EXPOSING SEX STEREOTYPES IN RECENT SAME-SEX MARRIAGE JURISPRUDENCE

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INTRODUCTION

In 1993, the Hawaii Supreme Court held in *Baehr v. Lewin*[1] that same-sex couples denied the right to marry could state a claim for sex discrimination. With that decision, an argument that had previously been primarily a matter of academic debate was thrust into the center of one of the defining cultural wars of our time. Following *Baehr*, same-sex couples filed lawsuits in at least eleven states. In the past few years, the highest state courts in Vermont,[2] Massachusetts,[3] New Jersey,[4] New York,[5] and Washington,[6] as well as intermediate courts in Arizona[7] and Indiana,[8] have ruled on the issue; as of May 2007, appeals are pending in the highest courts in California,[9] Connecticut,[10] and Maryland.[11] Some suits have been won by plaintiffs,

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[1] Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (holding that state marriage statute employs sex-based classification subject to strict scrutiny under state equal protection provision).

[2] Baker v. State, 744 A.2d 864 (Vt. 1999).

[3] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

[4] Lewis v. Harris, 908 A.2d 196 (N.J. 2006).

[5] Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006).

[6] Andersen v. King County, 138 P.3d 963 (Wash. 2006).

[7] Standhardt v. Super. Ct. *ex rel.* County of Maricopa, 77 P.3d 451 (Ariz. Ct. App. 2003), *review denied*, No. CV-03-0422-PR, 2004 Ariz. LEXIS 62 (Ariz. May 25, 2004).

[8] Morrison v. Sadler, 821 N.E.2d 15 (Ind. Ct. App. 2005).

[9] *In re* Marriage Cases, 49 Cal. Rptr. 3d 675, 706 (Cal. Ct. App. 2006), *review granted*, 149 P.3d 737 (Cal. 2006).

[10] Kerrigan v. State, 909 A.2d 89 (Conn. Super. Ct. 2006).

[11] Deane v. Conaway, No. 24-C-04-005390, 2006 WL 148145 (Md. Jan. 20, 2006), *appeal docketed*, 903 A.2d 416 (2006).

leading either to marriage (Massachusetts) or civil unions providing all of the benefits of marriage (New Jersey and Vermont). Others, largely in closely divided opinions, have been lost by plaintiffs (New York and Washington). But while sex discrimination has been argued by the plaintiffs in each of these cases, no state high court since *Baehr* has found that denying a same-sex couple the right to marry successfully states a sex discrimination claim. Rather, the subsequent decisions have either ignored or rejected sex discrimination arguments. Indeed—and most troubling—several of the more recent opinions rejecting same-sex couples' claims to the right to marry have actually relied in part on sex stereotypes, even as they reject arguments that such stereotypes are embodied in and perpetuated by exclusionary marriage laws.

This Article considers the sex discrimination arguments in the context of the flurry of recent decisions issued by state courts and the arguments presented by parties and amici before those courts. Now that there is a critical mass of decisions regarding limiting marriage to different-sex couples, we can see patterns in how the sex discrimination argument has been used by litigants and received by courts. Thus, the primary objective of this Article is not to evaluate the academic merits of the sex discrimination argument (which many commentators, some cited herein, have done before us), but rather to strengthen that argument by closely reading recent decisions issued in the marriage cases across the country and placing those decisions in context with selected sex discrimination jurisprudence.

Specifically, this Article attempts to diagnose why recent high court majorities have not accepted previous iterations of the sex discrimination argument in favor of marriage rights for same-sex couples, and to provide support that may have been overlooked in such previous iterations. It concludes that the sex discrimination argument is based on two interconnected arguments: first, that restrictive marriage statutes facially discriminate on the basis of sex, and second, that the rationales offered as justifications for the sex-based classifications in these statutes rely upon sex stereotypes that may not be the basis for government action. This Article argues that the facial sex discrimination argument draws normative strength from, and vindicates values associated with, the sex stereotyping argument. In recent cases, the facial sex discrimination argument has been presented as distinct from the more substantive sex stereotyping argument, making it unnecessarily vulnerable to a claim that the state has not discriminated because the sex-based restrictions in marriage statutes apply equally to (gay) men and (lesbian) women. Showing that justifications for sex classifications in marriage statutes perpetuate sex stereotypes that can subordinate women and can limit the freedom of both women and men to choose how to structure their lives strengthens the analogy between the sex discrimination argument in these cases and the race discrimination argument in the Supreme Court's groundbreaking anti-miscegenation case, *Loving v. Virginia*, in which the Court

held that the right to marry could not be restricted on the basis of race by a law whose rationales and classifications perpetuated racial hierarchy.[12]

In fact, as our review of recent decisions demonstrates, courts regularly impute to legislatures justifications for limiting marriage to different-sex couples that rely upon sex-based stereotypes that have been found to be unconstitutional sex discrimination in other contexts. Courts, for example, have upheld different-sex marriage requirements on the grounds that men and women, simply by virtue of their gender, provide distinct role models for children; that men and women play "opposite" or "complementary" roles within marriage; and that marriage is essential to protect vulnerable women from irresponsible men who, absent the bonds of marriage, would abandon their children.[13] Such unexamined reliance on sex stereotypes stands in sharp contrast to recent changes in family law and constitutional law requiring gender neutrality, which has led to the removal of explicit sex-based classifications and the disavowal of sex-based presumptions in custody, alimony, and other areas that had previously relied on gender stereotypes. Exposing the sex stereotypes at play makes it more likely that the classifications will be acknowledged as a form of facial sex discrimination by demonstrating a real "harm" caused by the sex-based classifications and, more generally, helps discredit the proffered rationalizations as insufficient to meet even "rational basis" review.

The Article shows that, for many, opposition to marriage for same-sex couples is part of a socially conservative philosophy that holds that sexual activity is only appropriate within (heterosexual) marriage and that is articulated in programs as varied as publicly-funded abstinence-only education and marriage promotion programs as part of welfare reform. Not all who oppose marriage for same-sex couples espouse this larger philosophy, but examining the views of those who do reveals how opposition to marriage for same-sex couples is often intertwined with efforts to enforce gender-differentiated family roles. Conservatives who argue against marriage for same-sex couples explicitly and implicitly invoke sex stereotypes about women's and men's roles. The connection is not new. A generation ago, in the 1970s and 1980s, conservative activists argued against proposed federal and state equal rights amendments ("ERAs") on the ground that they would require recognition of marriage rights for same-sex couples.[14] In arguing that the ERA would invalidate sex-based limitations on who could marry, the amendment's opponents consciously used public discomfort with the concept of marriage by same-sex couples to undermine support for constitutional guarantees of sex equality. And today, many organizations leading opposition to expansion of marriage rights for same-sex couples characterize their efforts as part of a larger agenda to roll back sex discrimination law to per-

[12] Loving v. Virginia, 388 U.S. 1, 10–12 (1967).
[13] *See infra* text accompanying notes 122–135, 138–147, 158–163.
[14] *See infra* text accompanying notes 23–27.

mit the government once again to promote sex-stereotyped gender roles.[15] Of course, individuals and individual families today, as in the past, may choose to structure their relationships in accordance with traditional gender roles. But, this Article argues, under modern sex discrimination jurisprudence, the government cannot justify the use of sex-based classifications—in marriage laws or in other contexts—by assumptions that individuals will, or should, conform to traditional gender roles.

Part I of this Article explains the sex discrimination arguments in favor of marriage for lesbians and gay men and puts such arguments in the context of briefs actually filed by plaintiffs' counsel and amici curiae in marriage cases. Part II charts the courts' receptivity, or lack thereof, to such arguments, from the Hawaii Supreme Court's decision in *Baehr v. Lewin* to recent decisions by courts in a number of states. Part III demonstrates that the sex discrimination argument may be strengthened by grounding the facial sex discrimination argument in a discussion of sex stereotyping to show how the sex-based classifications limit individual freedom and tend to maintain gender hierarchies. Finally, Part IV exposes the way in which harmful sex stereotypes do, in fact, underlie restrictive marriage statutes and assumptions regarding those statutes, even to this day. Indeed, Part IV reveals how many courts and judges have relied on harmful sex stereotypes to justify marriage restrictions. By highlighting the extent to which the statutory objectives identified as underlying different-sex marriage restrictions actually depend on sex-based stereotypes regarding gender roles, this Article strengthens the case for striking down such restrictions as unlawful sex discrimination.

I. Articulating the Sex Discrimination Claim

Of the numerous grounds on which state and federal laws restricting marriage to different-sex couples may be challenged as unconstitutional, sex discrimination has the potential to be a particularly powerful tool. It has a logical strength that is easy to grasp: the laws at issue clearly use sex-based classifications in prescribing that a man may only marry a woman and that a woman may only marry a man. As a practical matter, it elevates the level of scrutiny applied to discriminatory marriage laws from the rational basis review commonly afforded classifications based on sexual orientation to the heightened intermediate or, in some states, strict scrutiny afforded classifications based on gender. And it may reach members of the public (and members of courts) who are not particularly concerned about discrimination against lesbians and gay men but care passionately about discrimination against women.[16]

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[15] *See infra* Part IV.D.

[16] *See, e.g.*, Susan Frelich Appleton, *Same-Sex Couples: Defining Marriage in the Twenty-First Century: Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 Stan. L. & Pol'y Rev. 97, 124–26 (2005) (suggesting gender talk

Significantly, the sex discrimination argument is not new to the debate over marriage rights for same-sex couples. Plaintiffs advanced sex discrimination arguments during the first wave of court cases by same-sex couples seeking the right to marry in the 1970s. That era's increased success with sex equality legislation and jurisprudence, however, did not translate into the right to marry for same-sex couples. For example, the Supreme Court of Minnesota in *Baker v. Nelson*[17] denied a sex discrimination claim in holding Minnesota's restriction of marriage to different-sex couples constitutional. The court rejected the plaintiffs' analogy to *Loving v. Virginia*,[18] concluding, without explanation, that "there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."[19] A few years later, in *Singer v. Hara*, the Washington State Court of Appeal rejected a same-sex couple's claim that restricting marriage to different-sex couples violated the state's recently-passed Equal Rights Amendment ("ERA").[20] Relying on tautological reasoning, the court held that the plaintiffs "are not being denied entry into the marriage relationship because of their sex; rather, they are being denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex."[21] The court rejected the analogy to *Loving* and held that the ERA was inapposite, citing commentary from proponents of the state ERA who had specifically rejected the contention that the amendment would require permitting same-sex couples to marry.[22]

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could be an effective strategy for broadening support for marriage for same-sex couples); Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 UCLA L. REV. 519 (2001). Even critics of the approach recognize these benefits, while noting that they may also be perceived as weaknesses in that they privilege a harm that is not the primary motivation or injury of the laws. *See, e.g.*, Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471 (2001) (acknowledging certain strategic advantages of the sex discrimination approach, but arguing that laws limiting gay and lesbian rights are primarily motivated by homophobia and primarily harm gay men and lesbian women and that focusing on sexism and harm to women misstates the primary harm).

[17] Baker v. Nelson, 191 N.W.2d. 185 (Minn. 1971). The couple appealed the case to the United States Supreme Court, which dismissed the appeal "for want of a substantial federal question." Baker v. Nelson, 409 U.S. 810, 810 (1972). At least one court considering a recent case brought by a same-sex couple seeking to marry held that *Baker* constitutes a definitive determination by the Supreme Court that different-sex marriage requirements do not violate the federal Equal Protection Clause. *See* Morrison v. Sadler, 821 N.E.2d 15, 19–20 (Ind. Ct. App. 2005). However, the Supreme Court's dismissal in *Baker* was issued several years before *Craig v. Boren*, 429 U.S. 190, 197 (1976), established that sex-based classifications are subject to heightened scrutiny. Thus, it is inappropriate to deem *Baker* as binding precedent under modern sex discrimination standards.

[18] Loving v. Virginia, 388 U.S. 1 (1967).

[19] *Baker*, 191 N.W.2d. at 187.

[20] Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974).

[21] *Id.* at 1192.

[22] *Id.* at 1191 n.5 (quoting an election preview supplement published in the Seattle newspaper that explained, "Opponents argue that passage [of the state ERA] would legalize homosexual marriage, deny preferential treatment to women in divorce settlements, make women eligible for Army combat duty, allow coed sports wrestling in

In fact, the specter of marriage by same-sex couples played a central role in debates during the 1970s over the federal Equal Rights Amendment.[23] The federal ERA was approved in Congress by large margins in 1972 and ratified by thirty of the thirty-eight states required within two years; ratification then slowed radically and finally stopped completely. As Reva Siegel details, the opposition movement, led by Phyllis Schlafly's remarkably effective STOP ERA organization, "linked together the ERA, abortion, and homosexuality in ways that changed the meaning of each, and mobilized a grassroots, 'profamily constituency' to oppose this unholy trinity."[24] Recognizing that marriage rights for same-sex couples (as well as abortion rights) discomforted much of the public who were otherwise supportive of guaranteeing sex equality, ERA opponents used these hot-button issues to derail passage of the ERA, which had seemed almost assured.

Schlafly, presaging sex discrimination arguments made in contemporary cases (though obviously with a very different intent), argued against the ERA on the grounds that it would require granting same-sex couples the right to marry because "[i]t is precisely 'on account of sex' that a state now denies a marriage license to a man and a man, or to a woman and a woman."[25] Schlafly also explicitly tied the possibility of marriage for same-sex couples to "degradat[ion]" of women's homemaker role and traditional gender roles within families.[26] Other anti-ERA advocates made similar arguments.[27] As in Washington state, many proponents of the federal ERA, well aware of the volatility of the issue, went to lengths to disclaim the possibility that ratification of the ERA would require permitting same-sex couples to marry. For example, at a 1977 conference, ERA advocates adopted a plat-

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schools, and eliminate preferential auto, health and life insurance rates for women. Proponents describe the foes' contentions as emotional, irresponsible fantasies, misleading, deceptive, and incorrect." *Election Preview Supplement*, SEATTLE POST-INTELLIGENCER, Nov. 5, 1972). The decision in 1972 by proponents of the state ERA to disclaim any effect on different-sex marriage requirements had far-reaching effects. In 2006, in holding that Washington's prohibition on marriage by same-sex couples did not implicate the state's ERA, the state Supreme Court relied in part on legislative history from the time of the ERA's passage suggesting that it was not intended to require granting same-sex couples. *See* Andersen v. King County, 138 P.3d 963, 988 (Wash. 2006). Note, however, that although the question of whether limiting marriage to heterosexual couples violates modern sex discrimination law remains undecided, other "irresponsible fantasies," such as denying sex-based presumptions in divorce settlements or making women eligible for combat duty, imagined by opponents of the state's ERA—and disclaimed at that point by proponents—have come to pass, often as specifically required under modern sex discrimination law.

[23] Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1389–1403 (2006). Our thanks to Reva Siegel for bringing this history to our attention.

[24] *Id.* at 1390.

[25] PHYLLIS SCHLAFLY, THE POWER OF THE POSITIVE WOMAN 90 (1977).

[26] *Id.* at 85–90 (grouping together tax and childcare polices that Schlafly asserted were likely to "drive wives and mothers out of the home"; removal of restrictions on abortion; and rights for gay men and lesbians to marry, teach in schools, and adopt children as likely "effects on the family" of an ERA).

