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Missing in Action?
Searching for Gender Talk in the Same-Sex Marriage Debate
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by

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MISSING IN ACTION? SEARCHING FOR GENDER TALK IN THE SAME-SEX MARRIAGE DEBATE

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> This gay marriage thing is tearing my wife and me apart. Now, because of activist judges in Massachusetts and overzealous officials in San Francisco, our union is hanging on by the thinnest of threads . . . .[1]

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1. Adam Felber, *A Concise History of "My Marriage" (2003-2004)*, based on *This American Life* (NPR broadcast, Mar. 28, 2004), http://www.felbers.net/mt/archives/001756.html (last visited Mar. 20, 2005). For another ironic look at the "threat" to marriage posed by same-sex couples, see Bill McClellan, *Gay Marriage Vote Shocks; Political Legacies Do Not*, ST. LOUIS POST-DISPATCH, Aug. 6, 2004, at B1 (reflecting on the ballot measure to amend the Missouri Constitution, which passed with 71% of the votes, columnist imagines conversation with his wife: "I love you, honey, and I love the kids, but if gays are going to get married, I can't see us staying together.").

INTRODUCTION

With the reality of same-sex marriage once in San Francisco[2] and now in Massachusetts,[3] the President's call for a constitutional amendment "to protect marriage in America,"[4] and three days of speeches on the subject in the United States Senate,[5] popular culture's focus on same-sex marriage has reached full throttle.[6] "Talking heads" with something to say about same-sex marriage frequent the airwaves;[7] feature stories[8] and op-ed pieces[9] keep us up to date on unfolding events and appropriate ways to react to them; and we can read any

2. *See* Carolyn Marshall, *Dozens of Gay Couples Marry in San Francisco Ceremonies*, N.Y. TIMES, Feb. 13, 2004, at A24; Carolyn Marshall, *Rushing to Say "I Do" Before City Is Told "You Can't"*, N.Y. TIMES, Feb. 17, 2004, at A10. The weddings, which began when the mayor of San Francisco directed officials to ignore state legislation limiting marriage to male-female couples, ended when the California Supreme Court halted the issuance of marriage licenses to same-sex couples, pending a later decision on whether the statutory restriction violated the state constitution. *See* Lockyer v. City of San Francisco, 2004 Cal. LEXIS 2184 (Mar. 11, 2004). Subsequently, the California Supreme Court ruled that all previously celebrated same-sex marriages were void from their inception because the mayor exceeded his authority when he unilaterally declined to enforce the restrictive state statute. Lockyer v. City of San Francisco, 95 P.3d 459 (Cal. 2004). In subsequent litigation challenging the merits of California's restriction, a trial court found the law unconstitutional. *See* Dean E. Murphy, *Judge in California Voids Ban on Same-Sex Marriage*, N.Y. TIMES, March 15, 2005, at A16.

3. *See* Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. TIMES, May 17, 2004, at A16 (describing first licenses once same-sex marriage became legal). State officials began to perform same-sex marriages on May 17, 2004, following decisions that the previous ban on such marriages violated the state constitution. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003). *See also In re* Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004) (rejecting civil unions as a remedy).

4. *See* Press Release, President George W. Bush, President Calls for Constitutional Amendment Protecting Marriage, Remarks from the Roosevelt Room, (Feb. 24, 2004), http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html (last visited Mar. 20, 2005).

5. *See* Carl Hulse, *Senators Block Initiative to Ban Same-Sex Unions*, N.Y. TIMES, July 15, 2004, at A1. On July 14, 2004, the Senate voted fifty to forty-eight against moving forward with the proposal. *See Senate Roll-Call Vote*, N.Y. TIMES, July 15, 2004, at A1.

6. Litigation challenging the male-female requirement for marriage is underway in, *inter alia*, Maryland and Washington. *See* Frank Langfitt, *Lawsuit Challenges State Law Barring Same-Sex Marriage; Nine Gay Couples File Suit that Says Statute Violates Maryland Constitution*, BALT. SUN, July 8, 2004, at A1; Lynn Marshall & Elizabeth Mehren, *Judge Backs Same-Sex Marriage: A Washington State Law That Bars Gay Unions Is Unconstitutional, a Lower Court Rules*, L.A. TIMES, Aug. 5, 2004, at A1.

7. *See, e.g.*, *Tavis Smiley Show: Gay Marriage* (NPR broadcast, Mar. 2, 2004) (interview with J.C. Watts); *Tavis Smiley Show: Recent Ruling by the Massachusetts Supreme Court Allowing Same-Sex Marriage in That State* (NPR broadcast, Dec. 3, 2003) (interview with Cornel West).

8. *See, e.g.*, Sean Captain, *Jumping in to Wed the Masses*, N.Y. TIMES, Feb. 22, 2004, § 9, at 12 (describing how volunteers helped perform same-sex weddings to meet demand in San Francisco in Feb. 2004).

9. *See, e.g.*, David Brooks, *The Power of Marriage*, N.Y. TIMES, Nov. 22, 2003, at A15 (explaining why conservatives should insist on marriage for same-sex couples).

number of trade books on the topic.[10]

Such sources and others like them present an expansive "public debate" on same-sex marriage—a term I use to refer to media coverage, publications, and speeches aimed at the general public, in contrast to judicial opinions or scholarly literature, which presumably are designed for more specialized consumers.[11] In addition to providing clues regarding how people talk and think about same-sex marriage, this public debate has become especially important because of ballot measures in several states asking voters to take a position on constitutional amendments to restrict marriage to one man and one woman.[12] At the end of the day, how members of the general population understand the issues raised by same-sex marriage could prove more influential than the approaches of judges, legislators, and legal scholars.

Given popular culture's preoccupation with same-sex marriage, the news coverage is incessant, wide-ranging, and sometimes even thoughtful. The public debate is sufficiently expansive to include every imaginable "angle," in contrast to the space- and time-limited opportunities presented by an advocate's brief or oral argument, for example. Accordingly, points of frequent contention in the

10. *See, e.g.*, ANDREW SULLIVAN, SAME-SEX MARRIAGE PRO & CON: A READER (rev. ed. 2004) [hereinafter SAME SEX MARRIAGE].

11. I confess that my consideration of the "public debate" omits one source that younger and more IT-savvy researchers might well find important: weblogs or blogs. *See, e.g.*, *The Revolution Will Be Posted*, N.Y. TIMES, Nov. 2, 2004, at A27 (various op-ed pieces noting the importance of blogs in 2004 elections); *cf.* Frank Rich, *The Nascar Nightly News: Anchorman Get Your Gun*, N.Y. TIMES, Dec. 5, 2004, § 2, at 1 (opining why "blogging" will not supercede network news).

12. A July 2004 compilation listed Missouri, Georgia, Kentucky, Mississippi, Oklahoma and Utah as states where constitutional same-sex marriage bans were on the ballot during that year and Arkansas, Massachusetts, Michigan, Montana, North Dakota, Ohio and Oregon as states where petitions had been filed to put such measures on the ballot. Kavan Peterson, *50-State Rundown on Gay Marriage Laws*, STATELINE.ORG, July 8, 2004, *available at* http://www.nationalcoalition.org/legal/50staterundown.html (last visited Mar. 20, 2005). In all, lawmakers in 25 states introduced proposed constitutional amendments, and "[a]ll would require a statewide vote." *Id.* On Aug. 3, 2004, 71% of those casting ballots voted in favor of adding the following language to the Missouri Constitution: "That to be valid and recognized in this state a marriage shall exist only between a man and a woman." *See* Matthew Franck, *Foes of Gay Marriage Hope Vote Is Catalyst*, ST. LOUIS POST-DISPATCH, Aug. 5, 2004, at A1. On Sept. 18, 2004, Louisiana voters supported a constitutional amendment requiring one man and one woman for a valid marriage and barring recognition of any other union; the measure survived challenges asserting that it covered more than one subject—both marriage and civil unions. *See* Forum for Equality PAC v. McKeithen, 2005 La. LEXIS 131 (2005); *see also* 2005 La. LEXIS 128 (2005). On Nov. 2, 2004, constitutional amendments banning same-sex marriage passed in all eleven states in which they appeared on the ballot. *See, e.g.*, James Dao, *Same-Sex Marriage Issue Key to Some G.O.P. Races*, N.Y. TIMES, Nov. 4, 2004, at P4. This prevailing stance in opposition to same-sex marriage has raised strategic questions for gay rights advocates. *See, e.g.*, John M. Broder, *Groups Debate Slower Strategy on Gay Rights*, N.Y. TIMES, Dec. 9, 2004, at A1; Kate Zernike, *Groups Vow Not to Let Losses Dash Gay Rights*, N.Y. TIMES, Nov. 14, 2004, § 1, at 30; *see also* Ellen Goodman, *Must Gay Rights Wait for Our "Comfort"?*, BOSTON GLOBE, Dec. 16, 2004, at A23 .

public debate include, not surprisingly, the rights of gays and lesbians to full acceptance and recognition,[13] the well-being of children growing up with gay and lesbian parents,[14] the appropriate role of religious understandings of marriage,[15] the place (and meaning) of morality in a constitutional democracy,[16] the appropriate work of judges,[17] the extra-state effects of a same-sex marriage valid where celebrated,[18] the division between state and federal authority over marriage,[19] and the slippery slope that any "redefinition" of marriage is said to introduce[20]—all important issues, to be sure.

Nonetheless, this expansive public debate remains curiously incomplete. Discussions about sex-based discrimination, women's subordination, and the quest for gender equality (discussions that I'll call "gender talk") are virtually impossible to locate in the popular discourse about same-sex marriage.[21] This is

13. *Cf., e.g.*, Ginia Bellafante, *A Gay Boomtown Is More Mainstream and Less the Cliché*, N.Y. TIMES, May 15, 2004, at A1; Richard A. Posner, *Wedding Bell Blues*, NEW REPUBLIC, Dec. 22, 2003, at 33 (observing that "most heterosexuals . . . do not approve of homosexuality . . . and do not want the state to allow the word 'marriage' to be appropriated by homosexual couples").

14. *See, e.g.*, Philip A. Belcastro et al., *A Review of Data Based Studies Addressing the Effects of Homosexual Parenting on Children's Sexual and Social Functioning*, *in* SAME-SEX MARRIAGE, *supra* note 10, at 250; David K. Flaks et al., *Lesbians Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parents and their Children*, *in* SAME-SEX MARRIAGE, *supra* note 10, at 246; Charlotte Patterson, *Children of Lesbian and Gay Parents: Summary of Research Findings*, *in* SAME-SEX MARRIAGE, *supra* note 10, at 240; *see also* Erica Goode, *A Rainbow of Differences in Gays' Children*, N.Y. TIMES, July 17, 2001, at F1.

15. *See, e.g.*, Thomas Crampton, *Two Ministers Are Charged in Gay Nuptials*, N.Y. TIMES, Mar. 16, 2004, at B1; Adam Liptak, *A Troubled "Marriage"*, N.Y. TIMES, Feb. 12, 2004, at A26; Tim Townsend, *When Does a Vote Become a Sin?*, ST. LOUIS POST-DISPATCH, Oct. 3, 2004, at B1.

16. *See, e.g.*, David Zwiebel, *A Landmark Day for Gay Marriage*, N.Y. TIMES, May 19, 2004, at A24 (decrying in letter to editor "the divorce of morality from law" represented by same-sex marriage).

17. *See, e.g.*, Mary Ann Glendon, *For Better or For Worse?*, WALL ST. J., Feb. 25, 2004, at A14; Jeffrey Rosen, *Immodest Proposal: Massachusetts Gets It Wrong on Gay Marriage*, NEW REP., Dec. 22, 2003, at 19.

18. *See, e.g.*, Adam Liptak, *Bans on Interracial Unions Offer Perspective on Gay Ones*, N.Y. TIMES, Mar. 17, 2004, at A22.

19. *See, e.g.*, Bruce Fein, *Constitutional Rashness*, WASH. TIMES, Sept. 2, 2003, at A14 (opposing federal constitutional amendment).

20. *See, e.g.*, Mike Hoey, *YES: Same-Sex Unions Damage Marriage, Open Door to Polygamy*, ST. LOUIS POST-DISPATCH, Aug. 1, 2004, at B4 (discussing upcoming vote on constitutional amendment).

21. One notable exception is Adam Haslett, *Love Supreme: Gay Nuptials and the Making of Modern Marriage*, NEW YORKER, May 31, 2004, at 76. In addition, I have used gender talk in my occasional opportunities to participate in the public debate. *See, e.g.*, Susan Frelich Appleton, *NO: Gay Marriage Ban Would Amount to Sex Discrimination*, ST. LOUIS POST-DISPATCH, Aug. 1, 2004, at B4 (discussing upcoming vote on constitutional amendment); Jessica Martin, *Massachusetts Supreme Court Took Bold Step on Same-Sex Marriage, But Ruling Was Outcome of "Contemporary Legal Developments"*, WASH. U. NEWS, Dec. 16, 2003, http://news-info.wustl.edu/news/page/normal/585.html (last visited

so even though the scholarly literature has analyzed such issues in depth and a few judicial opinions have used gender talk to find invalid laws denying same-sex couples the opportunity to marry.

Certainly, I cannot catalog here (or even recall) every examination of same-sex marriage that I have recently encountered in the media. Yet, I feel confident that a sex discrimination or gender equality analysis would have caught my attention, given both the way I have watched family law evolve for almost thirty years as a teacher of the subject and my intense interest in modern family law's approach to gender.[22] Empirical data support my intuitive conclusion. A survey of news articles over the last two years disclosed 28,179 articles about same-sex marriage, with only 64 (or 0.23%) plausibly raising the sex discrimination issue in an explicit fashion.[23] In their inattention to sex discrimination and gender equality, Andrew Sullivan's updated anthology, *Same-Sex Marriage Pro & Con: A Reader*,[24] and Matt Coles's explanation for nonlawyers of pro-marriage

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Feb. 27, 2005); Bob Watson, *For Some, Legal Interpretations Fuel Gay Marriage Debate*, JEFFERSON CITY NEWS TRIB., July 11, 2004, http://www.newstribune.com/articles/2004/07/11/news_state/0711040020.txt (last visited Mar. 20, 2005).

