legal remedy for their discrimination. This curious logic, however, has also surfaced in legal scholarship. *See* Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 409 (1994) ("[T]he available evidence indicates that [discrimination against homosexuals] is neither pervasive nor economically devastating. Not only are homosexuals an affluent and highly educated class, they are also politically powerful.").

115 Chief Justice Rehnquist and Justice Thomas joined this dissent.

116 *Romer*, 517 U.S. at 645-46 (Scalia, J., dissenting) (citations omitted, emphasis added).

Similarly, Scalia characterized Amendment 2 as "a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a *politically powerful minority* to revise those mores through the use of the laws."[117] Finally, Scalia criticized the majority for "placing the prestige of [the Court] behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias."[118]

Justice Scalia's arguments closely parallel every element of the racialized special rights rhetoric. He describes gays and lesbians as wealthy and politically powerful, and therefore undeserving of judicial protection. He characterizes gay and lesbian civil rights efforts as an exertion of this disproportionate power. Finally, he separates and implicitly contrasts gays and lesbians and persons of color by implying that opposition to homosexuality is not as reprehensible as—and therefore not related to—racial bias.

The decision in *High Tech Gays*, the *Romer* dissent, and the special rights rhetoric in political discourse demonstrate how race is deployed in opposition to gay and lesbian equality efforts. In such political and juridicial discourses, the subjugation of persons of color is juxtaposed with the presumed privilege of gays and lesbians in order to suggest that the latter are unworthy of civil rights protection. By separating gays and lesbians from persons of color for comparative treatment, treating racism and heterosexism as unconnected forces, and relying upon racially- and class-biased statistical data, proponents of the special rights rhetoric, including jurists, characterize gays and lesbians as white and invoke their "whiteness" to deny them civil rights protection.

Ironically, the misleading racial rhetoric deployed by anti-gay activists and courts mirrors the discourse of mainstream pro-gay forces in one crucial respect: both groups construct the gay and lesbian community as white and upper-class. Because essentialist pro-gay commentators actually legitimize and reinforce the harmful, white construction of the gay and lesbian community that informs anti-gay discourse, they must rethink and reconstruct their approach to sexual identity, heterosexism, and race. Only a multidimensional approach to the problem of subordination, one that analyzes the multiple axes of identity and oppression and treats race as an integral component of sexual identity and subordination, can marshal an effective response to the essentialization of gay identity through the special rights discourse.

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117 *Id.* at 636 (Scalia, J., dissenting) (emphasis added).

118 *Id.* (Scalia, J., dissenting).

IV
TOWARD MULTIDIMENSIONALITY IN EQUALITY DISCOURSE

A. The Role of Multidimensional Analysis

In order to strip the special rights rhetoric of legitimacy, legal scholars must first embrace an integrated—rather than comparative—analysis of race and class in their advocacy of gay and lesbian rights.[119] A multidimensional approach to the question of race within sexuality discourse, one that uncovers the racial, classed, and gendered dimensions of heterosexist oppression and anti-gay discourse, can more accurately depict sexual subordination and destabilize the false image of a privileged white gay and lesbian community undeserving of civil rights protection. Such a multidimensional gay rights discourse can serve as the basis for re-representing gay and lesbian subjectivity and for obtaining civil rights protection of transgressive sexual identities.

B. Immediate Implications of a Multidimensional Pro-Gay and Lesbian Discourse

Adopting a multidimensional lens for scrutinizing heterosexism can affect equality discourse in at least three ways. First, a multidimensional framework suggests the need to decenter privilege in progressive theory. Second, multidimensionality exposes the need to relax the rigid comparative approach to equal protection analysis. Finally, multidimensionality uncovers the contradictory and indeterminate nature of traditional rights-based equality jurisprudence.