[27] Siegel, *Constitutional Culture*, *supra* note 23, at 1393 n.208, 1394 n.209.

form proclaiming "ERA will NOT change or weaken family structure . . . ERA will NOT require States to permit homosexual marriage."[28] Some ERA supporters, on the other hand, explicitly argued, or at least "acknowledged," that one of the benefits of the ERA was that it would require elimination of different-sex requirements for civil marriages.[29]

Thus, it is not only contemporary advocates for expansion of marriage rights that understand that the government's refusal to permit same-sex couples to marry implicates sex discrimination concerns and that much resistance to marriage for same-sex couples is intimately related to the perpetuation of gender-differentiated family roles; conservative advocates have been making similar arguments (though with the opposite intended effect) for several decades. And, as discussed in Part IV, conservative groups today continue to oppose marriage for same-sex couples as part of a larger effort to promote a return to sex-stereotyped gender roles within marriage.[30] Significantly, advocates on both sides of the ERA issue—that is, both those who "acknowledged" and those who "warned"—were correct in noting that robust protection against sex discrimination by the government would require

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[28] *Id.* at 1401 (quoting NAT'L COMM'N ON THE OBSERVANCE OF INT'L WOMEN'S YEAR, THE SPIRIT OF HOUSTON: THE FIRST NATIONAL WOMEN'S CONFERENCE, AN OFFICIAL REPORT TO THE PRESIDENT, THE CONGRESS AND THE PEOPLE OF THE UNITED STATES 51 (1978)). Of course, statements from thirty years ago regarding a constitutional amendment that was never enacted have no weight in determining whether different-sex marriage requirements violate modern sex discrimination standards. *Cf.* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (observing, in holding that male-on-male sexual harassment is actionable under Title VII, that it "assuredly [was] not the principal evil Congress was concerned with when it enacted Title VII . . . . [b]ut statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed").

[29] Siegel, *Constitutional Culture*, *supra* note 23, at 1400 (citing S.T. Perkins & A.J. Silverstein, *Note, The Legality of Homosexual Marriage*, 82 YALE L.J. 573, 583–88 (1972–1973) (arguing that proposed ERA would require granting marriage licenses to same-sex couples)). Siegel notes that Schlafly "immediately republished the relevant pages of the article in full." *Id.*; *see also* SCHLAFLY, *supra* note 25, at 91 (quoting testimony before Senate Judiciary Committee by Harvard Law Professor Paul Freund as stating, "Indeed, if the law must be as undiscriminating concerning sex as it is toward race, it would follow that laws outlawing wedlock between members of the same sex would be as invalid as laws forbidding miscegenation. Whether the proponents of the Amendment shrink from these implications is not clear.").

[30] Conservative activists continue to oppose the ERA by arguing it would lead to recognition of marriage rights for same-sex couples. In 2007, the federal ERA was reintroduced in Congress as the Women's Equality Amendment. The conservative organization Concerned Women for America immediately put out a press release opposing the ERA and noting specifically that "State-passed ERAs were used by courts to declare same-sex marriage in Hawaii" as well as to require state funding for abortions in New Mexico. Concerned Women for America, ERA: An Outdated Icon of Radical Feminism, Mar. 27, 2007, http://www.cwfa.org/articledisplay.asp?id=12675&department=MEDIA&categoryid=family; *see also, e.g.*, Kathryn Jean Lopez, *ERA: Equality for Whom?*, SACRAMENTO BEE, Feb. 3, 2006, http://dwb.sacbee.com/content/opinion/story/14143574p-14971931c.html (2006 opinion column discussing Schlafly's opposition to the "nonsensical" ERA as "prescient" and decrying Maryland trial court decision that had just found denial of marriage rights to same-sex couples violated state ERA).

permitting same-sex couples to marry. As set forth in Part III, although the federal ERA was never ratified, the protection against sex discrimination that we now recognize as guaranteed by the federal Equal Protection Clause and state analogs (as well as state ERAs that were enacted) *should* be understood as requiring elimination of different-sex requirements in statutes governing civil marriage.

In the late 1980s, the Supreme Court's decision in *Bowers v. Hardwick*[31] seemed to foreclose privacy-based challenges to the denial of lesbian and gay rights. Led by the work of Andrew Koppelman and Sylvia Law, scholars took this opportunity to resurrect a sex discrimination focus within gay rights commentary.[32] These legal experts made explicit the way in which norms for both gender and sexuality act to police the same conduct and punish the same violations. In particular, these scholars showed that the stigmatization of lesbians and gay men is linked to the subordination of women. As Koppelman later explained:

> The two stigmas—sex-inappropriateness and homosexuality—are virtually interchangeable, and each is readily used as a metaphor for the other. Moreover, both stigmas have gender-specific forms that imply that men ought to have power over women. Gay men are stigmatized as effeminate, which means insufficiently aggressive and dominant. Lesbians are stigmatized as too aggressive and dominant; . . . they appear to be guilty of some kind of insubordination.[33]

Through this lens, it becomes clear that the same sex stereotypes that act to devalue women also work to demonize lesbians and gay men. Thus, the scholars argued, just as the U.S. Supreme Court found in *Loving* that an anti-miscegenation law unconstitutionally discriminated on the basis of race, so should courts recognize that limiting marriage to different-sex couples (or other forms of discrimination against lesbians and gay men) unconstitutionally discriminates on the basis of sex.

Thus conceived, the sex discrimination argument has been presented as having two distinct parts. First, a restrictive marriage statute, which only

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[31] 478 U.S. 186 (1986).

[32] Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988); Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (1988). The theories initially presented by Koppelman and Law have remained the subject of much scholarly commentary. *See, e.g.*, Appleton, *supra* note 16; Stephen Clark, *Same-Sex But Equal: Reformulating the Miscegenation Analogy*, 34 RUTGERS L.J. 107 (2002); Sandi Farell, *Reconsidering the Gender-Equality Perspective for Understanding LGBT Rights*, 13 L. & SEXUALITY 605 (2004); Stein, *supra* note 16; Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1 (1994). Koppelman has also returned to and refined his ideas in several subsequent articles. *See, e.g.*, Andrew Koppelman, Romer v. Evans *and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89, 129 (1997); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994).

[33] Koppelman, Romer v. Evans *and Invidious Intent*, *supra* note 32, at 129.

allows marriage between a man and a woman, discriminates on its face by restricting an individual's right to marry his or her chosen spouse purely on the basis of gender. That is, a man is not permitted to marry a man, but would be permitted to marry that same person if he were a woman. This is what we will term the "facial sex discrimination" argument.

The second form of the sex discrimination argument posits that the denial of the right to marry to same-sex couples relies on and enforces impermissible sex stereotypes. This is what we will term the "sex stereotype discrimination," or "sex stereotyping" argument. Broadly, this argument is that a restrictive marriage statute discriminates because it relies upon and perpetuates a system under which men and women occupy different marriage and family roles: men must "act like husbands" and women must "act like wives."[34] The sex stereotyping argument may be understood as vindicating anti-subordination values, on the view that sex stereotypes implicated by the marriage statute are harmful because they perpetuate a patriarchal view of marriage and family that presumes a breadwinner, head-of-household husband/father and a caretaker, subordinate wife/mother. The argument also advances liberty interests, prohibiting government enforcement of sex roles that limit the freedom of individual women and men to depart from traditional gender roles in choosing their own life paths. A slightly different formulation of the argument takes a more libertarian form, positing that the State should be agnostic as to gender roles, allowing women and men to choose their roles in marriage and family without government preferences. That is, regardless of whether it is "good" or "bad" to adhere to traditional gender roles, the State should express no preference and should allow individual women and men to choose for themselves.[35]

While theorists usually emphasize the extent to which the sex discrimination argument involves sex stereotypes that enforce gender hierarchies, litigants have generally separated the facial sex discrimination argument from the sex stereotype discrimination argument. Many litigants have chosen to emphasize the facial sex discrimination argument, shying away from more controversial subordination themes. For instance, in the pending California marriage litigation, the brief submitted by plaintiffs' counsel in the Court of Appeal first emphasized the facial nature of the classification: "To conclude that California's marriage statutes unconstitutionally discriminate on the basis of sex, this Court need look no further than the existence of a

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[34] *See infra* text accompanying notes 102–112; *see also, e.g.*, Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. Ill. L. Rev. 991, 994–97 (2007).

[35] Janet Halley provides a useful explanation of how a feminist perspective operates in its more libertarian form. *See* JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 79 (2006) (explaining how "[t]he more closely [liberal feminism] hews to the classic liberal view that the state has no business forming strong views of the good life and good ways of being human, the less it has to say about gender, the more likely it is to take libertarian forms, and the more likely it is to want to stop at formal equality").

facial classification based on sex and the absence of any current justification for that restriction."[36] The brief then relied on *Loving* and California's state analog, *Perez v. Sharp*,[37] to argue that the purported "equal application" of the statutes to women and men does not save it from constitutional scrutiny: "Although the statute 'equally' prohibits men and women from marrying a person of the same sex, mere equal application to different groups does not negate the injury to individuals nor immunize a discriminatory statute from heightened scrutiny."[38]

Then, in a separate section of their brief, plaintiffs' counsel contended that the restriction on marriage is "a vestige of an era in which the rights and duties of spouses were defined by gender."[39] Addressing the historical roots of marriage that subordinated women to men, plaintiffs' counsel explained how courts and legislatures have rejected such subordination as "natural" and have instead taken "steps to eliminate gender as a relevant legal factor within the marital relationship."[40] In not tying the sex stereotypes at work in the restriction of marriage to different-sex couples to the facial sex classification seen in the marriage statutes, the plaintiffs' brief presented two seemingly separate justifications for a finding of impermissible sex discrimination.

Other briefs submitted by plaintiffs' counsel in marriage cases around the country have adhered to the same strategy, either laying out the two sex discrimination arguments as separate concepts or advancing only the facial sex discrimination argument as the basis of the claim for relief.[41] For in-

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[36] Respondents' Corrected Answering Brief at 28–29, *In re* Marriage Cases, 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006) (No. A110451) [hereinafter *In re* Marriage Cases Respondents' Brief].

[37] Perez v. Sharp, 198 P.2d 17 (1948).

[38] *In re* Marriage Cases Respondents' Brief, *supra* note 36, at 33–34.

[39] *Id.* at 37.

[40] *Id.* at 38.

[41] An exception to this trend is observed in the plaintiffs' briefing in *Hernandez v. Robles*, in which plaintiffs' counsel advanced an argument that, to a certain extent, intertwined the facial and sex stereotype discrimination arguments. After explaining that "the State's marriage laws . . . explicitly classify—and discriminate—on the basis of sex," plaintiffs' counsel also tied sex stereotype discrimination to a rejection of the "equal application" theory in arguing that "impermissible [sex] stereotypes are at play when the State insists that a man's rightful role is to 'take' only a woman in marriage, and a woman's only a man, so that each will follow their prescribed gender roles." Brief for Plaintiffs-Appellants at 71–74, Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006) (No. 103434-04). Similarly, one set of plaintiffs' counsel in Washington also connected the facial and sex stereotype discrimination arguments in the context of *Loving*. *See* Brief of Respondents at 41, Andersen v. King County, 138 P.3d 963 (Wash. 2004) (No. 75934-1) ("But the *Loving* analogy goes deeper. Behind the logic, here, as in *Loving*, lies a history of group-based discrimination. DOMA is embedded in sexism every bit as much as miscegenation laws were embedded in racism."). Interestingly, the other set of plaintiffs' counsel in Washington used the language of sex stereotypes to debunk an argument by the state of a legitimate governmental interest but did not independently advance sex discrimination as an equality claim. *See* Brief of Respondents Castle et al. at 45, Andersen v. King County, 138 P.3d 963 (Wash. 2004) (No. 75934-1) (In arguing that the state's definition of marriage is not accommodated by current understandings, plaintiffs' counsel

stance, in *Goodridge v. Department of Public Health*, the Massachusetts case, plaintiffs' counsel contended that the state applied the marriage statute in a way that discriminated based on sex: "Heidi Norton was denied a license to marry Gina Smith because she is a woman. But a man can marry Gina, and if Heidi were a man, she could marry Gina."[42] Plaintiffs' counsel also countered the state's appeal to the "equal application" theory in the context of *Loving* and *Perez*. However, rather than point to the invidious nature of the sex discrimination at issue, to analogize to the invidious race discrimination embodied in the anti-miscegenation statutes, plaintiffs' counsel used *Loving* and *Perez* to demonstrate that the right to marry is an *individual* right that cannot be restricted merely because two *groups* are treated the same. As plaintiffs' counsel concluded, "[f]rom the perspective of each individual plaintiff, the defendants set up a sex-based classification by rejecting their choice of partner based on their own sex."[43]

Plaintiffs' counsel in *Goodridge* did not affirmatively argue sex discrimination based on sex stereotypes. Rather, they employed the concept of sex stereotypes to counter the defendants' purported justification for the sex-based classification. Rejecting the state's justification based on procreation, plaintiffs' counsel explained that "[t]o rely on generalizations about procreative capacity as the basis for determining who shall participate in legal rights, as defendants do here, harkens back to an era in which women were defined by their procreative abilities."[44] Analogous divisions were made by plaintiffs' counsel in New Jersey[45] and Maryland.[46]

Following the lead of plaintiffs' counsel, amici curiae writing briefs focused on sex discrimination arguments have also, to a large extent, separated the facial and sex stereotype discrimination arguments.[47] For example, in the

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stated that "over the years the Legislature and the courts have replaced sexist stereotypes in marriage with concepts of equality.").

[42] Brief of Plaintiffs-Appellants at 56, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (No. SJC-08860).

[43] *Id.* at 59–60.

[44] *Id.* at 68–69.

[45] *Compare* Brief of Appellants at 30–31, Lewis v. Harris, 908 A.2d 196 (N.J. 2006) (No. 58, 398) ("[P]ermitting same-sex couples to marry requires nothing more than construing the marriage eligibility requirements to be gender neutral, akin to what was ordered in other cases eliminating discriminatory treatment on the basis of the sex of marital partners."), *with id.* at 51 ("By claiming that sex roles must . . . be reified in marriage, the State urges the Court to take a giant step backwards.").

[46] *Compare* Brief of Plaintiffs-Appellee at 20–21, Deane v. Conaway, No. 24-C-04-005390, 2006 WL 148145 (Md. Jan. 20, 2006), *appeal docketed*, 903 A.2d 416 (2006) (No. 44) (arguing that "permitting opposite-sex couples but not same-sex couples to marry constitutes a sex-based classification" and distinguishing the "equal application" argument based on the principle that "constitutional rights are *individual* rights, not class rights"), *with id.* at 76 (Countering the State's purported interest in "tradition," plaintiffs' counsel explained that the "State has abandoned many aspects of the historical definition of marriage, which included . . . inequalities based on . . . sex.").

[47] To some extent, this has been to avoid duplication of the arguments made by plaintiffs' counsel. For example, in the Washington state litigation, plaintiffs' counsel had made a facial sex discrimination argument but not a sex stereotyping argument. The *amici curiae* brief submitted by various women's organizations explicitly adopted the

California litigation, the brief of amici curiae concerned with women's rights first explained how the California marriage statute classifies on the basis of sex and is therefore invalid, despite its purported "equal application" to women and men.[48] Then, separate from the preceding argument, the brief delved into sex stereotype discrimination.[49]

Given the initial success of *Baehr* on facial sex discrimination grounds, the sharp division between the facial sex discrimination argument and the sex stereotype arguments is not surprising. Practitioners, quite reasonably, positioned the arguments separately for clarity and simplicity. This appeared to have the obvious benefit of leaving the seductive and relatively moderate facial sex discrimination argument as an independent ground upon which a ruling in plaintiffs' favor could be based.[50] However, as demonstrated below, this strategy has not worked. State court majorities have generally relied on an "equal application" theory to reject the facial sex discrimination argument and then gone on to dismiss the sex stereotype argument separately, if they have addressed it at all. Dissenters who have relied upon the facial sex discrimination argument have generally relied upon the sex stereotype argument as well. This should not be surprising: in many crucial ways, the facial sex discrimination argument is animated by, and finds normative strength from, the sex stereotyping argument. This is demonstrated in greater detail in Parts II, III, and IV of this Article.

