

## NOT A MORAL ISSUE: SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY<sup>†</sup>

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*Same-Sex Marriage and Religious Liberty is a new book of essays edited by Douglas Laycock, Anthony R. Picarello, Jr., and Robin Fretwell Wilson. The book purports to offer a solution that will give Gays and Lesbians access to the benefits of marriage, while recognizing religious objectors' rights to oppose gay marriage. This Book Review focuses on the book's intellectual center, Professor Wilson's essay, Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context, and Professor Laycock's Afterword.*

*In this Book Review, the author shows that Professors Wilson and Laycock's analysis of the same-sex marriage debate fails to seriously account for equality issues that are at stake. The Fourteenth Amendment does not allow religious objection to justify anti-miscegenation laws. Similarly, Equal Protection demands that we ex-*

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<sup>†</sup> The title of this Book Review, "Not a Moral Issue," is a riff on a 1983 essay by Catharine MacKinnon of the same name, proposing a radical feminist critique of pornography. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 146–62 (1988). Her title was itself a play on "Not a Love Story," a 1983 anti-pornography film by the Canadian Film Board. I think that the predominating discourses on pornography and same-sex marriage are composed curiously of the same stuff. Both discourses center, superficially at least, on a morality theme—to lesser or greater degree depending on who is doing the moralizing, but almost always in decidedly moral terms. Both, however, are really about power—who has it, who wants it, and what those who have it will do to keep it. No amount of moralizing can dissolve what are, at bottom, indissoluble questions of distribution of power. In reality, it is the real-life equality of their objects that are at stake, women and Gays respectively. Lest my readers think that the link with pornography here is too far-fetched, Professor Laycock, primary editor and a contributor to the book that is the subject of this Book Review, makes the connection himself in the *Afterword*, making essentially my point here in reverse. Douglas Laycock, *Afterword* to SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 189, 193 (Douglas Laycock et al. eds., 2008). Professor Laycock apparently believes that enough moralizing about pornography and enough moralizing about same-sex marriage transforms both into moral questions, quite irrespective of, and often in direct opposition to, the real equality concerns that underlie both practices.

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*amine the religious justifications for anti-Gay marriage arguments more closely. The author demonstrates that, contrary to Professors Wilson and Laycock's assertions, one cannot easily distinguish between religious objections to interracial marriage, as well as religious justifications for other forms of inequality, and religious objections to Gay marriage. The author proposes we should analyze objections to same-sex marriage in light of group-based equality issues, and not subordinate Gays' and Lesbians' collective equality rights to the political power of individual religious objectors.*

*Same-Sex Marriage and Religious Liberty: Emerging Conflicts*, by Douglas Laycock, Anthony R. Picarello, Jr., and Robin Fretwell Wilson, eds. Rowan & Littlefield, New York, 2008. Pp. xiv, 329. Cloth \$85.00. Paper \$34.95.

Lesbian and Gay<sup>1</sup> Americans have long recognized that we live in a country that rejects our equality. The issue of same-sex marriage, newly illuminating our lives for people who long preferred to see us only dimly, has focused the disparity between Gay and straight America in bold relief. *Same-Sex Marriage and Religious Liberty*, the new book of essays edited by Douglas Laycock, Anthony R. Picarello, Jr., and Robin Fretwell Wilson, purports to offer compromise solutions that will allow Gay people access to the civil status of marriage while allowing religious objectors to maintain exercise of unfettered religious conscience. Unfortunately, far from inching us toward the goal of marriage equality, which the book concedes to be inevitable, the work represents the rampant structural liberalism<sup>2</sup> currently eroding equality at every turn.

Shortly after I finished reading *Same-Sex Marriage and Religious Liberty*, I attended a panel discussion on marriage equality organized by student members of the newly formed Gay/Straight Student Alliance at Winston-Salem State University.<sup>3</sup> The effort of these students, one hundred strong, to broach this topic at a historically Black university was a particular act of bravery. What was most interesting to me about the ensuing discussion was that none of the three Gay couples or the straight

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1. My convention is to capitalize the words "Gay," "Lesbian," and "Black." I do this in recognition of the fact that these categorical labels often describe far more than the mere implication of biological essence. By this I mean that "Gay" and "Black" often bespeak a cultural, social, and political identity of shared experience that "white" and "straight" do not. For purposes of this essay, "Gay" usually encompasses both "Gay" and "Lesbian."

2. I employ the term structural liberalism to describe a perspective that proceeds from the faulty premise that society is already basically equal. It is a perspective that is ecumenical for ecumenism's sake. It fails to take account of power realities. It supposes social progressivism, but then turns on the socially and legally subordinated when they dare demand equality over tolerance. It defines progress in terms of what subordinated people can work out with the dominant in society on the oppressors' terms. And it faults disempowered people for failing gratefully to assimilate into this paradigm from which they are always already excluded.

3. The panel discussion was held April 14, 2009, on the campus of Winston-Salem State University, Winston-Salem, North Carolina.

minister (supportive of marriage equality) on the panel could answer the question: “What is at stake for people who oppose Gay marriage?” It was a fair question by the student-activist who asked it. The panelists, each of whom sincerely wanted to believe it, I’m sure, answered that Gay marriage costs its opponents nothing. Of course, nothing could be further from the truth. At the center of the crossroads of the substance (as opposed to the rhetoric) of the Gay marriage debate is the question of power: who has it, who wants it, and what those who already have it will do to keep it. “Most legal conflicts, whatever else is at stake, involve social ranking and distribute social resources and treasure for the living of life; most have dimensions of, or effects on, ‘who gets what, when, and how.’”<sup>4</sup>

Equality questions—and the question of same-sex marriage is undeniably one—are acme examples of cases affecting (and effecting) distribution of power. The two groups, the marriage equality panelists (from the perspective of the law, lay people) and the authors of *Same-Sex Marriage and Religious Liberty* (from the perspective of the law, experts), both misstate the true nature of the question in curiously similar ways. Both groups proceed from a formalistic approach to equality, which particularizes inequalities and focuses on the individuals involved in a particular legal dispute. Of course, there is some truth in this, because all law is someone’s story in the individual sense. But few cases, and certainly no equality cases, really stop with the individual litigants—parties named and usually forgotten in all but the opinion’s caption. A case’s greater importance is not what it does in the confines of these individualized disputes, but in what it does in the wider world. This is what a case is really about, what it really means.

The authors of *Same-Sex Marriage and Religious Liberty* understand that equality claims and equality-based decisions reach beyond individual disputes. That is what makes equality decisions dangerous to the power hierarchies the authors theorize to support. So the authors use individual rights as a bulwark against equality, in an attempt to make what is generally substantive—that is, equality—into that which is particularly abstract—that is, amorphous claims of individual moral conscience. The authors have bad arguments (in the sense that they are terribly undertheorized), but they are clever lawyers. They know that what a thing is called in the law can make a lot of difference. When cases centered on the question of distribution of power are litigated (or commented on) as purely individuated, person-to-person conflicts, their true substance—equality—is evaded.

