Women, Gays, and the Constitution

The Grounds for Feminism and Gay Rights in Culture and Law

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Women, Gays, and the Constitution

For Donald Levy

We made slavery, and slavery makes the prejudice. No christian, who questions his own conscience, can justify himself in indulging the feeling. The removal of this prejudice is not a matter of opinion—it is a matter of *duty*.

—Lydia Maria Child, *An Appeal in Favor of Americans Called Africans*

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The dedication of this book to Donald Levy marks heartfully twenty-one years of our loving life together: "O miracol d'amore."[1]

New York, N.Y.
May 1, 1997

1. Claudio Monteverdi, "Luci serene e chiare," *Quarto Libro dei Madrigali.*

CONTENTS

INTRODUCTION

This book combines interpretive history, political philosophy, and constitutional argument to make sense of the background, development, and growing impact of two of the most important movements for human rights currently on the American constitutional scene: feminism and gay rights.

My interest in this approach has its roots in my past two books, the first of which studied American revolutionary constitutionalism as the background of the Constitution of 1787,[1] and the second, as the background of the Civil War and Reconstruction Amendments.[2] American revolutionary constitutionalism, as I understand it, tests the legitimacy of political power (including constitutional law as a higher-order organization of political power) in terms of respect for inalienable human rights. Both the American Revolution and Civil War are, in my view, reasonably interpreted as expressions of such revolutionary constitutionalism; both are revolts against forms of constitutionalism that failed this test with the aim to replace them with more legitimate forms of constitutionalism (in the one case, ultimately with the Constitution of 1787, as amended by the Bill of Rights; in the other, that Constitution, as further amended by the Reconstruction Amendments).

My study of the second expression of American revolutionary consti-

1. See David A. J. Richards, *Foundations of American Constitutionalism* (New York: Oxford University Press, 1989).

2. See David A. J. Richards, *Conscience and the Constitution: History, Theory, and Law of the Reconstruction Amendments* (Princeton: Princeton University Press, 1993).

tutionalism led me, like all other serious students of this development, to the close study of the abolitionist movement. How, I asked myself, should we interpret these amendments today, in light of the clear impact of some quite radical abolitionist ideas on the Reconstruction Amendments? I offered some initial investigations of this topic in my last book, but the interpretive effort of that book was largely directed to the racial cases and only dealt rather cursorily with issues of gender and sexual preference. The more I studied the abolitionist movement and, in particular, the abolitionist feminists within it, the more it became clear to me that interpreting issues of gender and sexual preference in light of the revolutionary constitutionalism of the Reconstruction Amendments would require an approach different from any I had previously taken. This approach must attend closely to the interpretive claims about American revolutionary constitutionalism of a particularly radical dissenting movement within abolitionism (a movement influential on the claims for gay rights of Walt Whitman): one whose distinctive claims were, if anything, largely ignored and often repudiated not only within abolitionism but, after the Civil War, by leading advocates of suffrage feminism. How, I asked myself, could such a movement (let alone its influence on an iconoclast like Whitman) have interpretive relevance to today's great constitutional debates about gender and sexual preference?

My answer to this question is the subject of this book. It is a book very much about the importance of certain kinds of radical theory and practice of rights-based dissent to the integrity of our revolutionary constitutionalism. I try to explain how and why this has been so in the past and how contemporary constitutional interpretation, at its best, builds upon and elaborates this tradition (chapter 1). It is a book treating feminist argument as interpretive argument about central principles of American revolutionary constitutionalism, beginning with antebellum abolitionist feminists who united common principles condemning slavery and racism and the subjection of women and sexism (chapters 2–3) on what they called the platform of human rights. I examine these antebellum feminists in depth and the degree to which their repudiation by suffrage feminists compromised feminism as a serious rights-based movement until the rebirth of second wave rights-based feminism after World War II (chapter 4). Second wave feminism not only took up again, in the wake of the successes of the antiracist civil rights movement (in which many second wave feminists participated), a theory and practice of rights-based feminism building on abolitionist feminism, but infused their reading of these issues of rights-based principle into constitutional interpretation of the Reconstruction

Amendments. These included both constitutional protection of basic rights (conscience, speech, intimate life, and work) and the increasing suspectness of gender as a ground for state action (chapter 5).

