Same-Sex Marriage Through the Equal Protection Clause:

A Gender-Conscious Analysis

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INTRODUCTION

Law's deep connection to precedent and concern with predictability, combined with the perceived constraints of abstraction that attend legal analysis, can make the law seem a hostile forum for discussions of the real world. Litigation and judicial opinions, however, do engage with the substance of issues, if at various levels of explicitness. In the case of same-sex marriage, the structure and operation of legal doctrine lends itself to a penetrating discussion of reality by interrogating same-sex marriage prohibitions as a symptom, such that its causes are exposed and scrutinized.

Same-sex marriage is a socially divisive topic and the controversy that surrounds it finds prominent expression in law, politics and religion. Marriage of two persons of the same sex implicates matters of family structure, gender roles, justice, and equality, as these issues are inextricable from the institution of marriage. Whereas the political discourse around same-sex marriage has often been shallow and conclusory, legal treatment of same-sex marriage disputes has, at times, been more careful. Because of the thoughtful treatment that same-sex marriage cases warrant under Equal Protection jurisprudence, legal disputes hold the potential to illuminate the issues and controversies involved to the benefit of public discourse in general.1

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1. A variety of legal protections and categories for same-sex couples short of formal marriage exist. While I do not explicitly deal with these arrangements, it is important to note that they fall far short of the full protections, benefits, obligations, and status of marriage. On the important distinctions between marriage and one such lesser arrangement of recognition see In re Opinion of the Justices to the Senate, 802 N.E.2d 565, 566-72 (Mass. 2004) (instructing the Massachusetts legislature that the establishment of same-sex marriage is mandated in part because of the infirmities that plague alternative arrangements). See generally National Gay and Lesbian Task Force, Why Civil Unions Are Not Enough (2005), http://www.
This article will build on courts' treatment of same-sex marriage litigation to develop an argument that the sex equality guarantees located in the Fourteenth Amendment’s Equal Protection Clause support same-sex marriage because the Equal Protection Clause protects gender non-conformity and same-sex marriage is fundamentally gender transgressive. That is, because same-sex marriage is thought to be an expression of sexuality which socially affirms gender identity, the proscription of same-sex marriage operates to maintain unconstitutional gender inequality to the detriment not only of LGBTQ (lesbian, gay, bisexual, transgender, and queer) persons, but also of women as a group.  

The first section of this article will survey the current legal landscape around the issue of same-sex marriage, identifying the prevalence of various legal strategies as well as their successes and failures. Section II will provide a theoretical background on sex, gender, and sexuality to frame the subsequent analysis. Section III will propose explanations for outcomes in same-sex marriage cases and discuss the unique features that accompany the application of the Equal Protection Clause to the issues presented by these cases. Then, having mapped the relationship between the operation of bans on same-sex marriage and Equal Protection Clause guarantees, I analogize to Supreme Court race jurisprudence in Section IV to develop a substantive, gender-conscious approach to same-sex marriage grounded in Equal Protection doctrine.

1. Survey of Legal Efforts to Recognize Same-Sex Marriage

At the writing of this article, same-sex marriage is only legal in one state. Seventeen states have amended their constitutions to ban same-sex marriage, thetaskforce.org/downloads/WhyCivilUnionsAreNotEnough.pdf (discussing the important distinctions between marriage and forms of recognition such as domestic partnerships or civil unions).