In this sense, *Same-Sex Marriage and Religious Liberty* is remarkable for what it does not contain. It does not contain a serious, substantive discussion of the real equality dimensions of the same-sex marriage

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4. CATHARINE A. MACKINNON, WOMEN’S LIVES, MEN’S LAWS 3 (2005).

question. Because this is a complex book, comprised of contributions from six writers, I am going to focus on what I consider to be the book's intellectual epicenter,<sup>5</sup> the contribution entitled *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*,<sup>6</sup> by Professor Robin Fretwell Wilson, as well as the *Afterword*<sup>7</sup> by Professor Douglas Laycock, which offers a summary and scaffolding for Professor Wilson's claims, as well as his own claim that the religious and civil components of marriage should be dissociated entirely in order to preserve marriage in its traditionalist form.

Reading Professor Wilson's chapter, one gets the impression that it aspires to be something more than it turns out to be. Her points are thoughtful and they are rigorously argued, making the lack of a serious equality analysis all the more startling. Throughout her substantial chapter, Professor Wilson speaks consistently of the "dignitary rights of gays and lesbians,"<sup>8</sup> which she defines as "the right not to be embarrassed, not be inconvenienced, not to have their choices questioned."<sup>9</sup> The word "equality" does not appear once.<sup>10</sup> The rights of Gays and Lesbians as a class of people, located most sensibly at the core of the equality norm, are reduced to hurt feelings or inconvenience.<sup>11</sup> This seems rather perverse, particularly given that we live in a system of government supposedly not constitutionally neutral on the subject of equality.

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5. I say this because the argument it represents is already becoming quite influential. The authors have been well represented in the popular press of late, especially Professor Wilson, whose op-ed in the *Los Angeles Times*, Robin Wilson, *Protection for All in Same-Sex Marriage*, L.A. TIMES, May 3, 2009, at A39, states her case to a general audience. Another piece by Wilson in the *Hartford Courant*, Robin Fretwell Wilson, *Will Law Demand We Support Gay Marriage?*, HARTFORD COURANT, Mar. 6, 2009, at A15, lobbied for religious conscience exemptions in the state's new marriage law, which passed in Connecticut with three conscience exceptions. Professors Laycock and Wilson, joined by several law professors, sent lobbying letters to the governor of Maine arguing for religious exceptions to that law as well. Professor Laycock wrote separately on April 30, 2009, but endorsed the suggestions made by Professor Wilson and others in their May 1, 2009 letter. Letter from Robin Fretwell Wilson et al., Professors, to John Baldacci, Governor of Me. (May 1, 2009) (on file with author) [hereinafter *Wilson Letter*]; Letter from Douglas Laycock, Professor, Univ. of Mich. Law Sch., to John Baldacci, Governor of Me. (Apr. 30, 2009) (on file with author) [hereinafter *Laycock Letter*]. The Maine marriage law passed with an exemption for anyone with a conscience objection to refuse to perform any marriage they want. Emily Sherman, *Same-Sex Marriage Battle Moves to Maine*, CNN, Oct. 26, 2009, <http://www.cnn.com/2009/POLITICS/10/25/maine.same.sex/>. Most recently, the governor of New Hampshire decided to send his state's marriage bill back to the legislature for additional "religious liberty" protection, along the lines proposed by Wilson et al., in their model provision. Abby Goodnough, *New Hampshire Pact Near on Same Sex Marriage*, N.Y. TIMES, May 14, 2009, at A16.

6. Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 77, 77-102 (Douglas Laycock et al. eds., 2008).

7. Douglas Laycock, *Afterword* to SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, *supra* note 6, at 189, 189-207.

8. Wilson, *supra* note 6, at 94.

9. *Id.*

10. It is unclear whether this is because Professor Wilson agrees with contributor Marc D. Stern when he asserts, approvingly it seems, that "[e]quality is less central to the American constitutional universe than it is in Canada or Europe." Marc D. Stern, *Same-Sex Marriage and the Churches*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, *supra* note 6, at 1, 6.

11. Wilson, *supra* note 6, at 94.

Equally perverse is how purposefully she elides the obvious analogy for same-sex marriage, which is interracial marriage. Why wouldn't we analogize marriage to marriage? It's what might be called the "duh" analogy.<sup>12</sup> *Loving v. Virginia* was an equality decision,<sup>13</sup> perhaps our best example—far better than *Brown v. Board of Education of Topeka*<sup>14</sup>—in which the Court actually named the real evil at issue. In striking down Virginia's antimiscegenation law, the Court recognized that the law was a tool for the maintenance of "White Supremacy,"<sup>15</sup> which struck at the core of the Fourteenth Amendment. But Professor Wilson does not make this analogy, writing instead that

[w]hile the parallels between racial discrimination and discrimination on the basis of sexual orientation should not be dismissed, it is not clear that the two are equivalent in this context. The religious and moral convictions that motivate objectors to refuse to facilitate same-sex marriage simply cannot be marshaled to justify racial discrimination.<sup>16</sup>

Really? On what basis are we to draw this conclusion? Religiously based descriptive moral judgments about the worth of Blacks were certainly sufficient to justify the ownership of human beings as chattel property for the better part of three hundred years in this country<sup>17</sup> and to undergird a system of segregation that would last at least another hundred years.<sup>18</sup> Frederick Douglass believed that "[r]evivals of religion and

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12. Professor Andrew Koppelman, whose theories about religious exemptions to generally applicable antidiscrimination laws are favored by the authors, has made this analogy. See Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 161 (1988). I explore it fully in Shannon Gilreath, *Some Penetrating Observations on the Fifth Anniversary of Lawrence v. Texas: Privacy, Dominance, and Substantive Equality Theory*, 30 WOMEN'S RTS. L. REP. 442 (2009), especially at Part III.

13. 388 U.S. 1, 11 (1967).

14. 347 U.S. 483 (1954).

15. *Loving*, 388 U.S. at 7. I have always believed that the Court's capitalization of "White Supremacy," to recognize the institution of it, was no mere stylistic accident. Any substantive equality decision must necessarily deal with the epistemological basis of inequality, which is the systemic institutionalization of social distinctions into legal castes. Of course, this connection between epistemology, as a method of knowing and thinking, with politics and law, as methods of power, is seldom present in judicial thinking. *Loving* is one of the few authentic exceptions. *Romer v. Evans*, 517 U.S. 620 (1996), may be another.

