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Victimhood to Agency: A Constructionist Comparison of Sexual Orientation to Religious Orientation

Carmen M. Butler¹

Introduction

“Injustice anywhere is a threat to justice everywhere.”² Dr. Martin Luther King, Jr.’s words bear a timeless truth to the extent that he spoke about our nation’s aspirations for “justice for all.” But when Coretta Scott King expounded on Dr. King’s words, she took the notion of “justice for all” to a new level. Specifically, she tied the notion of civil rights for African Americans to other groups in American society when she said, “Freedom from discrimination based on sexual orientation is surely a fundamental human right in any great democracy, as much as freedom from racial, religious, gender, or ethnic discrimination.”³

Some gay⁴ rights advocates have seized upon Ms. King’s characterization of the struggle for human rights to advocate specifically for gay rights. But in so doing, have they chosen a less advantageous comparison of rights?⁵ In this essay, I argue that when gay rights advocates base their advocacy on a comparison of gay rights to civil rights for African Americans, the essentialist nature of their comparison is detrimental. An essentialist comparison is detrimental because it limits the dynamics of sexuality to the perceived dynamics of race—a fixed, unalterable status. It forces gays to pair their demands for equality with victimizing assertions that “I was born this way and I can’t help it.” Whatever the scientific support for this assertion, it is psychologically demeaning.

Gay rights advocates and gays would improve long-term basic rights⁶ recognition for and amongst gays if they employed a constructionist approach. A constructionist approach focuses less on victimizing immutable status and more on one’s own agency.⁷ Constructionist

arguments that sexuality is an exercise in freedom of conscience would liberate the gay image from the victimization paradigm inherent in essentialism,⁸ cast off unrealistic stereotypes imposed on gays and gay advocates, and reflect more accurately the dynamic nature of human sexuality. Under constructionist theory, gay rights advocates can also draw a more beneficial analogy between sexual orientation and religious orientation. By focusing on the personal integrity inherent in the freedom of conscience rather than the helplessness inherent in status, and by acting as agents rather than victims, constructionist gay rights advocates can obtain a more meaningful recognition of gay rights.

In this essay, I critique the paradigms that judges, lawyers, and advocates use when they interpret and apply the law with respect to gay rights. I begin by examining essentialist and constructionist approaches to gay rights. In Part I, I define essentialism and constructionism and measure their potential impact on the gay rights movement. In Part II, I compare the application of each theory in litigation. Although essentialists frequently compare sexual orientation to race, the way they use the comparison might not advance gay rights. I conclude that gay rights advocates could secure more meaningful rights recognition with a constructionist theory that analogizes sexual orientation to religious orientation, an orientation based on the notion of freedom of conscience. Through asserting freedom of conscience, gay rights advocates can finally achieve what the gay rights movement has been missing: a way to unabashedly reclaim basic rights.⁹

I. ESSENTIALISM V. CONSTRUCTIONISM

A. A Tale of Two Theories

In recent decades, gay rights advocates have commonly used essentialist theory as a platform for promoting gay rights. According to essentialists, being gay is a biological fact.¹⁰ “Gays can’t help it,” the argument goes, “they [or we] were born this way.”¹¹ In contrast to essentialists,

constructionists believe that being gay is part of the identity a person develops in the course of her lifetime, not simply at birth.

The contrast between essentialism and constructionism raises the question: if being “born this way” is a category that boxes gays into a static, immutable category, why would gay rights advocates choose to employ it? The primary reason these advocates rely on essentialist theory is to obtain status and rights as a suspect class that warrants constitutional and statutory protection.¹² A renowned gay rights theorist, Joe Sartelle, explains that gay essentialists have a “profound collective wish . . . for ‘proof’ that our sexuality is forced upon us, that [our sexuality] . . . does not involve free choice and free will.”¹³ By arguing that sexuality is an imposition and not a choice, gay essentialists create a “biological destiny” that is easier for politicians, family, and friends to accept.¹⁴ Essentialist advocates point to “gay brain studies,” studies that posit that gays have unique brain structures.¹⁵ Still, the essentialist approach, as it is currently expounded, has proved counterproductive as a vehicle for securing gay rights for three reasons.

First, when an essentialist gay person claims that she cannot help her condition, she basically claims that she¹⁶ is helpless, a victim in her own skin.¹⁷ In so doing, she unwittingly marginalizes gays as a minority identity.¹⁸ She inadvertently invites others to conclude that her own and others’ minority sexual orientation is a condition that might one day be scientifically cured or otherwise eliminated. Worst of all, she loses the opportunity to foster a more accurate understanding of what it means to be gay, lesbian, or queer.¹⁹ Meanwhile, the political and social gains she can make for gays are limited to those she can obtain on the basis of supposed victim status.

Second, the essentialist advocate fails to capture reality. He fails to recognize the societal influences that shape a person’s own perceptions of sexuality over time.²⁰ Essentialist theory instead offers “a false premise that if you are something, that’s all you are” and that is all you will ever be.²¹

Our essentialist advocate cannot explain, for example, how Anne Heche could fall in love with Ellen Degeneres when she was not “born a lesbian.”²² She is equally at a loss to explain why Ani Di Franco, a bisexual and feminist singer who gained fame among lesbians, took a man to be her partner.

Third, the essentialist advocate tends to promote stereotypes. Specifically, she tends to support what Sartelle calls the “heterosexual alibi.”²³ The heterosexual alibi is the belief that a gay person can be easily identified by her non-sexual behavior. For example, the heterosexual alibi supports the misconception that just because a woman is a feminist, she must be a lesbian.²⁴ It also supports the assumption that just because a man played college football, he could not possibly be gay because, according to the heterosexual alibi, gay men are not likely to be good football players.²⁵ Based on this tendency to stereotype, essentialists struggle to explain Rock Hudson, a movie star no one would have guessed could be gay because he was just what a man is “supposed to be”—masculine and popular with women. In this way, essentialists—intentionally or otherwise—link a person’s sexuality to a number of other assumptions about that person’s preferences in other realms of life.²⁶

In contrast to essentialists, constructionists assume that sexuality is a social fact about a person.²⁷ Constructionists describe a “social fact” as a matter of conscience—an exercise of free will—rather than an immutable condition. While constructionists do not entirely rule out the possibility that some people are born gay or that there might be something innate about sexuality, they allow people to first define themselves as they are, rather than acquiescing to definitions of sexuality imposed by a heterosexual standard.²⁸

As a legal tool, there are at least three ways constructionist theory overcomes barriers inherent in essentialist theory. First, because constructionists believe that sexuality is an exercise of conscience and an affirmation of human freedom,²⁹ they are able to vanquish the stifling image

that gays are somehow their own victims. Constructionist advocates capture the exercise of free will and personal autonomy that is inherent in acting on one's sexual attractions. They turn the essentialist mantra, "I'm attracted to a person of the same sex and I can't help it," into an affirmative statement: "I'm attracted to a person of the same sex and, in today's society, there is no reason I can't show my true feelings."