2. The issues of exclusion, inequality, and power addressed in this article affect people self-identified as or perceived to be lesbian, gay, bisexual, transgender, transsexual, and queer. When my analysis discusses lesbians, gays, or homosexuals, this is not meant to exclude the experience, status, or treatment of those persons who do not neatly fit into these categories. However, because the legal materials principally employ these terms in the context of same-sex marriage discussions, I often use the same terminology to engage these materials. I speak of women as a group not in the sense that they are uniformly affected by male dominance; rather, while women experience misogyny in ways that specifically relate to other social statuses and identities, none escape it. For an explanation and demonstration of how understanding women to be affected by male dominance as a group does not homogenize or “essentialize” the group “women” see Catharine A. MacKinnon, From Practice to Theory, Or What Is a White Woman Anyway?, 4 YALE J.L. & FEMINISM 13 (1991); Catharine A. MacKinnon, Keeping It Real: On Anti-“Essentialism,” in CRITICAL RACE THEORY: HISTORIES, CROSSROADS, DIRECTIONS 71 (Valdes et al. eds., 2002); Catharine A. MacKinnon, Points Against Postmodernism, 75 CHI.-KENT L. REV. 687, 689-700 (2000).


4. The state constitutions of Alaska, Arkansas, Georgia, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nevada, North Dakota, Ohio, Oklahoma, Oregon,
forty-two states have enacted legislation defining marriage as between a man and a woman, and five states and the District of Columbia currently have no legal definition limiting marriage to a union between one man and one woman. Although courts are currently the venue of choice for rights-seeking advocates of same-sex marriage, the legal concepts involved in same-sex marriage cases differ widely and have been variously received.

Marriage has historically been an institution recognized and regulated at the state level, which explains in part why the majority of legal claims for same-sex couples. However, the 1998 amendment to the constitution only empowered the legislature to enact such a ban, which it promptly did. See ALA. CODE § 30-1-19 (1975); ARIZ. REV. STAT. ANN. §§ 25-101, 25-112 (2006); ARK. CODE ANN. §§ 9-11-208, 9-11-107 (West 2005); CAL. FAM. CODE § 3.08.5 (West 2000); COLO. REV. STAT. § 14-2-104 (West 2005); CONN. GEN. STAT. § 46a-81r; DEL. CODE ANN. tit. 13, § 101 (2005); FLA. STAT. ANN. §§ 741.04, 741.212 (West 2005); GA. CODE ANN. § 19-3-3.1 (West 2005); HAW. REV. STAT. ANN. § 572-1 (LexisNexis 2004); IDAHO CODE ANN. § 32-209 (2005); 750 ILL. COMP. STAT. ANN. 5/212, 5/213.1 (West 2005); IND. CODE ANN. § 31-11-1-1 (West 2005); IOWA CODE ANN. § 595.2 (West 2005); KAN. STAT. ANN. § 23-101 (2004); KY. REV. STAT. ANN. §§ 402.040, 402.020 (West 2005); LA. CIV. CODE ANN. art. 96, 3520 (2005); ME. REV. STAT. ANN. tit. 19-A, § 701 (2005); MD. CODE ANN., FAM. LAW § 2-201 (West 2005); Mich. Comp. Laws Ann. §§ 551.1, 551.271 (West 2005); MINN. STAT. ANN. § 517.03 (West 2005); MISS. CODE ANN. § 93-1-1 (West 2005); MO. STAT. ANN. § 451.022 (West 2005); MONT. CODE ANN. §§ 40-1-103, 40-1-401 (2005); N.H. REV. STAT. ANN. §§ 457:1-3 (2005); N.C. GEN. STAT. ANN. § 51-1.2 (2005); N.D. CENT. CODE §§ 14-03-01, 14-03-08 (2005); OHIO REV. CODE ANN. § 3101.01 (West 2006); OR. REV. STAT. ANN. § 106.010 (West 2003); 23 PA. CONS. STAT. ANN. § 1704 (West 2005); S.C. CODE ANN. § 20-1-15 (2005); S.D. CODIFIED LAWS §§ 25-1-1, 25-1-38 (2005); TENN. CODE ANN. § 36-3-113 (West 2005); TEX. FAM. CODE ANN. §§ 2.001, 6.204 (Vernon 2005); UTAH CODE ANN. § 30-1-2 (West 2005); VT. STAT. ANN. tit. 15, § 1201 (2005); VA. CODE ANN. §§ 20-45.2, 20-45.3 (West 2005); WASH. REV. CODE ANN. § 26.04.010 (West 2005); W. VA. CODE § 48-2-603 (West 2005); WIS. STAT. ANN. §§ 765.01, 765.04, 765.001 (West 2005); WYO. STAT. ANN. § 20-1-101 (2005).