II. Courts' Treatment of Sex Discrimination Arguments

Only recently have enough courts issued marriage decisions to permit a true test of the viability of sex discrimination arguments as currently articulated by plaintiffs' counsel and amici curiae. Therefore, the time is ripe to assess the courts' receptivity to a sex discrimination claim and to explore recent decisions in a way that sheds light on how and why many courts are rejecting sex discrimination claims in the marriage cases. Review of the decisions shows that courts have rejected the facial sex discrimination argument on the ground that it applies equally to men and women, and have rejected analogies to *Loving*, facilitated in part by the decoupling of the fa-

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facial sex discrimination argument made by the plaintiffs but focused their brief on the sex stereotyping argument exclusively. *See* Brief of Amici Curiae Women's Organizations in Support of Respondents at 2, Andersen v. Kings County, 138 P.3d 963, 983 (Wash. 2006) (No. 75934-1) [hereinafter *Andersen* Brief of Amici Curiae]. The *Andersen* Brief of Amici Curiae was submitted by the authors of this Article.

[48] Brief of Amici Curiae Concerned with Women's Rights at 9–13, *In re* Marriage Cases, 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006) (No. A110451) [hereinafter *In re* Marriage Cases Brief of Amici Curiae]. The *In re* Marriage Cases Brief of Amici Curiae was submitted by the authors of this Article.

[49] *Id.* at 13–30.

[50] *See* Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, *supra* note 32, at 220 (discussing how a "firewall" exists between the facial sex discrimination argument and "more controversial sociological and psychological claims" relating to gender subordination).

cial sex discrimination argument and the sex stereotype argument. To the extent that state court majorities have reached the sex stereotyping discrimination theory, they have addressed it separately from the facial sex discrimination argument, and have generally dismissed it based on a perceived shortage of proof of discriminatory purpose or intent underlying the marriage laws.

As noted above, the earliest decision in the recent wave of marriage cases relied on the sex discrimination argument to seriously question the propriety of a discriminatory marriage law. In *Baehr v. Lewin*,[51] the Supreme Court of Hawaii held that the state's marriage statutes used sex-based classifications, that they were therefore subject to strict scrutiny under the state's Equal Rights Amendment, and that they could thus only be justified by a compelling state interest.[52] The court remanded so that the trial court could consider whether the state could present any such compelling interest. Hawaii subsequently adopted a constitutional amendment permitting the legislature to limit marriage to different-sex couples, mooting the then still-ongoing appeal.[53] *Baehr* was decided on facial sex discrimination grounds; it did not address more substantive sex stereotyping arguments. But despite this early promise, the facial sex discrimination approach has proven largely ineffective.[54]

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[51] 852 P.2d 44 (Haw. 1993).

[52] *Id.* at 64–67.

[53] *See* HAW. CONST. art. I, § 23 (granting the legislature the power to reserve marriage to different-sex couples); Baehr v. Miike, No. 20371, 1999 Haw. LEXIS 391, at *8 (Haw. Dec. 9, 1999) (holding that constitutional amendment rendered equal protection challenge to marriage laws moot).

[54] As noted, plaintiffs have included sex discrimination claims in most, if not all, of the state court cases that have been brought since *Baehr*. However, no other state supreme court has relied on sex discrimination arguments in holding that statutes limiting marriage to different-sex couples are unconstitutional. The trial court in Maryland, another state with an Equal Rights Amendment, did hold that that state's marriage statute unconstitutionally discriminated on the basis of sex. Deane v. Conaway, No. 24-C-04-005390, 2006 WL 148145 (Md. Cir. Ct. Jan. 20, 2006), *appeal docketed*, 903 A.2d 416 (2006). That decision relied solely on facial sex discrimination reasoning, finding that the statute employed sexual classifications and therefore under Maryland's Equal Rights Amendment was unconstitutional unless the state could show that it was narrowly tailored to achieve a compelling government interest. The court specifically rejected the "equal application" theory, relying on cases under Maryland law and finding the analogy to *Loving* persuasive, *id.* at *3–6, and then held that the state had failed to provide sufficiently compelling justifications for the sex based classifications. *Id.* at *7–9. The Maryland decision is currently being appealed. Significantly, as discussed below, even in other states that have equal rights amendments, such as Washington, or that use "strict scrutiny" to evaluate laws that discriminate on the basis of sex, such as California, facial sex discrimination arguments have been rejected on equal application grounds. *See infra* text accompanying notes 44–47. The sex discrimination claim may not have been made explicitly in Standhardt v. Super. Ct. *ex rel.* County of Maricopa, 77 P.3d 451 (Ariz. Ct. App. 2003), *review denied*, No. CV-03-0422-PR, 2004 Ariz. LEXIS 62 (Ariz. May 25, 2004) (denying plaintiffs' due process and equal protection claims without specifically discussing a sex discrimination theory), or in Morrison v. Sadler, 821 N.E.2d 15 (Ind. Ct. App. 2005) (denying plaintiffs' various claims under the Indiana Constitution without specifically discussing a sex discrimination theory). Some Justices, though not writing

Rather, review of the several decisions issued by state courts in recent years demonstrates that the facial sex discrimination argument generally fails, even when plaintiffs succeed on other grounds. For example, in one of the earliest marriage decisions from the recent wave of litigation, *Baker v. State*,[55] the majority of the Vermont Supreme Court found that even though the state's denial of marriage rights to same-sex couples was unconstitutional, sex discrimination did not provide "a useful analytic framework for determining plaintiffs' rights."[56] First, the court rejected the facial sex discrimination argument based on the "equal application" theory, noting that the marriage statute was facially neutral because "each sex is equally prohibited from precisely the same conduct."[57] Next, the court rejected the sex stereotype discrimination argument:

> Our colleague argues . . . that the effect, if not the purpose, of the exclusion of same-sex partners from the marriage laws is to maintain certain male and female stereotypes to the detriment of both. To support the claim, she cites a number of antiquated statutes that denied married women a variety of freedoms, including the right to enter into contracts and hold property. The test to evaluate whether a facially gender-neutral statute discriminates on the basis of sex is whether the law 'can be traced to a discriminatory purpose.' The evidence does not demonstrate such a purpose. It is one thing to show that long-repealed marriage statutes subordinated women to men within the marital relation. It is quite another to demonstrate that the authors of the marriage laws excluded same-sex couples because of incorrect and discriminatory assumptions about gender roles or anxiety about gender-role confusion.[58]

Recent wins for plaintiffs in Massachusetts and New Jersey have similarly been on grounds other than sex discrimination. The New Jersey court did not provide any ruling on the sex discrimination argument in holding that denying committed same-sex couples the rights and benefits of marriage violated their rights under the state's equal protection guarantees.[59] Similarly, the Massachusetts court found that the state's different-sex requirement failed to satisfy even rational basis review and did not specifically address whether it was properly understood as a form of sex discrimination.[60]

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for court majorities, have accepted the sex discrimination claims of same-sex couples. *See infra* text accompanying notes 76–82.

[55] Baker v. State, 744 A.2d 864 (Vt. 1999).

[56] *Id.* at 880 n.13.

[57] *Id.*

[58] *Id.* (quoting Pers. Adm'r v. Feeney, 442 U.S. 256, 272 (1979)).

[59] Lewis v. Harris, 908 A.2d 196 (N.J. 2006).

[60] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003). The court noted that Article 1 of the Massachusetts Constitution specifically prohibits sex-based discrimination and states that since it resolves the case using rational basis review, it need not decide whether "sexual orientation" is a suspect classification. *Id.* at 961 n.21. The fact that the footnote refers specifically to "sexual orientation" discrimination and not to

The facial sex discrimination argument has also failed in recent decisions denying plaintiffs' claims. These decisions have generally used the "equal application" theory to reject the claim. In *Hernandez v. Robles*,[61] the New York Court of Appeals, the state's highest court, held that the state's denial of marriage to individuals who wish to marry other individuals of the same sex "does not put men and women in different classes, and give one class a benefit not given to the other."[62] In *Andersen v. King County*,[63] the Washington Supreme Court similarly found that "[m]en and women are treated identically under DOMA [the state Defense of Marriage Act]; neither may marry a person of the same sex."[64] Therefore, the court concluded that Washington's DOMA "does not discriminate on account of sex."[65] Although it has not yet reached the California Supreme Court, the majority of California's Court of Appeal has ruled similarly to the high courts of New York and Washington. The court held that California's marriage law does not discriminate based on sex because it "treat[s] men and women exactly the same, in that neither group is permitted to marry a person of the same gender."[66]

In finding that the statutes at issue apply equally to both women and men and therefore do not discriminate based on sex, these courts adopted the very "equal application" theory expressly rejected by the U.S. Supreme Court in *Loving*. Generally, courts have justified their holdings by reasoning that the anti-miscegenation statute at issue in *Loving* was intended to perpetuate white supremacy[67] and contending that no similarly sexist purpose un-

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sex discrimination suggests that it may not have been considering the case as potentially raising sex discrimination issues. *Goodridge* is, however, the only recent majority opinion other than Hawaii's *Baehr* opinion to refer favorably to sex discrimination arguments. Although the court did not adopt a sex discrimination argument in favor of the plaintiffs, the court highlighted the sex stereotypes apparent in Justice Cordy's dissenting opinion. Rejecting Justice Cordy's assertion that marriage is tied to the "'optimal' mother and father setting for child rearing," *id.* at 965 n.28 (quoting *id.* at 983 (Cordy, J., dissenting)), the court explained that such an idea "hews perilously close to the argument, long repudiated by the Legislature and the courts, that men and women are so innately and fundamentally different that their respective 'proper spheres' can be rigidly and universally delineated." *Id.* at 965 n.28. In fact, the court noted that "legislative enactments and decisions of this court negate any such stereotypical premises." *Id.* The court did not address the "equal application" theory. Justice Cordy, however, relied in his dissent on an "equal application" theory in rejecting a facial sex discrimination argument. *See id.* at 991–92 (Cordy, J., dissenting). Justice Greaney, concurring, relied explicitly on both facial and sex stereotype discrimination grounds. *See infra* text accompanying notes 80–81.

[61] 855 N.E.2d 1 (N.Y. 2006).

[62] *Id.* at 10.

[63] 138 P.3d 963 (Wash. 2006).

[64] *Id.* at 988.

[65] *Id.*

[66] *In re* Marriage Cases, 49 Cal. Rptr. 3d 675, 706 (Cal. Ct. App. 2006), *rev'g* 149 P.3d 737 (2006).

[67] As discussed below, *Loving* does have language that suggests that white supremacist objectives of the anti-miscegenation statute were part of the basis for the Court's holding that it was unconstitutional. *See infra* text accompanying notes 88–89. Earlier Supreme Court decisions, however, had rejected the "equal application" argument with-

derlies the different-sex requirements in marriage laws. For instance, in *Hernandez*, the court rejected the analogy to anti-miscegenation laws, finding that

> the historical background of *Loving* is different from the history underlying this case. Racism has been recognized for centuries—at first by a few people, and later by many more—as a revolting moral evil . . . . [T]he traditional definition of marriage is not merely a by-product of historical injustice. Its history is of a different kind.[68]

Distinguishing *Loving*, the court reasoned that "[t]his is not the kind of sham equality that the Supreme Court confronted in *Loving*; the statute there . . . was in substance anti-black legislation. Plaintiffs do not argue here that the legislation they challenge is designed to subordinate either men to women or women to men as a class."[69] Likewise, the California intermediate court held that "[t]he analogy to statutes prohibiting interracial marriage is not entirely apt,"[70] because, although Virginia's anti-miscegenation law was "a vehicle to perpetuate invidious racial discrimination. . . [,] [n]o evidence indicates California's opposite-sex definition of marriage was intended to discriminate against males or females."[71]

After rejecting the facial sex discrimination based on a perceived distinction between the invidious race discrimination in *Loving* and the lack (they contend) of invidious sex discrimination underlying the marriage statutes, the courts have either rejected or completely ignored the separate sex stereotyping discrimination argument. For instance, the *Andersen* court found "unpersuasive" the argument that "keeping marriage as an exclusively heterosexual institution is based on gender-role stereotypes and exclusion of those who do not conform to them."[72] The court, explaining that "nothing in DOMA . . . speaks to gender stereotyping within marriage," pointed to plaintiffs' failure "to show that gay and lesbian persons are ex-

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out requiring a showing that the statutes at issue perpetuated racial hierarchies, *see infra* note 86, and *Loving* is clear that notwithstanding the "equal application" of the anti-miscegenation statute, the mere use of racial classifications was sufficient to trigger heightened scrutiny. *See infra* text accompanying note 87. Thus, as described more fully below, reliance by some courts on *Loving*'s white supremacy language to distinguish *Loving* and thus to conclude that the sex-based classifications at issue in state marriage statutes do not require heightened scrutiny is inappropriate.

[68] Hernandez v. Robles, 855 N.E.2d 1, 8 (N.Y. 2006).

[69] *Id.* at 11.

[70] *In re* Marriage Cases, 49 Cal. Rptr. 3d at 708.

[71] *Id.*; *see also* Andersen v. King County, 138 P.3d 963, 989 (Wash. 2006) (Finding *Loving* to be "not analogous," the court noted that "[m]en and women are treated identically under DOMA" and such equal application is not undermined by any invidious sex discrimination.); Baker v. State, 744 A.2d 864, 880 n.13 (Vt. 1999) (holding that "[a]lthough the concurring and dissenting opinion invokes . . . *Loving*, the reliance is misplaced" because the court found no invidious sex discrimination at issue to compare with the invidious race discrimination at issue in *Loving* (citation omitted)).

[72] *Andersen*, 138 P.3d at 989.

cluded from marriage on account of or in order to perpetuate gender stereotyping."[73] Similarly, the California Court of Appeal also rejected the sex stereotyping argument, finding instead that the history of the marriage statute "does not demonstrate that the definition of marriage as male-female can itself be traced to a discriminatory purpose."[74] The court reasoned that while certain repealed marriage statutes subordinated women to men, this did not demonstrate that the exclusion of same-sex couples from marriage was due to sex-role assumptions.[75]

In contrast to the majority opinions, several state court concurring and dissenting opinions have expounded upon sex discrimination arguments. In Vermont, Massachusetts, and New York, concurring and dissenting justices, respectively, rejected their colleagues' reliance on the "equal application" theory in response to the facial sex discrimination argument. In both Vermont and Massachusetts, these justices went beyond the facial discrimination argument and found that restrictive marriage statutes were also discriminatory on a sex stereotyping basis. Only in New York has a high court justice adopted the facial sex discrimination argument without also reaching the sex stereotype argument.