22. *See, e.g.*, Susan Frelich Appleton, *From the Lemma Barkeloo and Phoebe Couzins Era to the New Millennium: 130 Years of Family Law*, 6 WASH. U. J.L. & POL'Y 189 (2001); *see also infra* notes 95-166.

23. In late July, 2004, a LEXIS search of the News Database for stories over the past two years, using the terms "same sex w/2 marriage," yielded 28,179 stories. (Because LEXIS stops a search when the yield reaches 3,000, completing this search in fact required breaking down the two-year period into several smaller time segments.) Next, a search of the same database using the terms "same sex w/2 marriage and (sex or gender) w/2 discrim!" yielded 331 stories. An examination of these 331 stories reveals that only 64 raised the sex discrimination argument at all—0.23% of the 28,179 news stories about same-sex marriage during the last two years. A closer look at the 64 stories raising the sex discrimination argument reveals that 32 merely mention the argument in reports about its use in specific cases challenging marriage restrictions. Of the remaining 32, 16 simply mention the argument in passing while 16 others actually state, examine, or criticize the basic principle that the male-female marriage requirement discriminates on the basis of sex or subordinates women. (The data and materials are on file with the author.)

24. SAME-SEX MARRIAGE, *supra* note 10. Sullivan updated and revised an earlier edition of this anthology following the decision of the Supreme Judicial Court of Massachusetts in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), the celebration of numerous same-sex weddings at San Francisco City Hall, and the President's call for a constitutional amendment banning same-sex marriage. This book contains 80 different excerpts and purports to include "the widest and fairest collection of views and data on the matter [of same-sex marriage] currently in print." SAME-SEX MARRIAGE, *supra* note 10, at xix. Yet, other than a brief excerpt from *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (plurality opinion) (deciding Hawaii case on formal sex discrimination grounds), *rev'd as moot sub nom. Baehr v. Miike*, 1999 Haw. LEXIS 391 (1999), arguments about sex discrimination and gender equality surface in only two excerpts and then only in passing or in an implicit way. I refer here to brief allusions in E.J. Graff, *Retying the Knot*, *in* SAME-SEX MARRIAGE, *supra* note 10, at 135, 138 ("[M]arriage law will have to become gender-blind . . . . Our entrance might thus rock marriage more toward its egalitarian shore.") and Maggie Gallagher, *What Marriage Is For*, *in* SAME-SEX MARRIAGE, *supra* note 10, at 263, 269 (condemning "unisex marriage," a concept suggesting that "law was neutral as to whether children had mothers and fathers").

litigation strategies[25] both exemplify what my own observations and the data show. Finally, I note that a recent pronouncement from the Vatican expressly linking feminism, gender equality, and same-sex marriage has produced barely a ripple in the public conversation.[26]

This particular gap in the public debate stands out because gender talk pervades the popular discourse in so many related contexts—for example, examinations of why so many women have "opted out" of their careers to stay home with children,[27] how some gay fathers are choosing a stay-at-home parental role,[28] and what we should make of the various contributions of contemporary servicewomen in a traditionally male arena, war.[29] In addition,

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Although Sullivan's excerpt of *Baehr v. Lewin* reveals clearly the plurality's sex discrimination rationale, another popular treatment completely fails to mention this rationale. *See* EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE'S RIGHT TO MARRY 32 (2004); *see also id.* at 63-65 (noting traditional subordination of women in marriage, but failing to note connection to sex-based definitions of marriage).

25. Matthew A. Coles, *Don't Just Sue the Bastards! A Strategic Approach to Marriage*, GAY.COM (n.d.), http://www.gay.com/families/article.html?sernum=459&navpath=/channels/families/commitment (last visited Mar. 20, 2005). In this column, Coles summarizes the constitutional challenges that might be brought against laws preventing same-sex couples from marrying. Under equal protection, he expresses doubt that courts would regard gays and lesbians as a suspect class or that courts would find the restrictions irrational—despite the force of such arguments. He also examines the likely fate of "right to marry" arguments in courts that emphasize tradition. Despite his contention that even these good arguments might well fail, he includes no mention at all of either the argument that these marriage restrictions discriminate on the basis of sex or the gender equality precedents supporting this argument.

26. Letter to the Bishops of the Catholic Church on the Collaboration of Men and Women in the Church and in the World (July 31, 2004), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20040731_collaboration_en.html (last visited Mar. 20, 2005) (criticizing, *inter alia*, feminists' emphasis on subordination and "gender," minimization of physical difference, and "a new model of polymorphous sexuality," in which "homosexuality and heterosexuality [are] virtually equivalent"). For example, a LEXIS search of the *New York Times* reveals only a brief news blurb on this Letter. *See World Briefing Europe: Vatican City: Criticism for Feminism*, N.Y. TIMES, July 31, 2004, at A4 (containing one paragraph from Associated Press wire service).

27. *See, e.g.*, Lisa Belkin, *Opt-Out Revolution*, N.Y. TIMES, Oct. 26, 2003, § 6, at 42.

28. *See, e.g.*, Ginia Bellafante, *Two Fathers, with One Happy to Stay at Home*, N.Y. TIMES, Jan. 12, 2004, at A1-3; *see also* Jennifer Medina, *Housewives, Try This for Desperation: Stay-at-Home Fathers Face Isolation and a Lingering Stigma*, N.Y. TIMES, Dec. 22, 2004, at B1. *But see, e.g.*, Donald G. McNeil, Jr., *Real Men Don't Clean Bathrooms*, N.Y. TIMES, Sept. 19, 2004, § 4, at 3.

29. *See, e.g.*, Frank Rich, *Saving Private England*, N.Y. TIMES, May 16, 2004, § 2, at 1 (contrasting popular culture's portrayal of Jessica Lynch as heroine and Lynndie England as torture perpetrator); Cal Thomas, *We Can't Fight Our Sex Drive*, ST. LOUIS POST-DISPATCH, May 19, 2004, at B7 (arguing that torture at Abu Ghraib resulted from "coed basic training and its effect on order and discipline"); Cal Thomas, *Wartime Is No Time to Send a Woman into Battle*, ST. LOUIS POST-DISPATCH, Dec. 22, 2004, at B11 (opposing female inclusion in combat units); *cf.* Maureen Dowd, *Absolute Power Erupts*, N.Y. TIMES, Nov. 21, 2004, § 4, at 13 ("The image of Republicans as the Daddy Party and Democrats as the Mommy Party came roaring back in 2004 . . . ."); Frank Rich, *How Kerry Became a Girlie-Man*, N.Y. TIMES, Sept. 5, 2004, § 2, at 1 ("Only in an election year ruled by fiction could a sissy who

candid gender talk can supply satisfactory answers to some of the quandaries now in the spotlight, such as how same-sex marriage proponents can distinguish opponents' red herring, an asserted right to polygamous or incestuous unions, and what same-sex marriage opponents must mean when they claim a constitutional amendment is necessary "to protect marriage in America."[30] Most significantly, explicit gender talk offers the most direct and effective way to reveal the implicit reliance on sex discrimination often hidden in opponents' resistance to same-sex marriage.

This Article sketches out the sex- and gender-based arguments that have emerged in the scholarly literature and judicial opinions about same-sex marriage, developing these arguments to make them most relevant to the gender talk prevalent on other topics occupying prominent positions in the popular culture and public consciousness. The place of gender roles, gender norms, gender performance, and gender neutrality in contemporary family law receives particular attention. Next, this Article looks beneath the rhetoric of the same-sex marriage debate, exposing the gender talk camouflaged in the arguments for retaining traditional marriage restrictions. Last, this Article shows how gender talk can usefully contribute to this ongoing debate.

I. A QUICK TOUR OF GENDER TALK IN SAME-SEX MARRIAGE CASES & LEGAL SCHOLARSHIP

A. The Formal Argument: Sex Classifications

Laws allowing male-female couples the opportunity to marry, while denying such opportunities to male-male and female-female couples, discriminate on their face on the basis of sex. For example, if Jane cannot marry Jill but Jane could do so if she were Jack, then Jane is denied the opportunity to marry because of her sex. Alternatively, one could focus on the discrimination triggered by the sex of Jane's prospective spouse—Jane cannot marry Jill but could marry Jack. Invoking this argument, along with an asserted right to marry, lesbian and gay activists in the 1970s sued public officials who refused to grant marriage licenses to same-sex couples.[31] Although bold, these lawsuits jibed

used Daddy's connections to escape Vietnam turn an actual war hero into a girlie-man."). For additional examples of contemporary, high-profile gender talk, consider the charges of sex discrimination evoked by Martha Stewart's prosecution and the kerfuffle over Harvard President Lawrence Summers's efforts to explain the dearth of women scientists. *See, e.g.*, Jonathan Glater, *Stewart's Celebrity Created Magnet for Scrutiny*, N.Y. TIMES, Mar. 7, 2004, § 1, at 1; Robert Tomsho, *Harvard Clash Pits Brusque Leader Against Faculty*, WALL ST. J., Feb. 18, 2005, at A1.

30. *See* Bush Press Release, *supra* note 4 and accompanying text.

31. For an overview of the history of such litigation challenging marriage restrictions, *see, e.g.*, WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 48-59 (1996); Peggy Pascoe, *Sex, Gender, and Same-Sex Marriage*, *in* IS ACADEMIC FEMINISM DEAD? THEORY IN PRACTICE 86 (Social Justice

with contemporaneous developments, including consequential changes in the rules governing marriage (with California's 1969 adoption of no-fault divorce, which soon spread to other states[32]) and nation-wide attention to gender equality (with the states' consideration whether to ratify the proposed Equal Rights Amendment to the United States Constitution[33]).

Whatever the larger context, challenges to sex-based marriage restrictions routinely failed during this era, often because of the courts' reliance on the traditional "definition" of marriage.[34] Typically, courts invoked such definitions to reject claims that a state's refusal to issue licenses to same-sex couples violated the constitutional right to marry recognized in *Loving v. Virginia*.[35] Further, during this period courts found no inconsistency in relying on sex-based definitions of marriage, even when a state constitutional Equal Rights Amendment (ERA) expressly guaranteed that "[e]quality of rights and responsibility under the law shall not be denied or abridged on account of sex."[36] Indeed, such opinions appear so preoccupied with the way dictionaries define marriage[37] that they failed to see the issue as one of sex discrimination at all.[38]

After these initial failures, in the late 1970s and early 1980s law reform efforts for same-sex marriage "languished in a generational purgatory," according to William Eskridge.[39] One explanation might point to the division within the gay and lesbian community about the value of pursuing marriage.[40] In addition, proponents might have seen futility in pursuing a right to same-sex marriage after 1986, when *Bowers v. Hardwick*[41] rejected as "facetious" the claim that the right to privacy or liberty protects consensual same-sex intimacy from criminal prosecution.[42] Yet during this "quiet phase" in the courts, while

Group at the Center for Advanced Feminist Studies, Univ. of Minnesota eds., 2002).

32. *See, e.g.*, Appleton, *supra* note 22, at 197.

33. *See, e.g.*, Pascoe, *supra* note 31, at 91.

34. *See, e.g.*, Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972); Singer v. Hara, 522 P.2d 1187, 1191-92 (Wash. Ct. App. 1974).

35. 388 U.S. 1 (1967) (holding Virginia's anti-miscegenation law unconstitutional under Equal Protection and Due Process Clauses).

36. *Singer*, 522 P.2d at 1190 (Wash. Ct. App. 1974) (quoting state of Washington's Equal Rights Amendment).

37. *See, e.g.*, *Baker*, 191 N.W.2d at 185-86 & n.1.

38. *See infra* notes 69-70, 246-257 and accompanying text (discussing equal-application argument and definitional obstacle).

39. ESKRIDGE, *supra* note 31, at 57. *But see* De Santo v. Barnsley, 476 A.2d 952 (Pa. Super. Ct. 1984) (rejecting petition to dissolve asserted common law same-sex marriage).

40. *Compare* Thomas Stoddard, *Why Gay People Should Seek the Right to Marry*, *in* LESBIAN, GAY MEN, AND THE LAW 398 (William B. Rubenstein, ed. 1993), *with* Paula Ettlebrick, *Since When Is Marriage a Path to Liberation?*, *in* LESBIAN, GAY MEN, AND THE LAW 401 (William B. Rubenstein, ed. 1993).

41. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

42. *Bowers*, 478 U.S. at 194. The *Bowers* Court saw "[n]o connection between family,

most scholars commenting on *Bowers* considered its implications for substantive due process or the level of scrutiny that gays and lesbians can invoke under the Equal Protection Clause,[43] Sylvia Law[44] and Andrew Koppelman[45] instead revisited and revived the sex discrimination argument that activists had made in the 1970s.[46]

Then, in 1993, taking a strikingly different approach from that of earlier courts faced with challenges to the denial of marriage licenses to same-sex couples, a plurality of the Hawaii Supreme Court in *Baehr v. Lewin*[47] declared Hawaii's sex-based classification for marriage presumptively unconstitutional under the state's ERA. The court remanded the case for a determination whether the state could demonstrate a sufficiently compelling justification.[48] The *Baehr* plurality cited *Loving v. Virginia*[49] to explain why the mere existence of a sex-based classification constitutes prohibited discrimination, notwithstanding the "equal application" of the restriction to men and women alike.[50] In other words, according to *Baehr*, *Loving*'s treatment of the racial classifications in Virginia's marriage law (which equally prevented blacks and whites from choosing spouses from the other group)[51] explains why laws that prohibit women from marrying women and men from marrying men nonetheless discriminate on the basis of sex.

Because *Baehr* might have paved the way for same-sex marriages in Hawaii, the case generated considerable public debate. Its most significant legacies, however, became the Federal Defense of Marriage Act[52] and several state counterparts enacted to forestall recognition of such marriages

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marriage, or procreation on the one hand and homosexual activity on the other." *Id*. at 191.

43. *See, e.g.*, Marc S. Spindelman, *Reorienting* Bowers v. Hardwick, 79 N. CAR. L. REV. 359, 367-70 (2001) (summarizing scholarship and collecting sources).

44. Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187.

45. Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988).

46. Koppelman later explained how his 1988 note and Law's 1988 article "revived" an argument introduced earlier. ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW 54 & n.4 (2002).

47. 852 P.2d 44 (Haw. 1993), *rev'd as moot sub nom.*, Baehr v. Miike, 1999 Haw. LEXIS 391 (1999).