6. The states lacking either constitutional or legislative definitions of marriage are Nebraska (Nebraska’s constitutional amendment was overturned in Citizens for Equal Prot. v. Bruning, 368 F. Supp. 2d 980 (D. Neb. 2005) due to its breadth), New Jersey, New Mexico, New York, Rhode Island, and the District of Columbia.

7. Cases that analyze arguments about a right to same-sex marriage date from 1971, but litigation around this issue increased substantially at the beginning of the twenty-first century. See generally GEORGE CHAUNCEY, WHY MARRIAGE?: THE HISTORY SHAPING TODAY’S DEBATE OVER GAY EQUALITY 137-144 (2005).

sex marriage have been grounded in state-specific law. However, marriage has also been understood to implicate rights and freedoms enshrined at the federal level in the United States Constitution. Significantly, every “successful” case in the legal struggle to recognize same-sex marriage has been decided on the basis of state law, whereas federal claims have been either rejected or unaddressed.

The reasons for this preference for state over federal law are both jurisprudential and pragmatic. Some legal concepts invoked by advocates of same-sex marriage have a longer and more stable history at the state than the federal level because, unlike the Federal Constitution, certain state constitutions provide for their explicit guarantee. In other instances, even familiar and settled legal concepts at the federal level may receive different treatment in state law. For example, whereas under the Federal Constitution sex is a quasi-suspect classification and receives intermediate scrutiny, some states consider sex a suspect classification that triggers the state equivalent of federal strict scrutiny.

Further, there is little doubt that same-sex marriage is a volatile political issue. Were a state court to find a federal right to same-sex marriage, the Supreme Court would be compelled to confront the issue. People on all sides of the same-sex marriage debate fear a Supreme Court decision on the issue. Some, citing the issue of abortion, fear a circumvention of the democratic process; others worry about the creation of significant anti-gay case law; still others fear that “activist judges” will strike down the Defense of Marriage Act and legalize same-sex marriage.

Within this state-centered context, proponents of same-sex marriage have, at different times and in different contexts, crafted legal arguments claiming primarily that prohibitions on same-sex marriage violate states’ constitutional due process, privacy, and equal protection guarantees. Depending on context

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10. Even successful cases, however, are subject to political backlash and/or legislative decisions regarding their implementation. The effect is often that something less than same-sex marriage is established to satisfy the decision (e.g. civil unions or domestic partnership laws) or legislative reaction to the decision involves a state constitutional amendment (or granting of powers to amend) banning same-sex marriage, effectively voiding the judicial finding. See, e.g., HAW. CONST. art. I, § 23 which followed Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).
11. For example, although the Federal Constitution lacks explicit privacy guarantees, ten state constitutions unambiguously provide for its protection (ALASKA CONST. art. I, § 22; ARIZ. CONST. art. II, § 8; CAL. CONST. art. I, § 1; FLA. CONST. art. I, §§ 12, 23; HAW. CONST. art. I, §§ 6, 7; ILL. CONST. art. I, §§ 6, 12; LA. CONST. art. I, § 5; MONT. CONST. art. II, § 10; S.C. CONST. art. 1, § 10; WASH. CONST. art. I, § 7).
and local precedent, these arguments have been made simultaneously, in isolation, or in various combinations. Due process arguments come in the forms of the right to marry and the right to privacy. The former holds that there exists a fundamental right to marry located in individuals regardless of the sex of the person they seek to marry; the latter seeks to include same-sex marriage in an inviolable sphere of safety in which everyone can make fundamental choices about their lives and identities without state intrusion, punishment, or constraint. Equal protection challenges object to the sex-based classifications employed by same-sex marriage prohibitions and also argue that the laws in question discriminate against lesbians and gays.