Second, constructionist advocates capture reality in a way that essentialist advocates cannot by recognizing the range of choices a person may willfully exercise as a result of her sexual orientation. A well-known survey of sexual desires and attractions, the Kinsey study, details a variety of ways that people express their sexual attractions.³⁰ The study makes a blur of the simplistic distinction between heterosexuals and homosexuals by revealing that most behavior cannot be plotted on a graph as belonging strictly to one group or another.³¹ This spectrum can only be captured by constructionist theory.

Finally, constructionist advocates can help liberate gays from confusing stereotypes. Instead of following the "heterosexual alibi," constructionist advocates perceive each individual according to his own personal choices. They accept the fluid nature of human sexuality³² and recognize that there is no universal "gay experience" that accompanies a gay sexual orientation.³³

I do not propose that constructionist theory is the answer to the gay rights movement; rather, I suggest that constructionist theory provides an answer to the troubling limitations of essentialist theory as it is currently expounded. Through dialogue, constructionist advocates address the ways that people discriminate against gays³⁴ and can create grounds by which gays can more meaningfully reclaim their autonomy. The ways that people discriminate against gays include establishing heterosexuality as the standard by which all people must live³⁵ and the harsh underlying heterosexist accusation that gays are immoral.³⁶ The constructionist addresses this discrimination not by way of apology, as an essentialist might, but by asserting personal autonomy, conscience, and choice. More

specifically, constructionist gay advocates engage opponents' concerns by asking when it is appropriate for society to restrain freedom of choice, and if it is ever appropriate to impinge on a person's freedom of conscience.³⁷ By engaging lawmakers and judges in the search for answers to these questions, constructionist advocates shift the focus away from protecting a victimized and victimizing class and toward honoring the dignity and autonomy inherent in following their own conscience. In other words, constructionist advocates direct the gay rights movement away from victimhood and towards agency.

B. Hypothetical Conversations between Gay Rights Proponents and Opponents

A simplified set of hypothetical arguments might help to frame the issue more clearly. These hypothetical debates demonstrate the contours of essentialist and constructionist theory and underscore the strengths and weaknesses of each theory.

The first conversation is between two essentialist theorists, one who opposes, and another who supports, gay rights. Note in this conversation how each essentialist theorist emphasizes the immutable characteristics and "status" of being gay.

Essentialist proponent: "I'm gay. It's a condition that I can't change. I'm part of a class analogous to African Americans, whose movement for civil rights developed into recognition of rights that no one would openly deny them today. It is time for recognition of my rights, too."

Essentialist opponent: [Reluctantly] "That's a pity that you can't change what you are. My son is also gay, and it pains me terribly to see him suffer. I have resisted any recognition of rights until now, but I see you people just can't help it. Your rights should be recognized."

This conversation demonstrates that even if consensus is reached, the consensus is likely to be based on pity and victimhood. The essentialist

proponent of gay rights requests that the essentialist opponent recognize his rights because he cannot help being gay and is therefore a victim. Notice that the essentialist opponent concedes, but only because she feels pity.

Note also that the essentialist proponent is himself gay. A heterosexual would not be as convincing in making the same argument unless he were arguing the more generalized notion of “justice for all.” This suggests that perspective matters. This is in part because the gay advocate for gay rights can evoke more pity by expressing contrition. His message is essentially this: “I’m gay. I can’t help it. (I’m sorry.)”

The essentialist proponent also compares his own struggle for rights to the civil rights movement, a movement the essentialist gay rights advocate assumes is based on essentialism. Many white gay advocates assume that African Americans assert their civil rights on the basis of skin color: “I can’t help being black. I was born this way.” But that assumption is incorrect.³⁸ Rather, leaders of the civil rights movement simply demanded and continue to demand that African Americans be given the chance to make the same contributions and receive similar treatment as white Americans.³⁹ They seek to be judged not by the color of their skin, but by their personal merit.⁴⁰ Their argument for civil rights is not essentialist, but purposely constructionist.⁴¹ Just as the movement for rights for African Americans is based on merit, the movement for gay rights must also be structured on a merit-seeking theory. Constructionist theory based on inviolable freedom of conscience is the more appropriate theory for accomplishing that goal.

The second hypothetical conversation features the same essentialist proponent of gay rights and a constructionist theorist who opposes gay rights.

Essentialist proponent: “Being gay isn’t something I can change. Like African Americans, who have struggled for and won recognition for their basic rights, my gay brothers and sisters and I have struggled. It is time that our rights are recognized.”

Constructionist opponent: “Whether or not you can change being gay, it’s okay to be African American, but it’s not okay to be gay. Just because you have a desire doesn’t mean you have to act on it.”

This conversation reveals further limitations in essentialist theory. The constructionist opponent of gay rights cleverly unveils the essentialist argument to show that there is some volition involved in sexuality. If there is any “condition” central to being gay, the constructionist says, that condition is not the end of the story. A person can still fake happiness by pretending to be heterosexual. For example, a person can be gay but remain celibate so that no one has to know that he is gay. Or, the same person can be gay but force himself to be intimate only with opposite sex partners in order to appease the majority non-gay society.⁴² The implicit message from the constructionist opponent of gay rights is the following: gay people must mold themselves to fit heterosexual behavioral norms, whether or not those norms are compatible with their innermost conscience.