48. *See id*. at 67-68; *cf.* WOLFSON, *supra* note 24, at 32 (summarizing *Baehr* but ignoring plurality's sex discrimination rationale).

49. 388 U.S. 1 (1967).

50. *Baehr*, 852 P.2d at 67-68.

51. *See Loving*, 388 U.S. at 8-9; *see also* McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (holding that racial classifications themselves are suspect and must meet highest scrutiny, even if they apply equally). *But see* Andrew Koppelman, *Why Discrimination Against Gay Men and Lesbians is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 223 (1994).

52. Pub. L No. 104-199, 110 Stat 2419 (1996) (codified as amended in 1 U.S.C. § 7; 28 U.S.C. § 1738C (2000)).

elsewhere,[53] as well as a public referendum amending Hawaii's constitution to give the legislature "the power to reserve marriage to opposite-sex couples."[54] Although these developments ultimately eclipsed the plurality's focus on sex-based classifications, the *Baehr* opinion remains a nice presentation of the argument that male-female marriage requirements discriminate on the basis of sex and require the same scrutiny that any sex discrimination would evoke.[55] Concurring opinions in both *Baker v. State*[56] (the Vermont case that produced that state's civil union legislation) and *Goodridge v. Department of Public Health*[57] (the Massachusetts case that required extending civil marriage to same-sex couples[58]) cite *Baehr* for this simple proposition, which has also become familiar in the scholarly literature.[59]

B. Elaborating the "Miscegenation Analogy":[60] The Gender Hierarchy

The case for analogizing sex-based marriage restrictions to the anti-miscegenation law invalidated in *Loving* proceeds well beyond a simple focus on classifications. Sylvia Law emphasizes how laws banning or marginalizing same-sex intimacy, like restrictions on abortion and contraception, reinforce patriarchy[61] and "privilege male-dominated, sexually repressed, heterosexual families."[62] Andrew Koppelman,[63] more recently joined by Cass Sunstein,[64]

53. By mid-2004, 39 states had such statutes. *See* Peterson, *supra* note 12.

54. HAW. CONST. art. I, § 23.

55. According to the U.S. Supreme Court, the Fourteenth Amendment requires an "exceedingly persuasive justification" to legitimize sex discrimination—an intermediate standard of review that requires more than a rational basis but falls short of strict scrutiny. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 531 (1996). States with ERAs generally articulate a more demanding standard, strict scrutiny, as the *Baehr* plurality illustrates. *See generally* Lee Epstein et al., *Constitutional Sex Discrimination*, 1 TENN. J.L. & POL'Y 11 (2004).

56. 744 A.2d 864, 905-06 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part).

57. 798 N.E.2d 941, 971-72 (Mass. 2003) (Greaney, J., concurring).

58. *See also In re* Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004) (rejecting civil unions as a remedy).

59. *See, e.g.*, Stephen Clark, *Same-Sex But Equal: Reformulating the Miscegenation Analogy*, 34 RUTGERS L.J. 107 (2002); Pamela S. Katz, *The Case for Legal Recognition of Same-Sex Marriage*, 8 J.L. & POL'Y, 61, 88-92 (1999); Mark Strasser, Loving *in the New Millennium: On Equal Protection and the Right to Marry*, 7 U. CHI. L. SCH. ROUNDTABLE 61, 74-80 (2000); Jeffrey Hubins, *Proposition 22: Veiled Discrimination or Sound Constitutional Law?*, 23 WHITTIER L. REV. 239, 258-60 (2001).

60. Koppelman, *supra* note 45.

61. Law, *supra* note 44, at 229.

62. *Id*. at 234.

63. Koppelman, *supra* note 51.

64. *E.g.*, Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1 (1994).

among others,[65] develops the parallel between the racial caste system that anti-miscegenation laws sought to maintain and the gender hierarchy that sex-based marriage restrictions perpetuate.[66]

Loving supported its finding of invidious discrimination with a description of the Virginia prohibitions as "measures designed to maintain White Supremacy."[67] To be more precise, after determining that the racial classification by itself triggered strict scrutiny, the *Loving* Court searched for a justification of the Virginia law that might satisfy the compelling state interest test. The justification that the Court found, White Supremacy, clearly made the law invalid. Law, Koppelman, Sunstein, and others all argue persuasively, in my opinion, that laws prohibiting same-sex coupling similarly preserve a gender hierarchy in which women must remain subordinate to men.[68]

Hence, any temptation to assert that same-sex marriage bans do not discriminate because they apply equally to men and women alike[69] must give way in view of males' traditional position of superiority in law, society, and family life.[70] Moreover, like the racial caste system in *Loving*, the gender hierarchy requires clearly defined categories,[71] male and female.[72] The work of

65. *See, e.g.*, John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119 (1999); Sandi Farrell, *Reconsidering the Gender-Equality Perspective for Understanding LGBT Rights*, 13 LAW & SEXUALITY 605 (2004).

66. *See, e.g.*, KOPPELMAN, *supra* note 46, at 63, 71.

67. Loving v. Virginia, 388 U.S 1, 11 (1967).

68. *See, e.g.*, Koppelman, *supra* note 51, at 235, 280, 284; Law, *supra* note 44, at 218-35; Sunstein, *supra* note 64, at 12-14. Mary Anne Case reads Law to emphasize the harm to autonomy of gender stereotypes, not the subordination of women. *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, 1473 n.130, 1488 (2000); *see also id.* at 1476. I disagree, based on Law's references to patriarchy and to the way the laws she examines "privilege male-dominated, sexually repressed, heterosexual families." Law, *supra* note 44, at 229, 234. In any event, I reject an "either-or" approach to this question because measures subordinating a particular group do constrain the autonomy of the group's members—as the restrictions invalidated in *Loving* illustrate. *See also* JUDITH BUTLER, UNDOING GENDER 8 (2004) ("The task of all of these movements [challenging gender norms and categories] seems to me to be about distinguishing among the norms and conventions that permit people to breathe, to desire, to love, and to live, and those norms and conventions that restrict or eviscerate the conditions of life itself.").

69. *See generally* Clark, *supra* note 59; *see also* Richard F. Duncan, *From* Loving *to* Romer: *Homosexual Marriage and Moral Discernment*, 12 BYU J. PUB. L. 239, 241 (1998).

70. *Cf.* United States v. Virginia, 518 U.S. 515, 534 (1996) ("[Sex] classifications may not be used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women."). Dissenting in *Lawrence v. Texas*, Justice Scalia fails to see the parallel between laws punishing same-sex relationships and antimiscegenation laws. 539 U.S. 558, 600 (2003) (Scalia, J., dissenting).

71. I refer here to constructs such as the "one drop" rule. *See, e.g.*, HARLON L. DALTON, RACIAL HEALING: CONFRONTING THE FEAR BETWEEN BLACKS AND WHITES 74 (1995); IAN F. HANEY-LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 118 (1996); *cf.* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 26-29 (1995) (comparing race and sex

establishing these categories and policing their boundaries is accomplished by gender roles and gender norms,[73] which provide the scripts for performing as a man or a woman.[74] Laws prohibiting same-sex intimacy and marriages impose just such a "gender script"[75] because they specify that each sexual and marital relationship must have one woman and one man—requirements that two men or two women would appear unable to satisfy.

Given the Court's repeated disapproval of gender classifications resting on "stereotypical" expectations of men and women—for example, the exclusion of women from Virginia Military Institute (VMI)[76]—however, any official gender script presumptively violates equal protection. Indeed, the VMI case suggests that the "skeptical scrutiny"[77] used to evaluate sex discrimination applies to all official gender stereotypes, including gender-based role assignments as well as expectations about the different ways that women and men should act, feel, and perform.[78] The constitutional flaw revealed in the VMI case lay not only in the state's assumption that women did not need the "unique educational benefit"[79] provided to men because of their respective roles in society, but also in the

differentiation).

72. *But see, e.g.*, ANNE FAUSTO-STERLING, SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY 78, 109 (2000) (suggesting recognition of five sexes but noting that, even in cultures with additional classifications, there are only two gender roles). *But see also* SANDRA LIPSITZ BEM, THE LENSES OF GENDER: TRANSFORMING THE DEBATE ON SEXUAL EQUALITY (1993) (positing continuum in place of clear binary categories).

73. *See, e.g.*, Butler, *supra* note 68, at 16, 41-42, 48, 52-56, 95, 210-19 (examining and critiquing gender norms). Historian Nancy Cott observes that "marriage uniquely and powerfully influences the way differences between the sexes are conveyed and symbolized. So far as it is a public institution, it is the vehicle through which the apparatus of state can shape the gender order." NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 3 (2002).

74. Many scholars maintain that social forces construct the biological categories of male and female, not just the gender roles or performances expected of those who occupy these classifications. *See generally, e.g.*, BEM, *supra* note 72; JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" 4-5 (1993); ALICE DOMURAT DREGER, HERMAPHRODITES AND THE MEDICAL INVENTION OF SEX (1998); FAUSTO-STERLING, *supra* note 72; Mary Joe Frug, *Commentary: A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1048-51 (1992); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995).

75. I have borrowed this helpful phrase from Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129, 193 (2003) ("the state should not craft its law of marriage to force individuals into a gender script—for instance, decreeing that a man may marry only a woman and a woman may marry only a man"), but Sylvia Law used it much earlier. *See* Law, *supra* note 44, at 210.

76. United States v. Virginia, 518 U.S. 515, 533 (1996).

77. *Id.* at 531.

78. *See also, e.g.*, J.E.B. v. Alabama *ex rel* T.B., 511 U.S. 127, 146 (1994) (striking down under equal protection discrimination in jury selection based on gender "or on the assumption that an individual will be biased in a particular case for no reason other than the fact that the person happens to be a woman or happens to be a man").

79. *Virginia*, 518 U.S. at 550.

state's "generalizations about 'the way women are.'"[80]

If the Court's equality jurisprudence makes stereotypes about gender roles and gender performance constitutionally vulnerable, then it necessarily raises questions about the disadvantageous treatment of gays and lesbians, treatment that reflects precisely such stereotypes—stereotypes about the expected sexual orientation or appropriate intimate partners of males and females. A number of scholars have reached this same bottom line using several different routes.[81]

Of course, some commentators have challenged this line of reasoning and the *Loving* analogy. One challenge asserts that sex discrimination law allows more room for "separate but equal" treatment than race discrimination law, with the result that legal recognition of same-sex marriage does not necessarily follow, although civil unions or domestic partnerships might.[82] (Yet, certainly much of today's debate reveals that separate here is not equal.[83]) Another challenge attempts to distinguish *Loving* by arguing that traditional marriage, a "dual-gender" relationship, promotes equality by integrating the two classes,[84] in contrast to the segregation required by Virginia's law.[85] (But surely that argument fails when one considers other "integrated relationships" once recognized by the law, including the "master-slave" relationship.) Some critics distinguish *Loving* by asserting an absence of purposeful sex discrimination, in contrast to the intentional race discrimination behind the anti-miscegenation laws.[86] (Yet laws that expressly use sex-based classifications necessarily do so purposely.) Finally, while at least one judge on the Vermont Supreme Court has embraced the "miscegenation analogy" and its condemnation of sex-based

80. *Id*. at 541; *see also* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (concluding that employer's reliance on stereotypes about gender performance to employee's detriment constitutes sex discrimination under Title VII).

81. *See, e.g.*, Amelia A. Craig, *Musing About Discrimination Based on Sex and Sexual Orientation as "Gender Role" Discrimination*, 5 S. CAL. REV. L. & WOMEN'S STUD. 105 (1995); Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1992); Danielle Kie Hart, *Same-Sex Marriage Revisited: Taking a Critical Look at* Baehr v. Lewin, 9 GEO. MASON U. CIV. RTS. L.J. 1 (1998); Koppelman, *supra* note 51; Law, *supra* note 44; Spindelman, *supra* note 43, at 441; Valdes, *supra* note 74; *see also* Butler, *supra* note 68, at 54.

82. *See* Clark, *supra* note 59, at 168-83.

83. *See In re* Opinions of the Justices to the Senate, 802 N.E.2d 565, 569 (Mass. 2004); *see also, e.g.*, Liptak, *supra* note 15; Posner, *supra* note 13, at 33.

84. Duncan, *supra* note 69, at 243. This argument is related to the contention that marriage requires "gender complementarity." *See, e.g.*, David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997, 1079 (2002).

85. *Cf.* Koppelman, *supra* note 51, at 282-83 (considering laws that segregate versus those that "assimilate").

86. Baker v. State, 744 A.2d 864, 880 n.13 (Vt. 1999); *see also* Lawrence v. Texas, 539 U.S. 558, 600 (2003) (Scalia, J., dissenting) (rejecting analogy between Texas's sodomy ban and miscegenation bans because "[n]o purpose to discriminate against men or women as a class can be gleaned" from the former).

stereotypes,[87] some judicial opinions accept the basic understanding of same-sex marriage bans as sex discrimination but expressly ignore the conclusion that these bans, in turn, discriminate on the basis of sexual orientation.[88] (So, these opinions fail to acknowledge that sexual orientation is one part of the stereotypical gender script.[89])

C. The View from Family Law

1. Family Roles & Responsibilities

The "miscegenation analogy" and the gender hierarchy become especially salient in the context of contemporary family law. And significantly, family law—which so often today constitutes "ground zero" in the culture wars—provides an important bridge between scholarly and judicial analyses, on the one hand, and the public debate as captured in the media and popular discourse, on the other. If the current preoccupation with same-sex marriage does not suffice to establish this generalization, then consider the public attention recently commanded by other contentious family law topics, such as abortion,[90] surrogacy arrangements,[91] and adoption challenges brought by unmarried birth fathers, such as the "Baby Jessica"[92] and "Baby Richard"[93] cases; these are all topics saturated with gender talk, moreover. Perhaps more than all other legal disciplines, family law regularly touches real people's lives and implicates deep, personal values.[94] Great fodder for family law also makes great fodder for *Oprah*, not to mention political crusades for "family values" and claims of expertise by everyone participating in the official decision-making process, the public debate, or private conversations.

Over the last thirty years, American family law has changed dramatically, with the elimination of official gender roles emerging as perhaps the most significant and pervasive transformation.[95] Once, family law consisted largely

87. *Baker*, 744 A.2d at 906 & n.11 (Johnson, J., concurring in part and dissenting in part).