In *Baker*, Justice Johnson reasoned that Vermont's marriage challenge presented "a straightforward case of sex discrimination."[76] She explained:

> Dr. A and Dr. B both want to marry Ms. C, an X-ray technician. Dr. A may do so because Dr. A is a man [but] Dr. B may not because Dr. B is a woman. Dr. A and Dr. B are people of opposite sexes who are similarly situated in the sense that they both want to marry a person of their choice. The statute disqualifies Dr. B from marriage solely on the basis of her sex and treats her different from Dr. A, a man. This is sex discrimination.[77]

Urging that "the sex-based classification contained in the marriage laws is . . . a vestige of sex-role stereotyping that applies to both men and women,"[78] Justice Johnson further reasoned that "uniting men and women to celebrate the 'complementarity' of the sexes and providing male and female role models for children' [is] based on broad and vague generalizations about the roles of men and women . . . ."[79]

In a concurring opinion in *Goodridge*, Justice Greaney of Massachusetts similarly adopted a sex discrimination theory, explaining:

> As a factual matter, an individual's choice of marital partner is constrained because of his or her own sex. Stated in particular

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[73] *Id.*
[74] *In re* Marriage Cases, 49 Cal. Rptr. 3d at 709.
[75] *Id.*
[76] *Baker*, 744 A.2d at 905 (Johnson, J., concurring in part, dissenting in part).
[77] *Id.* at 906.
[78] *Id.*
[79] *Id.* at 909.

> terms, Hillary Goodridge cannot marry Julie Goodridge because she (Hillary) is a woman. Likewise, Gary Chalmers cannot marry Richard Linnell because he (Gary) is a man. Only their gender prevents Hillary and Gary from marrying their chosen partners under present law.[80]

Like Justice Johnson, Justice Greaney also moved beyond a mere facial sex discrimination argument and into sex stereotype territory, adding that:

> [The] case requires that we confront ingrained assumptions with respect to historically accepted roles of men and women within the institution of marriage and requires that we reexamine these assumptions in light of the unequivocal language of art 1. [of the Massachusetts Constitution], in order to ensure that the governmental conduct challenged here conforms to the supreme charter of our Commonwealth.[81]

Finally, Chief Judge Kaye, in her dissenting opinion in the New York litigation, expressly adopted the facial sex discrimination argument and rejected the "equal application" theory by analogy to *Loving*:

> The exclusion of same-sex couples from civil marriages . . . discriminates on the basis of sex . . . . [A] woman who seeks to marry another woman is prevented from doing so on account of her sex—that is, because she is not a man. If she were, she would be given a marriage license to marry that woman. That the statutory scheme applies equally to both sexes does not alter the conclusion that the classification here is based on sex. The "equal application" approach to equal protection analysis was expressly rejected by the Supreme Court in *Loving*.[82]

Judge Kaye's dissent is the only high court opinion since the Hawaii Supreme Court's decision in *Baehr* that adopts a facial sex discrimination theory without expressly connecting the facial discrimination to sex stereotypes or historical gender-based inequalities within marriage. Her dissent does, however, adopt the analogy to *Loving* and perhaps thereby suggests a recognition that the sex classifications in the New York marriage statute reflect invidious discrimination.

Clearly, then, some justices on the states' highest courts have understood and found compelling the sex discrimination argument in favor of marriage for same-sex couples. Their acceptance of plaintiffs' sex discrimination claims may derive from the justices' connection of the facial sex classification with invidious sex discrimination based on harmful gender

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[80] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 971 (Mass. 2003) (Greaney, J., concurring).

[81] *Id.* at 973.

[82] Hernandez v. Robles, 855 N.E.2d 1, 29 (N.Y. 2006) (Kaye, C.J., dissenting).

stereotypes. Since only a minority of justices have made this connection and since only a minority of justices have favorably ruled based on a sex discrimination theory, it is necessary to consider why the many justices ruling against plaintiff couples, or ruling for plaintiff couples on other grounds, find the sex discrimination argument unconvincing. Such analysis may permit litigants to strengthen the conceptual and factual connections between the facial sex discrimination at work in restrictive marriage statutes and the invidious sex stereotype discrimination perpetuated by such facial sex discrimination.

Of course, we can only speculate as to why some justices have rejected the sex discrimination argument. Perhaps the justices do not *recognize* the sex stereotyping at work in restrictive marriage statutes in the face of changes in contemporary society (or even their own modern marriages). Perhaps the justices, like many other citizens, do not think that the idea of "male" and "female" role models for children are in fact based in sex stereotypes. Perhaps the justices are reluctant to brand marriage as a patriarchal or negative institution when they view "traditional" marriage as a reasonable personal choice. Regardless of which, if any, of these hypotheses are correct, the truth of the matter is that many court majorities have missed the very real analogy to *Loving* and have neglected the very real stereotypes still at play in the maintenance and idealization of different-sex marriage. As we will show below, the analogy to *Loving* is apt, and the stereotyping is apparent even from the decisions themselves.

III. Strengthening the *Loving* Analogy by Explicitly Grounding the Facial Discrimination Argument in a Discussion of Sex Stereotypes

Koppelman, Law, and other scholars have articulated the connection between sex discrimination and discrimination against lesbians and gay men in largely theoretical terms, focusing on the overlap and slippage between norms regulating gender and norms regulating sexuality.[83] And, although scholars and plaintiffs alike have consistently articulated a sex discrimination argument in support of marriage rights for lesbian and gay individuals, the actual sex discrimination harm—that is, the harm caused by the sex clas-

[83] *See, e.g.*, Koppelman, Romer v. Evans *and Invidious Intent*, *supra* note 32, at 129 ("The two stigmas—sex-inappropriateness and homosexuality—are virtually interchangeable, and each is readily used as a metaphor for the other."); Law, *supra* note 32, at 196 ("Homosexual relationships challenge the dichotomous concept of gender. These relationships challenge the notion that social traits, such as dominance and nurturance, are naturally linked to one sex or the other."); *see also* Jo Bennett, *Same-Sex Sexual Harassment*, 6 Law & Sexuality 1, 23 (1996); Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 Yale L.J. 1, 7 (1995); Deborah L. Rhode, *Lesbians in the Law: Symposium Issue: Sex-Based Discrimination: Common Legacies and Common Challenges*, 5 S. Cal. Rev. L. & Women's Stud. 11, 21 (1995).

sifications at issue—has remained rather abstract.[84] The sex discrimination argument has thus foundered on an "equal application" defense—that is, that since gay men and lesbian women are "equally" harmed by the denial of the opportunity to marry, there is no sex discrimination because men and women are treated "equally." The decoupling of the facial sex discrimination argument and the sex stereotype discrimination argument may in some sense have encouraged this result because the classifications themselves, that is, the requirements that a man may only marry a woman and that a woman may only marry a man, on their face seem to be relatively "harmless" from a sex-discrimination perspective.

This Part and the following Part demonstrate that the analogy to *Loving* can be strengthened by showing that the rationales used to justify the sex-based classifications in the marriage statutes rely on gender-based stereotypes that tend to perpetuate traditional gender hierarchies and limit the freedom of both women and men to choose how to structure their lives and their relationships. In other words, grounding the facial sex discrimination argument in a substantive discussion of the sex stereotypes at play can make the sex *discrimination* caused by the use of sex-based classifications in the marriage statutes much more real. This approach makes clear that sex discrimination in marriage is not just a historical relic that has been largely erased from marriage statutes; as demonstrated in Part IV, the sex stereotypes continue to have significant currency today.

As discussed above, plaintiffs' counsel and amici curiae have generally based the facial sex discrimination argument, in part, on the Court's rejection of the anti-miscegenation statute at issue in the landmark Supreme Court case of *Loving v. Virginia*.[85] Plaintiffs' counsel and amici curiae have generally relied on *Loving* not only by analogy, but also as a rebuttal to the "equal application" theory, since that theory was expressly rejected by the Supreme Court in *Loving*. Because the right to marry is an individual right, supporters argue, the individual's right to marry her chosen spouse is infringed regardless of the purportedly equal treatment of the implicated groups. Each individual is discriminated against on an individual basis. In other words, plaintiffs and amici curiae have responded to the "equal application" argu-

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[84] *See, e.g., Andersen* Brief of Amici Curiae, *supra* note 47, at 2–3 ("Men and women who fail to conform to gender norms are often equated with homosexuals (regardless of their actual sexual orientation), and homosexuals and gender-non-conforming individuals alike are stigmatized in ways that devalue the 'female' and the female's 'traditional' role in the family. Because it hides behind these notions of what roles are 'proper' in the family—bolstering a system in which men are expected to conform to (dominant) 'masculine' ideals and women to (subservient) 'feminine' ideals—the denial of the right to marry to lesbian and gay couples is a particularly invidious form of gender-stereotype discrimination."); Law, *supra* note 32, at 197 ("[H]istorical justifications for condemnation of homosexuality are based on patriarchal cultural arrangements and value structures that are no longer defensible.").

[85] 388 U.S. 1 (1967).

ment by arguing that the fact of a sex-based classification, like the fact of a race-based classification, is enough to require heightened scrutiny.

This argument has not been successful—despite ample support[86]—perhaps because it overlooks much of the animating force behind the *Loving* analogy. The holding in *Loving* does not rely exclusively on the fundamental proposition that the right to marry an individual of one's choice is an individual right that cannot be denied based on purported "equal application" to various racial groups. The decision also turned on the Court's explicit recognition that the anti-miscegenation law at stake in *Loving* was designed to perpetuate white supremacy. First, the Court recognized that the anti-miscegenation law relied on racial classifications and thus triggered strict scrutiny, notwithstanding the so-called "equal application."[87] Then, the Court determined that the classifications at issue were not justified by a sufficiently compelling governmental interest, explicitly on the grounds that they were "measures designed to maintain White Supremacy" and that they had "no legitimate overriding purpose independent of invidious racial dis-

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[86] In fact, *Loving* followed earlier Supreme Court decisions that had likewise rejected "equal application" arguments and, significantly, had done so without requiring a showing that the challenged classification perpetuated white supremacy. For example, in *Shelley v. Kraemer*, 334 U.S. 1 (1948), the Court held that judicial enforcement of racial covenants violated the Equal Protection Clause. The Court specifically rejected a claim that there was no Equal Protection Clause violation because courts would enforce equally covenants against blacks and covenants against whites on the grounds that "[t]he rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual." *Id.* at 21–22. Likewise, in *McLaughlin v. Florida*, 379 U.S. 184 (1964), the Court struck down a statute that specifically criminalized cohabitation by an unmarried white woman and black man or black woman and white man. While noting the "equal application" of the statute, the Court held that "[j]udicial inquiry under the Equal Protection Clause . . . does not end with a showing of equal application among the members of the class defined by the legislation. The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose—in this case, whether there is an arbitrary or invidious discrimination between those classes covered by Florida's cohabitation law and those excluded." *Id.* at 191. Thus, the reliance by some courts on the "white supremacy" language in *Loving* to distinguish the racial classifications in *Loving* from the sex classifications in the statutes implicated in the current marriage cases is misplaced. Under *Loving* and contemporaneous Supreme Court decisions, the fact of suspect classifications, even when purportedly "equally applied," is sufficient to trigger heightened scrutiny. Therefore, even though the marriage restrictions apply "equally" to women and men, they should be recognized as sex-based classifications and should only be upheld upon a showing that the classifications meet the level of heightened scrutiny applied to sex-based classifications under the specific state's law. Nonetheless, given the emphasis that the *Loving* Court placed on the anti-miscegenation statute's perpetuation of racial hierarchies, it is perhaps not surprising that contemporary courts have rejected the *Loving* analogy in the marriage cases without a stronger showing that the statutes tend to perpetuate gender-based hierarchies or sex-based stereotypes. Thus, without suggesting that the plaintiffs in such cases are incorrect to argue that *Loving* and other cases make clear that "equal application" of a discriminatory classification does not exempt a statute from heightened scrutiny, we suggest in this Part that the *Loving* analogy will be more persuasive if the connection between the sex classifications at issue and the perpetuation of sex-based stereotypes is made more apparent.

[87] *Loving*, 388 U.S. at 8–9.

crimination."[88] The Court's language supporting marriage as a fundamental individual right came later in the decision, as part of the Court's due process analysis.[89] In other words, within the discrimination framework set forth in *Loving*, the equal protection violation derived from the statute's invidious discrimination—that the classifications at issue were justified by nothing other than white supremacy. Thus, an understanding of the sex stereotypes perpetuating gender-differentiated family roles at stake in the current marriage debate (and thus the invidious sex discrimination underlying restrictive marriage statutes) strengthens the sex discrimination-based "*Loving* analogy" because it is sex stereotypes, and their effect of limiting freedom of individuals and subordinating women, that give the discrimination analogy its full effect.[90]

This is not merely a theoretical concern. Rather, as discussed above, courts faced with a sex discrimination claim in several cases have rejected the facial sex discrimination argument and the *Loving* analogy on the grounds that *Loving* was about white supremacy and that the marriage statutes, by contrast, are not about gender-based hierarchies.[91] But these decisions overlook, as many litigants have, the inextricable connection between the facial sex discrimination of restrictive marriage statutes and the sex ste-

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[88] *Id.* at 11.

[89] *Id.* at 12 ("These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital *personal* rights essential to the orderly pursuit of happiness by free men. . . . [T]he freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.").

[90] By contrast, the California Supreme Court's landmark decision in *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948), the first state supreme court decision striking down a state miscegenation law on equal protection grounds, emphasized the individual interests at stake in rejecting the equal application argument:

> [T]he decisive question . . . is not whether different races, each considered as a group, are equally treated. The right to marry is the right of individuals, not of racial groups. The equal protection clause [sic] of the United States Constitution does not refer to rights of the Negro race, the Caucasian race, or any other race, but to the rights of individuals.

Id. at 20. *Loving*, decided almost twenty years later, did not follow this model. More recent U.S. Supreme Court cases have increasingly emphasized an *individual* interest in not being categorized on the basis of racial classifications as part of a move towards a formal anti-classification analysis rather than the more substantive anti-subordination analysis. *See infra* text accompanying notes 99–100.

[91] *See supra* text accompanying notes 67–71. There is also a small yet significant body of academic literature that rejects same-sex couples' analogy to *Loving*. *See, e.g.*, David Orgon Coolidge, *Playing the* Loving *Card: Same-Sex Marriage and the Politics of Analogy*, 12 BYU J. PUB. L. 201 (1998); Richard F. Duncan, *From* Loving *to* Romer*: Homosexual Marriage and Moral Discernment*, 12 BYU J. PUB. L. 239 (1998); Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1 (1996). As William Eskridge has explained, the sex discrimination argument for gay rights might at first glance appear unconvincing partly because it seems to have a "transvestic quality, dressing up gay rights in sex equality garb." William N. Eskridge, Jr., *Multivocal Prejudices and Homo Equity*, 74 IND. L.J. 1085, 1110 (1999). Eskridge, however, then discusses how "antihomosexual attitudes are connected with attitudes sequestering women in traditional gender roles." *Id.*

reotypes such statutes rely upon and perpetuate. As Andrew Koppelman has persuasively argued, homosexuality does not threaten the family itself but rather only a "traditional ideology of the family . . . in which men, but not women, belong to the public world of work and are not so much members as owners of their families, while women, but not men, should rear children, manage homes, and obey their husbands."[92] Making the connections between the restrictive marriage statutes and sex stereotypes (which tend to subordinate women) implicit in the rationales offered to justify those restrictions more clear would put plaintiffs' claims in line with *Loving* and elevate the *Loving* analogy above the mere rejection of the "equal application" theory.