16. Wilson, *supra* note 6, at 101.

17. Slave holders and their churches looking for biblical sanction of slavery did not have to go far. Approval of slavery is as obvious in the Bible as is condemnation of same-sexuality. Things get off to a rousing start in *Genesis* 9 with the curse on Ham and Canaan. *Genesis* 9:20–27. Slaves were just part of the cultural background when one reads passages like *Exodus* 21:2, 20–21, *Leviticus* 22:10–11, and *Leviticus* 25:44. In *Deuteronomy* 15:12 (jubilee year discussion), provisions were made for release of Hebrew slaves, but not foreign ones. Abraham had slaves as did other patriarchs, *Genesis* 16:1, and Saint Paul, in *Philemon*, had a perfect opportunity to denounce slavery but did not. *Philemon* 1:8–21.

This note is indebted to the quick reference assistance of Rev. Susan Parker.

18. See, e.g., *Kinney v. Commonwealth*, 71 Va. (30 Gratt.) 858, 869 (1878) ("[T]he destiny to which the Almighty has assigned [the races] on this continent . . . require[s] that they should be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion.").

revivals in the slave-trade [went] hand in hand together.”<sup>19</sup> He was so honestly critical of the role that the established Christian religion played in the formation and perpetuation of the slave economy that, when Douglass published his first book, his publisher prevailed upon him to publish an Appendix to the book, explaining why Douglass was not personally hostile to Christianity.<sup>20</sup> In opposition to the Civil Rights Act of 1964, Senator Robert Byrd read Genesis 9:18–27 (Noah’s curse of the descendants of Ham) into the Congressional Record.<sup>21</sup> In *Loving*, the Virginia trial judge offered an explicitly religious rationale for upholding Virginia’s antimiscegenation law.<sup>22</sup> The slaveholders of history and the segregationists of today make no distinctions between their biblically based religious beliefs and the systems of subordination they seek to institutionalize as part and parcel of and in the name of those same religious beliefs.<sup>23</sup> My question to Professor Wilson is this: if they make no such distinction, why should we? Of course, if she had made this analogy, the conversation would be quite different. Readers would instantly rebel at the idea of a county clerk being able to refuse a marriage license to a Black and white couple, as she suggests clerks should be able to do on moral grounds when faced with a Gay couple. But we are not having this conversation because, as Professor Wilson demonstrates, Gays and Lesbians remain the last group against whom it is permissible to discriminate openly and then call that discrimination “religion.”

Ignoring the race analogy makes it easy for the authors to hypothesize that Gay rights are something other than those which the law already knows how to address. It allows them to suggest that addressing the Gay rights question requires complicated theorizing and historic compromis-

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19. FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE 118 (Dolphin Books 1963) (1845).

20. It is left to the reader to judge how convincing he was:

[B]etween the Christianity of this land, and the Christianity of Christ, I recognize the widest possible difference—so wide, that to receive the one as good, pure, and holy, is of necessity to reject the other as bad, corrupt, and wicked. To be the friend of one, is of necessity to be the enemy of the other. I love the pure, peaceable, and impartial Christianity of Christ: I therefore hate the corrupt, slaveholding, women-whipping, cradle-plundering, partial and hypocritical Christianity of this land. Indeed, I can see no reason, but the most deceitful one, for calling the religion of this land Christianity. I look upon it as the climax of all misnomers, the boldest of all frauds, and the grossest of all libels. . . . He who is the religious advocate of marriage robs whole millions of its sacred influence, and leaves them to the ravages of wholesale pollution.

*Id.* at 117–18.

21. Byrd also invoked *Genesis* 1:21–25, *Leviticus* 19:19, and *Matthew* 20:1–15. 110 CONG. REC., 13,206–08 (1964); see also TAYLOR BRANCH, PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963–65, at 334–35 (1998) (reading the Magna Carta).

22. “Almighty God created the races white, black, yellow, malay [sic] and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.” *Loving v. Virginia*, 388 U.S. 1, 3 (1967).

23. Jerry Falwell, for example, believed that segregation was biblically mandated. “If Chief Justice Warren and his associates had known God’s word and had desired to do the Lord’s will, I am quite confident that the 1954 decision would never have been made.” He later recanted this position. Max Blumenthal, *Agent of Intolerance*, NATION, May 16, 2007, <http://www.thenation.com/doc/20070528/blumenthal> (quoting Jerry Falwell’s infamous statement).

es. The truth is that the law has dealt with religiously motivated discrimination—as rationalization or sincere belief—before. Certainly, this was true with race. Despite staunch opposition to integration on religious grounds, the Civil Rights Act of 1964 contained no broad religious exemptions.<sup>24</sup> It is fair, given their treatment of Gay civil rights, to ask the authors whether they believe it should have.

Professor Wilson’s preferred analogy—preferred over race—of abortion, is an analogy to which gender is undeniably central. But women have fared just as poorly at the hands of religionists. Women have been as much the chattel property of men, first of their fathers and then of their husbands, as Blacks have been the property of whites. The Fourteenth Amendment was argued not to apply to women, with Congressman Thaddeus Stevens pointedly declaring that “[w]hen a distinction is made between two married people or two *femmes sole*, then it is unequal legislation; but where all of the same class are dealt with in the same way then there is no pretense of inequality.”<sup>25</sup> In another context, that of suffrage and Section 2 of the Fourteenth Amendment, Senator Howard explained that by “the law of nature . . . women and children were not regarded as the equals of men.”<sup>26</sup> The prevailing cultural attitude regarding women was neatly summed up by the North Carolina Supreme Court, which held that a woman did not have grounds for divorce when her husband had disciplined her by horse-whipping her.<sup>27</sup> The court, citing *Genesis* 3:16, “Thy desire shall be to thy husband, and he shall rule over thee,” declared that being beaten in this way was not cause for divorce as a matter of law.<sup>28</sup> Even as Black men received the right to vote, women were still denied it.<sup>29</sup> The rape of women by their husbands went unrecognized because women were to become “one flesh” with their husbands.<sup>30</sup> Women have been denied employment because of patriarchal attitudes reinforced through religion and, as to abortion particularly, they have been denied reproductive control largely by effective campaigns organized by religious ideologues.<sup>31</sup>

Professor Wilson argues that it is permissible for businesses and even state employees to discriminate against Gays on religious conscience grounds.<sup>32</sup> I think it is fair to ask her whether there should have been similar religious conscience exceptions to Title VII for those who do not wish to hire or otherwise accommodate women. Why have we

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24. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified at 42 U.S.C. §§ 1981–2000 (2006)).

25. CONG. GLOBE, 39th Cong., 1st Sess. 1064 (1866).

26. *Id.* at 2767.

27. *Joyner v. Joyner*, 59 N.C. (6 Jones Eq.) 322, 325 (1862).