Gay rights advocates might find a solution to this dilemma when they employ constructionist theory to defend gay rights and to engage gay rights opponents in a more meaningful dialogue. For an example of how this dialogue works, consider a third conversation between the same constructionist theorist who opposed gay rights in the last conversation and a new constructionist theorist who supports gay rights. In this conversation, note that the theorists focus their exchange on choice and conduct, rather than on immutable characteristics and status.

Constructionist proponent: “It’s my choice to share intimate touch and feelings. Who are you to insist that I can’t decide for myself who my partner will be?”

Constructionist opponent: “Sure, you have choices in life. But it’s immoral to act on them to engage in intimacy with members of the same sex. It’s simply not right.”

Constructionist proponent: “Your denial of my ability to make a very personal choice would restrict my free exercise of autonomy

and conscience. Whether you choose to reflect on my actions as such, I know that my decisions reflect a clear conscience and sense of personal dignity. No outside imposition of morality can change the intrinsic values or the clear conscience I possess.”

The theorists in this conversation start by addressing personal integrity, or agency,⁴³ and advance to address notions of societal morality and the inviolability of a person’s dignity. Their conversation is an example of a genuine exchange that moves beyond pleas for pity and sympathy into a dialogue where value systems are compared and contrasted. In this example, the constructionist proponent of gay rights takes responsibility for his own actions. Furthermore, he does so without revealing whether his choices and actions reflect a gay sexuality. In this example, sexuality is not at issue, freedom of conscience is.

In sum, constructionist theory offers a more meaningful approach to gay rights than essentialist theory for two reasons. First, constructionist theory is more liberating because it gives gay rights advocates a more empowering way to reclaim gay rights. Instead of making a plea for rights based on immutable characteristics, constructionist gay rights advocates reclaim an inherent right to exercise one’s conscience. Second, constructionist theory is more realistic because it acknowledges that human sexuality is dynamic rather than static, and that one’s choices with respect to intimacy are not conclusively determined at birth or by personal decisions throughout life. Through its liberating and realistic approach, constructionist theory avoids perpetuating stereotypes that establish unrealistic expectations for gay people. At the same time, it offers a more meaningful basis for gay rights advocates to engage opponents in a dialogue about the value of personal integrity in American society today.

II. SEXUAL ORIENTATION, RACE, AND RELIGIOUS ORIENTATION

A. *The Old Analog: Comparing Sexual Orientation to Race*

Case law can help demonstrate the underlying theories that shape litigation and the law concerning gay rights. Although judges do not usually explicitly analogize racism to homophobia, they do make assumptions regarding the parties in court from which we can infer either an essentialist or constructionist posture. Based on that inference, we can make an educated guess as to which analogy might support the judges' conclusions.

In the following two case examples, I consider the court's implicit assumptions, infer whether the court employed an essentialist or constructionist paradigm, determine what analogy the court might have used to balance the parties' relative rights, and review the courts' final holdings. The results of this analysis suggest that essentialist theory does not, for the most part, help advance gay rights, and that constructionist theory coupled with a new analog would strengthen the gay rights movement.

First, the case of *Thomas S. v. Robin Y.* demonstrates how a court's essentialist perception of gay families is detrimental.⁴⁴ In this case, the court issued an order of filiation, a judicial determination of paternity, to force an already complete family to accept a sperm donor as a third parent. The court issued the order supporting the sperm donor even though, according to a mutual agreement between him and the two mothers, he never financially supported his biological daughter, and he did not call to inquire about the child for the first three years of her life.⁴⁵ Although the majority opinion does not explicitly state that it employed essentialism to fashion its conclusions, we can look to certain passages in the opinion to deconstruct its essentialist leanings.

The issue in *Thomas S.* was whether a sperm donor who is known to his daughter is entitled to a judicial determination of paternity.⁴⁶ In this case

Ry, a twelve-year-old girl, lived with her biological mother, Robin, and her mother's lifetime companion, Sandra.⁴⁷ Robin conceived Ry by artificial insemination using the semen of Thomas, who was gay and a known sperm donor in San Francisco.⁴⁸ Ry was the second girl in the family after Cade, who was born to Sandra by artificial insemination two years before by a different sperm donor.⁴⁹ The family lived in New York, where Thomas visited only occasionally during business trips.⁵⁰ In accordance with an oral agreement between Robin and Thomas, Thomas did not support Ry financially or call her during the first three years of Ry's life.⁵¹

When Cade, then age five, started asking questions about her own sperm donor, Robin and Sandra made arrangements for Ry and Cade to meet their biological fathers in the presence of their mothers.⁵² Over the following six-year period, Thomas met with Robin and Sandra's family for approximately twenty-six visits.⁵³ Then, when Ry was eight years old, Thomas told Robin and Sandra that he would like to establish a parental relationship with Ry. Robin and Sandra regarded this as a breach of their agreement.⁵⁴ After Thomas initiated litigation, Ry expressed a desire to end all contact with her biological father.⁵⁵

Although the family court refused to enter an order of filiation in the case, characterizing Thomas as an "outsider attacking [Ry's] family [and] refusing to give it respect,"⁵⁶ a majority of the Supreme Court, Appellate Division, found that Thomas had developed a sufficient relationship with Ry. It reversed the Family Court's decision and remanded the case with instructions to recognize Thomas as Ry's father.⁵⁷ Throughout the opinion, the majority implies that there is but one formula for parenting—a father and a mother—and it must be upheld regardless of how the family developed before litigation. Implicit in the opinion is the essentialist notion that a lesbian woman can never complete a family by being the second parent. In four different parts of its opinion, the majority drives home its vision of what a family ought to be.