Although less common, uniformly unsuccessful, and always employed in conjunction with state-specific strategies, arguments based on the Federal Constitution have been made against laws excluding same-sex couples from marriage. These strategies have been grounded in the Fourteenth Amendment’s ban on sex-based classifications embodied in the Equal Protection Clause, the Fourteenth’s Amendment’s Due Process Clause (in “right to marry” and “right to privacy” formulations), the First Amendment’s right to expressive speech, the Eighth Amendment, the Ninth Amendment, the Tenth Amendment and the Constitution’s ban on bills of attainder.

Against these state and federal challenges, states have argued various combinations of the following: that the fundamental right to marriage exists definitionally between two people of the opposite sex; laws that restrict marriage to opposite-sex couples do not employ sex-based classifications and therefore are not subject to heightened scrutiny; the laws in question do not discriminate against lesbians and gays, and even if they did, this would only trigger rational review; and that the state has a compelling interest in preserving opposite-sex marriage because it promotes procreation, child rearing, and proper (opposite-sex parent) families.

Examining the primary arguments that have prevailed in successful state

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17. For a representative case decided on equal protection grounds see, e.g., Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).
19. Id.
20. Id.
21. Id.
22. Id.
23. Id.
cases is instructive for determining what role various legal concepts could play in federal same-sex marriage litigation. In surveying past and current same-sex marriage litigation, I acknowledge the limits of what can be learned from cases argued and decided based on state law, but see these arguments as helpful background before shifting the discussion to the federal context.

In *Baehr v. Lewin*, the Hawaii Supreme Court rejected a substantive due process/privacy argument for same-sex marriage, but found that restricting marriage to opposite-sex couples violated Hawaii’s constitution. The *Baehr* Court refused to find a right to same-sex marriage in substantive due process guarantees because it did not “believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.” Regardless of history, however, the Court understood the restriction of marriage to opposite-sex couples to involve sex discrimination because it excluded same-sex couples on the basis of the sex of the partners. The remedy for this unconstitutional discrimination was left to the legislature, and in the wake of *Baehr*, the Hawaii Constitution was amended to prohibit same-sex marriage, effectively voiding the decision.

The Superior Court of Alaska, in *Brause v. Bureau of Vital Statistics*, agreed in part with the Hawaii Court’s analysis, finding that same-sex marriage prohibitions deny a fundamental right on the basis of sex under the Alaska Constitution. After recognizing marriage as a fundamental right, the Alaska court required a compelling interest to justify the denial of this right to those choosing a same-sex partner. The treatment of the substantive due process claim in *Brause* differed from that in *Baehr* in much the same way the treatment of sodomy laws in *Lawrence v. Texas* differed from that in *Bowers v. Hardwick*. For instance, in *Brause* the level of generality with which the question was asked increased so that the relevant question was “not whether same-sex marriage is so rooted in our traditions that it is a fundamental right, but whether the freedom to choose one’s own life partner is so rooted in our traditions.” As in *Baehr*, *Brause* also found sex discrimination in the

25. *Id.* at 57.
26. *Id.*
29. *Id.*
31. 478 U.S. 186 (1986). In *Lawrence*, the Court stated that “The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions... To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.” 539 U.S. at 562, 567.
prohibition of same-sex marriage. Because the Court found that the prohibition involved a fundamental interest, further hearings were scheduled to determine whether there was a compelling state interest for the ban on same-sex marriage found in the Alaska Marriage Code. Before these hearings occurred, however, Alaska’s constitution was amended to ban same-sex marriage.

