

## WHAT FEMINISTS HAVE TO LOSE IN SAME-SEX MARRIAGE LITIGATION

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*This Article highlights both the rewards in accepting and the risks in rejecting a claim of sex discrimination as one constitutional basis for invalidating restrictions on marriage for same-sex couples. It argues that recognition of same-sex marriage and elimination of enforced sex roles are as inextricably intertwined as the duck is with the rabbit in the famous optical illusion. As the Article demonstrates, this has long been clear to opponents, from the pope to David Blankenhorn, but needs to become as clear to proponents and to judges deciding same-sex marriage cases if we are to preserve and extend the liberty and equality of all regardless of sex or orientation.*

*The Article begins by suggesting some advantages of thin over thick definitions of both sex and marriage in law. Through a review, first of landmark U.S. Supreme Court sex discrimination cases concerning the law of marriage and then of state constitutional same-sex marriage litigation from the 1970s to the present, it goes on to demonstrate, on the bright side, that opening marriage to same-sex couples would eliminate the last vestige of sex stereotyping from the law of marriage and complete the law's evolution away from legally enforced sex-role differentiated inegalitarian marriage, with a resulting benefit to persons of all orientations. On the dark side, however, it also demonstrates that to insist, as some state judges have done, that denial of marriage licenses to same-sex couples does not discriminate on the basis of sex because neither the class of women nor the class of men is singled out for disadvantageous treatment is a repudiation, not only of the entire body of U.S. Supreme Court sex discrimination law of the last forty years, but of more general fundamental principles of U.S. equal protection law established for a century. Even*

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more ominously, some state judges have justified the exclusion of same-sex couples from marriage by relying on exactly the sort of “fixed notions concerning the roles and abilities of males and females” settled understandings of federal constitutional sex equality mandate they repudiate. Not only gays and lesbians, but heterosexual women from a feminist perspective are the losers when marriage is (p)reserved for heterosexual couples because of and not in spite of its traditions, traditions that include sex-role differentiation and female subordination.

The Article ends with an examination of the many opportunities Ted Olson and David Boies missed to highlight the sex discrimination argument in the trial of *Perry v. Schwarzenegger* and with some speculation as to why the two have so far failed to make the strong case they could have in support of the proposition that denial of marriage to same-sex couples is unconstitutional discrimination on the basis of sex.

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## INTRODUCTION

For several years now, at a time when so many different religious fundamentalisms have come to the fore to demand legal recognition, I have sought to vindicate what I call feminist fundamentalism, defined as an uncompromising commitment to the equality of the sexes as intense and at least as worthy of respect as, for example, a religiously or culturally based commitment to female subordination or fixed sex roles.<sup>1</sup> As I have argued, both individuals and nation-states can have feminist fundamentalist commitments that, like

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1. See, e.g., Mary Anne Case, *Feminist Fundamentalism and Constitutional Citizenship*, in DIMENSIONS OF WOMEN'S EQUAL CITIZENSHIP 107 (Joanna Grossman & Linda McClain eds., 2009) [hereinafter Case, *Fundamentalism and Citizenship*]; Mary Anne Case, *Feminist Fundamentalism on the Frontier Between Government and Family Responsibility for Children*, 2009 UTAH L. REV. 381; Mary Anne Case, *Perfectionism and Fundamentalism in the Application of the German Abortion Laws*, in CONSTITUTING EQUALITY: GENDER EQUALITY AND COMPARATIVE CONSTITUTIONAL LAW 93 (Susan Williams ed., 2009).

the religious commitments to which they can fruitfully be analogized, may differ somewhat in content as well as in character. While all feminists repudiate female subordination, for example, some may seek equality in separate spheres, while others insist instead that “fixed notions concerning the roles and abilities of males and females”<sup>2</sup> are anathema.<sup>3</sup> Although in the late-twentieth century feminist fundamentalist commitments of the latter kind were central to the constitutionalization of the law of marriage in the United States and elsewhere, more recent disputes at the intersection of constitutional and family law in Western constitutional democracies have foregrounded other concerns, including sexual orientation nondiscrimination and religious liberty.

In this Article, I propose to analyze what a feminist fundamentalist perspective might bring to one of these ongoing disputes, the question of whether same-sex couples have a constitutional right to marry. Taking the bulk of my examples from state constitutional cases in the United States, I shall argue that to reject a constitutional prohibition on sex discrimination as one basis for invalidating restrictions on same-sex marriage has broader adverse consequences for the sexual liberty and equality of all individuals, particularly but not exclusively for heterosexual women from a feminist perspective.

As I shall explain, in part because an explicitly feminist perspective has been underrepresented and undervalued in the same-sex marriage debates,<sup>4</sup> heterosexual feminist couples, including but not limited to those who resist marriage from a feminist perspective, are among the losers in recent U.S. state constitutional decisions concerning same-sex couples. They lose whether they live in a state like New York, whose high court has now said that marriage can be reserved for them in order to inculcate traditional sex roles;<sup>5</sup> or a state like California, whose pre-Proposition 8<sup>6</sup> state supreme court decision opening

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2. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982).

3. The repudiation of such stereotyped notions as a basis for law has become the orthodox view of constitutional sex equality guarantees as articulated by the U.S. Supreme Court under the U.S. Constitution since the 1970s. See Mary Anne Case, “*The Very Stereotype the Law Condemns*”: *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1448–49 (2000).

4. Susan Frelich Appleton’s *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL’Y REV. 97 (2005), focuses on the absence of what she calls “gender talk” in the public debates on same-sex marriage. My focus will instead be on the effect of its underrepresentation in the case law. See also Deborah A. Widiss et al., *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461, 501 (2007) (analyzing the use of sex discrimination arguments in recent same-sex marriage cases in an effort to explain and correct for their lack of success).

5. See discussion *infra* Part V of *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) (“Intuition 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.”).

6. Proposition 8 is the ballot designation for the state constitutional amendment, passed by referendum of California voters in November 2008, adding to the California Constitution the provision “Only marriage between a man and a woman is valid or recognized in California.” *Strauss v. Horton*,

marriage to all went out of its way to reject the claim that sex discrimination was at issue in the state's prior exclusion of same-sex couples;<sup>7</sup> even, perhaps especially, if they live in states that have vindicated the claims of gay and lesbian couples for recognition of their relationships under another name, but have allowed marriage to be (p)reserved—or at least the name of “marriage” to be (p)reserved—for heterosexual couples “‘because of,’ not merely ‘in spite of’”<sup>8</sup> its traditions.<sup>9</sup> The traditions of marriage, including its legal traditions, are anything but free of “fixed notions concerning the roles and abilities of males and females,” also anything but free of female subordination.

This is not to say that civil marriage today need be a prisoner of its restrictive and subordinating traditions, only that by explicitly continuing, because of its traditions, to limit marriage to male-female couples, the law so imprisons it and the couples who enter it. To grant civil marriage licenses to couples regardless of their sex would be to eliminate the last vestige of sex stereotyping from the law of marriage in the United States. It would complete the evolution away from sex-role differentiated, inegalitarian marriage law that began with nineteenth-century efforts to ameliorate the effects of coverture and continued in legislative reform and constitutional adjudication through the last third of the twentieth century. As feminist theorists have insisted for decades,<sup>10</sup> this

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207 P.3d 48, 59–50 (Cal. 2009) (upholding Proposition 8 as a permissible constitutional amendment). The passage of Proposition 8 overturned that portion of the California Supreme Court's earlier ruling opening marriage in California to same-sex couples. See *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

7. *Marriage Cases*, 183 P.3d at 439–40. Even if it had wanted to make clear that heightened scrutiny for sexual orientation, rather than sex discrimination or substantive due process, was the basis for its decision in the *Marriage Cases*, the California Supreme Court majority could have done as the Iowa or the Connecticut Supreme Court did and simply declined to reach the sex discrimination claim instead of gratuitously rejecting it. See *infra* Part V.

8. I take this language, of course, from *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979) (requiring discriminatory intent as well as disparate impact for claims of violation of equal protection on grounds of sex).

9. See *infra* Part V. For further discussion, see Mary Anne Case, *What Stake Do Heterosexual Women Have in the Same-Sex Marriage/Domestic Partnership/Civil Union Debates?* (unpublished manuscript, on file with the author).

10. See, e.g., Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 218 (“Gay people and feminists violate conservative ideology of family in many ways . . . . [W]hen homosexual people build relations of caring and commitment, they deny the traditional belief and prescription that stable relations require the hierarchy and reciprocity of male/female polarity.”); SUSAN MOLLER OKIN, *JUSTICE, GENDER AND THE FAMILY* 140 (1989) (“It seems evident . . . from the disagreements between traditionalists and feminists . . . that there exists no clear current consensus in this society about what marriage is or should be. . . . By contrast, the lack of expectations about gender, and the lack of history of the institution of marriage, allow gay and lesbian couples more freedom in ordering their lives together and more chance to do so in an egalitarian manner.”); Nan D. Hunter, *Marriage, Law and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 17 (1991) (“Same-sex marriage could create the model in law for an egalitarian kind of interpersonal relation, outside the gendered terms of power, for many marriages. At the least, it would radically strengthen and dramatically illuminate the claim that marriage partners are presumptively equal.”).

would have benefits, not only for gay and lesbian couples, but for all who value liberty and equality on the basis of sex.

I. THE LIBERATORY ADVANTAGES OF THIN DEFINITIONS  
OF “MARRIAGE” AND OF “SEX” IN THE LAW

It has long been my claim that the greatest liberatory potential, from both a feminist and a queer perspective,<sup>11</sup> lies in an extremely thin, rather than in any thicker, definition of both “sex” and “marriage” in the law.

With respect to marriage, I make the claim as a matter of contingent historical fact, rather than as a purely theoretical matter. As I have argued since 1993, “[m]arried couples in this society are not required to do the rather conservative things” courts and regulators typically require of unmarried couples, whether of the same or of opposite sexes, as a condition for relationship recognition:

A marriage certificate now allows heterosexual couples to have an open marriage, to live in different cities or in different apartments in the same city, to structure their finances as they please, without having their commitment or the legal benefits that follow from it challenged.<sup>12</sup>

By contrast:

The requirements of actual cohabitation in a shared residence and commingled finances are quite typical of most domestic partner registries. Ascriptive or functional recognition schemes may also weigh additional requirements, such as that a couple be monogamous or be known as a couple to family and neighbors. Which is a greater restriction on my ability freely to structure my life with my partner—the requirement that I must marry that partner and on rare occasions produce the marriage license to third parties, or the requirement that we must reside together, be sexually faithful to one another, commingle our finances, hold ourselves out to the world as a couple, and provide to third parties the details of how we live our lives, as domestic partnership ordinances and judicially enforced “functional” family definitions often require? But for the lingering cloud of repressive history hanging over marriage, it would be clear that marriage today provides far more license, and has the potential to be far more flexible, liberatory, and egalitarian than most available alternatives.<sup>13</sup>

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11. Or, to put it in terms that are outdated, but still attractive to me, from the perspective of both women’s liberation and gay liberation.

12. Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1665–66 (1993).

13. Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1774 (2005).

Not only does the law tend to impose more restrictive behaviors, such as commingled finances and shared residence, on registered domestic partners than on married spouses, it even on occasion requires of such domestic partners specific affective intentions not required as a condition of marriage. Thus, for example, California law defines domestic partners as “two adults who have chosen to share one another’s lives in an intimate and committed relationship of mutual caring.”<sup>14</sup> By contrast, marriage is defined simply as “a personal relation arising out of a civil contract between a man and a woman,”<sup>15</sup> and those eligible to marry are described simply as “an unmarried male . . . and an unmarried female of the age of 18 years or older, and not otherwise disqualified.”<sup>16</sup>

It is not my intention to sneer at “intimate and committed relationship[s] of mutual caring.” I simply wish to point out that anyone concerned about state interference with and control over the details of adult consensual relationships, whether from a feminist, libertarian, or queer perspective, may find that the existing laws governing marriage are not the most worrisome or restrictive. In its evolution to a point of extreme thinness, the law of marriage can fruitfully be analogized to the law of business corporations, as I have also long argued.<sup>17</sup> Like corporate status, civil marriage today serves as an off-the-rack rule. Its principal legal function, at least while the relationship is ongoing, may not be to structure relations between the members of the marital couple, but instead to structure their relations with third parties; to license not just a select group of worthy activities or individuals, but almost anyone to do almost anything otherwise legally permissible.<sup>18</sup>

Recently, gay rights advocates in same-sex marriage cases have tended to emphasize a much thicker view of marriage, for example by denigrating registered domestic partnership as feeling like no more than a business-like filling out of forms and sorting out of legalities, which lacks the uplifting and validating symbolic meaning and social approval of marriage.<sup>19</sup> It is, however, no accident, in my view, that the one judge in the Vermont same-sex marriage case who thought that the only appropriate remedy was immediate access to civil marriage for same-sex couples, rather than legislative elaboration of an alternative legal status for them, was the judge who took the thinnest possible view of legal marriage. According to Justice Denise Johnson:

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14. CAL. FAM. CODE § 297(a) (Deering 1994).

15. CAL. FAM. CODE § 300 (Deering 1994).

16. CAL. FAM. CODE § 301 (Deering 1994).

17. See, e.g., Case, *supra* note 13, at 1777–84.

18. *Id.* at 1781.

19. See, e.g., Plaintiffs’ and Plaintiff-Intervenor’s Annotated Amended Proposed Findings of Fact and Conclusions of Law at 63–66, *Perry v. Schwarzenegger*, No. 09-CV-2292 VRW (N.D. Cal. argued Jan. 11, 2010).

This case concerns the secular licensing of marriage. The State's interest in licensing marriages is regulatory in nature . . . . The regulatory purpose of the licensing scheme is to create public records for the orderly allocation of benefits, imposition of obligations, and distribution of property through inheritance. Thus, a marriage license merely acts as a trigger for state-conferred benefits. In granting a marriage license, the State is not espousing certain morals, lifestyles, or relationships, but only identifying those persons entitled to the benefits of the marital status.<sup>20</sup>

As I will discuss below, Justice Johnson was also the only judge in the Vermont case to hold that sex discrimination was at stake in the denial of a marriage license to two persons of the same sex. Thus, a thin view of legal marriage and a thin view of legal sex came together in an opinion that most fully vindicated the rights of persons of all sexes and orientations.

There are many reasons, therefore, why, in my view, Justice Johnson's is by far the best to date of the many judicial opinions written on the constitutional question of same-sex marriage. For about as long as I have been touting the descriptive accuracy and normative advantages of a thin view of marriage in the law, I have been doing the same for a thin view of the legal meaning of sex.<sup>21</sup> This thin view reduces legal sex—in the sense of legal designation as male or female—to little more than the basis for a claim of discrimination, allowing a plaintiff, whether in a statutory or a constitutional case, to prevail by showing that the plaintiff's legal sex is a but-for cause of the treatment of which plaintiff complains. As will be discussed further below, as articulated by the U.S. Supreme Court, this thin view of legal sex is at the core of the constitutional prohibition on embodying in law any "fixed notions concerning the roles and abilities of males and females."<sup>22</sup> It is also at the core of the Court's interpretation of statutes such as Title VII "to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."<sup>23</sup>

Just as a thin view of civil marriage makes it a legal shell that couples can fill with their own normative meaning and internal structure, a thin view of legal sex is normatively appealing in no small part because of its liberatory

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20. *Baker v. Vermont*, 744 A.2d 864, 898–99 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part) (internal citations omitted).

21. See generally Mary Anne Case, *Disaggregating Gender From Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 *YALE L.J.* 1 (1995) [hereinafter Case, *Disaggregating*]; Mary Anne Case, *Two Cheers for Cheerleading: The Noisy Integration of VMI and the Quiet Success of Virginia Women in Leadership*, 1999 *U. CHI. LEGAL F.* 347; Mary Anne Case, *Unpacking Package Deals: Separate Spheres Are Not the Answer*, 75 *DENV. U. L. REV.* 1305 (1998) [hereinafter Case, *Unpacking*]; Case, *supra* note 3, at 1476–77.

22. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982).

23. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

potential for gender expression:<sup>24</sup> It opens the possibility of legal protection to gender benders of all stripes, regardless of their sex; regardless of whether they can or do make an identitarian claim as transgendered, transsexual, or even gay; and regardless of how mild or how extreme, how occasional or how systematic, their transgression of conventional gender norms may be.

## II. WHAT “GENDER” MEANS TO THE U.S. SUPREME COURT AND TO THE VATICAN (OR TO RUTH BADER GINSBURG AND TO JOSEPH RATZINGER)

When I speak of gender expression herein, I am, of course, using the term “gender” to refer to qualities coded masculine or feminine, qualities whose treatment is sometimes inflected by, and sometimes irrespective of, whether the person exhibiting those qualities is male or female.<sup>25</sup> Confusingly, however, both statutes and case law in the United States have for the last several decades tended to use the words “sex” and “gender” interchangeably, creating what I have argued is an unfortunate terminological gap. Given that the subject of the panel for which this Article was written is “The Many Meanings of Gender,” it is particularly appropriate for me to highlight here yet again my agreement with Justice Scalia that it is to be regretted that the terms “gender” and “sex” have become interchangeable in the law because in other domains than the law “the word ‘gender’ has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine is to male.”<sup>26</sup>

I do not agree with Scalia on much to do with the law of sex and gender, but am usually in agreement on such matters with Ruth Bader Ginsburg. It thus presents somewhat of a paradox that Ginsburg is the person most responsible for the interchangeability of the terms “sex” and “gender” in American law. While a litigator for the ACLU Women’s Rights Project, Ginsburg was enormously influential in the development of the U.S. constitutional law of equal protection on grounds of sex.<sup>27</sup> But she worried that “for impressionable minds

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24. Of course, for both sex and marriage, the law is not the only source of constraint—societal expectations and norms, whether or not backed by the force of law, can restrict and impose conformity on both individuals and married couples.

25. For a detailed explanation, see Case, *Disaggregating*, *supra* note 21.

26. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting). For further discussion see Case, *Disaggregating*, *supra* note 21, at 11–18.

27. See Case, *supra* note 3, at 1450 (arguing that “[a]ll of the moving parts of the present law are fully articulated in her brief for the appellant in *Reed v. Reed*, although it took until the second

the word ‘sex’ may conjure up improper images” of what occurs in porn theaters,<sup>28</sup> so, following the suggestion of her secretary, she began to substitute the word “gender,”<sup>29</sup> which “by contrast, has a neutral, clinical tone that may ward off distracting associations.”<sup>30</sup>

Although her terminology differs from mine, the normative view Ginsburg has long advocated is one with which I am in full accord: If for Ginsburg “gender” means “sex” in the law, it also means that on the basis of which the law should not impose restrictions based on stereotype, should not “pigeonhole in lieu of functional description.”<sup>31</sup> As the author of the majority opinion in *United States v. Virginia*,<sup>32</sup> Ginsburg was able to affirm as a justice what she had first endorsed as an advocate and scholar decades earlier:

that men and women should be given the same rights, obligations and work assignments in society . . . [and] that nobody should be forced into a predetermined role on account of sex, but each person should be given . . . possibilities to develop his or her personal talents.<sup>33</sup>

As the next Part of this Article will discuss, Ginsburg’s opposition to fixed sex roles, a view she succeeded as an advocate in enshrining in constitutional law, fully extended to the family and the law of marriage. First, however, I want to bring into the discussion another perspective on the many meanings of gender, one that has much in common with that of Ginsburg and the Supreme Court as a descriptive matter, but gives it a diametrically opposite normative valence.

Whereas, thanks in no small part to Ginsburg, the Supreme Court now sees legally enforced fixed sex roles, in marriage and elsewhere, as a threat to the full dignity and personhood of both men and women, the Vatican, thanks in no small part to Joseph Ratzinger (aka Pope Benedict XVI), now sees any move away from legal enforcement of fixed sex roles, especially when it comes to marriage and the family, as a threat to the natural order comparable to the destruction of the rainforest and entailing the “self-destruction of man himself.”<sup>34</sup>

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modern constitutional sex discrimination case, *Frontiero v. Richardson*, which Ginsburg argued for the ACLU as amicus curiae, for members of the Court explicitly to adopt them”).

28. Ruth Bader Ginsburg, *Gender in the Supreme Court: The 1973 and 1974 Terms*, 1975 SUP. CT. REV. 1, 1 n.1.

29. Ernie Freda, *Washington in Brief: A Lesson in Semantics*, ATLANTA J. & CONST., Dec. 29, 1993, at A8.

30. Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 1 (1975).