First, the majority starts by championing Thomas as deserving a greater status than that of a mere biological father or sperm donor. The majority seems to equate Thomas' sperm donation with parental status, regardless of whether Thomas has acted in a parent-like fashion and regardless of whether the family already considers itself a complete unit:

[T]he effect of the Family Court's order is to cut off the parental rights of a man who is conceded by all concerned . . . to be the biological father. The legal question is not . . . whether an established family unit is to be broken up. . . . Rather [it is] whether the rights of a biological parent are to be terminated.⁵⁸

Second, even though Thomas' only connection to the family is his sperm donation and two dozen visits with the family as a whole, the court compares the biological and actual mother, Robin, and the sperm donor/biological father, Thomas, to a divorced couple: "No one would suggest that, in the typical case of divorce and remarriage of a mother, a father's parental rights should thereupon be subject to termination because his intimate involvement in the child's upbringing is no longer feasible or welcome."⁵⁹

The inherently essentialist and heterosexist nature of the majority's comparison can be fleshed out if we consider how the majority would opine using the same formula, but different facts. Consider, for example, how the court would likely react to a request for an order of filiation if Robin and Sandra were Rob and Sandra, and if Thomas were Tomasina, the surrogate mother. In that case, the court would probably find, using its essentialist filter, that Tomasina had no parental rights to see Ry whenever she pleased without Rob and Sandra present. Rob, Sandra, Ry, and Cade would be a complete family, not by virtue of their conduct, but by virtue of their acceptable heterosexual status in the eyes of the court.⁶⁰ By altering the facts, we see more clearly that the court in this case forces an image based on a heterosexist and patriarchal essentialism.

Third, the majority reconstructs Robin and Sandra's family and the roles of each litigant according to an essentialist formula: "The notion that a lesbian mother should enjoy a parental relationship with her daughter but a gay father should not is so innately discriminatory as to be unworthy of comment."⁶¹

The court asserts that if Robin, the biological mother, can have a parental relationship with Ry, so should Thomas, the biological father. Notice, though, that in this part of the opinion, the majority subtly discards the "biological" label in order to refashion Thomas as the "father." This role reconstruction helps put Thomas on par with Ry's mothers, Robin and Sandra. The majority's implicit message is that a family run by two mothers is unacceptable. The court must introduce a real father—not just a biological father or sperm donor—to make the family whole.

Fourth, the majority cites the New York Domestic Relations statute to drive home its heteropatriarchal⁶² point: "A child born out of wedlock will only be rendered legitimate by the subsequent marriage of the mother and a man admitting paternity or judicially declared to be the father."⁶³ By mentioning the concepts of "wedlock" and of "a mother and a man," the majority again suggests that both the child and the family in which the child is born can only approach legitimacy if the court declares the petitioner sperm donor to be Ry's father.

In contrast to the essentialist paradigm employed by the majority, the dissent's opening demonstrates a constructionist understanding of the family: "The complexity of human relationships that permeate this case and the contemporary reality of millions of households that maintain alternative family life styles strongly militate against the rigid, abstract application of legal principles, not designed for situations such as this . . ."⁶⁴

After examining Thomas' contact with Ry and considering what was best for her given her family structure, the dissent concluded that Thomas had no protected parental rights as a result of his failure for nearly ten years to assume the responsibilities of parenthood.⁶⁵

The majority opinion in *Thomas S.*, demonstrates all of the pitfalls of essentialist theory. First, essentialism supports the view that one's sexuality is a fixed condition. To that condition, judges and lawyers are apt to affix a preset status. In the case of *Thomas S.*, the majority affixed to the condition of the two lesbian mothers the status of incomplete parenthood. In contrast, the dissent's constructionist argument challenged the majority to focus not on the status of the lesbian mothers and the gay sperm donor, but on their conduct as parents. By focusing on Robin and Sandra's conduct as parents, the dissent recognized that Robin and Sandra's parenthood was complete and that, in contrast, Thomas was more aptly described as an "outsider."⁶⁶

Second, essentialism is destructive in this instance because it fails to capture reality and fails, more specifically, to recognize the significance of social influences.⁶⁷ The essentialist majority in this case operates according to a binary structure, whereby a family is not coded as complete until it features a man, a woman, and children. In other words, the majority perceived Robin and Sandra's parenting as one half of a heterosexual equation which can only be completed by the biological father, Thomas. The majority does not show signs of engaging in a constructionist dialogue to inquire whether this family is complete given the way Ry relates to her mothers and the way they relate to Ry. Nor does the majority seem concerned with Thomas' meager connection to Ry or his lack of father-like conduct.⁶⁸

Third, essentialism tends to promote stereotypes. The court implies that there are clear differences between same-sex parents and opposite-sex parents. It implies that only opposite-sex parents are legitimate, even though this view is not supported by any definitive studies.⁶⁹ Thus, when the majority concluded that it must issue an order of paternity for Thomas, it relied on its own stereotype of what makes a complete family.

The case of *Thomas S.* aside, there is merit to the argument that essentialism does not always harm gay individuals, couples, or families. In fact, *Romer v. Evans* is one case in which the Supreme Court employed an

essentialist paradigm to maintain basic rights for gays.⁷⁰ However, the statute in question was an unprecedented attack on gays' basic access to political processes. The court itself characterized the attack as "rare."⁷¹

At issue in *Romer v. Evans* was the Colorado constitutional amendment that barred all legislative, executive, or judicial action to protect gays, lesbians, and bisexuals.⁷² Amendment 2, adopted in a 1992 statewide referendum, was an antagonistic reaction to several municipal ordinances that had banned discrimination against gays, lesbians, and bisexuals in housing, employment, education, public accommodations, and health and welfare services.⁷³ Specifically, the amendment read as follows:

No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian, or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.⁷⁴

The Supreme Court examined the statute using an essentialist filter that stressed the status and inherent traits attributed to gays. In particular, it emphasized the apparent discriminatory purpose of Amendment 2 against "persons by a single trait."⁷⁵ The court further acknowledged the "status-based" nature of the act,⁷⁶ and held that "[c]entral to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."⁷⁷ By focusing on the essentialist status and traits of homosexuality and bisexuality under Amendment 2, the court found Colorado's law to be unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.⁷⁸ While the victory in this case protected gays from an

encroachment on their most basic civil right to access political processes, it was not a victory in which new ground was gained.⁷⁹

Thomas S. Romer, and their progeny suggest that essentialism, as it is currently expounded, is too limiting to meaningfully advance gay rights. While essentialism may help maintain rights in “rare” cases, the theory is less likely to help advance gay rights. Meanwhile, gays face continuing violence, and discrimination in housing, public accommodations, employment, health benefits, adoption, child custody, child visitation, civil marriage, family-based immigration, and inheritance. A new approach is needed.⁸⁰

B. Call for a New Analog: Comparing Sexual Orientation to Religious Orientation

The gay rights movement would benefit from a new analog that aligns the movement more easily with constructionist theory, a theory that emphasizes the autonomy inherent in being gay. A more useful analog for the gay rights movement is to compare sexual orientation to religious orientation. Ultimately, this analog can help link the familiar premise of religious rights to a new premise for gay rights: freedom of conscience.