88. Baehr v. Lewin, 852 P.2d 44, 52 & nn.11-12 (Haw. 1993) (plurality opinion).

89. *See generally* Hart, *supra* note 81.

90. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973).

91. *See, e.g.*, *In re* Baby M, 537 A.2d 1227 (N.J. 1988).

92. *See In re* B.G.C., 496 N.W.2d 239 (Iowa 1992); *In re* Baby Girl Clausen, 502 N.W.2d 649 (Mich. 1993).

93. *In re* John Doe, 638 N.E.2d 181 (Ill.), *cert. denied*, 513 U.S. 994 (1994); *In re* Kirchner, 649 N.E.2d 324 (Ill. 1995), *stay denied sub nom.* O'Connell v. Kirchner, 513 U.S. 1138 (1995).

94. *See, e.g.*, Diane Cardwell, *For Many in Missouri, Picking a President Is More a Matter of Values Than Policy*, N.Y. TIMES, Sept. 19, 2004, § 1, at 25 (citing importance of issues like abortion and gay marriage in presidential race).

95. *See* Appleton, *supra* note 22, at 196-99; *see also, e.g.*, MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 182-204 (2004) (critiquing

of rules specifying different rights and responsibilities for men and women, husbands and wives, and fathers and mothers. Traceable to Blackstone's famous commentary about the legal nonexistence of married women,[96] these gender-based rules regarded a wife as her husband's property; subjected her money to his control; denied her access to certain employment; and recognized his prerogative to inflict domestic violence, including rape.[97]

Certainly, this legacy in family law provides powerful evidence of a gender hierarchy—one built, to be sure, on laws that assumed a white norm and thus most directly advanced white male supremacy.[98] Indeed, the analogy between the gender hierarchy and the racial caste system should come as no surprise when one recalls that American slavery was once justified by reference to marriage: just as "nature intended women to be the subordinates in marriage,"[99] so too could slavery be rationalized as a domestic relation reflecting the master's natural superiority and the slave's natural inferiority.[100]

Today, however, explicit gender-based family laws have all but vanished.[101] The Supreme Court initiated this transformation by sending the increasingly unambiguous message that state action reflecting or reinforcing traditional gender-based stereotypes violates the Equal Protection Clause and related equality norms.[102] The Court's recent opinion in *Nevada Department of Human Resources v. Hibbs*,[103] a case about the Family and Medical Leave Act

"egalitarian family law").

96. "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated or consolidated into that of the husband . . . ." 1 WILLIAM BLACKSTONE, COMMENTARIES *442.

97. *See* COTT, *supra* note 73, at 162. *See generally* D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 245-396 (2d ed. 2002). In addition, as Cott notes, divorce was available only to spouses who played their gender-assigned roles and only against spouses who breached them. COTT, *supra* note 73, at 49, 52.

98. Of course, slavery once excluded African-Americans from marriage altogether in some states. *See* MARY BETH NORTON, LIBERTY'S DAUGHTERS: THE REVOLUTIONARY EXPERIENCE OF AMERICAN WOMEN, 1750-1800 at 65-68 (1996). In addition, for a long time, African-American women frequently worked outside the home, sharing or assuming the provider role that in white families belonged exclusively to men. *See, e.g.*, Twila L. Perry, *Alimony: Race, Privilege, and Dependency in the Search for Theory*, 82 GEO. L.J. 2481, 2488-91 (1994); *see also* COTT, *supra* note 73, at 158. Nonetheless, despite variations, the gender hierarchy no doubt plays out in families of color as well.

99. COTT, *supra* note 73, at 61.

100. *Id*. Both the husband-wife relationship and the master-slave relationship were considered part of the law of domestic relations. *See, e.g.*, Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1299 (1998).

101. *But see infra* notes 143-166 and accompanying text (examining sex-based classifications and "real differences"). I also develop elsewhere some of the reasoning presented here. *See* Susan Frelich Appleton, *Contesting Gender in Popular Culture and Family Law:* Middlesex *and Other Transgender Tales*, 80 IND. L.J. 391, 415-29 (2005).

102. *See, e.g.*, Case, *supra* note 68, at 1449 (contending most of the work in the Court's sex discrimination cases is performed by rejection of stereotypes, not intermediate scrutiny).

103. 538 U.S. 721 (2003).

(FMLA), provides the most recent expression of this anti-stereotyping analysis (written by Chief Justice Rehnquist no less![104]). In upholding the application to the states of the remedial provisions of the FMLA, the *Hibbs* majority noted with approval how Congress had collected evidence of the states' reliance on "invalid gender stereotypes in the employment context"[105] and then enacted legislation designed to address this problem. In the majority's view, Congress—in its own way—was doing precisely what the Court had done repeatedly in subjecting official gender classifications to heightened scrutiny, a standard of review that disallows justifications based on "overbroad generalizations about the different talents, capacities, or preferences of males and females."[106] Accordingly, reading the FMLA as an anti-discrimination measure,[107] the *Hibbs* majority understood and embraced Congress's efforts to combat "[s]tereotypes about women's domestic roles . . . [and] parallel stereotypes presuming a lack of domestic responsibilities for men."[108] Both produce harmful workplace consequences: diminished chances for success in employment for women and rare opportunities for family leaves for men.[109]

Although arising in the employment context and responding to a remedial device developed by Congress, *Hibbs* succinctly captures the Court's contemporary position on gender-based stereotypes in family law, where gender-specific roles perhaps have the deepest roots and strongest purchase. Indeed, to the extent that the "separate spheres doctrine" once regarded the family as the domestic realm assigned to women while the workplace and professional life comprised the public realm that belonged to men,[110] we can now see home and employment as complementary but interlocking spaces. Changing the rules and norms in one affects the other, as *Hibbs* indicates. Further, *Hibbs* shows that the Court appreciates how gender stereotypes operate not just through the force of sex-based laws, but also "on the ground" in the

104. Rehnquist's position is noteworthy because of his earlier misidentification of a cultural stereotype as a biological difference. *See* Michael M. v. Superior Ct., 450 U.S. 464 (1981) (plurality opinion) (finding no constitutional problem in statutory rape, a crime that only males can commit); *see also* Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 999-1000 (1984). In addition, one of his previous opinions rejected the argument that discrimination based on pregnancy constitutes sex discrimination. Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

105. *Hibbs*, 538 U.S. at 730.

106. *Id*. at 729 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

107. *See id*. at 728 ("The FMLA aims to protect the right to be free from gender-based discrimination in the workplace.").

108. *Id*. at 736.

109. *Id*.

110. *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring) ("[T]he civil laws, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and 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.").

ordinary, quotidian interactions within the workplace and the family.[111]

Thus, *Hibbs* belongs with a long line of cases in which the Court has invoked anti-stereotyping analysis to strike down many traditional family laws under the Equal Protection Clause. For example, using this approach, the Court has invalidated laws that specified on the basis of gender who might need alimony (former wives only),[112] who needs education and training to perform the provider role (young men only),[113] who can manage community property (husbands only),[114] and who will be caring for a child after the other parent dies (mothers only).[115] Although male plaintiffs prevailed in many of these challenges,[116] overall this line of cases has gone far towards dismantling a caste system that had relegated women to a secondary status in society.[117] This trajectory acquired additional momentum from the Court's contraception and abortion decisions, which provide constitutional protection for women to choose whether and to what extent biology means destiny.[118] Put differently, as *Hibbs* and these other cases indicate, the Court increasingly has transformed family law, once the bedrock of the separate-spheres ideology,[119] into a site to be governed by gender neutrality.

State and federal legislatures, as well as state courts, have followed the

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111. Some speculate that Rehnquist's views on gender stereotypes might have evolved as a result of personal experience. Reportedly, his daughter, a single mother, sometimes had professional obligations that required the Chief Justice to help care for his young granddaughters. *See* Linda Greenhouse, *Ideas and Trends: Evolving Opinions: Heartfelt Words From the Rehnquist Court*, N.Y. TIMES, July 6, 2003, § 4, at 3; *see also supra* note 104.

112. Orr v. Orr, 440 U.S. 268 (1979).

113. Stanton v. Stanton, 421 U.S. 7 (1975); *see* Jessie Bernard, *The Good-Provider Role: Its Rise and Fall*, 36 AM. PSYCHOL. 2 (1981).

114. Kirchberg v. Feenstra, 450 U.S. 455 (1981).

115. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Stanley v. Illinois, 405 U.S. 645 (1972).

116. In addition to male plaintiffs' success in *Orr*, *Wiesenfeld*, and *Stanley*, see also *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), for a successful challenge to an all women's nursing school, and *Craig v. Boren*, 429 U.S. 190 (1976), for a successful challenge to a higher drinking age for males than for females.

117. *See* United States v. Virginia, 518 U.S. 515, 532 (1996) ("[T]he Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.").

118. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992); *see also Casey*, 518 U.S. at 896-98 (condemning common law's treatment of married women, in striking down requirement of spousal notification before abortion); Law, *supra* note 44, at 225-29 (noting how laws restricting contraception and abortion, like laws prohibiting homosexual conduct, reinforce patriarchal family). *But see infra* notes 144-166 and accompanying text (discussing "real differences").

119. *See supra* note 110 and accompanying text.

Justices' lead, developing gender-neutral rules about child custody,[120] post-dissolution support,[121] premarital contract enforcement,[122] and age requirements for marriage[123]—to name some representative illustrations. Similarly, the American Law Institute's *Principles of the Law of Family Dissolution*, the latest word in family law reform, follows a gender-neutral approach in formulating how legal decision-makers should treat the consequences of family breakups in the absence of agreement by the parties.[124]

Several important observations follow from this analysis. First, although undertaken in the name of equality, these developments have significant consequences for personal autonomy. The elimination of the official gender script both in public life and in the family enhances the freedom to choose one's own role.[125] Mom can choose to be the breadwinner, and Dad the homemaker—or both can share these previously gendered assignments.[126] Any division of familial labor becomes permissible in this gender-neutral regime.[127]

Second, to emphasize and develop a point noted earlier,[128] in rejecting gender-based stereotypes the Court not only has permitted individuals to choose

120. *See, e.g.*, MO. REV. STAT. § 452.375 (2004); Devine v. Devine, 398 So. 2d 686 (Ala. 1981).

121. *See generally, e.g.*, Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CAL. L. REV. 2017 (2000).

122. *See, e.g.*, Simeone v. Simeone, 581 A.2d 162 (Pa. 1990).

123. *See, e.g.*, UNIF. MARRIAGE & DIVORCE ACT § 203, 9A U.L.A. 180 (1998).

124. *See generally* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 12, 24 (A.L.I. 2002).

125. Again, I do not accept the need to "choose" between an approach based exclusively on anti-subordination principles versus one based exclusively on agency. Addressing the subordination of women as a group frees individual women (and men) to choose roles, activities, and performances once believed inextricably tied to gender. *See supra* note 68; *see also* Nguyen v. Immigration & Naturalization Serv., 533 U.S. 53, 74 (2001) (O'Connor, J., dissenting, joined by Souter, Ginsburg, and Breyer, JJ.) ("Sex-based statutes, even when accurately reflecting the way most men or women behave, deny individuals opportunity.").

126. This consequence might resemble one "solution" that Mary Anne Case has envisioned for educational programs traditionally considered appropriate only for males or only for females. Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 105 (1995) ("[O]ne might retain both sets of [educational] programs as embodiments of the opposite poles of masculine and feminine, but open each up to members of either sex who are appropriately gendered"). Alternatively, one could go farther, reading the Court's anti-stereotyping doctrine to call for the abandonment of gender altogether in the legal conception of spousal rights and responsibilities.

127. *See* Case, *supra* note 68, at 1488. For a parallel between how the Court has addressed gender equality and the First Amendment's Religion Clauses, see DAVID L. KIRP ET AL., GENDER JUSTICE 120-23 (1986). The authors interpret the Court's cases in both areas to have similar objectives: "to protect free exercise, whether of religion or life choices; and to proscribe governmental imposition of conventions, establishments of religion or sex-role stereotypes." *Id.* at 120-21. David Cruz also develops this parallel. *See* Cruz, *supra* note 84.

128. *See supra* notes 76-80 and accompanying text.

their own roles, but also has shown an openness to questioning traditional assumptions about the performance of gender itself. Official expectations that males and females should exhibit particular "tendencies"[129] or should present themselves in a particularly masculine or feminine way[130] flunk the Court's test for gender equality. If we transpose to family law such pronouncements, which the Justices have made mostly in other contexts, then the "gender neutralization" I have described becomes very expansive and thoroughgoing indeed.

Third, although the Court's gender jurisprudence may go well beyond the views of the "median voter"[131] or the "ordinary observer,"[132] the "gender neutralization" of family law is not some obscure development taking place outside public consciousness. Rather, everybody talks about evolving family roles and the diminishing importance of gendered expectations in familial life—nurturing fathers and "mad dads" who play an increasingly active role in childrearing,[133] mothers on public assistance whom the government requires to join the workforce,[134] ex-wives who seek half their husbands' marital earnings for domestic services once taken for granted,[135] men's participation or lack thereof in family care,[136] and the growing number of "respectable" women openly enjoying sex-positive lifestyles,[137] to name a few examples.[138] These

129. United States v. Virginia, 518 U.S. 515, 541 (1996); *see also* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994) (rejecting stereotypes about how female and male jurors differ); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 729 (1982) (rejecting stereotype that only women should be nurses).

130. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); *cf.* Case, *supra* note 126.

131. *See, e.g.*, ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 114-41 (1957).

132. I have borrowed (and perhaps misapplied) this term, which Bruce Ackerman defined and used as an analytic device to examine constitutional law, specifically the requirement of just compensation for governmental takings of privately owned property. BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 15 (1977).

133. *See, e.g.*, Bellafante, *supra* note 28; Leslie Eaton, *Lawyer Who Fought Pledge Assails Courts on Custody*, N.Y. TIMES, Oct. 23, 2004, at B2; Medina, *supra* note 28; William C. Smith, *Dads Want Their Day: Fathers Charge Legal Bias Toward Moms Hamstrings Them as Full-Time Parents*, 89 A.B.A. J. 38 (Feb. 2003).

134. *See, e.g.*, Douglas J. Besharov, *There's More Welfare to Reform*, N.Y. TIMES, Mar. 6, 2004, at A15.