1. *Decentering Privilege in Progressive Theory*

The racialized discourse of anti-gay theorists and jurists portrays gays and lesbians as white, wealthy, and undeserving of protection by

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119 Although a multidimensional analysis of subordination ultimately must be employed to deconstruct the special rights rhetoric, some elements of that argument can be challenged without recurring to multidimensional analysis. For example, the notion that wealth disqualifies a social group for heightened scrutiny is problematic, given the application of heightened scrutiny to the discrimination claims of other groups (in particular whites) who also have wealthy individuals, and given continued application of rationality review to equal protection claims brought by the poor. Furthermore, if the mere existence of statutory prohibitions of discrimination against a particular group disqualifies that group from suspect or quasi-suspect status (as it did in *Cleburne* and in *High Tech Gays*), then *none* of the existing suspect classes would receive heightened scrutiny, because civil rights legislation seeks to protect each of them. In addition, equal protection doctrine becomes contradictory when the Court applies heightened scrutiny to discrimination claims brought by whites, who cannot as a class be described as "politically powerless" or as having suffered from a history of discrimination, but deny suspect status to gays and lesbians on the ground that sexual identity is "mutable" or that gays and lesbians possess political power. Yet, despite the possibility of challenging special rights arguments with the vocabulary of the traditional analysis, multidimensionality is ultimately required to deconstruct its racial (and class) distortions.

civil rights structures. While I would argue that gays and lesbians as a class, regardless of their individual race, class, or gender, warrant civil rights protection given the harms of heterosexism, pro-gay theorists should nevertheless deconstruct this racialized discourse by exploring the diverse axes of class, race, gender, and sexuality along which gays and lesbians are situated. An explication of the multiple layers and effects of heterosexism destabilizes the privileged, essentialist construction of gay, lesbian, bisexual, and transgendered status.

Despite the insidious deployment of "gay and lesbian privilege" in equality discourse, pro-gay, lesbian, bisexual, and transgendered activists have not attempted to unearth the harmful material effects of heterosexism.[120] Gay and lesbian studies and activism, instead, remain centered around the experiences of privileged individuals—men, whites, and the wealthy—whose lives, marked by social advantage, tend to affirm the notion of gay privilege. Several factors explain the centrality of privilege in gay and lesbian theory and activism. The debilitating effects of intertwined poverty, racism, patriarchy, and heterosexism render the most vulnerable members of the gay and lesbian population less visible;[121] gay and lesbian activism and legal advocacy are dominated by privileged individuals who have historically failed to comprehend, challenge, or feel concern for the subordination endured by less powerful gays and lesbians;[122] and racism, sexism, and class insensitivity plague gay and lesbian theory and activism.[123] In addition, gay rights activists pursue white and upper-class political agendas in order to ingratiate themselves with white and upper-class power structures; they assert their white and upper-class statuses in order to gain "respectability" in the eyes of a heterosexist, racist, class-stratified, and sexist society.[124] The immediate effect of the centrality of privilege in gay and lesbian activism and other progressive move-

120 *See, e.g.*, Ruthann Robson, *To Market, To Market: Considering Class in the Context of Lesbian Legal Theories and Reforms*, 5 S. CAL. REV. L. & WOMEN'S STUD. 173, 182 (1995) (criticizing gay and lesbian legal theorists for failing to "effectively counter[ ]" the perception of gay and lesbian wealth).

121 *See supra* notes 77-78 and accompanying text (discussing how racism and poverty diminish one's ability to "come out").

122 *See* Hutchinson, *Out Yet Unseen*, *supra* note 10, at 641 n.332 ("Narrow equality theories and political resistance . . . result because theorists and activists fail to acknowledge their own racial and class privileges and how these privileges shape their discourses.").

123 *See id.* at 620-35.