There are several useful comparisons that advocates can draw from this new analog. First, religious orientation, like sexual orientation, encompasses a conscious belief or series of beliefs to which we may silently adhere or which we may share with a community. Neither a religious minority nor a sexual minority may be singled out from a crowd of people under most circumstances; the individual’s status is often only known when she manifests her conscience. Second, the religious or sexual minority individual may choose to exercise her conscience or refrain from exercising her conscience, depending on the nature of the community in which she lives and the extent to which she feels secure reaching out to others of similar orientation. Third, just as a person’s religious orientation may alter during her lifetime to more aptly suit her conscience or experience, her

sexual orientation may also undergo change and adaptation. Fourth, just as the identity of a religious minority is more accurately described by constructionist theory, so is the identity of a sexual minority. For example, the extent to which a person's religious or sexual orientation is more accepted or less accepted in a society will depend on the time in which a person lives, the culture, and most of all, the prevalent social mores. Fifth, regardless of the societal or familial pressures a person may face with respect to his religious or sexual orientation, the personal determination of what is right and wrong ultimately depends on his own conscience.⁸¹

There are a number of benefits that gay rights advocates can derive from analogizing gay rights to religious rights. Constructionist gay rights advocates can move beyond the essentialist-based recognition that discrimination exists and into a more dynamic analysis of why there ought to be equal protection for people who have a minority sexual orientation. Utilizing the new analogy, gay rights advocates can invite faith-based groups to join in advancing both minority religious rights and gay rights through a common appreciation of freedom of conscience.⁸² Moreover, the analogy of religious orientation to sexual orientation can help foster a more positive image among gays who seek a less victimizing approach to claiming their own rights.

The question of how advocates can analogize homosexuality to religion is one of unexplored legal strategy, perhaps in part because religious and gay groups in society are frequently seen as political adversaries.⁸³ A simple comparison of how courts⁸⁴ perceive rights based on sexual orientation versus how courts perceive rights based on religious orientation demonstrates that courts do not currently view gay litigants with respect to their freedom of conscience or expression in the same way they view religious litigants. *Niemotko v. Maryland* is one case in which the Supreme Court addressed religious orientation with deference to the group's freedom of expression.

In *Niemotko*, appellant Nietmotko and a co-appellant were members of a Jehovah's Witness religious group.⁸⁵ When the group submitted a request to city hall to use the city park for Bible talks, city officials denied them access.⁸⁶ In spite of the city's denial, the group proceeded with their plans because no statute required the group to secure formal permission.⁸⁷ However, when Nietmotko opened the meeting in the city park, police officers immediately arrested him.⁸⁸ He and his colleague were charged with disorderly conduct, convicted, and fined.⁸⁹ The Court of Appeals of Maryland declined review, but the United States Supreme Court took the case because it presented substantial constitutional issues.⁹⁰

In a concise constructionist opinion, the *Niemotko* court concluded that the city's refusal to issue the group a license constituted clear "unwarranted discrimination."⁹¹ The Court acknowledged that the only questions the city council asked appellants before denying them access "pertained to their alleged refusal to salute the flag, their views on the Bible, and other issues irrelevant to unencumbered use of the public parks."⁹² The Court determined that it was clear from this irrelevant exchange that "the use of the park was denied because of the city council's dislike for or disagreement with the Witnesses or their views."⁹³ Thus, the Court concluded that the refusal constituted a violation of the appellants' constitutional rights to equal protection under the First and Fourteenth Amendments, which have "a firmer foundation than the whims or personal opinions of a local governing body."⁹⁴

The deference the Supreme Court accorded to the appellants in this case based on their freedom of religion stands in stark contrast to the lack of deference accorded to the two mothers in the case of *Thomas S.* There are at least three ways in which the *Thomas S.* court's holding on gay rights differed from the *Niemotko* court's holding on religious freedoms.

First, although the *Thomas S.* majority claimed to focus on the rights of the father, to the extent that that focus was based on the majority's disagreement with the mothers and their incomplete status as parents, the

focus amounted to what the *Niemotko* court would call “unwarranted discrimination.”⁹⁵ If the *Thomas S.* majority had accorded as much deference to the conduct of the mothers, Robin and Sandra, as the *Niemotko* court accorded the conduct of the Witnesses, perhaps the *Thomas S.* court would have come to a more constructionist acceptance of the family unit consisting of two mothers and their children.

Second, the *Thomas S.* majority insisted on perceiving the litigants as part of a heteropatriarchal⁹⁶ world based on status where same-sex parenting is bad and opposite-sex parenting is good. This binary vision of the litigants’ status is evidenced first by comparing the relationship of the actual mother and sperm donor to a divorced couple and second, by comparing Ry’s birth to a birth out of wedlock. In contrast to the status-based essentialist paradigm the *Thomas S.* majority employs, the *Niemotko* court insisted that the same law apply to the same conduct, regardless of the differences among those who seek the law’s protection.

Third, the *Niemotko* court expressly forbade stereotyping when it declared that constitutional rights will not be regarded or disregarded according to the “whims or personal opinions of a local governing body.”⁹⁷ The *Thomas S.* majority, on the other hand, seemed either unaware that it applied unproven stereotypes to the same-sex parents in question or unsympathetic to the consequences of its decision.⁹⁸ Whatever the case may be, the majority clearly accorded less deference to the lesbian mothers in *Thomas S.* case than the *Niemotko* court accorded the Witnesses.⁹⁹

The *Thomas S.* and *Niemotko* cases present comparable rights issues. They suggest that to avoid discrimination courts should, but currently do not, treat freedom of conscience with the same deference, whether that exercise of conscience relates to sexual orientation or to religious orientation.¹⁰⁰

CONCLUSION

Essentialism has limited what gay rights advocates—including friends, family, and other allies—can achieve. Advocates who use essentialist theory to promote gay rights inadvertently support a static image of sexuality in general and a victim image of gays in particular. However, these advocates can overcome the limitations of essentialist theory if they premise their advocacy on a more constructionist-nuanced theory that focuses on autonomy and integrity, and if they emphasize the right to freedom of conscience that is analogous to the notion of religious freedom. Through this use of constructionist theory, gay rights advocates will entice judges and lawyers into a more meaningful dialogue that will advance, rather than simply maintain, rights recognition. While these advocates must be aware that this new approach will not respond to all of the difficulties inherent in the gay rights movement, and while it may even create new dilemmas, I believe they will nevertheless find that using constructionist theory will empower gays more as agents rather than victims, and as conscientious actors who, in today's society, have a right to make their own choices regarding sexuality. This renewed sense of agency will help gay rights advocates cultivate more meaningful rights recognition to help protect against discrimination and violence.