135. *See, e.g.*, Elisabeth Bumiller, *Public Lives: One Word from a Corporate Ex-Wife: Half*, N.Y. TIMES, Jan. 6, 1998, at B2; Ann Marlowe, *Why, Exactly, Is Rudy Paying $6.8 M.?*, N.Y. OBSERVER, July 22, 2002, at 5.

136. *See* McNeil, *supra* note 28.

137. *See, e.g.*, Lorraine Ali & Lisa Miller, *The Secret Lives of Wives*, NEWSWEEK, July 12, 2004, at 47 (featuring a cover story entitled "The New Infidelity: From Office Affairs to Internet Hookups, More Wives Are Cheating Too"); Jennifer Senior, *Everything a Happily Married Bible Belt Woman Always Wanted to Know About Sex But Was Afraid to Ask*, N.Y. TIMES, July 4, 2004, § 6, at 32 ("On the road with Linda Brewer, a top heartland seller of sex toys"); *see also* William Booth, *A Hot Property: For the Cast, Creator—and Fans—of "Desperate Housewives," the Suburbs Are the Place to Be*, WASH. POST, Nov. 14, 2004, at N1 (noting popularity of steamy new soap opera about suburban wives); Julie Salamon, *Will*

and similar contemporary social and legal developments evoke intense interest in the popular culture, and explicit gender talk informs much of the chatter.

Finally, the anti-stereotyping analysis that animates the Supreme Court's gender discrimination opinions would seem to pose significant challenges for laws that prohibit same-sex couples from marrying. If the Court's precedents stand for the principle that males and females alike must be free to assume various family roles, then by what rationale does a valid marriage require one man and one woman? The male-female requirement rests on stereotypes (whether such stereotypes are invoked to define marriage[139] or to assume its purpose[140]) that limit the role of wife to women and that of husband to men—and in so doing perpetuate the gender hierarchy that the Supreme Court's anti-stereotyping analysis has sought to undo. Justice Johnson, concurring in part and dissenting in part in *Baker v. State*, recognized this tension between the Supreme Court's equality precedents and the exclusion of same-sex couples from marriage.[141] To borrow an observation that Mary Anne Case made in the context of employment discrimination, we could argue that the job of "wife" will not be valued until it is open to men.[142]

Yet more generally, given the face of modern family law, what differentiates the role of a wife from that of a husband—beyond outmoded stereotypes? What substantive content does the law give to each such status, now that the Court and other lawmakers have developed gender-neutral rules for alimony, childcare, work outside the home, family leaves, and the like? In the absence of any substantive difference between the meaning of "wife" and "husband," how can marriage law require one of each and permit only women to serve as the former and only men to serve as the latter? And why has the frequent gender talk about other matters of family law not spilled over to raise this precise question about same-sex marriage in the public debate?

2. "Real Differences," Procreation & Parentage

One might reply that I have overstated the case for gender neutrality in family law. The Supreme Court's doctrine has explicitly rejected strict scrutiny

"Sex and the City" Without Sex Have Much Appeal?, N.Y. TIMES, June 9, 2004, at E2 (evaluating edited re-runs of popular television series). *Compare* Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001), *with* Marc Spindelman, *Sex Equality Panic*, 13 COLUM. J. GENDER & L. 1 (2004).

138. *See also supra* notes 27-29 and accompanying text.

139. *See, e.g.*, Standhardt v. Superior Court, 77 P.3d 451, 458 & n.10 (Ariz. Ct. App. 2003); Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973); Singer v. Hara, 522 P.2d 1187, 1191-92 (Wash. Ct. App. 1974).

140. *See, e.g.*, Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971).

141. 744 A.2d 864, 907 (Vt. 1999).

142. *See* Case, *supra* note 126, at 3. *But see* Case, *supra* note 68 (contending that the problem is stereotyping, not subordination or devaluation of women).

for sex-based classifications, using instead some form of intermediate scrutiny and reaching unpredictable results.[143] Further, the Court's equality doctrine expressly permits a narrow band of departures from gender neutrality; these exceptions cover those cases in which men and women are not similarly situated, based on "real differences."[144] For example, the Court has upheld statutory rape laws that only males can violate and only with female sexual partners, with the plurality citing the capacity for pregnancy as the decisive sex-based "real difference."[145] Likewise, the Court has upheld different treatment of nonmarital children born abroad of citizen fathers versus those of citizen mothers, because, unlike mothers, fathers need not be present at the child's birth and so documented.[146] Hence, one might contend that males and females are so inherently different in ways that matter for family law generally, and marriage law in particular, that true gender neutrality remains illusory or misguided.

Still, our understanding of what counts as a "real difference" necessarily reflects the cultural context. Dissenters in both the statutory-rape case[147] and the immigration case[148] explain how the controlling opinions mistook stereotypes for biology; in both cases, gender-neutral laws would have served the governmental objective just as well, if not even more effectively.[149] In considering the scope of the "real differences" exception to gender neutrality, it is also worth recalling how in earlier times alleged "natural differences" between races were invoked to justify slavery.[150]

To the extent that some opponents of same-sex marriage have emphasized procreation as the defining purpose of marriage, they are engaging in implicit

143. *See* Epstein et al., *supra* note 55. *But see* Case, *supra* note 68, at 1453 ("The perfect proxy test [apparent in the Court's sex discrimination cases] has always had the capacity to be more strict even than strict scrutiny.").

144. Michael M. v. Superior Court, 450 U.S. 464, 469 (1981) (plurality opinion) (stating that the Court upholds gender classifications that "realistically [reflect] the fact that the sexes are not similarly situated in certain circumstances"); *see, e.g.*, Nguyen v. INS, 533 U.S. 53 (2001); Lehr v. Robertson, 463 U.S. 248 (1983); *see also* Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987); Case, *supra* note 68; Cruz, *supra* note 84, at 1002-03.

145. *Michael M.*, 450 U.S. at 471-72.

146. *Nguyen*, 533 U.S. at 62-63.

147. *Michael M.*, 450 U.S. at 496 (Brennan, J., dissenting, joined by White and Marshall, JJ.) (finding true purpose of the law to rest on the stereotypical assumption that abstinence is best for young females, whatever their own preferences, but not for young males); *id.* at 501 (Stevens, J., dissenting) (noting that the legislature adopted "traditional attitudes" that the male is typically the aggressor); *see also* Law, *supra* note 104, at 1000.

148. *Nguyen*, 533 U.S. at 86 (O'Connor, J., dissenting, joined by Stevens, Ginsburg, and Breyer, JJ.) ("[T]he idea that a mother's presence at birth supplies adequate assurance of an opportunity to develop a relationship while a father's presence at birth does not would appear to rest only on an overbroad sex-based generalization.").

149. *See Michael M.*, 450 U.S. at 493-94 (Brennan, J., et al, dissenting); *Nguyen*, 533 U.S. at 79, 83 (O'Conner, et al., dissenting).

150. COTT, *supra* note 73, at 62-63. This parallel supports the "miscegenation analogy." *See supra* note 60 and accompanying text.

gender talk about males' and females' different biological contributions to human reproduction.[151] Certainly, this argument once carried the day, imposing an apparently insurmountable obstacle to the case for same-sex marriage.[152] Today, however, this argument has become increasingly vulnerable.

First, as the *Goodridge* majority points out, states do not require applicants for marriage licenses to pass a fertility test, intend to have children, or even consummate their union.[153] (Indeed, the choice whether to engage in such activities is constitutionally protected.[154]) Further, according to the *Goodridge* majority, to "single[] out the one unbridgeable difference between same-sex and opposite-sex couples" as the asserted essence of marriage invidiously stereotypes same-sex relationships as inferior by comparison.[155] *Goodridge* also notes the increasing use of assisted reproduction, which permits procreation for single persons and couples regardless of sex.[156] And, scholars have repeatedly cited the Supreme Court's emphasis on the benefits of marriage that exist independently of any traditional consummation.[157]

Reliance on procreative contributions as the quintessential "real differences" that justify the sex classifications in marriage laws exaggerates the importance of such differences in contemporary family law. Even for laws rooted in biology and procreation, gender neutrality is becoming the rule of the day.[158] Consider, for example, Vermont's extension of the traditional presumption of legitimacy for children born in marriage to those born in a civil union.[159] A California appellate court recently took this approach a step further, adopting a gender-neutral reading of the *paternity* statutes to allow the non-

151. *See, e.g.*, Jean Bethke Elshtain, *Against Gay Marriage*, *in* SAME-SEX MARRIAGE, *supra* note 10, at 54; Michael Novak, *What Marriage Is*, 156 PUB. INT. 24, 28-29 (2004); Richard G. Wilkins, *The Constitutionality of Legal Preferences for Heterosexual Marriage*, 16 REGENT U.L. REV. 121 (2003-2004); *see also* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 985, 1002 (Mass. 2003) (Cordy, J., dissenting); Frank Bruni, *Vatican Exhorts Legislators to Reject Same-Sex Unions*, N.Y. TIMES, Aug. 1, 2003, at A1 (reporting Vatican's statement that the inability of same-sex couples to procreate on their own violates "one of the God-given and most important aspects of marriage").

152. *See, e.g.*, Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971); Singer v. Hara, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974).

153. *Goodridge*, 798 N.E.2d at 961.

154. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).

155. *Goodridge*, 798 N.E.2d at 962.

156. *Id*. at 962 n.24; *see also* Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297.

157. These scholars cite the Court's recognition of the right to marry for prison inmates in *Turner v. Safley*, 482 U.S. 78 (1987). *See, e.g.*, Culhane, *supra* note 65, at 1152-54; Katz, *supra* note 59, at 99-100.

158. *See, e.g.*, Fineman, *supra* note 95, at 182-204 (critiquing "Mothering in a Gender-Neutral World"). Fineman's analysis questions why the state does not support mothering if procreation is the purpose of marriage and dependency is inevitable. *See, e.g., id.* at 263.

159. *See* VT. STAT ANN. tit. 15, § 1204(f) (2002).

biological mother in a dissolved lesbian relationship to establish parentage.[160] Reporting on this case, the headline in a California legal newspaper announced: "*Court Breaks Precedent, Says Woman Can Be Dad*."[161]

An additional example appears in the FMLA (the statute examined in *Hibbs*), which shows that today lawmakers are likely to choose a gender-neutral scheme *even when* sex-based biological differences (as distinguished from stereotypical notions)[162] would permit an exception. In the FMLA context, Congress might well have rationalized that pregnancy and childbirth, which give rise to the need of some female employees (but no male employees) for a specific type of leave, demand additional protection, beyond that offered for other leaves needed by male and female employees alike.[163] Indeed, one could well criticize Congress for ignoring "real differences," leaving women at a substantive disadvantage compared to men when they attempt to have families while maintaining jobs.[164] Nonetheless, Congress enacted a gender-neutral leave law, explaining in the statute itself the policy reason for this choice—halting gender discrimination.[165]

As this line of reasoning demonstrates, whether constitutionally required or not, family law increasingly treats men and women alike even in matters of procreation and parentage. Once presumed-father statutes apply to women, then all gendered family laws appear headed toward extinction. In fact, the single most visible gender-based family law still surviving is the requirement of one man and one woman for a valid marriage, even though the spouses' legal roles and responsibilities have become essentially interchangeable. Maintaining this formal male-female requirement, even after law reforms have emptied "husband" and "wife" of their legal substance, must signal a deep resistance to finishing off what remains of marriage's traditional gender script. Yet, in the public debate, no one seems to be talking about same-sex marriage in this

160. Kristine Renee H. v. Lisa Ann R., 16 Cal. Rptr. 3d 123 (Cal. Ct. App. 2004). The Supreme Court of California subsequently granted review and "depublished" the opinion of the appellate court. 97 P.3d 72 (Cal. 2004).

161. Mike McKee, *Court Breaks Precedent, Says Woman Can Be Dad*, RECORDER, July 2, 2004, at 2; *see also* Susan E. Dalton, *From Presumed Fathers to Lesbian Mothers: Sex Discrimination and the Legal Construction of Parenthood*, 9 MICH. J. GENDER & L. 261 (2003).

162. Lawmakers do not always see the distinction, as Sylvia Law has documented. *See* Law, *supra* note 104, at 987-1002; *see also* Franke, *supra* note 71, at 29-30, 81-82.

163. *Cf.* Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) (upholding unpaid pregnancy disability leave and reinstatement law against sex discrimination claim).

164. Despite such biological differences, the Court has declined to treat state action disadvantaging pregnant workers as unconstitutional sex discrimination, a conclusion that persists even though Congress corrected a similar interpretation of Title VII's ban on sex discrimination by enacting the Pregnancy Discrimination Act. 42 U.S.C. § 2000e(k) (2000). *Compare* Geduldig v. Aiello, 417 U.S. 484 (1974), *with* Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976). *See generally* Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1 (1985) (arguing pregnancy-related leaves required).

165. 29 U.S.C. § 2601(a) (2000).

way—as the culmination of the gender neutralization of family law and perhaps a final step to equal treatment for all men and women, straight and gay alike.[166]

II. EXPLORING THE VOID

A. The Analytical Divide

Although gender talk exists in judicial and scholarly analyses of same-sex marriage, today it occupies an unstable foothold. This Part briefly examines the role that explicit gender talk has or has not played in recent court decisions and the controversy among scholars on the merits of using gender talk to attack same-sex marriage bans. This examination should help inform the search for gender talk in the popular debate, where perhaps similar considerations are at work.

No doubt, the majority opinion of the Massachusetts Supreme Judicial Court in *Goodridge*[167] stands out as a stunning victory for opponents of traditional sex-based marriage restrictions.[168] The court, however, reached its path-breaking outcome, state constitutional protection for access to same-sex civil marriage, without addressing whether the challenged restrictions violate the state's ERA.[169] The state's failure to produce a justification meeting the

166. *See, e.g.*, William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's* Sex and Reason*: Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333, 356 (1992) ("Recognizing same-sex marriage would contribute to the erosion of gender-based hierarchy within the family, because in a same-sex marriage there can be no division of labor according to gender."); Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9 (1991); Jennifer Wriggins, *Marriage Law and Family Law: Autonomy, Interdependence and Couples of the Same Gender*, 41 B.C. L. REV. 265, 312-14 (2000) (discussing how same-sex marriage will make marriage "less sexist"); *see also* Letter to the Bishops, *supra* note 26.