124 *See, e.g.*, WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 83-84 (1996) (arguing that same-sex marriage will "civilize" and provide "discipline" for gay men); Ettelbrick, *supra* note 61, at 404 (arguing that same-sex marriage appeals to race, class, and gender privileged individuals because it is their "final acceptance, the ultimate affirmation of [their] identity"); Hutchinson, *Out Yet Unseen*, *supra* note 10, at 591 ("[P]ersons who face multiple oppressions and those who possess social privileges will likely have disparate views on the ability of marriage to place them within structures of power and acceptability and to transform radically their lives.").

ments is the marginalization and invisibility of, and diversion of resources from, gay, lesbian, bisexual, and transgendered people who are poor or of color. Ultimately, however, the prominence of social advantage within gay and lesbian equality discourse lends credibility to an inaccurate, racialized, anti-gay discourse that would deny equality to *all* sexually transgressive individuals.

Multidimensional analysis provides a needed theoretical framework for decentering privilege in gay and lesbian and other progressive social movements. Multidimensionality engages all of the "interlocking sources of advantage and disadvantage" that sustain the "various institutions of oppression" and corresponding identity categories used to justify them.[125] Accordingly, a multidimensional analysis of heterosexist subordination would not simply uncover the problem of formal inequality for gays and lesbians and examine "gay experience" as delimited by whiteness, maleness, and class privilege. Instead, a multidimensional gay liberation theory would unveil the diverse material, social, and emotional harms caused by intertwined racism, sexism, poverty, and heterosexism. These varied injustices call for a more comprehensive analysis of heterosexist oppression, and they belie the depiction of gay, lesbian, bisexual, and transgendered identity as privileged. It is therefore imperative that gay and lesbian advocates employ a multidimensional lens for analyzing the conditions of heterosexism.

2. *Relaxation of Rigidly "Comparative" Equal Protection Analysis*

The second implication of a multidimensional approach to subordination is a relaxation of an often rigid comparative approach to equality in constitutional and statutory civil rights contexts. Under the traditional comparative approach, social groups seeking heightened judicial scrutiny of their equal protection claims must show how they are "like" racial groups (usually, people of color, especially blacks) and other protected classes.[126] The comparative focus of equal protection analysis is a product of a legal culture wedded to precedent. Furthermore, comparative equal protection jurisprudence may reflect a judicial concern to remain true to the original purposes of the Fourteenth Amendment—the eradication of racial subjuga-

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125 Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 10, at 10; *see also* Hutchinson, *Out Yet Unseen*, *supra* note 10, at 640 ("Multidimensionality exposes the various layers of social power that inform heterosexism and homophobia. Multidimensional analysis also reveals the multiple dimensions of social identity categories and offers a comprehensive framework for conceptualizing sexual subordination that neither 'destroys' nor 'fragments' our lives." (citation omitted)).

126 *See* Yoshino, *supra* note 109, at 487 ("In considering arguments that other classifications be accorded heightened scrutiny, the courts have required claimants to demonstrate the similarities these classifications share with race and sex.").

tion—and to guard against a "slippery slope" or endless proliferation of government classifications subject to exacting judicial scrutiny.[127] Because the comparative approach often denies judicial solicitude to historically oppressed groups,[128] it may in fact reflect the conservative jurists' fear of "too much justice."[129] Furthermore, while historical, federalism, and separation of powers concerns may provide limited justification for comparative and cautious equal protection analysis,[130] the reality of multidimensional subordination renders problematic the *strict* comparative model courts typically apply in sexual orientation discrimination cases. For example, because racial subjugation, heterosexism, and patriarchy are intertwined and mutually reinforcing systems of subordination, an equality jurisprudence that seeks to undo racial and gender hierarchies must also prevent the perpetuation of sexualized subordination. By failing to recognize the ways in which racism, patriarchy, and homophobia interact to create subordination, courts and commentators deny the existence of gays and lesbians of color, construct gays and lesbians as white and people of color as heterosexual, and erase the important differences within and among oppressed social groups.[131] In addition, while gay and lesbian equal protection litigants labor to meet doctrinal requirements that force them to show how they are like persons of color and other protected classes, the painful and complex reality of heterosexist subordination escapes judicial analysis.[132]

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127 *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 445-46 (1985) (declining to apply heightened scrutiny to equal protection claim of the "mentally retarded" because it would be "difficult to find a principled way to distinguish a variety of other groups" such as "the aging, the disabled, the mentally ill, and the infirm"); GERSTMANN, *supra* note 1, at 39 ("Conservative justices developed the three-tiered framework to beat back the then-rapid expansion of the equal protection clause."); Yoshino, *supra* note 109, at 562-63 (describing gatekeeping role of suspect class doctrine).