31. *Id.* at 13.

32. 518 U.S. 515 (1996). See *infra* Part V for further discussion.

33. Ginsburg, *supra* note 30, at 1 (quoting address by Swedish Prime Minister Olof Palme, Women’s National Democratic Club, Washington, D.C., June 8, 1970).

34. See Pope Benedict XVI, Address of His Holiness Benedict XVI to the Members of the Roman Curia for the Traditional Exchange of Christmas Greetings (Dec. 22, 2008), available at [http://www.vatican.va/holy\\_father/benedict\\_xvi/speeches/2008/december/documents/hf\\_ben-xvi\\_](http://www.vatican.va/holy_father/benedict_xvi/speeches/2008/december/documents/hf_ben-xvi_)

Like Ginsburg as a Supreme Court justice, Ratzinger as pope is now able to put more authority behind a normative take on gender for which he had long been arguing. Before becoming pope, Joseph Cardinal Ratzinger was the head of the Roman Catholic Church's Congregation for the Doctrine of the Faith, previously known as the Holy Inquisition. In this capacity, he issued a 2004 Letter to the Bishops of the Catholic Church on the Collaboration of Men and Women in the Church and in the World<sup>35</sup> in which he warned:

Recent years have seen new approaches to women's issues. A first tendency is to emphasize strongly conditions of subordination . . . . A second tendency emerges in the wake of the first. In order to avoid the domination of one sex or the other, their differences tend to be denied, viewed as mere effects of historical and cultural conditioning. In this perspective, physical difference, termed *sex*, is minimized, while the purely cultural element, termed *gender*, is emphasized to the maximum and held to be primary. The obscuring of the difference or duality of the sexes has enormous consequences on a variety of levels. This theory of the human person, intended to promote prospects for equality of women through liberation from biological determinism, has in reality inspired ideologies which, for example, call into question the family, in its natural two-parent structure of mother and father, and make homosexuality and heterosexuality virtually equivalent, in a new model of polymorphous sexuality.

While the immediate roots of this second tendency are found in the context of reflection on women's roles, its deeper motivation must be sought in the human attempt to be freed from one's biological conditioning. According to this perspective, human nature in itself does not possess characteristics in an absolute manner: all persons can and ought to constitute themselves as they like, since they are free from every predetermination linked to their essential constitution.

I introduce this official Vatican view on the many meanings of gender at this point in my discussion of the relationship between the development of the law of sex discrimination and that of same-sex marriage because I think it

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spe\_20081222\_curia-romana\_en.html ("If the Church speaks of the nature of the human being as man and woman, and demands that this order of creation be respected, this is not some antiquated metaphysics. What is involved here is . . . a readiness to listen to the 'language' of creation. To disregard this would be the self-destruction of man himself . . . . What is often expressed and understood by the term 'gender' ultimately ends up being man's attempt at self-emancipation from creation and the Creator . . . . Rain forests deserve indeed to be protected, but no less so does man, as a creature having an innate 'message' which does not contradict our freedom, but is instead its very premise.").

35. Letter From Cardinal Joseph Ratzinger, Prefect, Congregation for the Doctrine of the Faith, to the Bishops of the Catholic Church on the Collaboration of Men and Women in the Church and in the World (May 31, 2004), available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20040731\\_collaboration\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20040731_collaboration_en.html).

is extremely important for what I see as my side of debates on the meaning of gender in law—the side of the feminists, the gay rights advocates, the queer theorists—to be clear about the relationship our most vehement and thoroughgoing opponents so clearly see between a commitment to traditional sex roles rooted in the subordination of women and opposition to equal rites and rights for gay and lesbian couples.<sup>36</sup>

### III. HOW SEX EQUALITY JURISPRUDENCE TRANSFORMED MARRIAGE UNDER U.S. LAW

Many of Ruth Bader Ginsburg's pathbreaking cases for the ACLU Women's Rights Project were brought on behalf of married couples, which enabled her to demonstrate that the law's reliance on sex-role stereotyping and presumptions of female subordination in marriage hurt both men and women.<sup>37</sup> Consider, for example, the case captioned *Frontiero et Vir v. Richardson*,<sup>38</sup> in which justices of the Supreme Court first articulated the now orthodox view that laws based on sex stereotypes are constitutionally impermissible. The case's very caption is the first indicator that sex stereotypes will be shattered: "*Frontiero et Vir*" ("Frontiero and [her] Man") is a twist on the more conventional addition of "*et ux.*" ("and wife") after a plaintiff's name. The caption indicates that instead of the stereotypical wage-earning husband with a dependent wife, this case was brought by a wage-earning wife in the unsterotypical job of lieutenant in the U.S. Air Force, seeking benefits including housing and medical insurance for her husband.<sup>39</sup>

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36. For further discussion, see *The Immanent Frame: Secularism, Religion and the Public Sphere*, Homosexuality and the Anglican Debate—Mary Anne Case, Aug. 4, 2009, <http://blogs.ssrc.org/tif/2009/08/04/homosexuality-and-the-anglican-debate>. As further evidence of this connection, consider that four years before Ratzinger, on behalf of the Congregation for the Doctrine of the Faith, condemned the pernicious influence he saw the concept of "gender" having on the collaboration of men and women in the church and in the world, Alfonso Cardinal Lopez Trujillo, on behalf of the Pontifical Council for the Family, blamed "the spread of a certain ideology of 'gender'" for the pernicious developments he saw in the laws governing marriage and de facto unions. Cardinal Alfonso Lopez Trujillo, President, Pontifical Council for the Family, Presentation on Family, Marriage, and "De Facto" Unions (July 26, 2000), available at [http://www.vatican.va/roman\\_curia/pontifical\\_councils/family/documents/rc\\_pc\\_family\\_doc\\_20001109\\_de-facto-unions\\_en.html](http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_20001109_de-facto-unions_en.html) ("Claiming a similar status for marriage and de facto unions (including homosexual unions) is usually justified today on the basis of categories and terms that come from the ideology of 'gender.'").

37. She may have been influenced by her own marriage to Martin Ginsburg, by all accounts a true partnership, in which they jointly decided on a career in law, broke with stereotypes in their division of household tasks (he did the cooking, for example), and cooperated on the early *Moritz* case, at the intersection of his specialty and hers—tax law and sex discrimination. See, e.g., FRED STREBEIGH, *EQUAL: WOMEN RESHAPE AMERICAN LAW* 12–13, 24–25 (2009).

38. 411 U.S. 677 (1973).

39. *Id.* at 680.

In *Frontiero*, the justices acknowledged the central historical role the law of marriage had played in the subordination of women. Taking their language almost verbatim from Ginsburg's briefs, they observed that

throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children.<sup>40</sup>

Indeed, in nineteenth century America, as in ancient Rome, slavery, like marriage, was one of the domestic relations;<sup>41</sup> and the law of marriage, like that of slavery, was premised not only on role-differentiation, but on hierarchy: Wives were subordinate to husbands as slaves were to masters. On the widely influential view of marriage set forth in *Blackstone's Commentaries*,<sup>42</sup> a marriage license could be seen to function, in ways loosely analogous to a modern dog license, as something like a certificate of ownership of the wife, entitling the husband to her property, her body and its products, including the labor she engaged in for wages and the labor that produced offspring; obliging him to provide for her care and feeding; giving him a cause of action against those who injured her or his interest in her; making him responsible for her actions; and giving him the right to control her. She did not have the same rights over and duties to him, although she was obliged to provide him domestic services and sexual access and to share his residence. Just as dog licenses require that the animal wear a collar and tag with its owner's name, so, as late as the 1970s, many U.S. states required by law that a wife take her husband's name; she also customarily always wore a wedding ring.<sup>43</sup> A husband did not ordinarily take his wife's name or indicate his marital status in his name or title in any way; nor, in much of U.S. society for long periods of history, did husbands tend to wear wedding rings.<sup>44</sup> This asymmetry of roles, duties, and privileges in the law of marriage, although on the decline since at least the passage of the first Married Women's Property

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40. *Id.* at 685; *cf., e.g.*, Brief of Appellant at 28, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4) ("Prior to the Civil War, the legal status of women in the United States was comparable to that of blacks under the slave codes . . . . Neither slaves nor married women had the legal capacity to hold property or to serve as guardians of their own children. Neither blacks nor women could hold office, serve on juries, or bring suit in their own names.").

41. See *Mary Anne Case, Pets or Meat*, 80 CHI.-KENT L. REV. 1129, 1133 (2005).

42. 1 WILLIAM BLACKSTONE, COMMENTARIES ch. 15 (Morris Wayne 2001) (1793) ("Of Husband and Wife").

43. *Case, supra* note 13, at 1768 (citing Joan S. Kohout, *The Right of Women to Use Their Maiden Names*, 38 ALB. L. REV. 105 (1973)).

44. *Id.*

Acts in the mid-nineteenth century, remained very much a part of the legal landscape at the time of *Frontiero*.<sup>45</sup>

It was also central to the early, now thoroughly discredited, U.S. constitutional law of sex discrimination, even when the issues in a case were on their face far removed from marriage. Thus, infamously, Justice Bradley, concurring in the denial of a right to practice law to women generally, focused on petitioner Myra Bradwell's status as a married woman:

The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most states. One of these is, that a married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him. This very incapacity was one circumstance which the Supreme Court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counselor.

It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.<sup>46</sup>

In *Frontiero*, husband and wife had a shared fate and a common interest, so as to make it difficult to disentangle whose rights were at issue. Similarly, in another Ginsburg case, to deny survivor's benefits to widower Wiesenfeld would have discriminated against both his deceased wife as wage earner and him as surviving

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45. See *id.* For an analysis of similarities in attitudes toward pets, slaves, and wives, see Case, *supra* note 41, at 1132.

46. *Bradwell v. State*, 83 U.S. 130, 141–42 (1873) (Bradley, J., concurring).

caregiver to their child.<sup>47</sup> The net effect of such cases was to dismantle, as a matter of constitutional law, legally (r)e(i)nforced sex role differentiation in marriage. Couples were still free to have a role-differentiated marriage, but no longer could the law require or even assume that breadwinners were male and homemakers female.