167. Chief Justice Marshall's opinion appears to be a majority opinion. Seven Justices sit on the court, and three wrote dissenting opinions. The swing or decisive fourth vote came from Justice Greaney, who—while expressly preferring a sex discrimination approach—states: "I agree with the result reached by *the court*, the remedy, and much of the reasoning in *the court's* opinion." Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 970 (Mass. 1970) (Greaney, J., dissenting) (emphasis added).

168. For a glimpse of the plaintiffs' legal strategy, see David J. Garrow, *Toward a More Perfect Union*, N.Y. TIMES, May 9, 2004, § 6, at 52.

169. *Goodridge*, 798 N.E.2d at 961. After noting the state constitution's prohibition of sex-based discrimination, the majority said: "We have not previously considered whether 'sexual orientation' is a 'suspect' classification. Our resolution of this case does not require that inquiry here." *Id.* at 961 n.21; *see also id.* at 962 (explaining why singling out procreation as the essence of marriage discriminates against same-sex couples); Rosen, *supra* note 17 (noting how proponents of Massachusetts's ERA, enacted in 1976, made explicit assurances it would not provide grounds for same-sex marriage).

Although this analysis focuses on U.S. developments, same-sex marriage has been gaining official recognition elsewhere. *See, e.g.*, Halpern v. Canada, [2003] O.R. (3d) 161 (authorizing same-sex marriages in Ontario, Canada); *In re* Section 53 of the Supreme Court Act [1988] 2 S.C.R. 217 (upholding constitutionality of proposed Canadian legislation

rational basis test mooted any possible grounds for more demanding standards of review.[170] Similarly, the Vermont Supreme Court's *Baker* majority, which relied on that state's Common Benefits Clause, found no need to adopt the sex discrimination argument.[171] Certainly, these majority judges were familiar with the argument, however, given its full presentation in the briefs,[172] its pivotal role in the Hawaii case *(Baehr*) a few years before,[173] and the separate opinions from their own colleagues preferring a sex discrimination analysis.[174]

One might be tempted to say that both *Goodridge* and *Baker* show the irrelevance of gender talk because they move well beyond the established law of sex discrimination, blazing new and more progressive trails as gay rights cases. Whatever their differences, both cases seem to recognize that prevailing marriage restrictions create a caste system that makes gays and lesbians and their children second-class citizens. In addition, *Goodridge*, handed down just a few months after the Court's decision in *Lawrence v. Texas*,[175] which overruled *Bowers v. Hardwick*,[176] could and did invoke *Lawrence*'s recognition of same-sex intimacy as a species of protected liberty and its acknowledgment of the affront to personal dignity that criminal sodomy laws inflict.[177] *Goodridge*'s

allowing same-sex marriage); *Developments in the Law—The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2006-09 (2003) (noting legal same-sex marriage in Belgium and the Netherlands).

170. *Goodridge*, 798 N.E.2d at 961. In its later opinion rejecting civil unions as a remedy, the majority explained: "[O]ur decision in *Goodridge* did not depend on reading a particular suspect class into the Massachusetts Constitution, but on the . . . elegant and universal [anti-discrimination] pronouncements of that document." *In re* Opinions of the Justices to the Senate, 802 N.E.2d 565, 569 n.3 (Mass. 2004).

171. *See* Baker v. State, 744 A.2d 864, 870 n.2 (Vt. 1999); *see also id*. at 880 n.13 (finding sex discrimination precedents inapplicable because traditional marriage restrictions did not intentionally discriminate against women).

172. *See* Brief of Plaintiffs-Appellants at 56-59, *Goodridge*, 798 N.E.2d 941 (No. SJC-08860), http://www.glad.org/marriage/Appellants_Brief.pdf (last visited Mar. 17, 2005); Brief of Amici Curiae Mass. Bar Ass'n at 13, *Goodridge*, 798 N.E.2d 941 (No. SJC-08860), http://www.glad.org/marriage/MBA_Brief.pdf (last visited Mar. 17, 2005); Brief of Amici Curiae Nat'l Ctr. for Lesbian Rights & Vermont Chapter of Nat'l Org. for Women, *Baker*, 744 A.2d 864 (No. 98-32), http://www.vtfreetomarry.org/co_lawsuit_amicusbriefs_ vtnow. html (last visited Mar. 17, 2005). For example, the Plaintiffs-Appellants' brief in *Goodridge* includes charts designed to demonstrate the parallel between the sex discrimination in the challenged marriage statutes and the race discrimination in the miscegenation bans invalidated in *Loving v. Virginia*, 388 U.S. 1 (1967). *See* Brief of Plaintiffs-Appellants at 59.

173. *See supra* notes 47-51 and accompanying text (*Baehr*).

174. *See supra* notes 56-59, 141 and accompanying text.

175. 539 U.S. 558 (2003).

176. 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. 558 (2003).

177. *Goodridge*, 798 N.E.2d at 948, 953, 958 n.17, 959, 961 n.23 (all citations of *Lawrence* by *Goodridge* majority). *Lawrence* itself might have used the narrow ground of sex discrimination rather than announcing a broad charter of personal autonomy and dignity. The Texas statute before the Court defined "deviate sexual intercourse" to include acts only between same-sex participants. Justice Scalia's acerbic dissent makes this point. 539 U.S. at 599-601 (Scalia, J., dissenting).

sequel, *In re Opinions of the Justices to the Senate*,[178] takes the gay rights approach a step further when it rejects civil unions as a remedy, emphasizing the inequality of a separate status for same-sex couples.[179]

On the other hand, both *Baker* and *Goodridge* expressly decline to decide whether gays and lesbians constitute a suspect class.[180] Moreover, *Baker* tolerates a second-class status by permitting civil unions instead of requiring access to full marriage.[181] And *Goodridge* at least suggests that the challengers' sexual orientation is not pivotal when the opinion observes that *everyone* is prohibited from marrying another individual of the same sex; hence, existing law permits gays and lesbians to marry, so long as they choose someone of a different sex.[182]

Whether we should classify *Baker* and *Goodridge* and even *Lawrence* as full-fledged gay rights cases in an effort to explain the absence of gender talk in the majority opinions matters because of the scholarly divide on these issues. In particular, perhaps these majority judges have sidestepped the issue for some of the same reasons presented by scholars who support same-sex marriage but criticize the sex discrimination approach. For example, Edward Stein rejects the sex discrimination rubric on the ground that it misidentifies the moral wrong in laws disadvantaging gays and lesbians.[183] He goes on to claim that sexism and homophobia constitute two different belief systems that require separate attacks.[184] Carlos Ball chimes in that the sex discrimination argument carries "little rhetorical weight."[185] Mae Kuykendall predicts that the sex discrimination argument will fail because it is too radical in its assault on all traditional gender roles; by comparison, a gay rights approach emerges as less

178. 802 N.E.2d 565 (Mass. 2004).

179. *See id*. at 569.

180. *See Goodridge*, 798 N.E.2d at 961 (Mass. 2003); *Baker*, 744 A.2d at 878 & n.10 (invoking inclusive purpose of state constitution's Common Benefits Clause).

181. Baker v. State, 744 A.2d 864, 886-88 (Vt. 1999).

182. *Goodridge*, 798 N.E.2d at 953 n.11; *cf*. Baehr v. Lewin, 852 P.2d 44, 54 n.14 & 58 n.17 (Haw. 1993) (plurality opinion).

183. Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471, 498, 503 (2001); *see, e.g.*, Kristin Eliasberg, *Pride and Privacy as the Supreme Court Prepares to Hear a Landmark Gay Rights Case, Advocates Debate Strategy*, BOSTON GLOBE, Mar. 2, 2003, at E1 (quoting Kenji Yoshino on reasons to eschew the sex discrimination argument: "The whole idea of gay civil rights is that it is something different from sex discrimination."); *see also* KOPPELMAN, *supra* note 46, at 67 (quoting other critics of the sex discrimination argument).

184. Stein, *supra* note 183, at 500. While Eskridge argues that "the sex discrimination argument for homo equality has a transvestic quality, dressing up gay rights in a sex equality garb," he has noted the links between anti-gay attitudes and attitudes supporting traditional gender-based roles. William N. Eskridge, Jr., *Multivocal Prejudices and Homo Equality*, 74 IND. L.J. 1085, 1110 (1999); *see also* Farrell, *supra* note 65; Hart, *supra* note 81.

185. Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871, 1880 (1997).

far-reaching and threatening.[186]

For still other advocates of gay rights, marriage itself is so inherently patriarchal that talk of gender equality makes no sense. Why seek access to an inherently sexist institution?[187] The quest for same-sex marriage troubles lesbian activists, in particular[188]—perhaps no surprise in light of the gendered data on satisfaction and health gathered from male-female marriages.[189] (Married men and single women fare better than married women.[190]) Further, why should gays and lesbians try to imitate heterosexuals' "domestication" instead of pursuing the autonomy to lead whatever lives they want, free from discrimination by the state?[191] In fact, why should the state create a relationship or status privileged above all others that, regardless of rules of access, results in two different classes—those "in" and those "out"?[192]

Two important sets of issues emerge from these divisions. First, divisions among judges and scholars reveal provocative questions—neither too sophisticated nor too esoteric to enter the public debate. Is same-sex marriage exclusively about gay rights? Do straight men and women who resist gender stereotypes and oppose any gender hierarchy also have something at stake in the same-sex marriage debate? Is marriage an especially compelling goal for men, including gay males, because it historically has reflected and reinforced male privilege?[193] Can gay rights meaningfully advance without more sweeping

186. Mae Kuykendall, *Gay Marriages and Civil Unions: Democracy, the Judiciary and Discursive Space in the Liberal Society*, 52 MERCER L. REV. 1003, 1023 (2001).

187. *See, e.g.*, Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage"*, 79 VA. L. REV. 1535 (1993); Nancy D. Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 AM. U. J. GENDER SOC. POL'Y & L. 167 (2000). *But see* Bernstein, *supra* note 75; Pascoe, *supra* note 31.

188. *See, e.g.*, Ettlebrick, *supra* note 40; Polikoff, *supra* note 187 (both articles cited).

189. *See, e.g.*, JESSIE BERNARD, THE FUTURE OF MARRIAGE 17-24, 28-58 (1972).

190. *Id*. More recent data on the health of married persons do not reveal Bernard's gender-based disparities. *See, e.g.*, Charlotte A. Schoenborn, U.S. Dep't of Health & Human Servs., *Marital Status and Health: United States, 1999-2002*, http://www.cdc.gov/nchs/data/ad/ad351.pdf (last visited Mar. 20, 2005).

191. *E.g.*, Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399 (2004). *But see* Marc Spindelman, *Sodomy Politics in* Lawrence v. Texas, JURIST, June 12, 2003, *available at* http://jurist.law.pitt.edu/forum/forumnew115.php (last visited Mar. 17, 2005).

192. *See* LAW COMM'N OF CANADA, BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS (2001), http://collection.nlc-bnc.ca/100/200/301/lcc-cdc/beyond_conjugality-e/pdf/37152-e.pdf (last visited Mar. 20, 2005) (urging government recognition of certain personal adult relationships beyond marriage and marriage-like conjugal relationships); *see also, e.g.*, Butler, *supra* note 68, at 26; *Can Marriage Be Saved? A Forum*, NATION, July 5, 2004 at 16, 16-17 (comments of Ellen Willis). Although *Goodridge* alluded to the abolition of civil marriage to remedy the constitutional violation to same-sex couples, the court rejected this possibility because of its "chaotic consequences." 798 N.E.2d 941, 957 n.14 (Mass. 2003).

193. *See, e.g.*, ESKRIDGE, *supra* note 31; Stoddard, *supra* note 40.

challenges to the entire "sex system"?[194] Put differently, what do gay rights mean if uncoupled from gender equality?[195] And how might same-sex marriage help transform marriage (or its place in law and society) for heterosexuals?[196]

Second, what role *should* gender talk play now that the same-sex marriage controversy has moved from the law reviews and the courts to the ballot box? Given the breadth of public debate, *should* activists raise the sex discrimination argument in interviews, op-ed pieces, and other such fora? For theorists like Stein, for example, who have expressed strong reservations about invoking sex discrimination even as an argument in the alternative,[197] might using this approach as "one arrow in the quiver"[198] change from a moral cop-out to a promising strategy once the audience becomes voters at large? Alternatively, might the notion of true gender equality prove so unsettling (even to gay males) that the sex discrimination argument becomes counter-productive?

B. Missing or Camouflaged?: Bringing Gender Talk Out of Hiding

Despite public awareness of equality norms, different treatment of males and females still strikes many as so "natural" that sex discrimination often goes undetected.[199] In numerous conversations about same-sex marriage, I have found surprising how many people (students, fellow lawyers, and activists committed to protecting reproductive rights, among others) do not "see" the sex discrimination argument when I first introduce it, but then become receptive once I provide a fuller explanation, including a recitation of marriage's traditional gender script. Although I concede that such explanations locate the important moral question about how we treat gay and lesbian members of our community within a discourse about the treatment of women, I know I have convinced some agnostics to become supporters of same-sex marriage once I engage in gender talk. I would describe these "converts" as straight liberals who support gender equality but, initially, fail to realize that they have something personal at stake in the same-sex marriage debate.[200] At least for other citizens

194. *Cf*. Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 394 (2001).

195. *See, e.g.*, Hart, *supra* note 81. More concretely, would *Lawrence* have been possible without *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and other abortion precedents? *See* Lawrence v. Texas, 539 U.S. 558, 573-74 (2003) (relying on *Casey*). I thank Marc Spindelman for this helpful observation. *See also* Butler, *supra* note 68, at 181-85.

196. *See, e.g.*, Pascoe, *supra* note 31, at 109-10.

197. *See* Stein, *supra* note 183, at 514-15.

198. This is Koppelman's phrase. Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 UCLA L. REV. 519, 538 (2001).

199. *See, e.g.*, Frug, *supra* note 74.