128 *See* GERSTMANN, *supra* note 1, at 24 (observing that "the judicial window for recognizing suspect and quasi-suspect classifications other than race and national ancestry was quite brief" and noting that "[n]o new suspect or quasi-suspect classifications have been found by the Court since 1977").

129 McCleskey v. Kemp, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

130 Substantive due process analysis also utilizes a comparative approach: judges debate whether rights at issue in contemporary cases are the same as or similar to historically recognized rights. When the Court demands a rigid similarity, it invariably refuses to recognize new rights, but if its comparison is more relaxed, then it may find the right at issue sufficiently related to an historically protected freedom. For a cogent explication of this controversy, see Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990).

131 This is particularly relevant in arguments concerning the "immutability" of the trait around which the governmental classification revolves. *See supra* text accompanying notes 108-11.

132 *See* Hutchinson, *Out Yet Unseen*, *supra* note 10, at 633 (arguing that the "many harms sexual subordination causes . . . require legal and political remedies for their own sake–without reference to the rights and injuries of black heterosexuals").

Instead of requiring equal protection plaintiffs to prove that they are identical to people of color (who themselves, given gender, class, and sexuality differences, do not have a monolithic experience) to receive civil rights protection, a better approach would examine *why* racial subordination and other forms of oppression are undesirable and injurious and why they therefore warrant statutory and constitutional remedies. Racial subjugation creates arbitrary, explosive, and violent divisions in society; it places unjustifiable limits on the cultural and economic productivity of classes of individuals; and it causes economic dislocation and emotional injuries. Accordingly, racial subjugation is necessarily inconsistent with notions of equality and fairness.

Focusing on these generalized harms rather than on whether certain classes of people are identical to or like persons of color (e.g., whether they possess an immutable trait that is the ground for discrimination), provides a useful alternative framework to the inflexible comparative approach to equal protection that has often justified denying equal protection claims of historically oppressed groups. This approach would also limit the categories of discrimination that receive heightened judicial scrutiny, because not all forms of governmental discrimination produce the harms, such as economic dislocation, emotional indignities, and suppressed productivity, central to this alternative approach. Furthermore, multidimensionality helps to reveal these harms, particularly in the emergent and unsettled terrain of gay and lesbian equality jurisprudence. For example, directing gay and lesbian equality theory to the economic dimensions of heterosexism and to the economic, racial, and gender diversity of gay and lesbian people will highlight the political powerlessness of gays and lesbians and discredit the notion that gays and lesbians are privileged and undeserving of civil rights protection.[133]

3. *Colorblindness, Contradictions, and the Indeterminacy of Rights*

A multidimensional approach to the issue of heterosexism, which unveils the racialized nature of anti-gay discourse, also uncovers the myth of "colorblindness" and the limitations of a rights-based equality analysis. In the last decade, the Rehnquist Court has become decidedly colorblind, at least in principle, holding that strict scrutiny should apply to all governmental race classifications—remedial or invidious, state or federal—and has required extensive and sophisti-

133 In a recent article, Kenji Yoshino argues that equal protection doctrine should focus on the "political powerlessness" strand of the heightened scrutiny test and retire others such as immutability and visibility because they require groups to portray themselves as being the same as blacks. *See* Yoshino, *supra* note 109 *passim* (focusing on generalized harms).