Shortly after deciding *Wiesenfeld*, the Court extended its prohibition of legal reinforcement of sex-role stereotypes to a case involving not spouses, but children being prepared for their adult roles. In the *Stanton* case, it held that, for the following reason, it would be unconstitutional for the state to require a divorced father to support his son until age twenty-one, but his daughter only until age eighteen:

No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas . . . . To distinguish between the two on educational grounds is to be self-serving: if the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed.<sup>48</sup>

While *Stanton* focused on preparing women as well as men for a role in the marketplace, *Hibbs*, written by Chief Justice Rehnquist as if he were channeling his colleague Justice Ginsburg, put the prophylactic power of Section Five of the Fourteenth Amendment behind the Family and Medical Leave Act, which facilitated a role for men as well as women in the care work of the home:

Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver . . . .<sup>49</sup>

Years earlier, Rehnquist had opposed the Equal Rights Amendment on the grounds that its supporters evinced "overtones of dislike and distaste for the traditional difference between men and women in the family unit, and in some cases very probably a complete rejection of the woman's traditionally different

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47. *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (holding unconstitutional the provision of social security survivor's benefits only to mothers and not to fathers).

48. *Stanton v. Stanton*, 421 U.S. 7, 14–15 (1975) (striking down differential ages of majority for boys and girls).

49. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (upholding Congress's power to apply the Family and Medical Leave Act to the states).

role in this regard.”<sup>50</sup> Other opponents of the ERA, such as Paul Freund, had expressed fear that it would lead perforce to an invalidation of “laws outlawing wedlock between members of the same sex.”<sup>51</sup> Although the ERA never did pass, in the end Rehnquist himself put the capstone on a constitutional jurisprudence that nevertheless amounted to a virtually “complete rejection” of laws reinforcing “the traditional difference between men and women in the family unit.” As of the date of *Hibbs*, bans on same-sex marriage were virtually all that was left in the law of “the traditional difference between men and women in the family unit.” Unfortunately, as the remainder of this Article will discuss, the fight to eliminate such bans has led to as much retrogression as progress in the fight to eliminate from the law in the United States “fixed notions concerning the roles and abilities of males and females.”

#### IV. SEX DISCRIMINATION CLAIMS AND SAME-SEX MARRIAGE IN THE 1970S

The first same-sex couple whose quest for a marriage license reached the U.S. Supreme Court, Jack Baker and Michael McConnell, did include in their case a claim of sex discrimination, together with a multiplicity of other federal claims. But Baker and McConnell’s legal challenge to the sex distinctions in the marriage laws began in 1970, before the U.S. Supreme Court had held any sex-respecting rule to be constitutionally problematic,<sup>52</sup> and their appeal was dismissed by the U.S. Supreme Court “for want of a substantial federal question” in 1972, before the now well-established doctrinal structure governing claims of denial of equal protection on grounds of sex was put in place. Rather than being able to strengthen their claim by invoking a line of other successful constitutional challenges to sex discrimination in the law of marriage, therefore, Baker and McConnell could only draw an analogy to *Loving v. Virginia*,<sup>53</sup> the then recently decided case striking down bans on interracial marriage. But the Minnesota Supreme Court held that, “in commonsense and in a constitutional sense, there is a clear distinction between a marital

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50. *Rehnquist: ERA Would Threaten Family Unit*, LEGAL TIMES, Sept. 15, 1986, at 4.

51. 118 CONG. REC. 9315 (1972) (Senator Sam Ervin quoting testimony of Paul Freund).

52. The first U.S. Supreme Court case invalidating any sex discrimination in the law was *Reed v. Reed*, 404 U.S. 71 (1971), which struck down categorical preference for males over females in the appointment of estate administrators.

53. 388 U.S. 1 (1967) (holding state bans on interracial marriage an unconstitutional denial of equal protection even when equally applied to blacks and whites).

restriction based merely upon race and one based upon the fundamental difference in sex.”<sup>54</sup>

According to the Minnesota Supreme Court:

The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis. . . . This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend. The due process clause of the Fourteenth Amendment is not a charter for restructuring it by judicial legislation.<sup>55</sup>

In their jurisdictional statement to the U.S. Supreme Court, Baker and McConnell note that “they were asked orally at the time of application which was to be the bride and which was to be the groom . . . [although] the forms for application for a marriage license did not inquire as to the sex of the applicants”<sup>56</sup> and although they “were not questioned as to which physical sex classification they belonged.”<sup>57</sup> The clerk did ask, however, “Where is the female in this marriage?”<sup>58</sup> and a reporter waiting outside the county clerk’s office insisted on knowing “[w]ho’s going to be the wife?” “We don’t play those kinds of roles,” came the reply.<sup>59</sup> The *Look* magazine spread on the couple, in an issue dedicated to *The American Family*, reinforced this answer, observing:

In many respects, the Baker-McConnell household is like that of any young marrieds except that there is no male-female role playing. Neither is a limp-wristed sissy. “I do the dishes,” says Baker, “because I don’t like to cook.” “And I do the cooking,” says McConnell, “because I cook better than Jack.”

. . . Baker, as befits a man with a business degree, keeps the financial records in a stenographer’s notebook, and keeps an eye out for bargains in the supermarkets.<sup>60</sup>

The repudiation of sex roles was reaffirmed in the couple’s wedding ceremony, when, dressed in identical white knit suits, each one said to the other, “[t]ouch me . . . I am your lover, brother, sister, and friend.”<sup>61</sup> At the time,

54. Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972) (holding that a state’s denial of a marriage license to a male couple did not violate the U.S. Constitution).

55. *Id.* at 186.

56. Jurisdictional Statement at 4, Baker v. Nelson, 409 U.S. 810 (1972) (No. 71-1027).

57. Alternative Writ of Mandamus, Hennepin County District Court, Jurisdictional Statement app. at 11a, Baker v. Nelson, 409 U.S. 810 (1972) (No. 71-1027).

58. KAY TOBIN & RANDY WICKER, *THE GAY CRUSADERS* 145 (Arno Press 1975) (1972).

59. *Id.*

60. Jack Star, *The Homosexual Couple*, *LOOK*, Jan. 26, 1971, at 69, 70.

61. TOBIN & WICKER, *supra* note 58, at 150. At the risk of stating the obvious, let me note how perfectly these identical outfits combined the bride’s traditional color with the groom’s traditional garb.

the Minnesota law governing the solemnization of marriages specified that “no particular form shall be required, except that the parties shall declare . . . that they take each other as husband and wife.”<sup>62</sup> It is important to remember that, in 1970, more than a form of words was legally at stake and that the reporter’s question could be far more than a facetious put-down or an inquiry into potential effeminacy. Which one would be the wife had serious legal consequences at a time when legally enforced sex-role differentiation in marriage was firmly entrenched in law and not yet seen as constitutionally problematic.<sup>63</sup>

The wife, after all, was the one to whose household services the husband was entitled, such that her loss, not necessarily his, gave rise to a claim for loss of consortium by the survivor; the process by which state courts and legislatures made consortium claims reciprocal was still underway in 1970.<sup>64</sup> The wife was the one presumed to be dependent, and who as a result could be eligible and make her husband eligible for benefits; not until the series of cases beginning with *Frontiero* in 1973 did the U.S. Supreme Court begin to dismantle on constitutional grounds the asymmetry in law between what a wife was entitled to on account of her husband and what a husband was entitled to on account of his wife.<sup>65</sup> The wife was the one the husband was obligated to support during marriage and who could be entitled to alimony on divorce; not until *Orr v. Orr* in 1979 did the U.S. Supreme Court insist that husbands be eligible for alimony equally with wives, holding that the state’s purpose of reinforcing a model of “allocation of family responsibilities under which the wife plays a dependent role . . . can no longer justify a statute that discriminates on the basis of gender.”<sup>66</sup> The wife was also the one whose share of jointly owned property could be disposed of by her husband as “head and master” of the marital community without her knowledge or consent; not until *Kirchberg v. Feenstra*<sup>67</sup> in 1981 did the U.S. Supreme Court hold that state statutes giving the husband such exclusive control violated the Equal Protection Clause.

In recommending Baker be denied a marriage license, the county attorney stressed that

both our statutory and case law in . . . Minnesota is replete with references to the distinction of husband and wife as being male and female with

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62. Jurisdictional Statement app. at 6a, *Baker v. Nelson*, 409 U.S. 810 (1972) (No. 71-1027) (quoting MINN. STAT. § 517.09 (1971), amended by MINN. STAT. § 517.09 (1979)).

63. Not all the legal consequences described below were part of Minnesota law in 1970, however.

64. Minnesota wives had been accorded claims for loss of consortium by 1969, but, as late as 1977, a Minnesota treatise noted that this remained one of the “legal remedies unavailable [to wives] in most States.” ELLEN DRESSELHUIS, *THE LEGAL STATUS OF HOMEMAKERS IN MINNESOTA* 6 (1977).

65. See *Frontiero v. Richardson*, 411 U.S. 677, 688–91 (1973).

66. 440 U.S. 268, 278–80 (1979).

67. 450 U.S. 455, 458–60 (1981).

different rights, duties and obligations accorded to each . . . . [I]f one were to permit the marriage of two male persons, it would result in a complete confusion as to the rights and duties of husband and wife, man and woman, in the numerous other sections of our law which govern the rights and duties of married persons . . . [and] result in an undermining and destruction of the entire legal concept of our family structure in all areas of law.<sup>68</sup>

As of 1970, these claims might well have had merit. In the interim, virtually all the laws that speak in a legally differentiated way in terms of husband and wife, except those governing entry into civil marriage, have been “undermin[ed] and destr[oyed]” by the U.S. Supreme Court’s decisions holding such differentiation an unconstitutional deprivation of equal protection on grounds of sex.<sup>69</sup> In ways not foreseen by the Minnesota Supreme Court as it decided *Baker*, the Fourteenth Amendment was indeed “a charter for restructuring” the “historic institution” of marriage so as to guarantee to men and women the equal protection of the laws.

## V. THE SECOND WAVE OF SAME-SEX MARRIAGE LITIGATION IN THE UNITED STATES

When same-sex marriage litigation resumed two decades after *Baker*, state rather than federal constitutional claims were raised.<sup>70</sup> In 1993, the Hawaii

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68. Brief of Appellee at 21, *Baker v. Nelson*, 409 U.S. 810 (1972) (No. 71-1027).