28. *Id.*

29. MACKINNON, *supra* note 4, at 117.

30. *Genesis* 2:24.

31. See DALLAS A. BLANCHARD & TERRY J. PREWITT, RELIGIOUS VIOLENCE AND ABORTION: THE GIDEON PROJECT 250–55 (1993); MACKINNON, *supra* note 4, at 119.

32. Wilson, *supra* note 6, at 81.

drawn the line at Gays? Whatever the answer to this query, claiming, as Wilson does, that Gays are the target of an especial religious animus justifying their subjection to especially discriminatory treatment is, as a matter of history, simply untrue.

Ignoring the race analogy also allows the authors to rationalize blatant discrimination. For example, Professor Laycock writes, “I would have no objection to a requirement that merchants that refuse to serve same-sex couples announce that fact on their website or, for businesses with only a local service area, on a sign outside their premises.”<sup>33</sup> He reasons that this would avoid “unfair surprise”<sup>34</sup> to Gays and then muses, “[w]hether the gay-rights side would want such a requirement is a harder question.”<sup>35</sup> I doubt that our “side” would care for his proposal, especially considering that most of us have believed for some time now that the segregation question has been answered in the negative.<sup>36</sup> But the reduction of the harm of this kind of economy of abuse to “inconvenience” looks, I suppose, more reasonable when the entire question has been totally divorced from any consideration of equality *qua* equality. It allows Laycock to go on to write offhandedly, almost glibly in the context of the surrounding prose, that “[i]n more traditional communities, same-sex couples planning a wedding might be forced to pick their merchants carefully, like black families driving across the South half a century ago.”<sup>37</sup> This casual invocation of Jim Crow offers scarcely a shade of reproof, merely extension by analogy to the sexual apartheid of the twenty-first century.<sup>38</sup>

Certainly, Professor Laycock is quick to point out that he supports Gay rights.<sup>39</sup> He offers this qualification to the reader—perhaps especially to the doubting Gay reader—as an assurance that what he suggests is for the reader’s own good. His proffered bona fides in this regard are persuasive. When I wrote a close friend to lament his having signed onto Laycock’s letter lobbying for religious exemptions to pending marriage laws,<sup>40</sup> he wrote back quickly to say—to remind me—that “Laycock’s letter emphasizes that he supports same-sex ‘marriage.’”<sup>41</sup> Yes, indeed, it does. But what, exactly, does this support entail? To say that one supports same-sex marriage, but not a right to marry that is equal to the

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33. Laycock, *supra* note 7, at 198.

34. *Id.*

35. *Id.*

36. *E.g.*, *Blow v. North Carolina*, 379 U.S. 684, 685–86 (1965) (finding that a restaurant serving “whites only” violated the Civil Rights Act of 1964).

37. Laycock, *supra* note 7, at 200.

38. Nor does Professor Laycock mention that changing these deplorable circumstances was the central purpose of the Civil Rights Act of 1964, and that the change was accomplished *without* religious exceptions.

39. Laycock, *supra* note 7, at 190.

40. *See supra* note 5.

41. E-mail from Michael Perry, Professor, Emory Law Sch., to author (May 5, 2009, 17:48 EST) (on file with author).

right straight people enjoy, because it is riddled with exceptions and segregated so as not to offend traditionalist sensibilities, is a support that exists in theory only. It is a little like saying: “I’m for absolute protection of free speech but not *for* the cross-burning that my absolutist view necessarily protects.” It is the sort of posturing that makes for small comfort when you are the one with the burnt cross on your lawn.

Professor Laycock casts religious conservatives as marginalized and oppressed.<sup>42</sup> Preceding an open-ended denunciation of harassment law as an effort “to suppress expression of traditional moral views,” Laycock agrees with “Robin Wilson’s succinct formulation, [that Gays] show every sign of seeking ‘to take same-sex marriage from a negative right to be free of state interference to a positive entitlement to assistance by others.’”<sup>43</sup> People whose worldview is demonstratively privileged are suddenly transformed into an endangered minority when their ability to subordinate those denominated “inferior”—socially, legally, or both—is even slightly ameliorated. In this, sadly, Professor Laycock and ex-Ku Klux Klan leader David Duke are of one mind. Duke has said that “the time has come for equal rights for . . . white people.”<sup>44</sup> Laycock similarly suggests that the time has come for equal rights for conservative religionists.<sup>45</sup> In a self-delusion common to the social reactionary and the structural liberal alike, neither pauses to acknowledge that there has never been a time when they did not already have them.

Perhaps the difference in Laycock’s and my definition of who needs protection stems from the fact that he is writing from a different perspective than I am reading. How one sees victimization is often wrapped up with one’s own group identity. But in this, as in all things, some realism is desirable. Professor Laycock says that religious conservatives are in need of protection. I say that Gays are in need of equality. The essential question then becomes: how do you know when a group is, in fact, subordinated and consequently in need of these things? Perhaps it is when the group can be assaulted, battered, and murdered at whim, and the law and those charged with executing the law look the other way or labor

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42. Several of Laycock’s phraseologies cast Gays as a menace to an endangered people, especially his admonition that “religious marriage will be much safer if it is cleanly separated [from civil marriage]” now that Gays want in. Laycock, *supra* note 7, at 207. He also characterizes Gays as having “organized the opposition that killed the proposed Religious Liberty Protection Act” and as “organizing the opposition to the proposed Workplace Religious Freedom Act.” *Id.* at 191. The underlying epistemologies that have fictionalized a world in which such “protection” and “freedom” acts are needed to “protect” religious conservatives is nowhere examined. Neither is the fact that religionists are on constant offensive to ensure subordinating, anti-equality messages are ever-present to warp the identities of young Gay people and to make certain that Gay adults are kept in precarious positions economically and physically.

43. *Id.* at 192.

44. Peter Applebome, *Ex-Klansman Puts New Racial Politics to Test*, N.Y. TIMES, June 18, 1990, at A1.

45. Or, if one prefers to adopt the pious individual rights rhetoric which saturates the book: “[A]ll people have a basic human right to preserve their own heritage.” DavidDuke.com, <http://www.davidduke.com/index.php?p=266> (Mar. 12, 2005, 8:14 EST).

mightily against admitting it.<sup>46</sup> Perhaps it is when a group is denied a whole range of opportunities, rights, and privileges of citizenship, and few bother to question why or, worse still, if they do, they conclude that it is somehow the group member's own fault.<sup>47</sup> Or perhaps it is when a group is made the object of malicious lies<sup>48</sup> or abusive jokes honed to killing sharpness, or constantly reduced to something trivial and inconsequential, and nobody bothers to question why the jokes make them laugh.<sup>49</sup> Or perhaps it is when every hard-won escape from the caste is propagandized into an attack on the liberty of the people who created the caste system and put you in it. All of these things are true for Gay people.<sup>50</sup> Are they true—*really* true—for Christian conservatives in this country?