Indeed, Catharine MacKinnon's analysis of *Lawrence v. Texas*, the U.S. Supreme Court case finding unconstitutional a state statute that criminalized homosexual (but not heterosexual) sodomy, demonstrates how a "substantive" equal protection analysis based on *Loving* could apply in this context.[93] MacKinnon argues that "[t]he substantive sex equality question . . . is the social question of whether a law and its application institutionalize the 'gender caste' system of sex: male dominance."[94] Therefore,

> [a] substantive sex equality approach asks not whether men and women are the same or different, are treated the same or differently, and whether the two fit, although that can indicate a substantive problem. It asks fundamentally whether a law promotes equality or inequality on the basis of sex in a domain in which the sexes are socially unequal, specifically whether gender hierarchy and sex-based dominance, or its progressive dissolution, is promoted.[95]

Moving MacKinnon's analogy from anti-sodomy laws to marriage statutes shows how a substantive sex equality approach to marriage statutes

> could proceed much as the Court did in *Loving v. Virginia*: as anti-miscegenation laws discriminate on the basis of race to maintain traditional racial and ethnic divisions to subordinate nonwhite people to maintain white supremacy, [marriage] laws discriminate on the basis of sex to maintain traditional sex and gender roles to subordinate women to maintain male supremacy.[96]

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[92] Koppelman, *The Miscegenation Analogy*, *supra* note 32, at 158.

[93] *See* Catharine A. MacKinnon, *The Road Not Taken*, 65 OHIO ST. L.J. 1081, 1085 (2004). Interestingly, the four dissenting justices in the now-discredited *Bowers v. Hardwick*, 478 U.S. 186 (1986) decision, emphasized the relevance of *Loving* to consideration of an anti-sodomy statute. As Justice Blackmun explained, "the parallel between *Loving* and this case is almost uncanny." *Bowers*, 478 U.S. at 211 n.5 (Blackmun, J., dissenting).

[94] MacKinnon, *supra* note 93, at 1085.

[95] *Id.* at 1085–86.

[96] *Id.* at 1086.

A court faced with a challenge to a restrictive marriage statute could find the statute to be "a facially sex-based means of institutionalizing compulsory heterosexuality, an institution of male supremacy, in ways that hurt both sexes on the basis of their sex."[97] In this conceptualization, "[h]omophobia would be understood as a reflex of male dominant ideology against challenges to the heterosexually gendered sexuality that is made compulsory to keep women sexually for men and men sexually inviolable."[98]

Of course, the U.S. Supreme Court and most (or maybe all) state supreme courts have not endorsed the connection between heterosexism and sexism and the extent to which both work to enforce the subordination of women. Indeed, as many commentators have recognized, the Supreme Court, and state courts following its lead, have seemed to reject the substantive anti-subordination approach to equal protection analysis in general.[99] The trend, particularly in race discrimination cases, has clearly been to move to a formal anti-classification analysis where the fact of the classification causes a presumptive holding of unconstitutionality and the injury caused is an individual injury. It is this "color-blind" approach that has given rise to successful "reverse" discrimination suits and the virtual demise of affirmative action outside of the education context.[100]

Sex discrimination jurisprudence, however, has developed somewhat differently from race discrimination jurisprudence; in sex discrimination cases, there is a much stronger focus on whether sex-based classifications rely on stereotypes and a recognition that such stereotypes may perpetuate gender hierarchies. Although the Supreme Court has not adopted a substantive anti-subordination approach, and it is clear (and appropriate) that state

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[97] *Id.* at 1087.

[98] *Id.*

[99] *See, e.g.*, Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 1009 (2002) ("Current Supreme Court doctrine understands equal protection as an antidiscrimination principle rather than an antisubordination principle."); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 37 (1991) ("The modern Court has moved away from . . . notions of race that recognize the diverging historical experiences of Black and white Americans . . . . In place of these concepts, the Court relies increasingly on the formal-race concept of race, a vision of race as unconnected to the historical reality of Black oppression."). *But see* Reva B. Siegel, *Brown at Fifty: Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1538–44 (2004) (arguing that while often masked, antisubordination concerns remain a factor in modern equal protection jurisprudence, particularly in the diversity rationale for affirmative action decisions); *id.* at 1473 n.10 (gathering other commentary suggesting antisubordination analysis continues to play a role in modern equal protection decisions).

[100] It is on this basis that the U.S. Supreme Court has struck down race-based affirmative action plans as evidence of so-called "reverse discrimination." *See, e.g.*, Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (holding unconstitutional city's affirmative action plan for awarding municipal construction contracts); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (holding that a federal affirmative action plan for awarding highway contracts was subject to strict scrutiny, and remanding to determine whether the challenged program satisfied this standard).

policies that discriminate against men are actionable,[101] it is also well established under modern sex discrimination jurisprudence that state policies based on sex stereotypes are unconstitutional.[102] Thirty years ago in *Stanton v. Stanton*,[103] in striking down a statute that required parents to support their sons until they turned twenty-one but their daughters only until they turned eighteen, the Court recognized that government policies cannot be based on stereotypical gender roles, such as the expectation that "the female [is] destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."[104] Likewise, a few years later, the Court found a social security program that provided benefits to children whose fathers were unemployed but not to children whose mothers were unemployed unconstitutional because it was "part of the 'baggage of sexual stereotypes' that presumes the father has the 'primary responsibility to provide a home and its essentials,' while the mother is the 'center of home and family life.'"[105]

More recent sex discrimination decisions are similarly grounded in sex stereotyping concerns. A gender-based classification triggers heightened scrutiny that

> must be applied free of fixed notions concerning the roles and abilities of males and females. *Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions.* Thus, if the statutory objective is to exclude or "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.[106]

Courts must scrutinize classifications based on sex by engaging in "reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women."[107] Plaintiffs do not need to show that the government policy at issue was moti-

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[101] Indeed, several of the most important sex discrimination cases decided by the Supreme Court, including many of the groundbreaking cases brought by Ruth Bader Ginsburg when she was an attorney at the ACLU Women's Rights Project, involved challenges to statutes that seemed to protect or privilege women but actually reinforced traditional stereotypical gender roles. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973) (challenge to military requirement that men but not women prove economic dependency to receive spousal benefits); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (challenge to Social Security Act provision that denied widowed fathers benefits afforded to widowed mothers).

[102] *See* Mary Ann Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1449–50 (2000).

[103] 421 U.S. 7 (1975).

[104] *Id.* at 14–15.

[105] Califano v. Westcott, 443 U.S. 76, 89 (1979) (citations omitted).

[106] Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724–25 (1982) (emphasis added).

[107] *Id.* at 726.

vated by a desire to subordinate or discriminate against women. Thus, for example, the Court was able to find that permitting only women to attend a nursing school violated equal protection without showing that the single-sex nature of the school was motivated by discriminatory intent.[108]

A statute or government policy based on sex stereotypes is unconstitutional even if the generalizations it relies upon remain true for many, or even most, women. Statutes or government policies that rely on "overbroad generalizations about the different talents, capacities, or preferences of males and females" are invalid.[109] Thus, although the Court in *United States v. Virginia* recognized that many women would not want to be educated in the brutal adversative training approach used by the Virginia Military Institute, failure to admit those women who did desire to attend the school violated the Equal Protection Clause.[110] Citing *Loving*, the Court recognized that "[s]upposed 'inherent differences' are no longer accepted as a ground for race or national origin classifications."[111] Although the Court recognized that "physical differences" between the sexes are enduring, it emphasized that sex-based classifications cannot be used to "create or perpetuate the legal, social, and economic inferiority of women."[112] State sex discrimination analysis often parallels, or goes even further than, these federal propositions.[113]

Close consideration of *Loving* and the Court's treatment of the "equal application" defense in that case, and the placement of that analysis within modern sex discrimination jurisprudence, demonstrates how the *Loving* analogy can be used more effectively in cases challenging different-sex requirements in marriage statutes. *Loving* depended on two propositions: that racial classifications, not withstanding their "equal application," triggered strict

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[108] The state had argued that the single-sex nature of the school was intended to compensate for discrimination against women. *Id.* Without foreclosing the possibility of potentially upholding gender-based classifications that "intentionally and directly assist[ ] members of the sex that is disproportionately burdened," *id.* at 728, the Court rejected the claimed rationale in this case and emphasized that any such analysis had to probe the real reasons for a classification and discounted the state's claim here on the ground that maintaining the school as single-sex "tend[ed] to perpetuate the stereotyped view of nursing as an exclusively woman's job." *Id.* at 729.

[109] United States v. Virginia, 518 U.S. 515, 533 (1996).

[110] *Id.* at 542.

[111] *Id.* at 533 (citing Loving v. Virginia, 388 U.S. 1 (1967)).

[112] *Id.* at 533–34. This language suggests a concern with antisubordination principles that is intertwined with sex stereotype analysis. *Id.*; *see also* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 731 (2003) ("[T]he gender stereotype . . . that women's family duties trump those of the workplace . . . has historically produced discrimination in the hiring and promotion of women.").

[113] *See, e.g.*, Gubernat v. Deremer, 657 A.2d 856, 865 (N.J. 1995) (stating that "gender neutrality is evident in the laws as administered by the courts of New Jersey" (quoting K.K. v. G., 530 A.2d 361 (N.J. Super. Ct. Ch. Div. 1987))); State v. Burch, 830 P.2d 357, 362 (Wash. 1992) ("The protection provided by the [Washington] ERA go beyond those of the equal protection guaranty under the federal constitution."); Kiore v. Metro Car Wash, 707 P.2d 195, 202 (Cal. 1985) ("[C]lassifications based on sex are considered 'suspect' for purposes of equal protection analysis under the California Constitution.").

scrutiny, and that the anti-miscegenation statute's underlying purpose of maintaining white supremacy could not pass such strict scrutiny. In the sex context, modern state supreme courts have routinely rejected the *Loving* analogy on the ground that anti-miscegenation statutes were intended to preserve white supremacy but marriage statutes, they contend, are not intended to preserve, and do not have the effect of preserving, male supremacy. Sex discrimination jurisprudence offers a response by making clear that government classifications based on sex stereotypes (even if purportedly benefiting women) are presumptively unconstitutional. Thus, the more comprehensive *Loving* analogy depends on showing that the sex classifications, notwithstanding their purported "equal application," trigger heightened scrutiny (intermediate or, in some states, strict), and that the government objectives served by the restrictions at issue rely on sex stereotypes, that is, on "overbroad generalizations about the different talents, capacities, or preferences of males and females," which cannot withstand such heightened scrutiny.[114] In other words, litigants in these cases must more fully expose the underlying sex stereotypes that bolster opposition to permitting same-sex couples to marry.

IV. Exposing the Sex Stereotypes Underlying the Rationales for Limiting Marriage to Different-Sex Couples and Other Government-Funded Efforts to Promote "Traditional" Marriage

Courts will perhaps become more convinced of the validity of a sex discrimination claim in favor of marriage for same-sex couples, and the concomitant connection to the substantive discrimination addressed in *Loving*, if they come to understand the extent to which sex stereotypes are at play in recent marriage jurisprudence and that these stereotypes inflict real harm on both women and men. Sex stereotypes are more prevalent, and more invidious, than court majorities would have us believe. In fact, recent decisions rely on sex-stereotyped assumptions that can be loosely categorized into three overlapping types.[115] The first assumes that children need or should

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[114] *Virginia*, 518 U.S. at 516.

[115] The restrictive nature of the stereotypes at play is even clearer in many of the amicus briefs submitted in support of limiting marriage to different-sex couples than in the judicial opinions. Significantly, the state defendants in these cases often disavow the more extreme of the arguments put forth by amici; indeed, many must because their states have formally adopted policies permitting same-sex couples to adopt or foster parent children, making it difficult (at best) to argue that such couples necessarily are suboptimal parents. *See, e.g.*, *In re* Marriage Cases, 49 Cal. Rptr. 3d 675, 724 n.33 (Cal. Ct. App. 2006) (noting that the California Attorney General expressly disavowed arguments put forth by amici suggesting families headed by different-sex parents are better for children as "contrary to California policy"). Nonetheless, the judges and justices deciding these cases often rely on the sex stereotyped arguments made explicitly by amici in their briefs. *See, e.g.*, Lewis v. Harris, 875 A.2d 259, 269 n.2 (N.J. Super. Ct. App. Div. 2005) (noting that although the New Jersey Attorney General had disclaimed reliance upon

have parent figures of different genders. The second assumes that men and women are temperamentally different and should (and do) play different, complementary roles in marriage and family. The third assumes that marriage is required to protect women who would otherwise be vulnerable to economic and sexual instability and dependence upon men, particularly in light of the possibility that heterosexual relationships can yield children accidentally. These same themes emerge in other recent developments of government programs that seek to "protect" or "encourage" heterosexual, traditional marriage using government funding.

The unquestioned reliance on gender-based stereotypes as justifying the different-sex requirements in marriage laws stands in sharp contrast to recent developments in family law and constitutional law. Spurred by sex discrimination claims and changing societal norms, explicit sex-based classifications and presumptions have been removed in custody, alimony, and other areas of law that previously relied on gender stereotypes.[116] Thus, as has been noted by courts considering claims by same-sex couples seeking to marry, most state family law has no gender-based distinctions remaining beyond the specification that marriage itself must be between a man and a woman. Although courts have sometimes used this fact as a basis to deny the sex discrimination argument,[117] recognizing the sex stereotypes underlying the so-called "rational" justifications imputed to state legislatures as a basis for limiting marriage to different-sex couples shows the fallacy of this reasoning. That is, as noted above, the Supreme Court has cautioned that in assessing the constitutionality of sex-based classifications, "[c]are must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions."[118] If the statutory objectives ascribed to the different-sex requirement in marriage rely upon such archaic and stereotypic notions, they should be properly recognized as discriminatory. Individuals, of course, may choose to structure their relationships in accordance with traditional gender roles. The government, however, may not rely upon such generalizations as a justification for sex-based classifications.

Thus, looking at the rationales offered to justify different-sex requirements in marriage statutes through the lens of sex discrimination jurisprudence, which clearly holds that sex-based stereotypes are insufficient to justify government use of sex-based classifications, yields two important

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promotion of procreation and creating the "optimal environment" for raising children, the court considered them to be properly presented for consideration by the amicus briefing), *overruled in part by* Lewis v. Harris, 908 A.2d 196 (N.J. 2006).

[116] *See generally* Appleton, *supra* note 16, at 110–16 (discussing a move toward gender-neutral rules in family law on such issues as child custody, post-dissolution support, premarital contract enforcement, and age requirements for marriage, as well as in anti-discrimination and employment law).

[117] *See, e.g.*, Baker v. State, 744 A.2d 864, 880 n.13 (Vt. 1999).

[118] Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724–25 (1982).

benefits.[119] First, it helps shore up the strategically advantageous sex discrimination argument by making the "harm" caused by the sex-based classifications at issue much more apparent. This may increase the likelihood that courts will recognize that the statutes' use of classifications, notwithstanding their "equal application," does in fact require heightened scrutiny and that the proffered justifications cannot withstand such scrutiny.