69. For the U.S. Supreme Court to say that embodying sex-based role differentiation in the law of marriage is no longer constitutionally permissible is by no means to outlaw legal rules based on role differentiation in marriage, however. Indeed, the claim *Baker* and *McConnell* brought for veterans’ spousal benefits in the 1970s clearly depended on such differentiation, as did their recent application for a tax refund. There may not have been a “wife” in the *Baker/McConnell* marriage, but there was a “dependent spouse,” under the statutes governing veterans’ benefits in 1971 and a secondary earner under the tax code in 2000. *McConnell v. Nooner*, 547 F.2d 54, 55 (8th Cir. 1976) (per curiam). Had there not been, there would have been no point to the couple’s suit. Equal earning couples get a marriage penalty, not a refund, for changing their tax status to “married, filing jointly.” *McConnell v. United States*, No. 04-2711, 2005 U.S. Dist. LEXIS 1313, at \*3 (D. Minn. Jan. 3, 2005), *aff’d*, No. 05-1781, 2006 U.S. App. LEXIS 17932 (8th Cir. July 17, 2006). And increased benefits were only awarded to veterans whose spouses depended financially on them. There might be objections from a feminist or other standpoint to the extent to which the law, particularly the tax law, disfavors equal earning couples and encourages marital role differentiation along the lines of the traditional role differentiation of husband and wife. But the importance of “fixed roles” in marriage no longer being legally assignable by sex should not be underestimated. Precisely because from time to time they may play different roles, without “male-female role playing” and despite both being men, *Baker* and *McConnell* in their spousal relationship embody the mandate against “fixed notions concerning the roles and abilities of males and females.” *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982).

70. A case decided shortly after *Baker*, *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974), also disposed of same-sex marriage claims on state constitutional grounds, holding, after considering

Supreme Court held it to be sex discrimination of the sort that, under the Hawaii Constitution, could only be upheld if narrowly tailored to serve a compelling state interest for Hawaii to deny same-sex couples entry into marriage.<sup>71</sup> The only purportedly compelling justification offered on remand was based on stereotypes and was, as such, rejected by the lower court.<sup>72</sup> Specifically, the state offered evidence on remand only with respect to its interest in promoting the well-being of children, who, the state claimed, were best off when raised by both of their biological parents in a marital household. In rejecting any “causal link between allowing same-sex marriage and adverse effects upon the optimal development of children,”<sup>73</sup> the trial court relied on evidence from even Hawaii’s own expert witnesses that there were gay and lesbian parents who provided good homes for children; heterosexual, married, biological parents who did not; as well as, more broadly, a diversity in functioning family structure. The court explained:

A father and a mother can, and do, provide his or her child with unique paternal and maternal contributions which are important, though not essential, to the development of a happy, healthy and well-adjusted child.

....

However, there is diversity in the structure and configuration of families. In Hawaii, and elsewhere, children are being raised by their natural parents, single parents, step-parents, grandparents, adopted parents, hanai parents, foster parents, gay and lesbian parents, and same-sex couples.

There also are families in Hawaii, and elsewhere, which do not have children as family members.

The evidence presented by Plaintiffs and Defendants establishes that the single most important factor in the development of a happy, healthy and well-adjusted child is the nurturing relationship between parent and child.

The sexual orientation of parents is not in and of itself an indicator of parental fitness.

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evidence of voter intent, that Washington’s then recently approved state constitutional Equal Rights Amendment did not extend the right to marry to same-sex couples.

71. Baehr v. Lewin, 852 P.2d 44, 63–64 (Haw. 1993).

72. I use stereotype here in the sense of an archaic normative template for a given sex, as well as an imperfect descriptive proxy. See Case, *supra* note 3, at 1486–90 for further discussion of the relationship between constitutional antistereotyping doctrine and sex discrimination challenges to bans on state recognition of same-sex marriage, including the federal Defense of Marriage Act.

73. Baehr v. Miike, No. 91-1394, 1996 WL 694235 at \*18 (Haw. Cir. Ct. Dec. 3, 1996), *aff’d*, 950 P.2d 1234 (Haw. 1997).

Gay and lesbian parents and same-sex couples can be as fit and loving parents, as non-gay men and women and different-sex couples.<sup>74</sup>

In other words, being a male-female couple was an imperfect proxy for being good parents.

The Hawaii case was the first and last case to date in which a plurality of the judges on the highest court of any U.S. state accepted the claim that denial of marriage to same-sex couples constituted discrimination on the basis of sex. Because a state constitutional amendment authorizing the legislature to deny marriage to same-sex couples mooted the Hawaii case before a final resolution,<sup>75</sup> there is not even a definitive high court holding in place to the effect that no compelling governmental interest justifies the sex discrimination inherent in the denial of marriage to same-sex couples.

Some subsequent state high court majority opinions that have addressed the question of same-sex marriage have avoided deciding the sex discrimination question entirely. Among them are those of the Massachusetts Supreme Judicial Court and the Iowa and Connecticut Supreme Courts, all three of which ruled on other grounds that same-sex couples had a right to marry under their respective state constitutions.<sup>76</sup> However, only when a court rules in favor of marriage on other grounds can it easily avoid the sex discrimination question. To rule against marriage for same-sex couples requires a court to dispose of all of the arguments raised in their favor, including sex discrimination. And, because laws found to discriminate on the basis of sex are entitled to heightened scrutiny under a state as well as the federal constitution, it is particularly difficult, as the trial on remand in Hawaii demonstrated, for them to survive such scrutiny, whether by proof that they are not based on impermissible stereotypes or by proof that they are well-enough tailored to a sufficiently important governmental interest. Perhaps for this reason, every state high court that has ruled adversely to marriage for same-sex couples—whether by denying them any state constitutional right to relationship recognition whatsoever, as the New York Court of Appeals did,<sup>77</sup> or by holding that their constitutional claims can be satisfied by providing for them under state law another relationship status that is not called marriage, as the Vermont Supreme Court did<sup>78</sup>—has

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74. *Id.* at \*17.

75. HAW. CONST. art. I, § 23, (“The legislature shall have the power to reserve marriage to opposite-sex couples.”).

76. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

77. *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006).

78. *Baker v. State*, 744 A.2d 864 (Vt. 1999).

held that granting marriage licenses only to male-female couples simply does not discriminate on the basis of sex.

The Vermont Supreme Court's analysis is typical of those opinions that deny sex discrimination is at issue:

[W]e do not doubt that a statute that discriminated on the basis of sex would bear a heavy burden . . . . The difficulty here is that the marriage laws are facially neutral; they do not single out men or women as a class for disparate treatment, but rather prohibit men and women equally from marrying a person of the same sex. . . . “[I]n order to trigger equal protection analysis at all . . . a [litigant] must show that he was treated differently as a member of *one class* from treatment of members of *another class* similarly situated.” . . . Here, there is no discrete class subject to differential treatment solely on the basis of sex; each sex is equally prohibited from precisely the same conduct.<sup>79</sup>

As Justice Denise Johnson, who as noted above was the only member of the Vermont Supreme Court to find sex discrimination in the denial of marriage to same-sex couples, and, not coincidentally, the only justice on the court to opine that prompt access to marriage rather than legislative approval of the separate institution of civil unions was the appropriate remedy, correctly responded, “Under the State’s analysis, a statute that required courts to give custody of male children to fathers and female children to mothers would not be sex discrimination. Although such a law would not treat men and women differently, I believe it would discriminate on the basis of sex.”<sup>80</sup>

A holding such as that of the Vermont Supreme Court majority, gratuitously echoed by the California Supreme Court majority in its apparent eagerness to reach and answer in the affirmative the question of whether denial of marriage licenses to same-sex couples is discrimination on the basis of sexual orientation and as such is entitled to heightened scrutiny under the California Constitution,<sup>81</sup> is a repudiation, not only of the entire body of U.S. Supreme Court sex discrimination law of the last forty years, but of more general fundamental principles of U.S. equal protection law established for more than a century.

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79. *Id.* at 880 n.13 (internal citations omitted).

80. *Id.* at 906 n.10 (Johnson, J., concurring in part and dissenting in part). She could have gone on to say that, under the majority’s reasoning, even a statute that required courts to give custody of female children to fathers and male children to mothers would not be sex discrimination. Such a statute could, perhaps, be argued to have the rational basis of facilitating successful resolution of the Oedipus complex.

81. *In re Marriage Cases*, 183 P.3d 384, 439–41 (Cal. 2008).

The individual, rather than the group, has long been the touchstone for discrimination claims under U.S. law. Even in the days when the U.S. Supreme Court tolerated segregation of blacks and whites, it insisted:

[T]he essence of the constitutional right is that it is a personal one. . . . It is the individual who is entitled to the equal protection of the laws, and if he is denied . . . a facility or convenience . . . which under substantially the same circumstances is furnished to another . . . he may properly complain that his constitutional privilege has been invaded.<sup>82</sup>

The antistereotyping sex discrimination jurisprudence first developed in statutory cases under Title VII and then extended into the constitutional realm by cases such as those brought by Ginsburg for the ACLU,<sup>83</sup> a jurisprudence that has been criticized for focusing on the exceptional individual rather than the more typical member of a group, is often derided as “formal equality.” But the doctrine of equal application courts such as the Vermont and California Supreme Courts now use to reject a sex discrimination challenge is no less formal—what differentiates it is a focus on the formal equality of groups rather than the formal equality of individuals.

In highlighting the harm to individuals, Justice Johnson also vindicates the rights of one of the few bisexuals to be discussed explicitly in same-sex marriage litigation, the hypothetical Ms. C, for whom the choice between a male and a female suitor is seen as open, rather than foreclosed by an immutable sexual orientation toward one and not the other sex:

[C]onsider the following example. 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. 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 differently from Dr. A, a man. This is sex discrimination.<sup>84</sup>

To characterize the discrimination in the marriage laws as sexual orientation discrimination and not as sex discrimination foregrounds antisubordination concerns, something most scholars of equal protection other than myself have been urging for a long time.<sup>85</sup> On their face, bans on same-sex marriage do

82. *McCabe v. Atchison, Topeka & Santa Fe Ry.*, 235 U.S. 151, 161–62 (1914) (rejecting the argument that limited demand by blacks justified providing sleeping cars only for whites).

83. See Mary Anne Case, *Of Richard Epstein and Other Radical Feminists*, 18 HARV. J.L. & PUB. POL'Y, 369, 382–83 (1995); Mary Anne Case, *Reflections on Constitutionalizing Women's Equality*, 90 CAL. L. REV. 765, 769 (2002) [hereinafter Case, *Reflections*]; Case, *supra* note 3, at 1450.