Of course, Laycock, and David Duke for that matter, are in rarified company; their brand of doublethink is reflected in judging as well. It reached an apogee in the Supreme Court's 1989 decision of *City of Richmond v. Croson*.<sup>51</sup> Justice O'Connor's opinion for the Court brought down the individual rights hammer on state and municipal affirmative action programs aimed at ameliorating generations of anti-equality law and social practice. O'Connor writes:

The rights created by the first section of the fourteenth amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. The Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public

46. Take, for example, the case of South Carolina youth Sean Kennedy. The facts of his violent death are recorded in Shannon Gilreath, *A Climate of Violence Against Gay People*, RALEIGH NEWS & OBSERVER, May 28, 2008, at A6, available at <http://www.newsobserver.com/opinion/columns/story/1087382.html>. His killer's charges were reduced to manslaughter. Or consider the recent and well-publicized episode of U.S. Representative Virginia Foxx (R-N.C.), who, in opposing new hate crimes legislation, called Matthew Shepard's brutal murder a "hoax" to further the Gay agenda. Editorial, *Matthew Shepard Act*, N.Y. TIMES, May 6, 2009, at A28.

47. See, e.g., Daniel E. Bontempo & Anthony R. D'Augelli, *Effects of At-School Victimization and Sexual Orientation on Lesbian, Gay, or Bisexual Youths' Health Risk Behavior*, 30 J. ADOLESCENT HEALTH 364, 371 (2002); Rich C. Savin-Williams, *Verbal and Physical Abuse as Stressors in the Lives of Lesbian, Gay Male, and Bisexual Youths: Associations with School Problems, Running Away, Substance Abuse, Prostitution, and Suicide*, 62 J. CONSULTING & CLINICAL PSYCH. 261, 267 (1994); Gay, Lesbian & Straight Educ. Network, *GLSEN's 2005 National School Climate Survey Sheds New Light on Experiences of Lesbian, Gay, Bisexual and Transgender (LGBT) Students*, GLSEN.ORG, Apr. 26, 2009, <http://www.glsen.org/cgi-bin/iowa/all/library/record/1927.html> (noting that "overall, gay students were twice as likely as the general population of students to report they were not planning to pursue any post secondary education"). For a thorough discussion, see Shannon Gilreath, "Tell Your Faggot Friend He Owes Me \$500 for My Broken Hand": *Thoughts on a Substantive Equality Theory of Free Speech*, 44 WAKE FOREST L. REV. 557 (2009).

48. Gays continue to be accused, by supposedly credible sources, of everything from inflated incomes to the routine consumption of blood. For a thorough discussion of anti-Gay propaganda, see Gilreath, *supra* note 47, at Part III.B.

49. For a discussion, see SHANNON GILREATH, *SEXUAL POLITICS: THE GAY PERSON IN AMERICA TODAY* 39–41 (2006).

50. They are also true of the group to which Gays are analogized by the authors: women. See Catharine A. MacKinnon, *Excerpts from MacKinnon/Schlaflly Debate*, 1 L. & INEQUALITY 341, 343–45 (1983). The formulation of this paragraph is indebted to Professor MacKinnon.

51. 488 U.S. 469 (1989).

contracts based solely upon their race. To whatever racial group these citizens belong, their personal rights to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public policy decision making.<sup>52</sup>

The opinion's doublethink disconnects affirmative action programs from a whole backdrop of inequality and from their responsive purposes, namely remedial efforts aimed at a caste system in which Blacks were (and are) oppressed based upon their *group* identities. The shift in focus from group-based equality rights to individual rights was necessary for an increasingly reactionary Court to accomplish its transmutation of whites into the embattled and subordinated. Suddenly, through the judicial looking glass, whites were as "suspect" and vulnerable to systemic racism as Blacks. Of course, any serious look at the *group* realities that define the existence of historically marginalized and subordinated peoples, in this case Blacks, makes the Court's decision obviously laughable. At bottom, *Croson* amounted to the translation of white privilege into a constitutionally guaranteed individual right.<sup>53</sup> In a fitting revelation of their transparency, the lacunae in this rationale did not take a lawyer to see. Philosopher Richard Mohr wrote "in an inversion of history the oddness of which perhaps only a Foucault or a cynic could fully savor, a purely formalist reading of *Brown* in *City of Richmond* has now become a chief guarantor of white power."<sup>54</sup> The philosopher understands my point, apropos *Same-Sex Marriage and Religious Liberty*, that the institutionalization of power privilege as the individual (and individuating) rights of the already powerful is not clever judicial manipulation only; it is the philosophy by which the world (America, anyway) is ruled.<sup>55</sup>

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52. *Id.* at 493 (internal quotations and citations omitted).

53. *See id.* at 470–71.

54. RICHARD MOHR, *GAY IDEAS, OUTING AND OTHER CONTROVERSIES* 76 (1992).

55. In wondering why the other side opposes same-sex marriage, no one seems to want to believe that opponents might have a very real stake in Straight Supremacy and in its entrenchment through institutionalization—including the institution of marriage. Clever lawyers attempting to spin a theory to justify inroads into marriage equality even in the few places where it exists have the convenience of this studied inability to call sexualized dominance what it is. Gays and Lesbians, however, cannot afford to indulge in this myth.

For her chapter in *Same-Sex Marriage and Religious Liberty*, Professor Chai Feldblum, an out Lesbian and longtime proponent of Lesbian and Gay equality, complains that "[t]hose who advocate for laws prohibiting discrimination on the basis of sexual orientation tend to talk simply about 'equality.'" Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY*, *supra* note 6, at 123, 124. Instead, she adopts the obfuscating rhetoric of her coauthors, writing about "identity liberty" and "belief liberty." *Id.* She gets caught up in the feelings versus feelings game that is descriptive moral counterbalancing, which allows Professor Laycock to characterize her argument, not unfairly, as one in which "the insult of being refused service and the inconvenience of going elsewhere . . . almost universally outweighs the harm of forcing the merchant to violate a deeply held moral obligation." Laycock, *supra* note 7, at 197. It makes her argument easy to dismiss, at least from Laycock's perspective. Of course, equality is not about insult or inconvenience. I am certain that Professor Feldblum knows this. Unfortunately, because she does not face up to the evasive rhetoric, she cannot face it down.