Second, identifying the underlying sex stereotypes helps discredit the justifications put forward for different-sex requirements more generally. This increases the likelihood that even a court that refuses to apply heightened scrutiny to the sex-based classifications employed by a marriage statute would determine that different-sex requirements in marriage statutes fail to satisfy even rational basis review. In other words, recognizing that many of the purported justifications for these requirements are largely or entirely based on sex stereotypes makes clear that such justifications cannot be an appropriate basis for government action, even if legislators and others sincerely believe in their validity. Thus, discussion of the sex stereotypes at play can expose the extent to which continuing to limit marriage to different-sex couples is not justified by legitimate government objectives, but rather reflects an unjustifiable effort to make same-sex couples unequal to all other couples.[120]

A. Different-Gender Role Models for Children

While there are studies demonstrating that children (unsurprisingly) benefit from living with two loving parents, such research also consistently finds that children living in same-sex-couple-headed households do as well

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[119] While we suggest focusing on the harm that perpetuation of gender stereotypes in the context of the same-sex marriage debates causes to women (and potentially men) who seek to challenge traditional gender roles, we understand that restrictive marriage statutes are more harmful to lesbians and gay men than they are to women generally. *Cf.* Stein, *supra* note 16 (arguing that laws limiting gay and lesbian rights are primarily motivated by homophobia and primarily harm gay men and lesbian women and that focusing on sexism and harm to women misstates the primary harm). Of course, restrictive marriage statutes also harm bisexuals, who often are excluded from any legal or political discussion of marriage rights. *See* Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000).

[120] *Cf.* Romer v. Evans, 517 U.S. 620, 635 (1996) (concluding that state constitutional amendment prohibiting protection from discrimination on the basis of sexual orientation failed to satisfy rational basis review because the amendment "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else"). We are not suggesting that when originally passed, different-sex requirements in marriage statutes were intended primarily to foreclose marriage between individuals of the same sex. In fact, the sex-specific classifications in marriage statutes were often linked to different roles or responsibilities (such as economic support or child-rearing) within marriage or upon the dissolution of marriage. These sex-based distinctions, however, have been systematically removed from marriage statutes because they relied on sex-based stereotypes, such as a presumption that wives are financially dependent on their husbands or that mothers are preferable to fathers as primary caretakers for children. *See generally* Appleton, *supra* note 16, at 110–16.

as those living in different-sex-couple-headed households.[121] Nevertheless, courts in the marriage cases have fallen back on an essentialized understanding of gender roles to hold that legislatures may assume that children do best with a "mother" and a "father" and that male and female parents, simply by virtue of their sex, play significantly different roles for their children.[122] For example, in *Hernandez*, the New York Court of Appeals held that "the Legislature could rationally proceed on the common-sense premise that children will do best with a mother and father in the home."[123] Moreover, the court noted that "[i]ntuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like."[124]

This rationale was also relied upon in both the plurality opinion and Justice Johnson's concurrence in the *Andersen* decision from Washington

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[121] *See, e.g.*, AM. PSYCHOL. ASS'N, APA POLICY STATEMENT: RESOLUTION ON SEXUAL ORIENTATION, PARENTS, AND CHILDREN (2004) ("[R]esearch has shown that adjustment, development, and psychological well-being of children is unrelated to parental sexual orientation and that the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish."); E.C. Perrin & Comm. on Psychol. Aspects of Child & Family Health, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341, 341 (2002) ("Children who grow up with 1 or 2 gay and/or lesbian parents fare as well in emotional, cognitive, social, and sexual functioning as do children whose parents are heterosexual."); Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 176 (2001) ("[E]very relevant study to date shows that parental sexual orientation per se has no measurable effect on the quality of parent-child relationships or on children's mental health or social adjustment.").

[122] An argument that children are ideally raised by "a" mother and "a" father is distinct from the argument (also often put forward in the same-sex marriage jurisprudence, and often intertwined with a discussion of male and female role models, as well as the "responsible procreation" arguments discussed *infra* text accompanying notes 149–162) that children are ideally raised by their biological parents. Although the latter by definition requires that a child is raised by a specific mother and a specific father, the former raises greater sex discrimination concerns by ascribing the significant benefit to children as relating to the parental figure's gender, not to a genetic connection. An article cited positively by both the *Morrison* and *Standhardt* courts helps make this distinction clear. In *"Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, Lynn Wardle argues against legalizing same-sex marriage on the grounds that it would weaken the nexus between procreation and parenting, stating, more broadly:

> On the basis of what we know about the tremendous disadvantages of children who grow up without both a mom and dad in the home, it would not be wise public policy to encourage the deliberate procreation of intentionally semi-orphaned, parentally deprived children. To endorse and thus encourage the rearing of children in an environment in which there is the deliberate rejection of not 'just' the other procreative parent, *but all parents of that gender*, does not seem very wise or prudent. The potential for increased social disorder if same-sex marriage is legalized is profound.

Lynn D. Wardle, *"Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL'Y 771, 798 (2001) (emphasis added).

[123] Hernandez v. Robles, 855 N.E.2d 1, 8 (N.Y. 2006).

[124] *Id.* at 7.

state.[125] The plurality opinion stated relatively briefly that the legislature had heard testimony arguing that children "tend to thrive in families consisting of a father, mother, and their biological children" and that "the legislature was entitled to believe that providing that only opposite sex-couples may marry will encourage procreation and child-rearing in a 'traditional' nuclear family where children tend to thrive."[126] Justice Johnson's concurrence was more explicit about the significance of gender-based stereotypes in this context, arguing that "because of nonfungible differences between men and women," since "female couple households are *necessarily* fatherless and male couple households are *necessarily* motherless[,] [e]ach of these differences from the optimum mother/father setting for family life may offer distinctive disadvantages."[127]

Likewise, Justice Cordy, dissenting in the *Goodridge* decision from Massachusetts,[128] argued that the state "could rationally conclude that a family environment with married opposite-sex parents remains the optimal social structure in which to bear children, and that the raising of children by same-sex couples, who . . . cannot provide children with a parental authority figure of each gender, presents an alternative structure for child rearing that has not proven itself."[129] And in the now-overruled Appellate Division decision in the New Jersey litigation, the court likewise reflexively stated that "marriage between a man and woman" provides "the ideal environment for raising children," without acknowledging that such an assertion depends upon adherence to well-defined, stereotypical gender roles.[130]

The court decisions rely on conclusory statements that children benefit from living with a male and a female role model without specifying the supposed different roles that the man and woman play in the family solely by virtue of their sex. Indeed, it is such a familiar concept that it may be difficult to recognize that an insistence that children need "mothers" and "fathers," or "male" and "female" role models, is in fact a form of sex stereotyping because it ascribes significant sex-based differences to the role that each parent plays. However, amicus briefs submitted in support of restrictive marriage statutes have discussed the need for children to have male and female role models in a way that makes clear the concrete harm that such justifications pose to women (and to men); these briefs have exposed the extent to which the male and female "role model" justification reflects stereotypical beliefs about the difference between men's and women's "na-

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[125] *See supra* text accompanying notes 63–65, 72–73.

[126] Andersen v. King County, 138 P.3d 963, 983 (Wash. 2006).

[127] *Id.* at 1005–06 (Johnson, J., concurring in judgment).

[128] *See supra* text accompanying note 60.

[129] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 999–1000 (Mass. 2003) (Cordy, J., dissenting).

[130] Lewis v. Harris, 875 A.2d 259, 269 (N.J. App. Div. 2005), *overruled in part by* Lewis v. Harris, 908 A.2d 196 (N.J. 2006).

tures."[131] For example, the American Center for Law and Justice Northeast brief in the California state litigation argued that because of "innate differences between men and women," each sex makes a "unique contribution" in childrearing.[132] The "unique" contributions of fathers include not only the "role model of husband/father" but also (purportedly) "intelligence/problem solving skills," "responsibility and autonomy,"[133] and "initiative, risk taking and independence."[134] Mothers, by contrast, provide love that is "[un]conditional, comforting, and the foundation of human attachment fostering empathic character in children."[135] The differences ascribed to the female and male role models reflect deep-seated stereotypes regarding male and female characteristics that are properly condemned as sex discrimination because they have so often been used as the basis to deny opportunities to women.[136]

B. Gender as a Complementary Dichotomy Within Marriage

In a closely related argument, courts justify legislatures' limitation of marriage to different-sex couples by suggesting that different-sex marriage is necessary and appropriate because women and men play opposite and com-

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[131] *See, e.g.*, Brief of Amicus Curiae American Center for Law & Justice Northeast, Inc. at 23–25, *In re* Marriage Cases, 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006) (Nos. A110651, A110652); Brief of Amici Curiae The Church of Jesus Christ of Latter-Day Saints et al. at 9, *In re* Marriage Cases, 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006) (No. A110449); Brief of Amici Curiae Monmouth Plastics, Corp. and John M. Bonforte Sr. at 29–32, Lewis v. Harris, 908 A.2d 196 (N.J. 2006) (No. 58,389).

[132] Brief of Amicus Curiae American Center for Law & Justice Northeast, Inc., *supra* note 131, at 23.

[133] *Id.* at 25.

[134] *Id.* at 24 (quoting DAVID POPENOE, LIFE WITHOUT FATHER 144, 146 (1996)).

[135] *Id.* (quoting DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM 219 (1995)).

[136] *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (In holding that sex stereotypes in employment context can state claim of sex discrimination under Title VII, the Court explained that "[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not."). Ironically, the influential conservative organization Focus on the Family uses the fact that women historically have had less access to the labor market as a justification for opposing marriage for same-sex couples, arguing that children, "especially boys," need "fathers" to help connect them to the labor market. *See* Glenn T. Stanton, *Why Children Need Father-Love and Mother-Love, Part 2*, available at http://www.family.org/socialissues/A000000635.cfm (last visited May 27, 2007) ("Fathers help connect their children, [sic] (especially boys) to job markets as they enter adulthood. This is because fathers, more than mothers, are likely to have the kinds of diverse community connections needed to help young adults get their first jobs. They are also more likely [sic] have the motivation to make sure their children make these connections."). Echoing the kind of arguments found in the amici curiae briefs, Stanton also contends that children need parents of different genders based on such platitudes as "[f]athers do 'man things' and women do 'lady things,'" *id.*; "fathers push limits; mothers encourage security," Glenn T. Stanton, *Why Children Need Father-Love and Mother-Love, Part 1*, http://www.family.org/socialissues/A000001142.cfm (last visited May 27, 2007) ("children need mom's softness as well as dad's roughhousing").

plementary roles within marriage, again, simply by virtue of their gender. This rationale, hearkening back to the "separate spheres" conception long discredited, likewise essentializes gender differences in a way that does not comport with modern equal protection law.[137] This rationale is most prominent in Justice Parrillo's concurrence in the (now overruled) Appellate Division decision in the New Jersey litigation, which relied on what he labeled "the fact of sexual difference."[138] Relying heavily on an article by commentator Monte Stewart, Justice Parillo suggested that these presumed inherent and natural differences fuel assumptions not only regarding the roles that men and women should (and, by assumption, do) perform in childrearing, as discussed above, but also in the broader context of marriage and family life.[139] Specifically, Justice Parrillo pointed to "the enormous tide of heterosexual desire," "the massive significance of male female bonding," "the unique social ecology of heterosexual parenting," and the "rich genealogical nature of heterosexual family ties."[140] To Justice Parrillo, the "specialness" of marriage derives from its "opposite-sex feature," a feature that relies on the stereotypical assumptions that the marriage and family roles of women and men are well-defined and contrasting.[141] In *Morrison v. Sadler*, the Indiana Court of Appeal likewise justified the state's interest in allowing only different-sex marriages by relying on the same article by Monte Stewart and explaining that Stewart "correctly notes" the "deep logic" of "man/woman intercourse."[142]

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[137] In fact, as noted *supra* note 60, the *Goodridge* majority rejected Justice Cordy's reliance on marriage as promoting the "'optimal' mother and father setting for child rearing," by specifically noting that it "hews perilously close to the argument, long repudiated by the Legislature and the courts, that men and women are so innately and fundamentally different that their respective 'proper spheres' can be rigidly and universally delineated." Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 965 n.28 (Mass. 2003).

[138] Lewis v. Harris, 875 A.2d 259, 276–77 (N.J. Super. Ct. App. Div. 2005) (Parrillo, J., concurring), *modified in part*, 908 A.2d 196 (N.J. 2006). For a discussion and critique of the United States Supreme Court's reliance on "real differences" based on sex, see David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997, 1002–03 (2002).

[139] *Id.* at 277 (citing Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 CAN. J. FAM. L. 11, 80 (2004)).

[140] *Id.* at 276.

[141] *Id.* at 277. For a discussion of non-judicial appeals to the "specialness" of heterosexual marriage, see David B. Cruz, *"Just Don't Call It Marriage": The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 947–48 (2001).

[142] Morrison v. Sadler, 821 N.E.2d 15, 30 (Ind. Ct. App. 2005) (citing Stewart, *supra* note 139, at 47). Justice Johnson, concurring in the *Andersen* judgment, also suggests in passing that the "complementary nature of the sexes" is a rational basis for limiting marriage to different-sex couples, though his opinion focuses more specifically on their procreative capacity. Andersen v. King County, 138 P.3d 963, 1002 (Wash. 2006) (Johnson, J., concurring in judgment). For an articulation and critique of the natural law arguments for gender complementarity used by opponents of same-sex marriage, see Andrew Koppelman, *Is Marriage Inherently Heterosexual?*, 42 AM. J. JURIS. 51, 62–70 (1997).

Stewart made similar arguments in a brief he authored that was submitted in the California litigation.[143] Other amicus briefs similarly assume the "fact" of sexual difference or understand marriage as necessary for bridging a sexual divide. For example, the far-right Family Research Council contended that "[t]he profound and complementary nature of the union of man and woman that constitutes a marriage is at issue."[144] A brief submitted by conservative religious groups suggested that marriage "bridges the male-female divide,"[145] and a socially-conservative student organization at Princeton University likewise characterized marriage as necessary to manage "opposite-sex relationships of 'bridging the sex divide' in the interest of men, women, and their children."[146]

Indeed, most surprisingly, a few of the amici argued that the longstanding exclusion of women from public life is a reason to preserve different-sex marriage. The United Families International brief (authored by Monte Stewart), for example, celebrated marriage as the "only important social institution in which women have always been necessary participants."[147] This, of course, ignores that women were relegated to the private sphere by legislation and widespread discrimination against them when they *tried to leave that private sphere.* It also ignores the gendered hierarchy of traditional marriage, which included rules, such as coverture, under which the married woman ceased to exist as a person with a separate legal identity from her husband, and chastisement, which granted husbands the legal entitlement to use physical force to discipline their wives. Thus, to celebrate marriage as the *only* institution in which women have always been necessary participants as a statement of its value for women is ironic, at best.

C. Marriage as Protection for Vulnerable Women from Irresponsible Men

Many advocates of limiting marriage to different-sex couples argue that marriage encourages "responsible procreation" and thereby protects vulnerable women and children. In judicial opinions, and to some extent in amicus briefing, this rationale generally relies primarily on the fact that male-female intercourse is the only form of sexual intercourse that can "naturally" (and

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[143] Brief of Amici Curiae United Families International and Family Leader Foundation at 14–18, *In re* Marriage Cases, 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006) (No. A110449).

[144] Brief of Amicus Curiae Family Research Council at 13, Andersen v. King County, 138 P.3d 963 (Wash. 2006) (No. 75934-1).

[145] Brief of Amicus Curiae The Church of Jesus Christ of Latter-Day Saints et al., *supra* note 131, at 10.

[146] Brief of Amici Curiae Anscombe Society at Princeton University at 15, Lewis v. Harris, 188 N.J. 415 (N.J. 2006) (No. 58,398).