84. *Baker*, 744 A.2d at 906 (Johnson, J., concurring in part and dissenting in part).

85. Case, *supra* note 3, at 1472.

not discriminate on the basis of sexual orientation—no state has ever sought to prohibit a gay man from marrying a lesbian, although the bans on same-sex marriage clearly have an overwhelming disparate impact on those with a gay or lesbian orientation. Denying that such bans also discriminate on the basis of sex, however, has serious costs for the equality of the sexes and the liberty of all. There are two main ways of formulating the principle behind the constitutional norm against the denial of equal protection on grounds of sex. The first is that women should not be subordinated by the law or, more broadly, by men. The second is that sex should be irrelevant to an individual's treatment by the law and, more broadly, to his or her life chances. On the latter view, "fixed notions concerning the roles and abilities of males and females" are problematic even when embodied in law that does not in any articulable way subordinate women to men.<sup>86</sup> I have long argued that, however important the former, or antisubordination view, may be, the latter, antidifferentiation or antistereotyping view, is an independently important guarantee of equal liberty. Among its many advantages is that it obviates the necessity of forcing individuals into well-defined rigid groups to whose standards they must conform—gay or straight, male or female, masculine or feminine—as a precondition for vindicating their rights.<sup>87</sup>

Thus, a court's rejection of a constitutional sex discrimination claim in a same-sex marriage case disturbs me for many of the same reasons that I am disturbed by the Ninth Circuit's recent rejection of Darlene Jespersen's statutory claim of sex discrimination against her employer, Harrah's Casino. Harrah's had imposed separate grooming standards on its male and female employees—requiring women and prohibiting men from wearing makeup, requiring women and prohibiting men to wear their hair long and "teased, curled, or styled."<sup>88</sup> As the majority that ruled against her summarized it:

Jespersen described the personal indignity she felt as a result of attempting to comply with the makeup policy. Jespersen testified that when she wore the makeup she "felt very degraded and very demeaned." In addition, Jespersen testified that "it prohibited [her] from doing [her] job" because "[i]t affected [her] self-dignity . . . [and] took away [her] credibility as an individual and as a person."<sup>89</sup>

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86. *Id.* at 1473.

87. *See, e.g., Case, Unpacking, supra* note 21.

88. *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1107 (9th Cir. 2006).

89. *Id.* at 1108.

Had Jespersen been willing to claim that she was a transsexual, she might, under recent case law, have prevailed.<sup>90</sup> But, as an individual seeking to diverge from the norms set for her group, she lost. A majority of the Ninth Circuit en banc disrespected Jespersen's commitments, describing her as idiosyncratic and Harrah's rules as neither rooted in sex stereotypes, nor posing an undue burden on women.<sup>91</sup> Just as I am disheartened and disturbed to see the *Jespersen* case abandon the statutory prohibition on sex stereotyping in employment I thought had been firmly established by the U.S. Supreme Court in *Price Waterhouse v. Hopkins*,<sup>92</sup> so I am disheartened and disturbed to see some state courts in same-sex marriage cases abandon the constitutional prohibitions on sex stereotyping I thought had been firmly established by the line of cases Ruth Bader Ginsburg began as a litigator and then reaffirmed as a justice in her majority opinion in *United States v. Virginia*,<sup>93</sup> the Virginia Military Institute case (VMI). Ginsburg's opinion in this case, like her litigation strategy for the ACLU, vindicated the individual who diverged from group norms. It was Rehnquist, writing only for himself in a concurring opinion, who held out the possibility that some sort of rough equality between groups might suffice to meet the demands of equal protection. According to Rehnquist:

[I]t is not the "exclusion of women" [from VMI] that violates the Equal Protection Clause, but the maintenance of an all-men school without providing any—much less a comparable—institution for women.

. . . An adequate remedy in my opinion might be a demonstration by Virginia that its interest in educating men in a single-sex environment is matched by its interest in educating women in a single-sex institution. To demonstrate such, the Commonwealth does not need to create two institutions with the same number of faculty Ph.D.'s, similar SAT scores, or comparable athletic fields. . . . Nor would it necessarily require that the women's institution offer the same curriculum as the men's; one could be strong in computer science, the other could be strong in liberal arts. It would be a sufficient remedy, I think, if the two institutions offered the same quality of education and were of the same overall caliber.<sup>94</sup>

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90. See *Schroer v. Billington*, 577 F. Supp. 2d 293, 304 (D.D.C. 2008) (distinguishing *Jespersen* from the case of an MTF transsexual).

91. *Jespersen*, 44 F.3d at 1106, 1112; see also *id.* at 1117 (Kozinski, C.J., dissenting) (criticizing the majority for wrongly presupposing that *Jespersen* is idiosyncratic).

92. 490 U.S. 228, 235, 251 (1989) (holding it to be impermissible sex discrimination to demand of a female candidate for an accounting partnership that she "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, . . . wear jewelry," and go to "charm school"). See Case, *Disaggregating*, *supra* note 21.

93. 518 U.S. 515 (1996).

94. *Id.* at 565 (Rehnquist, C.J., concurring).

Not only would Rehnquist's solution deny liberty, but, as Justice Souter noted at oral argument in *VMI*, because we do not stand "on the world's first morning" with respect to sex distinctions, but rather at the close of millennia of subordination, continued separation of the sexes along the remedial lines suggested by Chief Justice Rehnquist cannot be free of a subordinating taint.<sup>95</sup>

A similar problem arises when states attempt to set up "separate but equal" institutions for same-sex couples while reserving marriage for male-female couples. This was the solution accepted by the Vermont Supreme Court, which allowed the state legislature to create a new status denominated civil union, with "all the same benefits, protections and responsibilities under [state] law . . . as are granted to spouses in a marriage,"<sup>96</sup> but limited in access to same-sex couples.

Such a bifurcated regime sends a message of subordination to both gays and lesbians on the one hand and heterosexual women on the other, while reaffirming patriarchy. Withholding from same-sex couples the opportunity to marry devalues their unions both symbolically and practically, while restricting marriage to male-female couples and male-female couples to marriage forces women who wish to unite themselves to men under state law to do so in an institution whose all too recent legal history is one of subordinating wives both practically and symbolically, an institution reserved for them alone because of and not in spite of its "traditional" (that is to say, patriarchal) significance. While civil union may have gone a long way toward constitutionalizing the equality of gay men and lesbians in the states that offer it to them, it was, in my view, a step backward for constitutionalizing the equality of straight women.

Note that if a state had opened either marriage to same-sex couples or civil union to male-female couples, I myself, unlike some other feminist fundamentalists, would not be complaining about an affront to women's equality. For if marriage were opened to all couples, it could continue its development away from its patriarchal past rather than be preserved in the tradition of that past. And if civil union were open to all couples, women who wished to receive state recognition of their union with a man, together with the associated bundle of legal benefits, could do so without being forced to submit to entry into a form of union that traditionally has subordinated them.

In some ways marriage is like the abaya in *McSally v. Rumsfeld*, in which Martha McSally, a female U.S. Air Force fighter pilot, challenged regulations requiring female military personnel to be accompanied by a male companion

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95. Transcript of Oral Argument at 18, *United States v. Virginia*, 518 U.S. 515 (1996) (No. 94-2941); Case, *supra* note 3, at 1476.

96. VT. STAT. ANN. tit. 15, § 1204(a) (2002). As of 2009, Vermont opened civil marriage to all couples, but it never opened civil union to any male-female couples, and bifurcated regimes in which no same-sex couples may marry remain in a number of other states.

and to wear an abaya on any trips off base in Saudi Arabia. McSally claimed that these regulations violated her constitutional rights, inter alia, “by forcing her to communicate the false and coerced message that she adheres to the belief that women are subservient to men, by according her different treatment and status based solely upon her gender, and by undermining her authority as an officer.”<sup>97</sup> Among other similarities, they both historically involve the “covering” of women in circumstances where men are not similarly covered: an abaya physically through its cumbersome enveloping folds; marriage legally, through the encumbrance of coverture, which subsumed a wife’s identity in her husband’s. Some women who voluntarily enter the one or put on the other do so without feeling or intending to “communicate . . . the belief that women are subservient to men . . . .”<sup>98</sup> Others by such acts embrace and announce their adherence to such a belief, as is their personal right. But a government committed to constitutionalizing women’s equality in the way that U.S. law now demands should not condition important privileges, including membership in the armed forces and in a legally recognized union, on a woman’s willingness to accept trappings whose social meaning she reasonably associates with a message of subordination she (and this nation) rejects.<sup>99</sup>

There have been heterosexual feminist fundamentalist marriage resisters, male and female, in the United States for centuries,<sup>100</sup> but they have never gotten much respect from the law. In recent years, challenges to benefits extended by employers and units of government only to those unmarried couples whose members were of the same sex have been met with the judicial response that because heterosexual couples can legally marry, they suffer no impermissible discrimination.<sup>101</sup> No weight at all is given to any fundamentalist objections they may have to civil marriage. Indeed, the affront to heterosexuals who resist marriage from a feminist perspective may be all the greater in states like New Jersey, which opens up its civil union status, as California does its domestic partnership, to only those heterosexual couples in which at least one partner

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97. Amended Complaint at 4, *McSally v. Rumsfeld*, C.A. No. 01-2481 (D.D.C. filed Dec. 3, 2001). McSally’s case was mooted by congressional action vindicating her position. See Case, *Fundamentalism and Citizenship*, *supra* note 1, at 128 (deploring Congress’s focus, in providing McSally a remedy, on her religious liberty claim rather than her claim to be free of unconstitutional sex discrimination).

98. Case, *Fundamentalism and Citizenship*, *supra* note 1, at 127.

99. This is a claim I first made in Case, *Reflections*, *supra* note 83, at 787–89.

100. See, e.g., 1 HISTORY OF WOMAN SUFFRAGE: 1848–1861, at 260–61 (Elizabeth Cady Stanton et al. eds., 1881) (setting forth text of 1855 Marriage Protest of Lucy Stone and Henry Blackwell).

101. See, e.g., *Irizarry v. Bd. of Educ.*, 251 F.3d 604, 607 (7th Cir. 2001) (holding that “a nationwide policy in favor of marriage” for heterosexuals made it constitutional to limit health benefits for unmarried partners of government employees to partners who were of the same sex as the employee).

is over the age of sixty-two. Unlike heterosexual marriage resisters, senior citizens who opt for civil union or registered domestic partnership over marriage tend to do so to preserve the benefits they have already accrued from a prior traditional marriage—for example, they are widows who do not wish to lose social security and pension benefits accrued through a deceased husband by remarrying.