200. My experience supports Koppelman's hypothesis. KOPPELMAN, *supra* note 46, at 71 ("Many people who are otherwise oblivious to the plight of gays do understand what is

like them, wider dissemination of gender talk should bring more supporters of same-sex marriage into the public conversation—and more concretely, should prompt such individuals to turn out to vote against referenda designed to restrict marriage to one man and one woman.[201]

Making gender talk accessible to the public would seem to provide an especially promising approach for those organizations that have both official positions against constitutional marriage amendments and members committed to gender equality, yet fail to make any explicit connection between sex discrimination and the same-sex marriage debate. For example, in soliciting its members to send to their U.S. Senators letters opposing the proposed Federal Marriage Amendment (FMA), the Planned Parenthood Federation of America distributed an email message stating: "While this constitutional amendment purports to define marriage as being between a man and a woman, it is really much more. The FMA is an effort to undermine the civil rights of gay and lesbian Americans in our nation's most sacred document, the Constitution."[202] Similarly, the website of the National Organization for Women (NOW) proclaims that "Same-Sex Marriage is a Feminist Issue," while noting NOW's advocacy of lesbian rights, including a woman's "right to define and express her own sexuality and to choose her own lifestyle."[203] Even if these statements elicited the desired response from some PPFA and NOW members, wouldn't a call to fight sex discrimination and gender stereotypes reach still others who

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wrong with sexism.").

201. Public opinion polls about attitudes toward same-sex relationships and marriage reveal notable demographic differences. For example, younger persons have more positive attitudes than their older counterparts. *See* Debbie Howlett, *Demographics Rule Attitude on Gay Relationships*, USA TODAY, June 26, 2003, http://www.usatoday.com/news/washington/2003-06-26-demo-usat_x.htm (last visited Mar. 15, 2005) (using Gallup Poll data to show that 72% of those ages 18-29 stated such relationships should be legal, in contrast to only 39% of those 65 and older). Opposition to same-sex marriage correlates strongly with church attendance more than once a week (with 84% of those opposing and 11% favoring). NATIONAL ANNENBERG ELECTION SURVEY 2004, *at* http://www.naes04.org (last visited Mar. 16, 2005). In 2003, 53% of the general population opposed or strongly opposed same-sex marriage, with the number climbing to 64% when just African-Americans were considered. PEW RESEARCH CENTER, RELIGION AND POLITICS: CONTENTION AND CONSENSUS (2003), *at* http://pewforum.org/publications (last visited Mar. 20, 2005); *see also* MORRIS P. FIORINA ET AL., CULTURE WAR? THE MYTH OF A POLARIZED AMERICA 55-64 (2005); WOLFSON, *supra* note 24, at 25.

202. Email from Planned Parenthood of America (actioncenter@ppfa.org), Stop the Marriage Amendment Now, to author (July 8, 2004) (on file with author).

203. *See Same-Sex Marriage Is a Feminist Issue*, *at* http://www.now.org/issues/lgbi/marr-rep-2.html (last visited Mar. 20, 2005). Although the Vermont chapter of NOW joined with National Center for Lesbian Rights to raise the sex discrimination argument in *Baker*, *see supra* note 172, nationally it has voiced support for the right of same-sex couples to marry with only an oblique and ambiguous reference to sex discrimination. *See Senate Majority Votes Against Writing Discrimination into Constitution; NOW Salutes Defeat of Federal Marriage Amendment*, *at* http://www.now.org/press/07-04/07-14.html (last visited Mar. 20, 2005) ("NOW believes that federal and state governments should not be allowed to deny rights to any individual based *on sex* or sexual orientation." (emphasis added)).

have yet to see the connection between gay rights and their own commitment to gender equality? And dare I wonder whether members of fathers' rights groups, which have crusaded against sex discrimination when the issue is child custody, might also be able to see the connection between their cause and the same-sex marriage debate?[204]

The second reason to add explicit gender talk to the public conversation is that doing so will both expose and answer the reliance on implicit gender talk by same-sex marriage opponents. A close look at three of the most frequently invoked—but generally unexplained—assertions against same-sex marriage reveals such implicit gender talk. An effective response requires putting issues of sex discrimination and gender stereotypes on the table for all to see.

I concede here that skeptics might properly worry about the prospect of true gender equality as precisely the consequence that makes same-sex marriage so threatening. Indeed, perhaps the public referendum adopted in Hawaii after *Baehr*'s explicit use of a sex discrimination rationale to strike down the male-female requirement for marriage is evidence of the validity of such concerns—although similar referenda elsewhere suggest that the specific rationale of the *Baehr* plurality was of no particular moment. In any event, once same-sex marriage opponents have introduced gender talk, even implicitly, then one who disagrees with them has two choices. One can either "out" the opponents' implicit reliance on sex discrimination, or one can leave their arguments unanswered—out of fear of repercussions, in the fragile hope that an exclusive focus on anti-gay animus or liberty will garner broad appeal, or in the wish that opponents' unexplained assertions will be dismissed as empty rhetoric. Given the expansive nature of the public debate and the opportunity for wide-ranging discussions, the former choice, transparency, represents the better move. In reaching this conclusion I note that, although anti-subordination feminism and calls for substantive equality might not win a popularity contest today, male-female marriage restrictions discriminate *on their face* on the basis of sex, just as the traditional rules governing husbands and wives did.[205]

1. Preserving or Protecting Marriage

Those who seek federal and state constitutional amendments to restrict marriage to "one man and one woman" often describe their goal as "preserving" or "protecting" marriage. For example, in calling for a constitutional

204. My search of websites of fathers' rights groups revealed no references to same-sex marriage or constitutional amendments restricting marriage to a man and a woman. *Cf. infra* notes 238-241 and accompanying text.

205. The discrimination problem is quite different from (and more accessible to the "ordinary observer," *see supra* note 132) than that posed by gender inequalities resulting from a facially neutral law with a disproportionate impact on, say, women. Of course, the "equal-application" counterargument might surface in response here, only to be rejected for reasons summarized above. *See supra* notes 69-70 and accompanying text.

amendment, President Bush cited the need "to protect marriage in America."[206] What do these words mean, especially when even some conservative commentators assert that including gays and lesbians will better safeguard marriage than keeping them out?[207] As the Massachusetts Supreme Judicial Court said in rejecting civil unions, a separate-but-equal track for same-sex couples "does nothing to 'preserve' the civil marriage law, only its constitutional infirmity."[208]

Preserving or protecting marriage might simply capture the notion of marriage as an elite private club. The value of membership depreciates if just anyone—particularly outsiders like gays and lesbians—can join.[209] So interpreted, efforts to prevent access to marriage emerge as nothing more than mean-spirited and invidious (and hence, if codified in state action, unconstitutional) exclusions.[210]

Humorist Adam Felber's statement quoted at the beginning of this Article,[211] however, jokingly suggests that something much more personal might be at stake—a perceived effect not just on marriage as an institution but also on the day-to-day lives of individual spouses.[212] The sex discrimination argument supports this intuition. Felber seems to detect a fear that straight spouses (and prospective spouses) will reject marriage's traditional gender script once they see same-sex couples living out their marriages free from the confines of "husband" and "wife." Indeed, given that some proponents of same-sex marriage insist that it will necessarily make all marriages more egalitarian by eviscerating traditional gender roles (in real life, not just in law),[213]

206. *See supra* note 4 and accompanying text.

207. *See, e.g.*, Brooks, *supra* note 9; Jonathan Rauch, *What I Learned at the AEI*, 156 PUB. INT. 17 (2004); *see also* JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA (2004).

208. *In re* Opinions of the Justices to the Senate, 802 N.E.2d 565, 569 (Mass. 2004).

209. *See, e.g.*, Posner, *supra* note 13, at 33 (theorizing that disapproval of homosexuals explains the fight over "marriage").

210. *See* Lawrence v. Texas, 539 U.S. 558, 574-75 (2003) (stating that laws born only of animosity have no legitimate rational basis); *see id.* at 582 (O'Connor, J., concurring) ("[W]e have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons."). Of course, this approach casts doubt on the constitutionality of the Defense of Marriage Act (DOMA), 1 U.S.C. § 7 (2000); 28 U.S.C. § 1738C (2000). *See, e.g.*, Barbara J. Flagg, *"Animus" and Moral Disapproval: A Comment on* Romer v. Evans, 82 MINN. L. REV. 833 (1998); *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 HARV. L. REV. 2684 (2004). DOMA's constitutional vulnerability is often cited as a reason for amending the Constitution. *But see Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring) (contrasting state interest based on morality to a "legitimate state interest . . . such as . . . preserving the traditional institution of marriage").

211. *See supra* note 1 and accompanying text.

212. *See also Can Marriage Be Saved?*, *supra* note 192, at 24 (comments of E.J. Graff quoting James Carville: "I was against gay marriage until I found out I didn't have to have one.").

213. *See supra* note 166.

opponents might well fear precisely this consequence.

If eliminating marriage's traditional gender script is in fact the consequence that those seeking to "preserve" or "protect" marriage are trying so hard to prevent,[214] then surely prevailing norms of gender equality make this issue worth debating.[215] Adding explicit gender talk to the public conversation would help unmask this goal. That is, proponents of same-sex marriage should engage detractors in conversation about sex discrimination, gender stereotypes, and equality. How would the "ordinary observer"[216] respond to a debate in these terms? Significantly, a conversation in these terms might help address any (misguided) questions about whether state actions to maintain the status quo constitute *intentional* sex discrimination.[217] Further, if efforts to preserve traditional gender roles and distinctions rest on religious beliefs,[218] then the discussion might helpfully shift to the First Amendment religion clauses.[219]

In addition, those aiming to "protect" or "preserve" marriage have raised distracting predictions that group marriage and incest will come next. Supporters of amendments to ban same-sex marriage contend that a right of gays and lesbians to marry would create a slippery slope toward a similar right on the part of "polygamists" or those "sexually oriented" to members of their own families.[220] Regardless how one might approach an expanded right to marry, a gender equality argument for same-sex marriage completely avoids these pitfalls. Stopping sex discrimination paves the way for neither polygamy

214. *See* COTT, *supra* note 73, at 213-14.

215. Of course, a constitutional amendment would make inapplicable the sex equality precedents, *see supra* notes 95-142 and accompanying text, but even amending the U.S. Constitution (or state constitutions) would not necessarily change the equality norms that these precedents have established.

216. *See supra* note 132.

217. We can find a parallel in the aftermath of *Goodridge.* True, some authorities claim that *Loving v. Virginia* does not apply to the same-sex marriage debate because the male-female requirement was not adopted for the purpose of sex-based discrimination. *See supra* note 86 and accompanying text. Even if that is so, the Massachusetts Supreme Judicial Court noted that the adoption of civil union legislation, in place of allowing same-sex couples to marry, would reflect purposeful discrimination. *See In re* Opinions of the Justices to the Senate, 802 N.E.2d 565, 570 (Mass. 2004); *cf. supra* note 86 and accompanying text (noting that sex-based classification is express and facial, hence purposely imposed in any event).

218. *See, e.g.*, Letter to the Bishops, *supra* note 26; RECOVERING BIBLICAL MANHOOD AND WOMANHOOD: A RESPONSE TO EVANGELICAL FEMINISM (John Piper & Wayne Grudem, eds. 1991), http://leaderu.com/orgs/cbmw/rbmw (last visited June 6, 2004).

219. The majority in *Goodridge* carefully distinguishes "civil marriage" from religious celebrations and understandings of marriage. 798 N.E.2d 941, 954, 965 n.29 (Mass. 2003). *See also* Howard Moody, *Gay Marriage Shows Why We Need to Separate Church and State; Sacred Rite or Civil Right?*, NATION, July 5, 2004, at 28.

220. For example, U.S. Rep. Marilyn Musgrave of Colorado, a leader in the push for a federal constitutional amendment, said: "If we redefine marriage, anything goes . . . . You could allow polygamy, group marriage." Mary Curtius, *Leading Foe of Gay Marriage Shows Mettle; Conservative Activists Say First-Term House Member Was the Perfect Choice to Push a Ban*, L.A. TIMES, Mar. 14, 2004, at A35; *see also* Hoey, *supra* note 20.

nor incest. Indeed, polygamy and incest are not practices that follow from the equal treatment of women and men, but instead practices that often reflect the subordination and exploitation of women.[221]

2. Transmitting Gender

Implicit gender talk is also at work when opponents of same-sex marriage focus on the welfare of children and insist that children need both a mother and a father.[222] This theme surfaced repeatedly in the speeches on the Senate floor by supporters of the Federal Marriage Amendment.[223] Even though they concede that single mothers can successfully rear children, these opponents express an unshakeable belief that the law must establish a male-female paradigm even while accepting the reality of departures from the ideal. Justice Cordy, dissenting in *Goodridge*, articulates this position.[224] This belief also forms a basis on which a federal court of appeals upheld Florida's statute banning adoptions by gays and lesbians, even in the face of evidence that the ban delays adoptions and that many gay and lesbian foster parents have performed their childrearing responsibilities in an exemplary fashion.[225]

Clearly, these opponents of same-sex marriage would reject the recent suggestion of the California court that reasoned that a woman can be recognized as a "dad."[226] Even so, it's not immediately clear precisely what these same-sex marriage opponents are saying and what they mean when they assert that children need a mother and a father. This implicit gender talk reveals three possible understandings. First, these opponents might be striving to preserve the

221. *See, e.g.*, Caroline Alphonso, *Speaking Out Against Polygamy: Wife Who Fled Marriage in B.C. Hopes Bigamy Conviction in U.S., Draws Attention to Abuse She Says Young Women Suffer*, GLOBE & MAIL (Toronto), May 21, 2001; Katha Pollitt, *Polymaritally Perverse: Polygamy and its Relation to Same-Sex Marriages*, NATION, Oct. 4, 1999, at 10. *See generally* Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy, and Same-Sex Marriage*, 75 N. CAR. L. REV. 1501 (1997).

222. *See, e.g.*, Gallagher, *supra* note 24. *See also* Butler, *supra* note 68, at 14, 118-28, 136-37, 211 (examining traditional psychoanalytic approach); WOLFSON, *supra* note 24, at 85-101 (covering chapter on gay parenting in pro-marriage book).

223. *See* 150 CONG. REC. S8088 (daily ed. July 14, 2004) (statement of Sen. McConnell); 150 CONG. REC. S7961 (daily ed. July 13, 2004) (statement of Sen. Hutchison); *id*. at S7967 (statement of Sen. Inhofe); *id*. at S7968 (statement of Sen. Ensign); *id*. at S7980, S8010, S8013-14 (statements of Sen. Santorum); *id*. at S7997, S8011 (statements of Sen. Brownback); 150 CONG. REC. S7908 (daily ed. July 12, 2004) (statement of Sen. Santorum); *id*. at S7922 (statement of Sen. Cornyn); *id*. at S7924 (statement of Sen. Lott).

224. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 1000 n.29 (Mass. 2003) (Cordy, J., dissenting) ("This family structure raises the prospect of children lacking any parent of their own gender. For example, a boy raised by two lesbians as his parents has no male parent . . . .").

225. Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 819, 822-23 (11th Cir. 2004), *cert. denied*, 129 S. Ct. 869 (2005).

226. *See supra* note 161 and accompanying text.

traditional patriarchal character of marriage, while purposely camouflaging this goal (or even their unconscious support of this goal) in language that appears to sidestep explicit sex discrimination. The prospect of same-sex marriage threatens male privilege, in society generally and in the family especially.[227] Perhaps these opponents of same-sex marriage would, if they could, roll back the developments in modern family law that have eliminated gender-based rules and stereotypes and—if that proves impossible—then erect a final barricade against the spread of gender neutrality.[228] Yet, this reasoning simply returns us to the earlier analysis of what same-sex marriage opponents likely mean when they seek to "preserve" or "protect" marriage.[229]

A second way to understand the asserted need for children to have two parents of different sexes, however, focuses on gender performance—the notion that "being" male or female is, at bottom, engaging in a collection of acts and self-presentations.[230] Here, the emphasis must rest not so much on roles, but on *role models*. The rhetoric about mothers and fathers reveals the belief that children need male and female parental models in order to grow up to be appropriately behaving males and females themselves. Yet, modern custody statutes have already rejected any preference for "gender-matching" in applying the best-interests-of-the-child test.[231] Further, although we do not usually associate those who oppose same-sex marriage with theories positing the social construction of gender, insistence that children require male and female role models conveys deep doubt that gender is a "hard-wired" trait rather than a learned performance. Perhaps surprisingly, these same-sex marriage opponents—along with several feminists and queer theorists[232]—have voted for "nurture" in the nature-nurture controversy,[233] and they evidently see gender itself (and sexual orientation) as a performance based on imitation and rehearsal, if not a script. Their arguments, then, disclose fear that

227. *Cf.* Brief of Amici Curiae Nat'l Org. on Male Sexual Victimization et al., Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998) (No. 96-568). Catharine MacKinnon's brief notes the social meaning of male-on-male sexual assaults: "They [the male victims] are feminized: made to serve the function and play the role customarily assigned to women as men's social inferiors." *Id.*; *cf.*, *e.g.*, Sunstein, *supra* note 64, at 22.

228. In other words, the debate about same-sex marriage offers an opportunity to revisit and undo gains that women have already made—a move commonly known as "backlash." *See generally* SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN (1991).

229. *See supra* notes 206-221 and accompanying text.

230. *See* BUTLER, *supra* note 74. For the use of Butler's theory of "performativity" in legal analysis, see Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002).

231. *E.g.*, MO. REV. STAT. § 452.375.8 (2004) ("As between the parents of a child, no preference may be given to either parent in the awarding of custody because of that parent's age, sex, or financial status, nor because of the age or sex of the child."); *see also* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 124, § 2.12(b).

232. *See supra* notes 72, 74.

233. *See, e.g.*, JOHN COLAPINTO, AS NATURE MADE HIM: THE BOY WHO WAS RAISED AS A GIRL 69-70 (2000).

heterosexuality is fragile and vulnerable and requires environmental supports to be maintained.

In any event, contemporary standards for child custody and modern equality norms about expected gender performance[234] at least make this justification for marriage restrictions problematic—and hence worth discussing explicitly. Certainly, most empirical data do not make the case that same-sex parenting causes harm to children,[235] despite claims to that effect on the Senate floor.[236] Of course, assessing such data forces us to determine the extent to which our understanding of "harm" incorporates gender and gender stereotypes: just how do we want boys and girls to develop?[237]

A third possibility concerns men's resistance to (or fear of) becoming dispensable.[238] The argument that children need mothers and fathers mostly seems to reflect a worry that girls *without fathers* will be "too masculine" and boys *without fathers* will be "too feminine."[239] Judge Posner has written that artificial insemination "accelerates the shift of economic power from men to women."[240] Precisely because of our gender-based stereotypes, the prospect of

234. *See supra* notes 76-80 and accompanying text. For a humorous critique of the opposition to same-sex marriage, with a focus on the performance of gender, see George Saunders, *My Amendment*, NEW YORKER, Mar. 8, 2003, at 38 (expressing objections to "Samish-Sex Marriage," including marriages in which an "effeminate man" is married to a "masculine woman").

235. *See, e.g.*, Belcastro et al., *supra* note 14 (criticizing most studies as flawed but finding, *inter alia*, that daughters reared by lesbian mothers are more "masculine" than those raised by heterosexual parents); Flaks, *supra* note 14 (supporting Patterson's conclusions below while also noting *more effective* parenting skills in lesbian couples, as compared to families headed by heterosexual couples, probably because of gender differences); Patterson, *supra* note 14 (summarizing literature and finding no appreciable difference in terms of children's gender identity, gender-role behavior, and sexual identity). Even the *Lofton* court, in upholding Florida's ban on adoptions by gays and lesbians, concedes that the preference for male-female parents constitutes an "unprovable assertion" that nonetheless suffices to meet the rational basis test. Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 819-20 (11th Cir. 2004), *cert. denied*, 129 S. Ct. 869 (2005).

236. *See supra* note 223.

237. For example, in summarizing studies, Belcastro et al. find evidence that "daughters of lesbian mothers are more likely to value and exhibit male sex-typed traits than daughters of heterosexual mothers," Belcastro et al., *supra* note 14. Some might see such evidence as showing "harm" to the former; others might see the very issue as the reflection of questionable stereotyping. *Cf. also* BUTLER, *supra* note 68, at 81 ("What if [the terms 'masculine' and 'feminine'] only operate in unwieldy ways to describe the experience of gender that someone has?").

238. *Cf. The End of Men*, All Things Considered (NPR broadcast, Dec. 13-15, 2004) (three-part series examining the loss of genes in Y chromosome, possibility of using stem cells to grow sperm, and new roles of men in society). One could make a parallel argument about women, once men perform many of the functions traditionally performed by women. *See* Bellafante, *supra* note 28; *see also* Cruz, *supra* note 84, at 1079 (suggesting supporters of "mixed-sex" requirement for marriage fear dispensability of men, despite contentions that they wish to protect against such messages about women).

239. *See supra* note 224; Belcastro et al., *supra* note 14.

240. RICHARD A. POSNER, SEX AND REASON 421 (1992).

same-sex marriages with children typically conjures up pictures of lesbian-headed families in which men have nothing to contribute (other than as anonymous sperm donors).[241] Pursuing this line of reasoning, however, returns us to deeper questions about what we mean by gender in the first place. If, at bottom, the understanding rests on culture and performance, then men are no more dispensable than women because anyone can accept the responsibilities and adopt the presentation that we have traditionally ascribed to males or females in the family. Ultimately, gender norms—and gender itself—as we know them might fade away.[242]

Explicitly raising questions about gender differences *in the family* ought to help illuminate the often unexamined way in which popular culture, even while embracing equality norms, assumes that family privacy neutralizes or insulates distinctions and preferences that in other contexts stand out as discriminatory. The ongoing public conversation about prenatal sex selection through sperm sorting or pre-implantation genetic screening offers an instructive example.[243] Should those who condemn sex discrimination challenge private family choices here? Isn't an even apparently "even-handed" effort to achieve a "balanced family"[244] just as questionable as an employer's conclusion that the company already has "too many women," for example?[245] What do preferences for sons or daughters tell us about our private understandings of gender itself—are sex-selecting parents focused on the chromosomes and anatomy of their prospective offspring or their vision of the social experience of rearing a son versus a daughter? Even if we conclude that such questions properly reside outside the law's reach, struggling with them in the public debate has merit.

3. Confronting the Definitional Obstacle

Yet another source of implicit gender talk by those opposing same-sex

241. *Cf., e.g.*, Francie Hornstein, *Children by Donor Insemination: A New Choice for Lesbians*, *in* TEST-TUBE WOMEN: WHAT FUTURE FOR MOTHERHOOD? 373 (Rita Arditti et al., eds. 1984). I concede that this hypothesis probably makes unrealistic my thought that fathers' rights groups might join advocates of gender equality to see that they have a personal stake in the same-sex marriage debate. *See supra* note 204 and accompanying text.

242. *See* Appleton, *supra* note 101, at 437-39 ("thought experiments"). *But see* Case, *supra* note 126, at 75-76.

243. *See, e.g.*, Lisa Belkin, *Getting the Girl*, N.Y. TIMES, July 25, 2004, § 6, at 26; Michael J. Sandel, *The Case Against Perfection*, ATLANTIC MONTHLY, Apr. 2004, at 50.

244. *See* Sandel, *supra* note 243, at 53-54 (exploring ethical issues that arise even when providers of sex-selection technologies serve only prospective parents seeking "family balancing," but not those who seek "to stock up on children of the same sex, or even to choose the sex of their firstborn child.").

245. I concede that, in some contexts, affirmative action in favor of members of certain previously subordinated groups might well be justified, even if the goal is described as "diversity." *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003).

marriage resides in invocations of the "definition" of marriage.[246] If marriage is necessarily and inalterably defined as the union of one man and one woman, then bans on same-sex marriage cannot discriminate because the very idea of same-sex marriage is incoherent. In early challenges to marriage's exclusion of same-sex couples, this definitional approach prevailed.[247]

This old approach is receiving new attention, as Congress and several states have felt a recent need to enact sex-specific definitions of marriage.[248] Ironically, these very actions signal ambiguity about the definition of marriage in the absence of such reforms. Although debates about the definition of marriage might well leave both sides talking past each other, I think *Goodridge* makes a good start toward addressing this issue in a way the public can understand. The majority opinion emphasizes its exclusive focus on *civil marriage*, as distinguished from religious rites and practices.[249] In addition, the opinion notes the myriad ways in which once closely held understandings of marriage have evolved—to incorporate new features such as interracial unions and easy divorce, for example. In fact, the opinion concedes that it has changed how some define marriage: "Certainly our decision today marks a significant change in the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries. But it does not disturb the fundamental value of marriage in our society."[250] The majority settles on a definition that makes marriage "the voluntary union of two persons as spouses, to the exclusion of all others."[251]

The majority probably need not have gone so far because society might well lack a shared understanding of the "definition" of marriage in the first place. By way of comparison, did no-fault divorce (now, in a significant departure from history,[252] widely available at the either spouse's request even over the other's objection[253]) change the "definition" of marriage or simply signal an adjustment that leaves the previous "definition" intact? One way to look at the problem is through the familiar process of identifying those characteristics so essential to a practice that any change in one of these characteristics results in an entirely different practice—rather than merely a modification of the practice itself. John Rawls wrote about this distinction many

246. *See supra* note 20 and accompanying text.

247. *See supra* notes 34-38 and accompanying text.

248. *See, e.g.*, 1 U.S.C. § 7 (2000) (containing Defense of Marriage Act definitions).

249. Goodridge v. Dep't of Pub Health, 798 N.E.2d 941, 954, 965 n.29 (Mass. 2003).

250. *Id*. at 965.

251. *Id*. at 969 (presenting "reformulation" of "civil marriage").

252. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 204-08 (1985).

253. *See, e.g.*, Herma Hill Kay, *Beyond No-Fault: New Directions in Divorce Reform*, *in* DIVORCE REFORM AT THE CROSSROADS 6, 8 (Stephen D. Sugarman & Herma Hill Kay eds., 1990). The press has noted that Massachusetts has the lowest divorce rate in the country, while more conservative southern states have high divorce rates. *See, e.g.*, Pam Belluck, *To Avoid Divorce, Move to Massachusetts*, N.Y. TIMES, Nov. 14, 2004, § 4, at 12.

years ago.[254] This distinction has surfaced more recently as well, for example, when the Supreme Court divided over both the question whether the use of a golf cart would "fundamentally alter" the game of golf[255] and the question whether admitting women to the Virginia Military Institute would be so "radical" that it would "destroy" the particular educational opportunity the school provides.[256]

The issue becomes whether gender differences are essential to marriage, that is, whether the inclusion of same-sex couples so fundamentally alters the practice that it is no longer marriage. Full exploration of this issue necessarily requires consideration of the way marriage has *already* changed in law and, for some, in life—with the importance of gender roles and stereotypes greatly diminished, the requirement of "one man and one woman" left as one of the few remaining official gender-based distinctions in modern family law, and the absence of distinctive legal content for "husband" and "wife." Full exploration might also require consideration of the possibility of abolishing civil marriage (if marriage must remain a practice based on discrimination), with civil unions or domestic partnerships open to all taking its place and religious marriage rites as well as private intimacy protected from state intrusion.[257]

Legal scholars have been having such conversations for some time now.[258] Why not include in this debate members of the public, now that they are addressing same-sex marriage in the voting booth? Although we might interpret the outcome of the 2004 ballot measures as a decisive refutation of same-sex marriage under any rationale,[259] the public debate is sure to continue, offering many opportunities for new arguments and fresh insights—which just might turn the tide.

254. John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955) (distinguishing between "justifying a practice and justifying a particular action falling under it").

255. *Compare* PGA Tour, Inc. v. Martin, 532 U.S. 661, 683-90 (2001) (finding no fundamental alteration), *with id*. at 700 (Scalia, J., dissenting) (accusing majority of improperly deciding what is and what is not essential to the game of golf).

256. *Compare* United States v. Virginia, 518 U.S. 515, 540 (1996), *with id*. at 588 (Scalia, J., dissenting). More precisely, the question addressed by the majority was whether modifications to accommodate women would "destroy" the program.

257. The Constitution's protection of a right to marry would not necessarily prevent the abolition of civil marriage. *See, e.g.*, Patricia A. Cain, *Imagine There's No Marriage*, 16 QUINNIPIAC L. REV. 27, 31-43 (1996) (concluding that state could abolish marriage so long as intimacy remained protected).

258. *See supra* notes 166, 187-188 and accompanying text.

259. *See supra* note 12 and accompanying text.