cated evidence to justify race-based affirmative action measures.[134] Nevertheless, equal protection analysis, as applied in lower courts and by at least three sitting Justices of the Supreme Court, racializes gays and lesbians: these Justices compare gays and lesbians to persons of color and, finding fundamental "differences" between the two groups, deny the former the protection of constitutional civil rights law. Ironically, the racializing special rights discourse is often invoked by members of the court—Justices Scalia, Thomas, and Rehnquist—and by political organizations that are among the most prominent and vehement opponents of remedial race consciousness.[135] Furthermore, the same Justices who find substantial differences between gays and lesbians and persons of color, including the purported possession of political power by the former, have not found sufficient differences between persons of color and whites to disqualify the latter from receiving the most exacting judicial scrutiny of their "discrimination" claims.[136] Thus, whites, as a class, receive strict judicial scrutiny of their equal protection claims, while gays and lesbians (and the poor and the elderly) receive only rational basis.[137] The contradictory recognition and nonrecognition of race and "political power" by the Court's most openly conservative bloc are probably less a logical flaw than a demonstration of the indeterminacy and limitations of a "rights" approach to equality and the impact of judicial bias on equal

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134 *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (applying strict scrutiny to federal, race-based affirmative action programs); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (applying strict scrutiny to invalidate municipal, race-based affirmative action program and rejecting as insufficient the city's stark evidence of discrimination in need of remedy).

135 *See* Shaw v. Reno, 517 U.S. 899, 907 (1996) (Rehnquist, C.J., writing for the Court) (arguing that "[r]acial classifications are antithetical to the Fourteenth Amendment" and invalidating voting district designed to remedy prior discrimination against blacks); *Adarand*, 515 U.S. at 239 (Scalia, J., concurring) ("In my view, government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction."); *id.* at 241 (Thomas, J., concurring) ("In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice." (footnote omitted)); Chideya, *supra* note 85, at 73 (questioning sincerity of anti-gay organizations' use of race and overtures to black community given the opposition to racial antidiscrimination policies by leaders of these organizations); Smith, *supra* note 85, at 128 (noting "irony" of "alliance" between conservative anti-gay organizations and blacks given those organizations' "long history of actively opposing [black] civil rights").

136 See arguments by Justices Rehnquist, Scalia, and Thomas discussed *supra* note 135.

137 *See* GERSTMANN, *supra* note 1, at 83. Professor Gerstmann explains:

> In the context of affirmative action and in other cases, the courts have applied strict scrutiny to laws that discriminate against *whites* and *males*. This has produced the bizarre result that gays and lesbians are considered too politically powerful to receive the benefit of strict scrutiny, but whites and males are not.

Id.

protection discourse.[138] By now, Justice Scalia has left little room for doubt about his opinions of the legitimacy of civil rights protection for gays and lesbians,[139] but the inconsistency of his approaches to color and power lends credibility to the indeterminacy thesis and the postmodern view that legal doctrine is shaped by political, economic, and social forces, rather than simply neutral abstraction.[140] Furthermore, it is unclear how most of the other members of the Court would approach the question of heightened scrutiny for gays and lesbians, as indeterminacy has marked their decisions regarding race and sexuality as well. For instance, while the Court in *Romer* applied what many scholars have characterized as "strong" rationality review to invalidate Amendment 2 (without reaching the question whether sexuality classifications warrant heightened scrutiny),[141] the majority of the Court, subscribing to its much-criticized "discriminatory intent rule," continues to apply a more deferential form of rational basis review to facially-neutral governmental policies that adversely affect people of color and women.[142] These contradictions, which perpetuate gender and racial hierarchies while granting *limited* protections to gays and lesbians, implicate an ongoing debate over the efficacy of rights discourse as a vehicle for social equality.

Despite the indeterminacy and politicization of rights-based equality doctrine, gay and lesbian theorists can learn from the experience of antiracist activists, particularly critical race theorists, who encourage progressive scholars to accept the "contradiction" of being

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138 *See, e.g.*, Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 633-51 (1992) (arguing that negative social stereotypes influence the outcome of litigation involving questions of gay and lesbian equality); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1364-84 (1984) (critiquing rights as unstable, indeterminate, offering a false reality, and as an impediment to progressive political forces). *But see* GERSTMANN, *supra* note 1, at 84-89 (attributing disparities resulting from class-to-classification shift in equal protection doctrine to "faulty analysis" in Supreme Court and "confusion" over this analysis in lower courts).