I have tried to suggest a variety of ways in which even some state courts that have granted some rights to same-sex couples in recent years have set back the cause of liberty and equality on grounds of sex. Worst of all, one state high court that denied all relief to same-sex couples recently approached the question of same-sex marriage in a majority opinion more closely resembling that of Bradley in *Bradwell* than that of Rehnquist in *Hibbs*, or even that of Rehnquist in the *VMI* case, thus threatening all settled understandings of constitutional sex equality. The New York Court of Appeals, in an opinion by Judge Robert Smith, held that the following constituted a sufficient basis for not extending civil marriage to same-sex couples:

The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition 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.<sup>102</sup>

As a feminist theorist and a constitutional law scholar, I find this rationale deeply disturbing. Far from being an acceptable rational basis for excluding same-sex couples from marriage, it does not even set forth a permissible governmental interest. It is directly contrary to the federal constitutional prohibition on embodying in law any “fixed notions concerning the roles and abilities of males and females.” Smith could only have been assuming the legislature wished to encourage more nudity in the home, because any other assumptions about “living models of what both a man and a woman are like” would run afoul of federal constitutional prohibitions on basing legal distinctions on sex stereotypes.

Although he rules against them, Smith seems far from hostile to gay people. He goes out of his way to acknowledge not only the careful and thoughtful way in which they become parents, but also “that there has been serious injustice in the treatment of homosexuals” and to speak favorably of New York legislative responses such as the Sexual Orientation Non-Discrimination Act of 2002.<sup>103</sup> But if, for Smith, homosexuals are, like blacks, victims of a long history of unjust prejudice, women seem to remain like children and imbeciles, in

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102. *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006).

103. *Id.* at 8.

special need of the protection of the laws. He seems much more interested in preserving sex-role differentiation than in putting gays down.

Smith insists that “the traditional definition of marriage is not merely a by-product of historical injustice. Its history is of a different kind.”<sup>104</sup> In my view he can only reach this conclusion by focusing exclusively on the injustice of exclusion of gay and lesbian couples and ignoring any historical injustice to heterosexual women. Justice Johnson’s concurring and dissenting opinion in the Vermont same-sex marriage case, by tracing aspects of the history of the legal regulation of marriage Smith ignores, makes clear why “[v]iewing the discrimination [in the marriage laws] as sex-based . . . is important.”<sup>105</sup> As Johnson correctly observes, the discrimination is “a vestige of sex-role stereotyping that applies to both men and women” in “that, historically, the marriage laws imposed sex-based roles for the partners to a marriage—male provider and female dependent—that bore no relation to their inherent abilities to contribute to society.”<sup>106</sup> Worse, the intent and effect of the common law of marriage was to subordinate a woman completely to her husband, wiping out her own independent legal existence. Only with the passage in the nineteenth century of laws such as Vermont’s Rights of Married Women Act did state legislatures begin “to set a married woman free ‘from the thralldom of the common law.’”<sup>107</sup> As Justice Johnson notes,<sup>108</sup> it took until 1973 for the Supreme Court of Vermont to declare: “Having rejected the archaic principle that husband and wife are ‘one person,’ it must necessarily follow that a married woman is a ‘person’ under the Constitution of Vermont, and is entitled to all the rights guaranteed to a person . . . .”<sup>109</sup>

Acknowledging that a history of denying the full personhood of married women and a continued commitment to traditional fixed sex roles outside the bedroom, not just aversion to homosexuality,<sup>110</sup> can undergird opposition to legal recognition of same-sex marriages, as Justice Johnson demonstrates, does not weaken the constitutional case in favor of same-sex marriage; it strengthens

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104. *Id.*

105. *Baker v. State*, 744 A.2d 864, 906 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part).

106. *Id.* at 906, 908.

107. *Id.* at 909 (citation omitted).

108. *Id.*

109. *Richard v. Richard*, 300 A.2d 637, 641 (Vt. 1973).

110. Cf. Michel Foucault, *Sexual Choice, Sexual Act: An Interview With Michel Foucault*, SALMAGUNDI, Fall 1982–Winter 1983, at 10, 22 (“I think that what most bothers those who are not gay about gayness is the gay life-style, not sex acts themselves. . . . It is the prospect that gays will create as yet unforeseen kinds of relationships that many people cannot tolerate.”).

it, given the strength of our existing well-established constitutional prohibitions against embodying fixed sex roles in law.

VI. *PERRY V. SCHWARZENEGGER* AS RISK AND OPPORTUNITY  
FOR FEMINISTS

From the time the political odd couple of former adversaries David Boies and Ted Olson first filed their federal constitutional challenge to California's Proposition 8, much was made by commentators and court watchers of the massive potential risks and opportunities the case presented for gay rights: While a broad victory could bring nationwide marriage rights, a broad defeat could entrench bad law and cause a long-term setback on the path to progress gay rights advocates have carefully charted through state courts and legislatures. There are similar risks and opportunities to the development of a federal constitutional sex discrimination claim for same-sex marriage in the *Perry* case.

As I hope I have demonstrated above, the federal constitutional law of sex discrimination could not be stronger from the perspective of advocates of same-sex marriage. A consistent line of Supreme Court cases has declared unconstitutional any "fixed notions concerning the roles and abilities of males and females" embodied in law, including, notably, in law pertaining to marriage and the family. As discussed above, this line of precedent is so strong, it even brought around Chief Justice Rehnquist, who came to strongly endorse what he earlier feared and opposed, to wit eradication, not only from the law but from societal norms, of "the traditional difference between men and women in the family unit."<sup>111</sup> Rehnquist's majority opinion in *Hibbs* authorizes Congress to use its Section 5 power to combat "stereotype-based beliefs about the allocation of family duties [which] remained firmly rooted"<sup>112</sup> precisely because rooting out such stereotype-based beliefs had become so central to our constitutional norm of sex equality.

Moreover, none of the Supreme Court's recent constitutional sex discrimination holdings has so much as suggested that equal application might foreclose a claim of sex discrimination. Indeed, to the contrary, in *J.E.B. v. Alabama*,<sup>113</sup> the Court very clearly held that sex-based peremptory challenges of jurors violated not only the individual rights of struck jurors but also more general

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111. See *supra* note 50 and accompanying text.

112. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 730 (2003).

113. 511 U.S. 127 (1994) (holding sex-based peremptory challenges of jurors an unconstitutional violation of equal protection despite evidence of equal application to both sexes).

norms of sex equality, notwithstanding dissenting Justice Scalia's insistence that:

Since all groups are subject to the peremptory challenge (and will be made the object of it, depending upon the nature of the particular case) it is hard to see how any group is denied equal protection. . . . This case is a perfect example of how the system as a whole is evenhanded. While the only claim before the Court is petitioner's complaint that the prosecutor struck male jurors, for every man struck by the government petitioner's own lawyer struck a woman. To say that men were singled out for discriminatory treatment in this process is preposterous.

Given the strength of the existing federal constitutional case law, therefore, the opportunity to make a strong, winning sex discrimination case in *Perry* is clear. On the other hand, if at trial or on appeal in *Perry*<sup>114</sup> the court explicitly rejects a sex discrimination claim, the potential harm to the settled body of sex equality law is far greater than when such a claim is rejected as part of a state constitutional law opinion in a state whose prior jurisprudence of sex equality may be less well-settled, far-reaching, or influential.

It is therefore particularly unfortunate, that, while the *Perry* plaintiffs have included a federal constitutional claim of sex discrimination in their case, plaintiffs' counsel have given it quite short shrift in their papers<sup>115</sup> and in their trial strategy, and have consistently missed important opportunities to highlight its strengths for their case. Thus, for example, on the very first day of the trial in *Perry*, before plaintiffs' counsel Ted Olson could get more than a few minutes into his opening statement, Judge Vaughan Walker interrupted him to ask, repeatedly and insistently:

Well, but the proponents argue that marriage has never been extended to same-sex couples in the past, and so we're simply preserving a tradition that is long established and that is, indeed, implicit in the very concept of marriage . . . . But what's the change that has occurred to

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114. I note with particular concern that an appeal in *Perry* will go to the very Ninth Circuit which en banc decided the statutory *Jespersen* case, in which, as I argue *supra* in text accompanying notes 88–93, it evidenced unjustifiable deference to claims of equal application in disregard of binding Supreme Court precedent.

115. That Olson and Boies view the sex discrimination argument as an also-ran is apparent in their litigation documents, beginning with the Complaint, whose "Claim Two: Equal Protection" devotes several paragraphs to explaining how Proposition 8 makes "[g]ays and lesbians . . . unequal in the eyes of the law," before tacking on, almost as an afterthought at the end of their equal protection claim, "Prop. 8 also violates the Equal Protection Clause because it discriminates on the basis of sex." See Complaint at 41-2, *Perry v. Schwarzenegger*, No. 09-CV-2292 VRW (N.D. Cal. argued Jan. 11, 2010).

elevate this right or to change the understanding of this right? What are the facts going to be?<sup>116</sup>

Olson's answer was unhelpfully and unnecessarily limited.<sup>117</sup> "What changed," he said "was Proposition 8, which isolated gay men and lesbian individuals and said: You're different. We're going to withhold and take away that right from you."<sup>118</sup> This response was emblematic of the *Perry* trial strategy as a whole, which focused centrally on a thick view of both lesbian and gay identity and of marriage. Olson would, however, have lost nothing and could have gained much, both for his cause and for the cause of liberty and sex equality more generally, had he supplemented his answer by reminding the court of "the change that occurred" in marriage, as a matter not only of the evolution of laws and social norms, but of federal constitutional mandate, from an institution that thickly specified roles for its participants on the basis of their sex to one that left participants, whatever their sex, equal and free to allocate roles within their family as suited them, not as mandated by law on the basis of their sex.

Of course, plaintiffs need not have introduced facts at trial in support of this proposition; they could demonstrate it as a matter of law simply by introducing the line of U.S. Supreme Court cases discussed in this Article and the corresponding line of California cases and legislative enactments identified and discussed in briefing before the California Supreme Court in the *Marriage Cases*.<sup>119</sup> To the extent that a supplemental factual record could be helpful to the

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116. See Transcript of Trial at 26–28, *Perry v. Schwarzenegger*, No. 09-CV-2292 VRW (N.D. Cal. argued Jan. 11, 2010).