Perhaps most importantly, these advocates might begin to understand through constructionist theory that all forms of discrimination—racism, homophobia, and religious discrimination, and others—are based on social constructs. Perhaps through constructionist dialogue we will all begin to learn that the perspective that matters for a rights movement is ultimately neither gay-specific, nor African American-specific. The only perspective that matters is the human one, in all its complexity and with all of the possible personal choices and expressions. Thus, when constructionist advocates revisit the words of Dr. Martin Luther King, Jr., that “injustice anywhere is a threat to justice everywhere,” they will draw on a comparison

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that supports a more genuine dialogue, a better understanding, and a truer sense of justice for all.

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² Hatecrime.org, *Coretta Scott King Links Gay Rights and African American Civil Rights*, <http://www.hatecrime.org/subpages/coretta.html> (last visited Nov. 1, 2005).

³ *Id.*

⁴ Throughout this essay, I use the term “gay” to refer to gay, lesbian, bisexual people, and some transgendered and transsexual people. See Shannon Minter, *Do Transsexuals Dream of Gay Rights? Getting Real About Transgender Inclusion in the Gay Rights Movement*, 17 N.Y.L. SCH. J. HUM. RTS. 589, 591-92 (2000) (positing that some trans people identify as gay or lesbian). Although I believe the term “queer” is preferable shorthand because it is a more inclusive term than “gay,” I have chosen to refer to “gays” and “gay rights” instead as a more popular way to frame the issues and movement. In short, I use the term “gay” in the hopes that the reader will perceive the term in its most inclusive sense.

⁵ See, e.g., Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument of Immutability*, 46 STAN. L. REV. 503, 504 (1994); William Eskridge, *A Social Constructionist Critique of Posner’s Sex and Reason: Steps Toward a Gay Legal Agenda*, 102 YALE L.J. 333, 372 (1992).

⁶ Basic rights include freedom from violence, and protection against discrimination in housing, public accommodations, employment, health benefits, adoption, child custody, child visitation, civil marriage, family-based immigration, and inheritance.

⁷ The American Heritage dictionary defines agency as “1. The condition of being in action; operation. 2. The means or mode of acting; instrumentality.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 32 (4th ed. 2000). In this essay, I use the word agency to capture the notion that people have an inherent freedom of conscience by which they can acknowledge their sexual identities and choose their intimate partners for themselves.

⁸ Joe Sartelle, *Rejecting the Gay Brain (and Choosing Homosexuality)*, BAD SUBJECTS: POLITICAL EDUCATION FOR EVERYDAY LIFE, May, 1994, <http://eserver.org/bs/14/Sartelle.html> (last visited Dec. 1, 2005).

⁹ See discussion, *supra* note 6, regarding what basic rights include.

¹⁰ CHESHIRE CALHOUN, FEMINISM, THE FAMILY, AND THE POLITICS OF THE CLOSET 21 (2000).

¹¹ Sartelle, *supra* note 8.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ However, these studies are based on questionable data analysis. For example, LeVay, one of the most famous “gay brain” researchers, claimed that when he studied the bodies of dead gay men and dead heterosexual men, he discovered a difference in a small section

of the brain called the hypothalamus. However, LeVay had no way of verifying the actual sexual preference of the men whose cadavers he examined. He merely assumed that those men who had died of AIDS were gay while they were alive, and he based the conclusions of his research on that assumption. *Id.*

¹⁶ In the spirit of inclusiveness and a more accurate reflection of gay people, I alternate using feminine and masculine pronouns to represent hypothetical advocates.

¹⁷ See Sartelle, *supra* note 8.

¹⁸ *Id.*

¹⁹ See JONATHAN TOLINS, *TWILIGHT OF THE GOLDS* (1994), which explores issues of genetic engineering and homosexuality. The play depicts a family that features a pregnant sister and her gay brother. When a break-through in science allows the sister to determine that her fetus will be gay, she struggles with deciding whether to abort the baby. The play demonstrates the most extreme dangers of essentialist theory: if being gay is purely genetic, and society could determine the sexuality of a baby before birth, what would society do with that information? To the extent that society continues to discriminate against gays, it is fair to say the sister in the play represents society and its current struggle with prejudice.

²⁰ See Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* 276 (Carole S. Vance ed., Pandora Press 1992) (1984).

²¹ Ted Gideonse, *The Sexual Blur*, *THE ADVOCATE*, June 24, 1997, at 28, available at http://www.gideonse.com/articles/sexual_blur.htm.

²² *Id.*

²³ Sartelle, *supra* note 8.

²⁴ See SUZANNE PHARR, *HOMOPHOBIA: A WEAPON OF SEXISM* 24 (1988).

²⁵ *Id.*

²⁶ *Id.*

²⁷ CALHOUN, *supra* note 10, at 20.

²⁸ See Catherine MacKinnon, *Difference and Dominance: On Sex Discrimination*, in *FEMINISM UNMODIFIED* 38-39 (1987) (referring to Carol Gilligan's concept of "moral reasoning").

²⁹ See Sartelle, *supra* note 8.

³⁰ Frequently Asked Questions to the Kinsey Institute, The Kinsey Institute for Research in Sex, Gender, and Reproduction, Inc., <http://kinseyinstitute.org/resources/faq.html> (last visited Dec. 15, 2004).

³¹ *Id.*

³² Deborah Gould, *We're Here, We're Queer, We're Genetically Determined?*, *BROADSIDE*, 1997, <http://web.archive.org/web/20030205005151/http://www.suba.com/~outlines/broadside/genetics.html> (last visited Dec. 15, 2004).