My interest in the subject of gay and lesbian rights has been at the center of my work since I first began teaching law. As a gay man, my conviction has long been that the capacity of American constitutional law to do justice to these issues should be a criterion of its legitimacy: the test, as it must be, of its respect for universal human rights. Much of my work has thus been concerned to explore the normative and interpretive foundations for this claim, and this book offers a perspective on this enterprise inspired by the abolitionist feminists in particular and second wave rights-based feminism in general. The case for gay rights is, I argue, a wholly principled and just interpretation of the demands of American revolutionary constitutionalism both in respect for basic human rights (conscience, speech, intimate life, and work) and in the suspectness of sexual preference on the basis of constitutional principles that condemn (in the areas of religion, race, gender, and sexual preference) the expression through law of forms of rights-denying moral slavery (chapter 6). I use this argument to explain why antigay/lesbian initiatives were properly struck down by the Supreme Court (chapter 7) and why both the exclusion of gays and lesbians from the military and from marriage rights are similarly unconstitutional (chapter 8). I conclude with some reflections on how such a rights-based approach clarifies important issues of contesting identity on grounds of justice central to public controversy today in many domains (chapter 9).

For American constitutional lawyers, the central contribution of the argument of this book is its interpretive proposal for how, in light of the history and political theory of the Reconstruction Amendments, these amendments should be interpreted in contemporary circumstances. The normative conception of *moral slavery* is, I argue, the best interpretation of the prohibition of slavery in the Thirteenth Amendment. Moral slavery, as I understand it (building on the arguments of antebellum abolitionist feminists), condemns a structural injustice marked by its abridgment of the basic human rights of a group on inadequate grounds (involving the dehumanization of the group in question) (chapters 3, 5). The analysis of the prohibition of moral slavery, as the hermeneutic pivot of the Reconstruction Amendments, in turn clarifies the proper interpretation of structurally related principles of the Fourteenth Amendment.

Two such principles are of special interpretive concern to contemporary American public law: the nationalization of the protection of

basic human rights against both the state and national governments, and the comparably applicable guarantee of equal protection of the laws. I argue that both these judicially enforceable substantive principles under the Fourteenth Amendment are structurally connected to the prohibition of moral slavery. The great normative prohibition of the Thirteenth Amendment identifies a constitutional evil condemned by the two principles protected by the Fourteenth Amendment: first, that basic human rights must be judicially protected against abridgment both by the state and national governments; and second, certain inadequate grounds cannot be permitted illegitimately to rationalize such abridgments. The prohibition on moral slavery condemns a constitutional evil turning both on the abridgment of such basic human rights and the inadequate grounds on which they have been abridged. Accordingly, a historically informed normative analysis of moral slavery makes possible a corresponding interpretive understanding of the central substantive principles of the Fourteenth Amendment.

With respect to the nationalization of the protection of basic human rights, I argue that a proper understanding of the structural injustice condemned by the Thirteenth Amendment crucially requires the identification and protection of basic human rights of conscience, free speech, intimate life, and work, all of which are abridged by institutions of moral slavery on inadequate grounds. The analysis thus clarifies the important role that these rights have played as judicially enforceable human rights against abridgment both by the state and national governments (see chapters 5–6).

With respect to the equal protection principle of the Fourteenth Amendment, equal protection expresses the general requirement, rooted in abolitionist political theory, that all forms of political power must be reasonably justifiable to all persons in terms of both equal respect for their basic human rights and the pursuit of acceptable public purposes of justice and the common good.[3] It has various dimensions, two of which (fundamental rights and suspect classification analysis) call for heightened scrutiny of laws; outside these categories, its demand for reasonable public justification is much more deferential to democratic politics.[4] Fundamental rights analysis calls for such de-

3. For the classic statement of equal protection as a form of public reasonableness, see Joseph Tussman and Jacobus tenBroek, "The Equal Protection of the Laws," *California Law Review* 37 (1949): 341. For tenBroek's pathbreaking work on the abolitionist antecedents of equal protection, see Jacobus tenBroek, *Equal under Law* (New York: Collier, 1969).