117. Even earlier in his opening statement, Olson had missed another big opportunity to highlight the sex discrimination argument. Asked by Judge Walker, whether "it's possible that opposite-sex couples could form a domestic partnership and register under California law," Olson initially answered, "I know nothing that would suggest that it would be exclusive to same-sex couples," leading Walker to demand, "All right. So where's the discrimination here?" *Id.* at 24. Had Olson been well-informed as to the actual law in California, which excludes the mine-run of opposite sex couples from domestic partnership, he could have highlighted, as I did in this Article, the ways in which this discriminatory exclusion hurts not only gays and lesbians, but heterosexuals and sex equality.

118. *Id.* at 28. Olson is regrettably not alone in failing to foreground, or even to mention, the changes in marriage from the perspective of sex discrimination when listing the changes in marriage relevant to a claim for same-sex marriage. Thus, for example, in a book arguing for same-sex marriage, Bill Eskridge and his coauthor list as relevant only "three different kinds of family law liberalizations": 1) marriage no longer has a monopoly on sex and parenting; 2) "sex within marriage no longer has to be procreative" and 3) "marriage is easier to exit." WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE?* 185–86 (2006). They would have done well to begin their list with the liberalization entailed in the abolition of legally enforced sex roles. Although long a supporter of the sex discrimination argument, Eskridge has unhelpfully and inaccurately labeled it as having "a transvestic quality, dressing up gay rights in sex equality garb." See, e.g., William N. Eskridge, Jr., *Multivocal Prejudices and Homo Equality*, 74 *IND. L.J.* 1085, 1110 (1999).

119. Respondents' Opening Brief on the Merits at 39–50, 43, *In re Marriage Cases*, 183 P.3d 384, (Cal. 2008) (No. S147999) (discussing California case law and legislation that shows "[t]he exclusion of

court, however, the *Perry* plaintiffs were ideally situated to make such a record. One of their principal expert witnesses, historian Nancy Cott testified that she has spent several decades "specializing in the history of women, gender, the family, marriage and related social and cultural and political topics."<sup>120</sup> Over the course of her long career, Cott has written and edited numerous works providing evidence of how changing notions of sex roles and of sex equality contributed to the sort of transformation of marriage Walker inquired about.<sup>121</sup> But plaintiffs' counsel centered her trial testimony almost exclusively around the one of her books, *Public Vows: A History of Marriage and the Nation*, that is perhaps least focused on gender. This book, published in 2000, before *Hibbs* put the capstone on federal constitutional repudiation of sex distinctions in the family, discusses religion, race, and sexual orientation issues in the law of marriage at some length, but devotes only a few sentences to the modern constitutional law of sex discrimination.<sup>122</sup>

Not only the plaintiffs' expert witnesses, but also the defendant-intervenors', could have been used to better advantage in the *Perry* trial to make a very strong case that sex discrimination and an unconstitutional commitment to enforcing "fixed notions concerning the roles and abilities of males and females" in law are deeply implicated in opposition to and prohibitions of same-sex marriage. Defendant-Intervenors' expert witness David Blankenhorn has made a career polemicizing against

the imperative of gender role convergence. The essence of the imperative is the removal of socially defined male and female roles from family life. . . .

. . . .

. . . In part, the imperative of role convergence simply urges the reduction or elimination of sex specialization within the family. But in a larger sense, the imperative warns that any notion of socially defined roles for human beings constitutes an oppressive and socially unnecessary restriction on the full emergence of human potentiality . . . .

Fundamentally, the . . . imperative of role convergence is based on the sexual equivalent of . . . the "end of history." . . .

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same-sex couples from marriage is a relic of an era in which the rights and duties of spouses were defined by sex").

120. Transcript of Trial at 184, *Perry v. Schwarzenegger*, No. 09-CV-2292 VRW (N.D. Cal. argued Jan. 11, 2010).

121. See, e.g., NANCY F. COTT, *THE GROUNDING OF MODERN FEMINISM* 179–211 (1987) (describing the early 20th century evolution of gender roles in the family).

122. See NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 205, 206 (2000). The book makes no mention of Ruth Bader Ginsburg in the index and Justice Bradley makes it into the index only for his opinion in a case related to polygamy; there is no mention of *Bradwell*. See *id.* at 287, citing to *id.* at 119–20.

... Sexually, the end of history would refer to the ending of any historically inherited and socially important differences between males and females. Unlike past sexual history, which was based on differences and complementarities, the end of sexual history would denote the fundamental social irrelevance of sexual roles—a new fusion of previously divided components of humanity . . . .<sup>123</sup>

. . . . I decline to accept the end of sexual history, either as an empirical fact or as a utopian goal.

Several things are worthy of note in this quoted passage from defendants' expert: First, the passage comes from an early book advocating a strengthening of gendered fatherhood, written well before Blankenhorn saw same-sex marriage as a central problem. It can thus fairly be said of Blankenhorn, as of New York's Judge Robert Smith, that he appears to be motivated more by an attraction to fixed gender roles than an aversion to gay rights. This alone should be evidence that the sex discrimination argument for same-sex marriage is not a formal trick, but deeply imbricated with arguments about gay rights to marry.<sup>124</sup>

Second, note the close resemblance between Blankenhorn's language here and that of Ruth Bader Ginsburg and Joseph Ratzinger quoted above.<sup>125</sup> Just as Ratzinger began by addressing the Collaboration of Men and Women in the Church and in the World and went on in later years to make explicit links to gay rights, so Blankenhorn began by lamenting what he perceived as a devaluing of heterosexual fatherhood and went on to make explicit links to same-sex marriage. Like Ratzinger's, Blankenhorn's vision of the abolition of gender roles is descriptively nearly identical and normatively diametrically opposed to Ruth Bader Ginsburg's.

Finally, then, it bears remembering that whatever cultural and religious influence these two men may still command, it is Ruth Bader Ginsburg's normative take on what Blankenhorn calls "gender role convergence" that has become firmly entrenched as the constitutional law of our land. Blankenhorn's refusal

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123. DAVID BLANKENHORN, *FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM* 119–21 (1995).

124. Thus, when defendant-intervenors assert that "Proposition 8 was not designed to reflect or promote improper gender stereotypes," Defendant-Intervenors' Proposed Findings of Fact at 14, *Perry v. Schwarzenegger*, No. 09-CV-2292 VRW (N.D. Cal. argued Jan. 11, 2010), but, following Blankenhorn's lead and relying on his testimony, also assert that "[e]xtending marriage to same-sex couples would contribute to significantly changing the legal and public meaning of marriage from an institution with defined legal and social structure and purposes to a right of personal expression," *id.* at 25, "would weaken the idea that each parent, both mother and father, makes a unique contribution to parenting," *id.* at 26, and "would legally enshrine the principle that sexual orientation, as opposed to sexual embodiment, is a valid determinant of the structure and meaning of marriage," *id.* at 27, they are contradicting themselves.

125. See *supra* notes 33–35 and accompanying text.

to accept the end of “sexual history . . . based on differences and complementarities” is precisely the sort of “firmly rooted . . . stereotype-based belief[ ] about the allocation of family duties” Rehnquist’s *Hibbs* opinion makes clear is so antithetical to our constitutional commitments against sex discrimination that the power of the federal government should be mobilized to extirpate it.

Why, then, did Olson and Boies not make the strong case they could have in support of the proposition that denial of marriage to same-sex couples is unconstitutional discrimination on the basis of sex? I can only engage in some rank speculation, amounting to armchair psychoanalysis: Olson and Boies are much-married straight men. Let me speculate that they are strongly invested in believing that their own marriages do not partake in any respect of the ugly history of marriage law that subordinated wives to husbands and locked them into fixed sex roles. As members of two career couples—each is currently married to another lawyer—they may also be invested in seeing themselves as free from “stereotype-based beliefs about the allocation of family duties.” Yet as fathers whose careers led them to concentrate on breadwinning over caregiving, they have a stake similar to David Blankenhorn’s in affirming the value of their gendered contribution to family life. While defending the rights of gay people may make them feel like altruistic heroes, acknowledging that there is a residuum of sex-stereotyping in the law and social norms of marriage may be so deeply threatening to their own sense of themselves as husbands that they have subconsciously blocked the possibility from their minds.<sup>126</sup>

### CONCLUSION

A quarter century ago, Justice White could write, in his now infamous majority opinion in *Bowers v. Hardwick*, “No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated . . . .”<sup>127</sup> Today, of course, the “connection between family, marriage, or procreation on the one hand and homosexual activity on the

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126. The argument I’m making here, can perhaps be extended to judges such as California’s Chief Justice George, who authored the opinion *In re Marriage Cases* explicitly rejecting sex discrimination while elevating orientation discrimination to heightened scrutiny. See *supra* note 7. The argument resembles one made by Jennifer Levi in the context of dress code cases like *Jespersen*. Levi argues that judges who reject a sex discrimination claim in deciding such cases adversely to plaintiffs may suffer from empathy problems, either because they view their own compliance with sex-specific dress codes as no big deal or alternatively they may feel that if they can do the hard work of conforming to such codes, plaintiffs should too. See Jennifer Levi, *Some Modest Proposals for Challenging Established Dress Code Jurisprudence*, 14 DUKE J. GENDER L. & POL’Y 243, 246 (2007).

127. *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (upholding criminalization of private consensual adult homosexual sodomy).

other” is much easier for judges to see. What some seem to find more difficult to see today is the connection between opposition to recognition of homosexual activity in the realms of family, marriage, and procreation on the one hand and constitutionally impermissible sex stereotyping on the other. The sex discrimination argument thus bears some resemblance to those optical illusions that, depending on how you look at them, can show either a duck or a rabbit, either a beautiful young woman or an ugly old crone. Some see one image and not the other, some find it hard not to see both, but each image is as real as the other, one is not a trick, nor is it severable from the other.

As I hope I have demonstrated, the fact that recognition of same-sex marriage and elimination of enforced sex roles are as inextricably intertwined as the duck is with the rabbit has long been clear to opponents of both, from David Blankenhorn to the pope. It needs to become as clear to proponents of both if we are to preserve and extend the liberty and equality of all regardless of sex or orientation.