³³ See Darren L. Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 *CONN. L. REV.* 561, 563, 602-3 (1997).

³⁴ Gould, *supra* note 32.

³⁵ *Id.*

³⁶ *Id.*

³⁷ In this essay I assume that American society in 2006 is ready for this dialogue.

³⁸ During the Harlem Renaissance, novelist Zora Neale Hurston vehemently protested the notion that African Americans were somehow born different and dismissed it as propaganda. According to Hurston, the idea was upheld by “the sobbing school of Negrohood who hold that nature somehow has given them a dirty deal.” Henry Louise Gates, Jr., *Epilogue to ZORA NEALE HURSTON, SERAPH ON THE SUWANEE* 357 (Henry Louis Gates, Jr. ed., HarperPerennial 1991) (1948). For Hurston, freedom was “something internal... The man himself must make his own emancipation.” *Id.* Through her writing, she railed against the “arrogance” of whites assuming that “black lives are only defensive reactions to white actions.” *Id.* Hurston’s sentiments were revitalized by Dr. Martin Luther King, Jr. and others who used a similar argument to lead the peaceful branch of the civil rights movement.

³⁹ Constructionism was at the heart of the Supreme Court’s holding in *Brown v. Board of Education*, 347 U.S. 483 (1954). But in spite of this powerful argument that sometimes won at least judicial notice, Cheryl Harris argues that suppression of African American rights has continued because of the countervailing social construction that whites possess rights superior to African Americans. She bases her argument on a constructionist analysis of history, and through history she presents a paradigm that analogizes whiteness to property. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993).

⁴⁰ “I have a dream my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.” Martin Luther King, Jr., Speech at the Lincoln Memorial (Aug. 28, 1963), in *I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD* 104 (James Melvin Washington ed., 1986).

⁴¹ Note that an important part of constructionist theory is intersectional rights theory, a theory that examines how rights movements converge and sometimes clash. For example, consider a gay woman who is African American. She might choose never to address her homosexuality because she chooses to focus instead on two other forms of oppression she faces: discrimination against African Americans and discrimination against women. She might also encounter these two forms of discrimination within the gay rights movement, a sad and all too common paradox. Consider the poem:

In this great gay mecca
I was an invisible man, still
I had no shadow, no substance
No history, no place
No reflection.

Hutchinson, *supra* note 33, at 583 (quoting Marlon T. Riggs, *Tongues Untied*, in *BROTHER TO BROTHER: NEW WRITINGS BY BLACK GAY MEN* 200, 205 (Essex Hemphill ed., 1991)).

⁴² See, for example, the State’s argument in *Andersen v. King County*, the marriage equality case currently before the Washington State Supreme Court. In oral argument, the State asserted that Washington’s Defense of Marriage Act (DOMA) does not violate the Equal Rights Amendment of the state because under DOMA, gays can marry. They are only prohibited from marrying someone of the same sex. Reply Brief of Appellant

State of Washington at 26, *Andersen v. King County*, __ Wn.2d __, __ P.3d __ (No. 75934-1).

⁴³ See *supra* note 7 regarding the definition of agency.

⁴⁴ *Thomas S. v. Robin Y.*, 209 A.D.2d 298, 618 N.Y.S.2d 356 (N.Y. App. Div. 1994).

⁴⁵ *Id.* at 299.

⁴⁶ *Id.* at 298.

⁴⁷ *Id.* at 299.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 300.

⁵⁵ In an interview ten years later, Ry reflected that she looked to Thomas as an uncle figure until the litigation. Thereafter, she grew worried that the court system would break her family apart over the case and had nightmares about the police taking her away. Susan Dominus, *Growing Up With Mom & Mom*, N. Y. TIMES, Oct. 24, 2004, 6 (Magazine), at 69.

⁵⁶ *Thomas S.*, 209 A.D.2d at 300.

⁵⁷ *Id.* at 306-7.

⁵⁸ *Id.* at 300.

⁵⁹ *Id.* at 303.

⁶⁰ Compare this hypothetical to the case of *In re Adoption of Matthew B.-M.*, 284 Cal. Rptr. 18, 22-23, 26 (Cal. Ct. App. 1991). In that case, Nancy B. agreed to be a surrogate for Timothy and Charlotte M. Eight months after the baby was born, Nancy changed her mind and tried to gain custody over the baby. The court denied Nancy any right to custody, holding that that would “deprive the court of power to order an adoption it found to be in [the baby’s] best interests, and would fail to preserve the integrity of the only family [the baby] has ever known.” *Id.*

⁶¹ *Thomas S.*, 209 A.D.2d at 305.

⁶² I define “heteropatriarchy” as a system of social organization dominated by heterosexuals and men.

⁶³ *Thomas S.*, 209 A.D.2d at 305. The court backs away from this assertion in the following sentence, but only after making its point regarding the essentialist family: “Such a prospect in this case is remote, as is the relevance of the cited authority.” *Id.*

⁶⁴ *Id.* at 307 (Ellerin, J., dissenting).

⁶⁵ *Id.* at 316 (Ellerin, J., dissenting).

⁶⁶ *Id.* at 300.

⁶⁷ Social influences include how society perceives gay couples, gay marriage, and gay parents. According to the New York Times, “the 2000 Census reported that some 150,000 same-sex couples had children in their homes. If the last three decades of the gay rights movement focused on sexual freedom and acceptance, the next three decades seem destined to continue the current battle for the right to marry and, by extension, the right to be a parent.” Dominus, *supra* note 56.

⁶⁸ This is not to say that Thomas could not have been a father to Ry if his conduct to her had indeed been father-like. But Thomas' relationship with Ry, featuring a few dozen meetings, simply did not merit the conclusion that he was or should be deemed her parent.

⁶⁹ Dominus, *supra* note 56. "Although definitive studies of these families don't yet exist—the sample size is still too small – . . . conservative groups like the American College of Pediatricians argue that kids raised by gay parents grow up sexually promiscuous and confused; advocates like the American Civil Liberties Union point to studies that suggest that the kids are as well adjusted as their peers, if not more so—more resilient, more open-minded, more tolerant." *Id.*

⁷⁰ Romer v. Evans, 517 U.S. 620 (1996).