[147] Brief of Amici Curiae United Families International and Family Leader Foundation, *supra* note 143, at 21 (quoting Camille S. Williams, *Women, Equality, and the Federal Marriage Amendment*, 20 BYU J. PUB. L. 487, 487 (2006) (paper presented at Symposium: A Federal Marriage Amendment, Brigham Young Univ. (Sept. 9, 2005))).

thus, accidentally) result in children. Although not explicitly "gendered," the court in *Goodridge* noted correctly in rejecting this argument that "[t]he 'marriage is procreation' argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage."[148] Moreover, as further explained below, the argument actually relies on gendered conceptions: without marriage, men are unlikely or unwilling to be involved with or financially support their children, and "vulnerable" women therefore need the state to promote heterosexual marriage to strengthen the bond between fathers, mothers, and children.

The "responsible procreation" rationale has been the predominant justification in many of the court decisions denying same-sex couples the right to marry. For example, in *Hernandez*, the New York court declared that the legislature could "rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships [because] heterosexual intercourse has a natural tendency to lead to the birth of children [but] homosexual intercourse does not."[149] The *Andersen* plurality likewise found that such "responsible procreation" arguments satisfied rational basis review, citing arguments put forward by the state that "no other relationship has the power to create, without third party involvement, a child biologically related to both parents," and observing that the state may have "found that encouraging marriage for opposite-sex couples who may have relationships is preferable to having children raised by unmarried parents."[150] Justice Johnson's concurrence goes further, explicitly announcing that "less stable homes equate to higher welfare and other burdens on the State" and that therefore, since "[u]nlike same-sex couples, only opposite sex couples may experience unintentional or unplanned procreation," "[s]tate sanctioned marriage as a union of one man and one woman" serves a "'private welfare' purpose" of encouraging couples to enter into a stable relationship prior to having children."[151]

Likewise, in *Standhardt v. Superior Court* ex rel. *County of Maricopa*,[152] the intermediate Arizona court denied plaintiffs' claim to marriage and found that the state had a valid and rational interest in "encouraging procreation and child-rearing within the stable environment traditionally associated with marriage."[153] The court noted that the state's interest is in "communicating to parents and prospective parents that their long-term

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[148] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 962 (Mass. 2003).
[149] Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006).
[150] Andersen v. King County, 138 P.3d 963, 982 (Wash. 2006).
[151] *Id.* at 1002 (Johnson, J., concurring in judgment) (quoting in part Lewis v. Harris, 875 A.2d 259, 277 (N.J. Super. Ct. App. Div. 2005) (Parillo, J., concurring)).
[152] 77 P.3d 451 (Ariz. Ct. App. 2003).
[153] *Id.* at 461.

committed relationships are uniquely important as a public concern."[154] *Morrison v. Sadler* likewise highlighted this benefit of marriage: "opposite-sex marriage is recognized and supported by law in large part to encourage 'responsible procreation' by opposite-sex couples, who are the only ones who can, in fact, procreate 'by accident[.]'"[155] The *Morrison* court relied in part on Justice Cordy's opinion, dissenting in the *Goodridge* case, which suggested that marriage "systematically provided for the regulation of heterosexual behavior, brought order to the resulting procreation, and ensured a stable family structure in which children will be reared, educated and socialized," and that marriage is necessary to "formally bind the husband-father to his wife and child, and impose on him the responsibilities of fatherhood."[156]

Plaintiffs in the marriage cases discussed throughout this Article generally challenge the responsible procreation argument on the grounds that it is both under- and over-inclusive, in that different-sex couples may marry without regard to whether they can or plan to have children and that many same-sex couples are in fact raising children and would benefit from the formality of relationships and obligations provided by marriage. Courts typically reject these claims on the grounds that, under rational basis review, statutes may be over- or under-inclusive.[157]

The "responsible procreation" rationale may also be challenged based on the sex stereotypes it promotes. That is, although it may be permissible and appropriate for a state to seek to promote relationships, at least prior to a lawful termination of parental rights, between children, born of either marital or extra-marital sexual relationships,[158] and their biological parents, the "responsible procreation" rationale (and its concern with the possible cost that children born out of wedlock can place on the public) reflects a deep-seated assumption that women are likely to be dependent upon men for financial security and that men, simply by virtue of their gender, will not be connected to their children emotionally or financially without being bound to them by marriage. Thus, it relies quite explicitly on gendered distinctions about mothers and fathers. For example, amicus United Families International and Family Leader Foundation argued in the California marriage litigation that marriage protects "the child and the often vulnerable mother"

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[154] *Id.*; *see also Andersen*, 138 P.3d at 1006 (Alexander, C.J., concurring) (describing "the optimum mother/father setting for stable family life" and referring to "opposite-sex homes . . . as [ ] better environment[s] for children").

[155] Morrison v. Sadler, 821 N.E.2d 15, 30 (Ind. Ct. App. 2005).

[156] *Id.* at 25 (quoting Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 995 (Mass. 2003) (Cordy, J., dissenting)).

[157] *See, e.g.*, *Andersen*, 138 P.3d at 980.

[158] Different considerations might come into play when regarding the state's role in promoting or enforcing the involvement of individuals who donate sperm, eggs, or play a role in the gestation of children born via assisted reproductive technology. Additionally, the state's interest in furthering the connection of biological parents to their children may be more effectively achieved by encouraging ongoing relationships between non-custodial parents (who have either never been married to the custodial parent or whose marriage has ended) and their children than by only, or primarily, promoting marriage.

from lacking adequate support.[159] Likewise, a brief filed by several conservative religious organizations suggested that marriage is necessary to protect "children and vulnerable women."[160] Relatedly, many of the briefs celebrate continuation of the paternal line as one of the primary benefits of marriage, relying on cases from almost one hundred years ago when so-called "bastard" children were ostracized as social miscasts. As a brief submitted by several conservative legal and family scholars put it, citing a decision from 1919, "[t]he great end of matrimony is . . . the procreation of a progeny having legal title to maintenance by the father."[161] Common to all these briefs is a concern that absent marriage, fathers (again simply by virtue of their gender) will not play a role in raising their children.[162]

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[159] Brief of Amici Curiae United Families International and Family Leader Foundation, *supra* note 143, at 15.

[160] Brief of Amici Curiae The Church of Jesus Christ of Latter-Day Saints et al., *supra* note 131, at 3.

[161] Brief of Amici Curiae James Q. Wilson et al., Legal and Family Scholars in Support of Applicants at 12, *In re* Marriage Cases, 143 Cal. App. 4th 873 (Cal. Ct. App. 2006) (No. A110449) (quoting Laudo v. Laudo, 197 N.Y.S. 396, 397 (N.Y. App. Div. 1919) (internal citations omitted)); *see also, e.g.*, *id.* at 15 (arguing the relationship between "marriage and procreation" is "about two related things: procreation and paternity" and an underlying "concern with illegitimacy") (quoting Laurence Drew Borten, *Sex, Procreation, and the State Interest in Marriage*, 102 COLUM. L. REV. 1089, 1114–15 (2002) (internal quotations omitted); Brief of Amici Curiae Clergy of New Jersey at 30, Lewis v. Harris, 908 A.2d 196 (N.J. 2006) (No. 58,398) (legal requirements that sex occur only within the context of marriage and allowing marriages to be dissolved if either party fails to consummate the marriage are essential to save us from becoming a "race of bastards") (quoting with approval statements from Raymond v. Raymond, 79 A. 430, 431 (N.J. Ch. 1909)); *cf.* Brief of Amici Curiae Families Northwest at 15, Andersen v. King County, 138 P.3d 963 (Wash. 2006) (No. 75934-1) (identifying a primary benefit of marriage as ensuring that "socially-valued" children have both a mother and a father).

[162] *See, e.g.*, Brief of Amicus Curiae American Center for Law and Justice Northeast, Inc., *supra* note 131, at 3 ("The default position . . . is too many children born without fathers, too many men abandoning the mothers of their children, and too many women left alone to care for their offspring") (quoting JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 162 (2001)); Brief of Amici Curiae The Church of Jesus Christ of Latter-Day Saints et al., *supra* note 131, at 6 ("[C]hildren born to [married parents] will have legally enforceable ties to their biological parents and . . . mothers will have legally enforceable obligations from fathers."); Brief of Amicus Curiae Concerned Women of America at 7–8, Andersen v. King County, 138 P.3d 963, 982 (Wash. 2006) (No. 75934-1) ("[A]side from an act of heterosexual intercourse nine months prior to childbirth, there is no process for creating a relationship between a man and a woman as parents of a particular child. The institution of marriage fills this void by formally binding the husband-father to his wife and children, and imposing on him the responsibilities of fatherhood") (quoting Morrison v. Sadler, 821 N.E.2d 15, 25–26 (Ind. Ct. App. 2005) (quoting Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 995–96 (Mass. 2003) (Cordy, J., dissenting))). The traditional gender-based presumption that the "husband-father" bears responsibility for providing for his family is intertwined with the tradition that all children of a marriage and the wife bear the husband's last name. Although modern law has increased flexibility on this point, a sex-stereotyped preference that a married couple bears a husband's last name remains embedded in many state codes. In most states, men who choose to take their wives' last name must file a legal petition, publish notices, and incur other costs, while women may take their husbands' names very simply upon marrying. *See* Greg Risling, *Man Files Lawsuit to Take Wife's Name*, Associated Press, Jan.

Current amici in the marriage debates are not alone in embracing stereotypes about vulnerable women and the necessity for marriage. In California, at least, such logic was actually among the explicit rationales for limiting marriage to different-sex couples. As the legislative history of that state's different-sex requirement (which was passed in 1977 after the first court cases challenging the limitation of marriage to different-sex couples) explains, marriage's "special benefits were designed to meet situations where one spouse, typically the female, could not adequately provide for herself because she was engaged in raising children. In other words, the legal benefits granted married couples were actually designed to accommodate motherhood."[163] Again, however, modern sex discrimination jurisprudence makes clear that laws or policies premised on the gender-stereotyped assumption that women are responsible for domestic care and that men are not, or that men will, by nature of their gender, be irresponsible parents unless bound by marriage, violate equal protection norms.[164]

D. Gender Roles in Other Government Programs Encouraging or Protecting "Traditional" Marriage

Considering the debates over marriage for same-sex couples in the context of other government programs that promote traditional heterosexual marriage helps expose the underlying sex stereotypes at issue and the harms they cause to women and men. The belief that marriage can and should play a central role in addressing poverty—and concomitant stereotypes about gender roles within marriage—has had a prominent place in recent welfare law developments, including "marriage promotion" programs and "responsible fatherhood" initiatives, as well as abstinence-only education. It is beyond the scope of this Article to comprehensively review these rapidly growing programs.[165] Many, however, are supported by the same conserva-

12, 2007, *available at* http://www.boston.com/news/nation/articles/2007/01/12/man_files_lawsuit_to_take_wifes_name.

[163] Cal. Assemb. Comm. on Judiciary, Digest of Assemb. Bill 607 (1977-78 Reg. Sess.) Apr. 14, 1977, at 1–2.

[164] *See supra* text accompanying notes 101–113.

[165] Other commentators have discussed the sex stereotypes perpetuated by the government's promotion of "traditional" gender roles in these programs and, in some cases, drawn connections to the same-sex marriage debates. *See, e.g.*, Brenda Cossman, *Contesting Conservativisms, Family Feuds, and the Privatization of Dependency*, 13 AM. U. J. GENDER SOC. POL'Y & L. 415, 429–30, 445–46 (2005) (discussing how social conservatives seek to promote the traditional family with its "highly gendered roles" in marriage promotion and responsible fatherhood programs that "will allow fathers to assume their 'proper' position as breadwinner for the family"); Judith E. Koons, *Motherhood, Marriage, and Morality: The Pro-Marriage Discourse of American Welfare Policy*, 19 WIS. WOMEN'S L.J. 1 (2004) (discussing conservative conceptions of mothers' roles in marriage promotion and responsible fatherhood initiatives); Nancy Leong, *Examining the Conservative Family Planning Agenda*, 7 GEO. J. GENDER & L. 81, 101–12 (2006) (discussing gender-based stereotypes promoted by conservative family planning policies, including abstinence-only education); JUDITH LEVINE, HARMFUL TO MINORS (2002) (discussing gender-based stereotypes promoted by abstinence-only education).

tive organizations that oppose permitting same-sex couples to marry.[166] And, as the brief discussion below makes clear, the conservative conception of "marriage" put forward in many of these programs relies upon and perpetuates the same sex-based stereotypes that underlie the rationales offered to justify limiting marriage to different-sex couples.

Indeed, as noted above in the discussion of the opposition to the federal ERA,[167] conservative advocates often make explicit connections between opposition to marriage by individuals of the same sex and preservation of "traditional" gender-differentiated family roles. For example, as Reva Siegel has observed, many leading social conservatives, including the late Jerry Falwell (former leader of the Moral Majority), Paul Weyrich (founder of the Heritage Foundation), Phyllis Schlafly (founder of the Eagle Forum and a leader of opposition to the ERA), Gary Bauer (former leader of the Family Research Council), as well as other senior representatives of Concerned Women for America, the Heritage Foundation, Priests for Life, and Alliance for the Family, have endorsed *The Natural Family: A Manifesto*, authored by Allan C. Carlson and Paul T. Mero.[168] The Manifesto "affirm[s] the natural family to be the union of a man and a woman through marriage" and characterizes such union as the "ideal, optimal, true family system," dismissing "all other 'family forms' [as] incomplete or . . . fabrications of the state."[169]

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[166] Many of the groups that submitted amicus briefs opposing permission of same-sex marriage or that otherwise sought to limit marriage to different-sex couples also explicitly support marriage promotion, responsible fatherhood initiatives, and abstinence-only education. For example, the Family Research Council, which filed a brief in the Washington case, has several position papers in favor of abstinence education. *See* Family Research Counsel, Policy Areas: Abstinence Education, http://www.frc.org/file.cfm?f=KEY WORD&key=ABSTED&tg=FF (last visited Mar. 19, 2007). The Alliance for Marriage, which filed a brief in the New Jersey case, lists welfare reform as one of its primary focuses and "calls on Congress . . . to embrace marriage-friendly welfare reforms" because "[m]arriage is what makes fatherhood more than a biological event." Alliance for Marriage, Multicultural Alliance Calls on Congress to Embrace Marriage-Friendly Welfare Reforms that will Benefit Low-Income Families, http://www.allianceformarriage.org (follow "Information Center" hyperlink; then follow "Welfare Reform" hyperlink) (last visited Mar. 19, 2007). Even in the absence of such direct connections, understanding the stereotyped views of women and men's roles that are used to justify marriage promotion, responsible fatherhood initiatives, and abstinence-only education helps make clear the extent to which such stereotypes animate government funding in this area. This is not to say, of course, that sex stereotypes are the only justifications for such programs. Indeed, there are other policy justifications, some more legitimate, offered for these programs.

[167] *See supra* text accompanying notes 23–29.

[168] Allan C. Carlson & Paul T. Mero, *The Natural Family: A Manifesto*, *in* THE FAMILY IN AMERICA (2005), *available for download at* http://www.familymanifesto.net/fm/obtain.asp. For discussion of endorsers of the Manifesto and their affiliations, see Siegel, *The New Politics of Abortion*, *supra* note 34, at 1005–06 & nn.59–67 (citing The Natural Family: A Manifesto, Featured Endorsements, http://familymanifesto.net/fm/endorsements.asp). Our thanks to Reva Siegel for bringing the Manifesto to our attention.

[169] Carlson & Mero, *supra* note 168, at 4.