The authors' preferred analogy—the abortion analogy—is developed by Professor Wilson.<sup>56</sup> This analogy underscores the lack of equality analysis in the authors' combined effort. Professor Wilson wants same-sex marriage analogized to abortion so that marriage can be subject to innumerable conscience clause exemptions, allowing those in the general business of facilitating marriage to opt out when they disapprove of same-sex couples—in the same way that hospitals and physicians can opt out of abortion and even less controversial reproductive control measures on religious grounds.<sup>57</sup> For example, Professor Wilson cites approvingly to the “Church Amendment,” which gives a private hospital receiving federal funding the right to refuse use of its facilities for “any sterilization procedure or abortion . . . prohibited by the entity on the basis of religious beliefs or moral convictions . . . .”<sup>58</sup> Congress enacted the Church Amendment in direct response to *Taylor v. St. Vincent's Hospital*, in which a Montana woman sued a local nonprofit hospital in Billings, Montana, because it refused to permit her willing physician to perform a tubal ligation for her during the Caesarian delivery of her child.<sup>59</sup>

Professor Wilson believes that putting the “moral convictions” of an “entity” ahead of the reproductive choices of a woman—in *Taylor* with the agreement of her physician *and* her husband, and where the hospital in question was the only local hospital available to her—is wise.<sup>60</sup> It is telling that Professor Wilson puts this discussion under the subheading of “Protecting Providers from Coercion by Patients.”<sup>61</sup> Coercion implies power; Professor Wilson theorizes based on a world where a hospital, with a monopoly on healthcare, and an individual patient, attempting to exercise reproductive freedom, are fundamentally equal. Alas, this world bears no relation to material reality.

This dissociation with reality that underlies Professor Wilson's argument is laid bare at its origination. Professor Wilson begins by characterizing *Roe v. Wade* as providing a “very strong constitutional right[] to abortion.”<sup>62</sup> How so? In contrast to *Loving v. Virginia*,<sup>63</sup> *Roe v. Wade*<sup>64</sup> was decidedly not an equality case. In *Roe*, the Court placed the right to choose an abortion in privacy, on the outer fringes of constitutional thought.<sup>65</sup> And “like a Greek chorus, or a bad dream,”<sup>66</sup> it has haunted

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56. Wilson, *supra* note 6, at 77.

57. *See id.* at 79.

58. *Id.* (citing the Church Amendment to the Health Programs Extension Act, 42 U.S.C. § 300a-7(b)(2)(A) (2006)).

59. 369 F. Supp. 948, 950 (D. Mont. 1973).

60. *Id.* at 949. This is an important fact that Professor Wilson leaves out of her description of the case.

61. Wilson, *supra* note 6, at 82.

62. *Id.* at 79.

63. 388 U.S. 1 (1967).

64. 410 U.S. 113 (1973).

65. *See id.* at 166–67.

66. H. N. HIRSCH, A THEORY OF LIBERTY: THE CONSTITUTION AND MINORITIES 30 (1992).

us ever since. By locating abortion rights on this fringe, the Court ensured that women's equality quickly became subsumed by the needs of male-dominated, heterocentric society, and made possible the future subordination of women's collective equality needs to the desires of straight male supremacy.

This was made plain in the Court's 1981 decision in *Harris v. McRae*, in which the Court held that there is no constitutional requirement that federal Medicaid funds be available to finance even medically necessary abortions.<sup>67</sup> *Roe*, the Court held, had guaranteed only a woman's "decision" whether to terminate her pregnancy.<sup>68</sup> *Roe* imposed no duty on government to see that women's abortion choice was in any way meaningful.<sup>69</sup> In less than a decade, *Roe*'s privacy jurisprudence devolved to this. The interests of (heterosexual) men—primarily manifest in the sectarian perspectives of religion designed by men for men—outweighed the highly circumscribed privacy interest of women. Women needed—and still need—something more than privacy. Women need equality, substantive equality, but the Court has studiously avoided it.<sup>70</sup> The assault on *Roe* and on women's equality in the name of individual rights defined from the male perspective has continued unremitting, namely in the form of the very conscience clause legislation Professor Wilson endorses.<sup>71</sup> What Wilson describes as a "very strong constitutional right to abortion" has been, as described by Chief Justice Rehnquist, reduced to a "Potemkin Village."<sup>72</sup>

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67. 448 U.S. 297, 311 (1980).

68. *Id.* at 314.

69. *See id.*

70. My criticism of the formalist sameness/difference approach to judging equality disputes is fully developed in *Some Penetrating Observations*. See Gilreath, *supra* note 12. Essentially, I argue that such a standard means that the dominant stay dominant because they write the rules that tell us when one is sufficiently approximate to the superior ideal. *Id.* at 443–44. But for a particularly illustrative example of what the sameness understanding of equality produces, consider *Lafler v. Athletic Board of Control*, 536 F. Supp. 104, 106–07 (W.D. Mich. 1982), in which a woman boxing competitor was barred from competing because she violated rules by wearing a protective covering over her breasts. "In this case, the real differences between the male and female anatomy are relevant in considering whether men and women may be treated differently with regard to their participation in boxing." *Id.* at 106. Or for a more recent, odious example, consider the remarks of Senator John Kyl (R-Ariz.), who argued during a Senate Finance Committee debate over proposed healthcare reform that, "I don't need maternity care. So requiring that on my insurance policy is something that I don't need and will make the policy more expensive." Senator Debbie Stabenow (D-Mich.) shot back, "I think your mom probably did." Lila Shapiro, *Kyl: "I Don't Need Maternity Care" so Employers Shouldn't Be Required to Provide It*, HUFFINGTON POST, Sept. 25, 2009, [http://www.huffingtonpost.com/2009/09/25/kyl-i-dont-need-maternity\\_n\\_300367.html](http://www.huffingtonpost.com/2009/09/25/kyl-i-dont-need-maternity_n_300367.html). Anatomical differences, like having breasts or the ability to give birth, are politicized under the formalist model and become legalized discrimination.

Nevertheless, despite my criticism of the sameness/difference approach, even the old formalist model of equality analysis could be sufficient for the question of Gay marriage. After all, Gay men are the only men who really are discriminated against as men. When two men are refused a marriage license because they are men, they are being discriminated against *as men*.

71. Wilson, *supra* note 6, at 97–101.

72. *Planned Parenthood v. Casey*, 505 U.S. 833, 966 (1992) (Rehnquist, C.J., concurring in part and dissenting in part).

By anchoring her arguments about marriage and religious liberty in *Roe* and its aftermath, Professor Wilson rewrites the question of what is at stake in the culture wars over marriage from the perspective of civil libertarianism and its attendant focus on individual rights. The equality-based claims of Gays and Lesbians are thereby translated, through the rhetoric of individual rights, into the realm of descriptive moral counterbalancing. This means that the asserted rights of the dominant straight ideology almost always win, because it is this ideology that controls how individual rights are defined and satisfied. So, despite her concession to the inevitability of same-sex marriage,<sup>73</sup> Professor Wilson does not argue for an expansion of marriage rights. For the most part, she explicates so-called solutions to the controversy which will seriously limit the content of the right to same-sex marriage anywhere it may be recognized.<sup>74</sup> The right to same-sex marriage is eviscerated, riddled with morals-based conscience exceptions in exactly the same way that reproductive freedom was and continues to be eviscerated.