⁷¹ *Id.* at 633. The court explained that "[r]espect for [the principle of equal protection under the law] explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare." *Id.*

⁷² *Id.* at 624.

⁷³ *Id.* at 623-24.

⁷⁴ Evans v. Romer, 882 P.2d 1335, 1338-39 (Colo. 1994).

⁷⁵ Romer, 517 U.S. at 633.

⁷⁶ *Id.* at 635.

⁷⁷ *Id.* at 633.

⁷⁸ *Id.* at 635.

⁷⁹ The majority opinion acknowledges this fact when it concludes that "Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do." *Id.*

⁸⁰ This is especially important for gays who live outside cosmopolitan areas where local governments are less likely to recognize basic rights for gays and where municipal ordinances more frequently fail to provide legal protection.

⁸¹ When Luke Timothy Johnson argues in support of tolerance for religious diversity, he could just as well be arguing in support of gays rights when he cites 1 Corinthians 2:11, "Who knows a person's thoughts except the spirit of that person within." Luke Timothy Johnson, *Religious Rights and Christian Text*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: RELIGIOUS PERSPECTIVES 65, 89-90 (John Witte, Jr., & Johan D. van der Vyver eds., 1996). With regard to whether the Bible condemns a gay conscience, some theologians claim that the original Hebrew and Greek texts of the Bible do not clearly admonish homosexuality, and are "either ambiguous or unrelated to consensual homosexuality within a committed relationship." Consequently, the mistranslation of certain vague words in the Bible have led many contemporary adherents of the Bible to disdain homosexual relationships. One example of such ambiguous words includes "qadesh," which means "a male temple prostitute who engaged in ritual sex." The word is often mistranslated as "sodomite" or "homosexual." However, qadesh has nothing to do with consensual relations between persons of the same sex, and is therefore incongruent with the contemporary meaning of "homosexual." Ontario Consultants on Religious Tolerance, *The Bible and Homosexuality: An Introduction*, http://www.religioustolerance.org/hom_bibi.htm (last visited Dec. 1, 2005).

⁸² Gay rights advocates must move beyond what Professor Ann Scales calls “fetishizing” the law. They must challenge the law’s fetish for categorization because it disables creative thinking. Advocates must also be careful to avoid an exclusionary approach focused on obtaining rights only for certain constituencies. Ann Scales, Did Margie Marshall Cost Democrats the Election?, Lunch Keynote Speaker, at The New Family Law: A National Symposium on the Socio-Legal Implications, CLE sponsored by Seattle University School of Law (Nov. 12-13, 2004).

⁸³ One exception is where a party to a case bases her claim on both religious freedoms and gay rights. See *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997). Note that this is another example of intersectional rights. See discussion *supra*, note 42.

⁸⁴ Another branch of government where gay rights advocates focus their efforts is the legislature. Consider the following constructionist statute, and the impact on gay rights if legislators changed the focus of following constructionist statute from protecting rights based on religious orientation to protecting rights based on sexual orientation:

The right to worship God according to the dictates of conscience shall never be infringed. No person shall be denied any civil or political rights, privilege or position on account of his religious opinions; but the liberty of conscience hereby secured shall not be so construed as to excuse licentiousness, the invasion of rights of others, or justify practices inconsistent with the peace or safety of the state.

S.D. CONST. art VI, § 3 (2005).

⁸⁵ *Niemotko v. Maryland*, 340 U.S. 268, 269 (1951).

⁸⁶ *Id.*

⁸⁷ *Id.* at 269-70.

⁸⁸ *Id.* at 270.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 272.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 270.

⁹⁶ See definition, *supra* note 62.

⁹⁷ *Niemotko*, 340 U.S. at 272.

⁹⁸ It seems hard to believe that the court is unaware that it is stereotyping Robin and Sandra as incomplete parents considering that the dissent criticized the majority on precisely these grounds. In particular, the dissent urged the majority to view parenthood in this day and age according to a continuum rather than a binary code. Thomas S., 209 A.S.2d at 307 (Ellerin, J., dissenting).

⁹⁹ While some may argue the two cases are not comparable because *Thomas S.* challenges notions of morality while *Niemotko* does not, this conclusion will depend on your definition of morality. According to Ronald Dworkin, preeminent theorist on law and morality, morality is a set of principles consistently and sincerely applied. Dworkin asserts that most laws or judicial opinions with respect to gay rights are not maintainable as morally based conclusions because they rest on prejudice, a concept he defines as the inconsistent or insincere application of principle. For example, while courts use

Biblically-based “morality” to prohibit recognition of the rights of gays, courts do not apply the same Biblical code to fornicators, adulterers or divorcees. Thus, if morality is a set of principles consistently and sincerely applied, the stereotyping and prejudice courts use to scrutinize gays are not examples of morality. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 249-52 (1977). Dworkin’s analysis of morality supports the conclusion that while both the *Thomas S.* and the *Niemotko* cases deal with the rights of an individual to follow his conscience, the *Thomas S.* majority employs essentialism and prejudice while the *Niemotko* court employs constructionism and deference to freedom of conscience.

¹⁰⁰ This is not to say, however, that gay rights advocates should or could make a wholesale copy of strategies aimed at promoting religious freedoms in order to promote gay rights. While constructionist advocates may analogize religious orientation to sexual orientation to inspire a more constructive dialogue and to help advance recognition for gay rights, they cannot or may not wish to duplicate every aspect of the struggle for religious freedoms. For example, gay rights advocates simply cannot demand the rights afforded to individuals on the basis of religion because religious freedom is specially protected under the First Amendment. Rather, they must advocate for rights either through the Fourteenth Amendment—using the substantive due process clause or the equal protection clause—or through a new argument that reaches beyond the Fourteenth Amendment. Moreover, gay rights advocates will not seek to exclude state interference, which is key to the separation of church and state. Rather, they will seek purposeful state interference in order to protect basic rights that the majority already enjoys. For example, if gay rights advocates want to secure protection from employment discrimination they must convince the state to do two things: first, recognize that homophobia exists, and second, make the state’s courts available to provide a remedy to gays who have been fired as a result of homophobic discrimination. Thus, when gay rights advocates adopt an analog to religious orientation, they should emphasize the general nature of the comparison to sexual orientation.