While proclaiming a "whole-hearted" belief in women's rights,[170] the Manifesto rejects modern sex discrimination law's requirement that men and women receive equal pay for equal work in favor of a "'family wage' ideal of 'equal pay for equal family responsibility'" (that is, that "heads" of households, typically men, may be paid a premium)[171] and defines women's rights as protecting rights that "recognize women's unique gifts of pregnancy, birthing, and breastfeeding."[172] The Manifesto asserts that "women and men are equal in dignity and innate human rights, but different in function" and advocates a "true home economy" that, through ending the "aggressive state promotion of androgyny," permits "men and women to live in harmony with their true natures."[173] It is clear that those "true natures" are framed as dependent on gender-differentiation: women are expected to be "home*makers*" and men are expected to be "home*builders*."[174] Furthermore, the Manifesto embraces several related policy objectives as stepping stones to a redefinition of the modern family:

> It is not enough to stop public recognition of "gay marriage," nor to oppose "safe sex education" in the public schools, nor to ban partial birth abortion, nor to create optional "covenant" marriages . . . unless the natural family is freed from the oppression of post-family ideologues, unless we build a broad culture of marriage and life.[175]

In other words, social conservative advocates explicitly frame their opposition to permitting same-sex couples to marry as part of a larger agenda to roll back modern sex discrimination law and encourage government promotion of sex-stereotyped gender roles.

The influence of the "traditional" family movement, represented by the Manifesto, has increased dramatically in recent decades, and the result has been a significant growth in government policies regarding marriage that adopt sex-stereotyped roles. For example, the 1996 federal welfare reform legislation, creating the Temporary Assistance to Needy Families ("TANF") program, strongly encourages marriage as a poverty reform measure for poor women, with three of the four purposes stated for the new program focusing on marriage.[176] Echoing the "vulnerable" women rationales used in the de-

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[170] *Id.* at 7.

[171] *Id.* at 5; *see also id.* at 3 (characterizing "family wage" as a historical system in which "the industrial sector could claim only one adult per family, the father, who in turn had the natural right to a living wage that would also sustain a mother and children at home in decency").

[172] *Id.* at 7.

[173] *Id.* at 6.

[174] *Id.* at 4 ("We envision young women growing into wives, home*makers*, and mothers; and we see young men growing into husbands, home*builders*, and fathers.") (emphasis added).

[175] *Id.* at 9.

[176] Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Reform Act), 42 U.S.C. § 601(a) (2000). The purposes of TANF are to:

bates over marriage for same-sex couples, marriage promotion programs implicitly—and sometimes explicitly—promote the idea that women must depend on a male breadwinner for their economic security rather than their own wage earning capacity. In some cases, the sex discrimination is readily apparent. For example, a marriage promotion program in Allentown, Pennsylvania was challenged as sex discriminatory because it provided funds for job training and placement for fathers, but not mothers, participating in the program.[177]

TANF reauthorization in 2005 committed $150 million per year for marriage promotion activities and for "responsible fatherhood" programs.[178] The authorized activities for the "responsible fatherhood" programs are explicitly discriminatory in that they permit funds to be awarded to programs to "foster economic stability by helping *fathers* improve their economic status" by providing activities such as job search assistance, job training, subsidized employment, education, and referrals.[179] Thus, rather than providing assistance to non-custodial parents (or to all parents), whatever their gender, the program specifically limits job training activities to fathers.[180]

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(1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives; (2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage; (3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and (4) encourage the formation and maintenance of two-parent families.

Id. TANF explicitly ended the entitlement nature of previous welfare programs. 42 U.S.C. § 601(b) (2000).

[177] Class Complaint of Sex Discrimination in Violation of Title IX, NOW Legal Defense Fund, No. 04-19110 (Dep't of Health & Human Servs. Feb. 4, 2004) (on file with author). Shortly after receiving the complaint, the Office of Civil Rights informed Legal Momentum that the program in question would provide job training to both mothers and fathers. *See* Community Services for Children Complaint, Legal Momentum Individual Case Description, http://legalmomentum.org/legalmomentum/inthecourts/2006/03/community_services_for_childre.php (last visited Apr. 4, 2007).

[178] Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7103(a), 120 Stat. 138 (2005).

[179] *Id.* (codified at 42 U.S.C.A. § 603(a)(2)(C)(ii)(III) (2007)) (emphasis added).

[180] On March 28, 2007, the National Organization for Women ("NOW") and Legal Momentum filed civil rights complaints challenging 34 of the 100 first "Responsible Fatherhood" programs funded under the initiative as sex discriminatory because they, according to their project summaries, provided job training services to men but not to women. Complaints available at http://legalmomentum.org/legalmomentum/programs/sexualityandfamilyrights/2007/03/legal_momentum_and_now_file_co.php. Although at the time of press the complaints were not yet resolved, one program at least immediately responded to the complaint by changing its policy to provide job-training services to women as well. *See* Christopher Lee, *NOW Demands Access to Program Geared to Fathers*, WASH. POST, Mar. 29, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/03/28/AR2007032802065.html (quoting representative of D.C. Department of Human Services as saying women were not eligible to participate in the D.C. Fatherhood Initiative program); Christopher Lee, *Mothers Are Eligible, Too, Official Says*, WASH. POST, Mar. 31, 2007, at BO3 (quoting director of program indicating that the fatherhood programs would serve mothers as well).

The 1996 welfare reform law, which included the stated goal of reducing the incidence of out-of-wedlock pregnancies,[181] also included a significant increase in federally-funded abstinence-only education programs. These programs teach that sexual relationships should only occur within the context of heterosexual marriage. Although federal funding for abstinence-only programs began in the early 1980s,[182] the 1996 welfare reform legislation created a large new funding stream,[183] and funding for abstinence-only programs has risen even more rapidly during George W. Bush's administrations.[184] In fiscal year 2006, $215 million dollars went to these programs, an increase of 15% from the previous year and more than twice as much as was appropriated in fiscal year 2001.[185]

The federal guidelines for these programs require that they teach abstinence from sexual activity as "the *only* certain way to avoid out-of-wedlock pregnancy, sexually transmitted diseases, and other associated health problems."[186] The primary federal funding source also explicitly prohibits discussion of abortion or contraception methods other than to emphasize their failure rates.[187] The scientific inaccuracies and distortions of such programs have been widely documented.[188]

What is most relevant in this context, however, is that the programs both condemn homosexuality and promote sex stereotypes. The federal guidelines require that programs teach that a "mutually faithful monoga-

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[181] 42 U.S.C. § 601(a)(3) (2000).

[182] Adolescent Family Life Act, *in* Omnibus Budget Reconciliation Act of 1981, 42 U.S.C. § 300z (2000).

[183] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 710 (2000) (often referred to as Section 510 of Title V of the Social Security Act).

[184] LEGAL MOMENTUM, OVERVIEW OF FEDERAL ABSTINENCE ONLY FUNDING 3 (2007), *available at* http://www.legalmomentum.org/legalmomentum/publications/Overviewof Abs.pdf. The Bush administration has authorized large grants under the Special Projects of Regional and National Significance—Community Based Abstinence Education ("CBAE"). *Id.* at 8–9.

[185] Legal Momentum, Sex, Lies & Stereotypes, Federal Funding for Abstinence-Only Programs, *available at* http://legalmomentum.org/legalmomentum/files/federalfunding cpcwebpage.pdf (last visited Apr. 4, 2007).

[186] 42 U.S.C.A. § 710(b)(2)(C) (2007) (emphasis added). This definition covers both programs funded directly under TANF and those funded under CBAE grants.

[187] *See, e.g.*, Dep't of Health & Human Servs., Administration for Children and Families, Funding Opportunity Description, *available at* http://www.acf.hhs.gov/grants/open/HHS-2006-ACF-ACYF-AE-0099.html (last visited Apr. 8, 2007) [hereinafter CBAE Funding Guidelines].

[188] *See, e.g.*, U.S. H.R. COMM. ON GOV'T REFORM, MINORITY STAFF SPECIAL INVESTIGATIONS DIV., THE CONTENT OF FEDERALLY FUNDED ABSTINENCE-ONLY EDUCATION PROGRAMS (prepared for Rep. Henry A. Waxman) (Dec. 2004) [hereinafter Waxman Report], *available at* http://oversight.house.gov/Documents/20041201102153-50247.pdf (documenting false information about the effectiveness of contraceptives and the risks of abortion, as well as other inaccuracies, in abstinence-only education materials); Hazel Glenn Beh & Milton Diamond, *The Failure of Abstinence-Only Education: Minors Have a Right to Honest Talk about Sex*, 15 COLUM. J. GENDER & L. 12 (2006) (charging that abstinence-only education fails to properly protect minors' health and ignores the needs of sexual minority youth).

mous relationship in the context of marriage is the expected standard of sexual activity" and that "sexual activity outside . . . of marriage is likely to have harmful psychological and physical effects."[189] The primary federal funding source also requires that curricula specifically define marriage as only between a man and a woman.[190] Thus, the programs explicitly condemn any sexual activity by lesbian and gay youth or adults who, of course, cannot enjoy such activity within the context of marriage anywhere in the United States but Massachusetts. Indeed, several of the curricula used in the programs explicitly stigmatize homosexuality. For example, one popular curriculum teaches that "[r]esearch shows the homosexual lifestyle is not a healthy alternative for males or females. . . . [t]his lifestyle should not be encouraged as healthy or as an equal alternative to marriage."[191]

Additionally, abstinence-only education is often grounded in essentialized differences between girls and boys, and by implication, women and men: girls and women want emotional companionship and boys and men want sex. As Judith Levine aptly demonstrates in documenting the rise of abstinence-only sex education in the United States, abstinence-only curricula often position "the peer doing the pressuring [as] male [and] the refuser-delayer [as] female."[192] Levine further explains, "girls are not supposed to feel desire and are charged with guarding the sexual gates."[193] In effect, abstinence-only education locates girls as objects of desire and boys as sexual subjects.[194]

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[189] 42 U.S.C.A. § 710(b)(D)–(E) (2007).

[190] *See* CBAE Funding Guidelines, *supra* note 187 (specifying that "[t]hroughout the entire curriculum, the term 'marriage' must be defined as only a legal union between one man and one woman as a husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife").

[191] Letter from Rep. Henry Waxman, H.R. Comm. on Gov't Reform, to David M. Walker, Comptroller General, U.S. Gov't Accountability Office (Oct. 6, 2005) (quoting NAT'L ABSTINENCE CLEARINGHOUSE, ABSTINENCE 101 88–90 (2005)), *available at* http://reform.democrats.house.gov/Documents/20051006114033-87692.pdf. For an important critique of the "homosexual lifestyle" trope, see David B. Cruz, *The New "Marital Property": Civil Marriage and the Right to Exclude?*, 30 CAP. U. L. REV. 279, 297–301 (2001).

[192] LEVINE, *supra* note 165, at 129.

[193] *Id.* at 136.

[194] Interestingly, abstinence-only education may result in more unplanned pregnancies due to the fact that young people are not getting information on contraceptives. *See id.* at 112 ("[B]ecause many abstinence programs teach kids that refraining from intercourse is the only surefire way to prevent pregnancy and vastly exaggerate the failures of contraception and condoms, students get the impression that birth control and STD prevention methods don't work. So they shrug off using them or don't know how to use them. Contraception education, on the other hand, works: teens who learn about birth control and condoms are 70 to 80 percent more likely to protect themselves if they have intercourse than kids who are not given such lessons."). It is ironic indeed that these types of unplanned pregnancies become the justification for the "responsible procreation" rationale for why heterosexual marriage benefits are essential to bind the otherwise unwed mother to the potentially absent father. *See supra* text accompanying notes 149–156.

To bolster the claim that girls and boys are essentially and necessarily "different" and that they play different roles within relationships, the programs consciously perpetuate outdated (and in other contexts acknowledged as discriminatory) stereotypes in support of the notion that marriage to a man is necessary to provide support and protection for otherwise vulnerable women. For example, one popular curriculum lists "Financial Support" as one of the "5 Major Needs of Women" and "Domestic Support" as one of the "5 Major Needs of Men."[195] Another teaches, "The father gives the bride to the groom because he is the one man who has had the responsibility of protecting her throughout her life. He is now giving his daughter to the only other man who will take over this protective role."[196] In fact, proponents of abstinence-only curricula often shamelessly (indeed, proudly) promote a family structure in which the father plays an unquestioned role as "head" of the family.[197] Thus, even as the law has formally rejected assumptions that men are in charge of the family, that women need to be protected, or that a daughter upon marriage passes from control of one man, her father, to another, her husband, government-funded abstinence-only curricula consciously perpetuate such rigid gender norms.

Indeed, the array of current governmental efforts discussed above—including restricting marriage to different-sex couples, teaching children that sex must be exclusive to marriage, and promoting marriage to low-income women—relies on larger ideas about what it means to be an adult of one's gender. Children and adults alike are being taught that marrying a woman is an essential, natural part of being an adult man, and marrying a man is an essential, natural part of being an adult woman. This is a sex-stereotypical expectation in its most basic, essentialized form.

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[195] Waxman Report, *supra* note 188, at 17 (quoting JONEEN KRAUTH, WAIT TRAINING: LEARN HOW TO HAVE THE BEST SEX . . . BY WAITING TILL MARRIAGE! 199). Another, seeking to demonstrate to students that boys and girls are "different," suggests that the teacher ask students to "give examples of responsibilities a mother and father may have in order to help a family run smoothly" and then ask students to identify "which parent is more likely to cut grass, wash clothes, decorate the home, etc." KRIS FRAINIE, WHY KNOW ABSTINENCE EDUCATION PROGRAMS: TEACHER'S MANUAL 4 (Marcia Swearington & Pam Sulser eds., AAA Women's Services 2002). Indeed, these are the exact types of overbroad generalizations that sex-based equal protection law condemns. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 533 (1996) (explaining that a sex-based classification "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females").

[196] FRAINIE, *supra* note 195, at 60.

[197] In one of the clearest examples, the movement celebrates the growing popularity of "purity balls," in which girls solemnize their commitment to abstinence by accepting a virginity ring from their fathers, which they are to wear until they are married. Jennifer Baumgardner, *Would You Pledge Your Virginity to Your Father?*, GLAMOUR, Feb. 2007, *available at* http://www.glamour.com/news/articles/2007/01/purityballs07feb. Fathers, in turn, take a pledge that "as the high priest in [their] home[s]" they will "cover [their] daughter[s] as [their] authority and protection in the area of purity." Lynn Harris, *Daddy's Little Virgin*, SALON.COM, May 3, 2006, http://www.salon.com/mwt/broadsheet/2006/05/03/purity_balls/index.html.

Conclusion

Same-sex couples seeking the right to marry have long contended that specifying that marriage must be between a man and a woman is a form of sex discrimination. Although the facial discrimination implicit in the sex-based classifications in state marriage laws is clear, courts have rejected sex discrimination claims on the grounds that restrictive marriage statutes apply "equally" to men and to women. This Article has highlighted ways in which litigants may advance a strengthened sex discrimination argument by articulating the explicit connection between restrictive marriage statutes' facial discrimination and the sex stereotyping that underlies the rationales offered to justify those sex classifications. Naturally, only time and litigation will tell whether courts are more likely to embrace an argument based on an integrated theory of facial and sex stereotype discrimination than they were to accept the decoupled arguments. The clear sex stereotypes at play in the recent decisions, however, demonstrate the integrated argument's saliency and significance. Sanctioning sex-based classifications on the grounds that men and women, simply by virtue of their gender, necessarily play different roles in the lives of their children and in their relationships with each other causes concrete harm to women and to men throughout our society. It should properly be rejected as sex discrimination.