While reproductive capacity itself has been used to subordinate women socially—by the politicization of pregnancy as a means to define women, to keep them immobile, and to patronize them in the name of exalted motherhood—the congressional efforts that Professor Wilson praises have been used to subordinate women legally, by significantly eroding the meager measure of reproductive control the law secured for women through *Roe*. To her credit, Professor Wilson does not pretend here, she states outright that

[t]he lesson of *Roe* and *Griswold* is that the individual's right to be free from the state's interference with reproductive and contraceptive choices is just that—the right to be free from government interference. It does not translate directly into a right to assistance, a fact that legislatures have chosen to make clear by statute.<sup>75</sup>

Consider for example the way in which Professor Wilson characterizes the Alaska Supreme Court's decision in *Valley Hospital Ass'n v. Mat-Su Coalition for Choice*, in which the court held that a private, nonprofit hospital could not burden the ability to procure an abortion under state law.<sup>76</sup> “[I]t was saying to the provider that the right to abortion matters more than an objector's interest in not participating. That decision was tantamount to saying that ‘not only does the patient deserve an abortion, but you, the provider, are going to perform it,’” she writes.<sup>77</sup> The talisman of individual rights has more than once been invoked to keep the government out of places it should otherwise go to secure the equality interests of subordinated people. Professor Wilson faults the court for

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73. Wilson, *supra* note 6, at 79–80.

74. *Id.* at 93–97.

75. *Id.* at 97.

76. 948 P.2d 963, 969 (Alaska 1997).

77. Wilson, *supra* note 6, at 94.

refusing to maintain the status quo in this way.<sup>78</sup> The court, instead, was saying that a woman's interest in sex equality matters more than a hospital's desire to burden women's equality. This is the fairer way of framing the case. Abortion *is* a sex equality issue. Calling it privacy and subjecting it to balancing with individual rights was perhaps the most we could hope for from the all male (ostensibly all *straight* male) *Roe* Court that could only identify with the abortion dilemma by objectifying it. Is it wrong to hope for more consciousness from a woman scholar with a substantial body of work on bioethics?<sup>79</sup>

Professor Wilson's logic, which is the logic of *Roe*, consummated in *Harris*, and translated by analogy to same-sex marriage, is a means of subordinating the collective equality rights of Gays and Lesbians to the imperatives of individual religious dissenters. The concentration on so-called "dignitary rights" of Gays and Lesbians rhetoricizes the harm inherent in the proposed system as an individual harm only: sustained only by the Gay couple that is embarrassed, insulted, or inconvenienced in the moment that this individual couple is embarrassed, insulted, or inconvenienced. Such an individualized harm can then easily be balanced against the individual rights of religious objectors. But it is important to recognize that this is a system of inequality. The significant source of power in any system of inequality is the ability to determine the "inferior" from the "superior." Defining same-sex marriage as something from which the superior can withdraw, by simple assertions of individual religious expression, and without regard to the group-based equality rights of Gays and Lesbians not to be subordinated, subordinates Gays and Lesbians *in fact and in law*. Professor Wilson's focus on individual rights and her utter lack of equality analysis amount to the right of a new breed of supremacists to subordinate all Gays and Lesbians one at a time.<sup>80</sup>

As I mentioned, Professor Wilson's arguments aspire to something better. She says her approach will sweep away grounds for opposition to same-sex marriage by assuring religious dissenters that they need not, and will not, be required to participate.<sup>81</sup> Essentially, she argues that her position is good for Gays, too, because it will make them more palatable to heterosociety by modulating the sweep of the change that Gay marriage will work in the straight world.<sup>82</sup> The fundamental gap in her logic is that Gay marriage *is* a *big* change. No amount of public relations or placation can disabuse people with power of the notion that they are los-

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78. *See id.*

79. *See, e.g.*, Robin Fretwell Wilson, *The Limits of Conscience: Moral Clashes Over Deeply Divisive Healthcare Procedures*, 34 AM. J.L. & MED. 41, 45 (2008).

80. Or perhaps in the marriage context, two by two.

81. Wilson, *supra* note 6, at 100-02.

82. *Id.* at 81 ("Because weighing competing moral values can be a 'zero-sum' game, perhaps the best we can hope for is a live-and-let-live solution, one that permits refusals for matters of conscience, but limits those refusals to instances where a significant hardship will not occur.").

ing it—when they actually *are* losing power. As stated before, every system of inequality depends upon the ability to distinguish the “superior” from the “inferior,” and heterosexism is no exception. Ceding marriage, the paradigmatic hetero-normative institution, means that the *Hetero*-roarchy is losing an important tool of supremacy. A world in which Gay people can marry on their own terms will be a world in which Gay people *are more equal*. Powerful people know this, and nothing new is communicated to them by the insertion of moral conscience exceptions to equality. Something very real is, however, communicated to the Gay community, the powerless in the equation. That real something is that even in the few states where their equality has been advanced, it must, according to Professor Wilson, once again be subordinated to the discriminatory practices of Straight Supremacy—which its proselytes insist upon packaging as *bona fide* religious conviction.

Wilson’s approach leaves out the myriad ways in which Gays are subordinated through the social institutionalization of petty prejudices and patronization, the ways in which Gay humanity is simultaneously violated and exploited by underscoring difference (Gay versus straight) socially. These social differences are then constructed into legal differences that matter. Far from contending with the social subordination of Gays—which a substantive equality approach that recognizes dominance would do<sup>83</sup>—Wilson’s approach is a product of the same politics, operating in and through the same context of straight over Gay domination. It would effectively enact into law sexuality classifications, namely that Gay relationships are inferior to straight relationships, which until very recently were not questioned because they were so civically powerful and all-pervasive.

The alternative approach, the one grounded in a substantive understanding of equality and our constitutional commitment to it, would ask an entirely different question: what if equality meant more than that which is defined by people with power, who tend to see equality as an issue only when people sufficiently like them (as defined by the definitions they write) are treated irrationally? Instead, Professors Laycock and Wilson ask Gays to give up legal equality and depend instead upon the good will of straights or, worse, on “market forces.”<sup>84</sup> But any system of subordination exists and subsists by rendering the inferior dependent upon the superior. In a tortured paradox, subordinated people are asked to depend upon the people who subordinate them to protect them from subordination. The “gay-rights side” ought surely to resist this. Instead of protection and goodwill or tolerance, we want equal rights. But from the perspective of *Same-Sex Marriage and Religious Liberty*, recognizing we deserve better and demanding it makes us “oppressors.”<sup>85</sup> Professor

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83. See generally Gilreath, *supra* note 12.