4. On the various modes of strict and rational basis analysis, see "Developments in the Law—Equal Protection," *Harvard Law Review* 82 (1969): 86. For arguments for more aggressive rational basis review, see Gerald Gunther, "Newer Equal Protection," *Harvard Law*

manding scrutiny on grounds of the protection or better protection of the basic human rights guaranteed by the principle nationalizing the protection of basic rights; suspect classification analysis calls for highly skeptical scrutiny of certain grounds for laws. The theory of moral slavery clarifies both grounds for heightened scrutiny. Its attention to the abridgment of basic rights illuminates fundamental rights scrutiny in the same way it advances understanding of the related principle calling for the nationalization of the protection of basic human rights. Suspect classification analysis is, I argue, best understood as rendering suspect the grounds condemned as inadequate by the theory of moral slavery (chapters 5–6). Much of the interpretive interest of my account derives, I believe, from the alternative perspective it affords on suspect classification analysis (chapters 5–6).

To be specific, my proposal (rooted in the background theory of moral slavery) aims to inform and guide contemporary debates over the treatment of women, gays, and lesbians in terms of an alternative account of the suspectness of race and gender (chapter 5) and sexual preference (chapter 6). I criticize, both as interpretively and normatively inadequate, the view taken by some scholars that suspect classifications rest either on the immutability or salience of a trait or on the alleged powerlessness of a certain group (chapter 5). Rather, on the alternative view I propose and defend, such classifications are suspect because they use a basis for laws condemned by the constitutional prohibition of moral slavery. They enforce the culturally constructed basis for the unconstitutional moral slavery of a group (the unjust basis of dehumanizing stereotypes on which the group was deprived of respect for its basic human rights) and are condemned, for this reason, as a fundamentally illegitimate basis for law. Such laws not only lack any acceptable basis in the constitutionally required public reasons for all law of justice and the common good, but work unreason by illegitimately rationalizing the fundamental structural injustice of moral slavery (thus, their constitutional suspectness). The structure of this account of suspect classification analysis is the condemnation of a basis for law that reflects the unjust degradation of a cultural tradition (moral slavery) with which a person reasonably identifies as central to their conscientious sense of personal and moral identity. Such devaluation of identity is, I argue, what unites on grounds of principle the interlinked grounds for the suspectness of religion, race, gender, and sexual preference.

Review 86 (1972): 1; Cass Sunstein, "Naked Preferences and the Constitution," *Columbia Law Review* 84 (1984): 1689.

Put another way, my account of suspect classification analysis links this analysis to a structural injustice centering on indignities to our legitimate moral freedom, which is undermined by the uncritical enforcement of traditions of moral slavery in the domains of religion, race, gender, and sexual preference. Such traditions ascribe a devalued or degraded status that dehumanizes a class of persons and, on this basis, abridges their basic human rights. If persons have any human rights, they must have the right rationally and reasonably to reinvent their identities on terms free of such fundamental injustice. Suspect classification analysis makes space for the basic human right of self-invention to challenge the terms of one's moral slavery. It thus gives a rights-based interpretation and justification to the protest against public enforcement of essentialist interpretations of religion, race, gender, and sexual preference because such enforcement is illegitimately based on dehumanizing stereotypes. The story I tell is very much the complex and nuanced historical narrative of coming to understand, recognize, and demand one's basic human rights of self-invention of one's personal and ethical life (including the role of religion, race, gender, and sexual preference in one's life) as an expression of the moral powers of free human personality, originating reasonable claims in protest of a tradition constructed on the basis of the unjust enforcement of the often interlinked stereotypes that abridged such rights.

To tell this story truthfully, I have found it necessary to insist on two methodologies that some may find in tension (if not inconsistent), but that I have found mutually complementary. First, my argument insists on proper historical contextualization so that the measure of the challenge taken and met by dissidents is properly understood. Second, in each case, the appeal of each dissenter requires us to take seriously the values of universal human rights that they found so fundamental to making claims of justice in their own voices and terms. Contextualization and abstract normative theory are not, in my argument, antithetical. Rather, they must be harnessed into a fruitful working relationship if we are both to understand and evaluate the power of the dissenting tradition in American public law that is the study of this book. My argument thus tells in detail a contextualized historical story in various domains of ongoing struggle against dominant forces in American political life, but the contextualization makes the normative sense it does (interlinking, for example, common antiracist and antisexist principles) only when understood, as it was by its best proponents, as in service of critical standards of universal human rights (in terms of which they interpreted American constitutional principles) that are their enduring moral legacy to their American posterity. We, their pos-