139 *See supra* text accompanying notes 115-18 (discussing Justice Scalia's dissenting opinion in *Romer v. Evans*, 517 U.S. 620, 636-53 (1996)); *see also* Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 518 U.S. 1001, 1001 (1996) (mem.) (Scalia, J., dissenting) ("Unelected heads of city departments and agencies, who are in other respects (as democratic theory requires) subject to the control of the people, must, where special protection for homosexuals are [sic] concerned, be permitted to do what they please.").

140 *See* Crenshaw, *supra* note 57, at 1346 ("[T]hough they attempt to lay claim to an apolitical perch from which to accuse civil rights visionaries of subverting the law to politics, the neoconservatives as well rely on their own political interpretations to give meaning to their respective concepts of rights and oppression.").

141 *See* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 327 (1997) (including *Romer* on a list of cases representing "rational basis review with a bite" (internal quotation marks omitted)).

142 *See* McCleskey v. Kemp, 481 U.S. 279 (1987); Personnel Adm'r v. Feeney, 442 U.S. 256 (1979); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

simultaneously skeptical of law as an instrument of social progress and committed, nonetheless, to utilizing law and "right reason" to advocate for oppressed social groups.[143] A multidimensional analysis, by unveiling the racial, gender, and class elements of anti-gay and lesbian discourse, can respond to the politicization and contradictions of equal protection jurisprudence and articulate creative theories that call upon courts to account for their "colorblind" yet racialized application of equal protection analysis.

CONCLUSION

The work of Audre Lorde, the late black lesbian writer, contains many important lessons for progressive theorists and activists. In an influential essay, Lorde warns critical theorists and activists not to reproduce the mechanics of oppression in their own work. Lorde has a powerful, yet seemingly obvious, message: "*the master's tools will never dismantle the master's house.*"[144] Contemporary gay, lesbian, bisexual, and transgendered theorists and activists can benefit from Lorde's vision, for there exists a harmful congruence of pro-gay and anti-gay discourses: both marginalize people of color and the poor and depict a gay and lesbian community privileged by race and class. Gay and lesbian essentialism, in addition to exacerbating the invisibility of the poor and people of color and leading to theories that fail to challenge their oppression, legitimizes a conservative racial discourse that seeks to deny the protections of civil rights structures to *all* gay, lesbian, bisexual, and transgendered people. This same discourse is invoked by jurists in equal protection litigation to justify the denial of judicial solicitude to gay and lesbian people. While heterosexism is a social evil whether endured by wealthy or poor, whites or persons of color, men, women, or transgendered people, it is imperative that pro-gay forces reconstruct their theories to counter the inaccurate racialized and classed depiction of gays and lesbians by homophobic forces. Multidimensional analysis provides a needed alternative to the current essentialism and conceptual narrowness of progressive sexual politics.

Multidimensionality examines the diverse effects of heterosexism and other forms of oppression on personal identity and well-being. It argues for the inclusion of sexual identity oppression within civil rights law, not by "comparing" heterosexism with racial subjugation,

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143 My thinking on this issue is informed by many sources, but most significantly by the important work of Angela Harris. *See* Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741 (1994). For other compelling works on this subject, see Crenshaw, *supra* note 57, Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987), and Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

144 AUDRE LORDE, *The Master's Tools Will Never Dismantle the Master's House*, *in* SISTER OUTSIDER 110, 112 (1984).

but by revealing the connections between the two modalities of oppression. With the recent growth of race critiques within queer theories, pro-gay activists now have the tools to redirect the negative path of antidiscrmination discourse. The choices they make will determine whether complex structures of oppression will be dismantled or whether civil rights law will continue to deliver a partial justice, grounded in racial, gender and class advantage and upon the silencing of women, the poor, and persons of color.