84. Wilson Letter, *supra* note 5; Laycock Letter, *supra* note 5.

85. Laycock Letter, *supra* note 5; see also Laycock, *supra* note 7, at 192–94.

Wilson concludes her argument with more unmitigated praise for the subordination of women accomplished through *Roe* and its aftermath<sup>86</sup> in the guise of women's rights:

[T]he history of litigation after *Roe* provides a convincing prediction about the trajectory that litigation after *Goodridge* and the *Marriage Cases* is beginning to take. States can deflect this litigation, as they have with abortion and other deeply divisive questions in healthcare, by deciding now whether issues of conscience matter.<sup>87</sup>

I'd like to suggest a different ending: perhaps we could, for once, decide that equality *really* matters.

The *coup d' grace* of the book is Professor Laycock's proposal to unwind the civil status of marriage from its religious status entirely.<sup>88</sup> The idea that Americans should go to the courthouse to be civilly united and to the church to be "married," and that thereby we might end the marriage controversy, is not new,<sup>89</sup> but the recent marriage developments give Laycock's formulation of this nominalism a new urgency. I have no objection to the outcome he proposes, but reading his argument to make marriage "safer" by clearly defining the distinctions between religious and civil commitment, I couldn't help but remember Andrea Dworkin's pithy observation that abortion was finally legalized because men realized that "getting laid was at stake."<sup>90</sup> Could it be that this ultimate concession to split marriage off from its civil status is because religious traditionalists realize that marriage, as they understand it—in other words, patriarchy—is at stake?

The two predominating themes of the Wilson/Laycock argument—reproductivity and marriage—have, from the perspective of straight male dominance, defined what power is. Denial of reproductive freedom for women, in and out of marriage, and denial of marriage generally to Gays, have been powerful weapons in the caste arsenal. A demand for something better is treated as an omnipresent threat to religious liberty because religion has always been a primary tool to subordinate women and Gays. There *is* a politics to this, concealed in the substantive way in which to be a *straight* man is the measure of all things.<sup>91</sup> But because these denials happen almost exclusively to women and Gays, they are not

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86. I do not mean to come off too hard on *Roe* here. *Roe* certainly did promote women's equality to an extent. My major complaint is that it did not do enough.

87. Wilson, *supra* note 6, at 102.

88. Laycock, *supra* note 7, at 201–07.

89. *Id.* at 206.

90. ANDREA DWORKIN, *RIGHT-WING WOMEN* 95 (1978).

91. One of feminism's great insights was to expose the ways in which male power maintains itself through the subterfuge that it is natural and inevitable because it is already always omnipresent. On this point, see CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 34 (1988). But I feel compelled to underscore what feminism has often forgotten to mention, namely that *male* power is necessarily only *straight* male power. Gay men, as Gay men, have been as alien to the so-called natural order of things as women have been, perhaps more so.

considered to raise equality considerations. The religious liberty argument combines conservative social and political values with the rhetoric of individual rights—a rhetoric which many liberals are instinctively drawn to and are seemingly powerless to resist.<sup>92</sup> The result is a smoke-screen to subvert the group-based equality rights of women and Gays, subordinating them to the individual rights of religious dissenters—the defenders of the religious politics, in America predominately Christianity, which was created by men for men, and which remains the chief vehicle for the delivery and static enforcement of patriarchy. Whether the discussion is about sex, marriage, or both, patriarchy is overwhelmingly the imperative, and religion is its metaethics.

From this perspective, heterosexuality itself is an institution of inequality, with women's inferiority centrally enacted through sex. But Gays present the possibility of sex between gender equals, thereby presenting the possibility that sex itself can actually be equal. Is this the new center of gravity for homophobia? Gays, because we have experienced what we have experienced and lived what we have lived, can't help but wonder. Objectifying a relationship through whatever method, including, as here, through legal nominalism, is a function of heterosexism. The legally recognized joining of two people in a "marriage," that was not from the get-go based upon gender differences constructed into legal significances, would be no small blow to the system of gender inequality, which is sexuality discrimination—which is patriarchy. This kind of destruction of the central unit of the whole system of patriarchal power is, from the perspective of straight male dominance, nothing short of revolution.

Having said all of this, I should say that I am not a supporter of marriage as a liberation strategy. Frankly, I really cannot see why, given all the ugliness about it that feminists have exposed over the last four decades—despite the legal incentives—Gay people would want it. Personally, I am not interested in redecorating the burning house. Of course, I am aware that despite the many principled reasons I see for resisting marriage, none of the marriage opponents on traditionalist grounds are making any of them. Their arguments are arguments for subordination. I also understand that, for Gays, having marriage, the ultimate straight measure, is a powerful teaching tool.<sup>93</sup> But in the wake of *Lawrence v. Texas*,<sup>94</sup> Katherine Franke, rightly I think, warned us about the "domestication" of Gay rights.<sup>95</sup> The Gay movement's headlong rush

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92. See, e.g., José Gabilondo, *When God Hates: How Liberal Guilt Lets the New Right Get Away with Murder*, 44 WAKE FOREST L. REV. 617, 619–20 (2009).

93. Surely, also, the pain of being committed to someone but facing the stigma—legal and social—of being "legal strangers," as a friend put it to me recently, is no small thing. I do not mean to minimize it in any way.

94. 539 U.S. 558 (2003).

95. See Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1399 (2004).

to marriage is a move that has been largely without critical analysis from the inside. Maybe it is time we start asking ourselves: Are we being led—to borrow a phrase from Alice Walker—“to sleep if not to the slaughter”?<sup>96</sup>

Karl Marx once observed that “revolutions are not made by laws.”<sup>97</sup> The real marriage revolution will depend upon what Gays and Lesbians do with marriage when we have it. Consequently, I think the analysis Gays and Lesbians ought to be embarking on, from the perspective of Gay liberation, is not so much whether we should have marriage, but rather what we will make of it when we get it. If we acquire this form of power, what will we do with it? Will we use it differently than straight men have used it? Or will marriage serve as the assimilationist epitaph for a movement that began as a conscious quest for equality? The answer, increasingly it seems, and as evidenced by the professed surrender of Laycock and Wilson to the inevitability of Gay marriage, lies with us.

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96. ALICE WALKER, *WE ARE THE ONES WE HAVE BEEN WAITING FOR: INNER LIGHT IN A TIME OF DARKNESS* 61 (2006).

97. KARL MARX, *CAPITAL* 775 (Frederick Engels ed., Samuel Moore & Edward Aveling trans., Swan Sonnenschein & Co. 8th ed. 1902) (1867).