In 1999, the Supreme Court of Vermont held in Baker v. State that the exclusion of same-sex couples from the benefits of marriage constituted a violation of the Vermont Constitution’s Common Benefits Clause. The court departed from Federal Equal Protection tiers of scrutiny and instead employed an analysis that looked at the significance of the benefits, and therefore the deprivation, in question. Instead, the court asked if excluding community members from the institution of marriage furthered the government’s stated goals and whether the sex-based classifications fit the state’s purported goals. The prohibition of same-sex marriage was held to be poorly tailored to achieve the state’s principal purpose of furthering the link between procreation and child rearing. This stated purpose was actually contradicted by existing state laws that, for example, allowed same sex couples to adopt children. Employing a rational review form of analysis, the court held that “none of the interests asserted by the State provides a reasonable and just basis for the continued exclusion of same-sex couples from the benefits incident to a civil marriage license under Vermont law.”

The case that legalized same-sex marriage for the first time in the United States was Goodridge v. Department of Public Health. In Goodridge, the Massachusetts Supreme Court found that the restriction of marriage to opposite-sex couples violated the state constitution’s overlapping guarantees of equality before the law, liberty, and due process. The court relied both on case law that connected marriage to privacy protections implicit in conceptions of due process, as well as on precedent holding that marriage is a civil and fundamental right. Because the state’s rationales failed to meet a rational review standard, the court did not consider the plaintiffs’ arguments that the case merited strict judicial scrutiny on the basis of sex. However, a concurring opinion argued that because the right to marriage was not denied in the abstract but rather on the basis of sex, the same-sex marriage prohibition should be eliminated because the

33. Id. at 6.
34. Id.
35. ALASKA CONST. art. I, § 25.
37. Id. at 878.
38. Id. at 882.
39. Id.
40. Id. at 886.
42. Id. at 954.
43. Id. at 953-59.
44. Id. at 968.
state was unable to meet the standards that strict scrutiny require.\(^4\)

In the currently pending same-sex marriage litigation in California (consolidated under the case *Woo v. Lockyer*), a Superior Court recently held that the law limiting marriage to opposite-sex couples was invalid under the state constitution.\(^4\) Although the various plaintiffs advanced both equal protection and privacy arguments for the recognition of same-sex marriage, the court chose to resolve the case solely under equal protection.\(^4\) The Superior Court opinion found that strict scrutiny applied both because a suspect classification (sex) was used and because the law infringed on the right to marry, which must be universally available because it is a fundamental individual right.\(^4\) *Woo* held that the state’s arguments for the exclusion of same-sex couples failed to meet the state’s burden to establish a rational purpose for the law. Specifically, the state’s arguments fell far short of what would be required under a heightened level of scrutiny because the ban’s fit was dramatically underinclusive on a procreation promotion rationale.\(^4\)

## II. ON SEX, GENDER, AND SEXUALITY

### A. What Same-Sex Marriage Bans Do

As cannot go unacknowledged in same-sex marriage litigation, marriage is a powerful social institution that confers both dignitary and material benefits on its participants.\(^4\) In part, marriage legitimizes relationships through state recognition that provides a vast array of automatic legal and economic benefits, privileges, and obligations ranging from hospital visitation to wrongful death claims, employment leave to child visitation, and health care to inheritance.\(^8\) Because states confer legal entitlements and social goods to recognized marriages, the denial of the right to marry deprives those individuals and couples excluded from the institution of marriage from myriad entitlements.\(^5\) In order to

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45. *Id.* at 971 (Greaney, J., concurring).
47. *Id.* at 3-23.
48. The *Woo* opinion was able to avoid the complicated ambiguities involved in determining whether the law in question also discriminated on the basis of sexual orientation (a protected class in the California constitution), through its holding that marriage is a fundamental right that cannot be denied without a compelling state justification, no matter how individuals are classified. *See id.* at 19-21.
49. *Id.* at 22-23.
50. *See generally* GEORGE CHAUNCEY, *WHY MARRIAGE?: THE HISTORY SHAPING TODAY’S DEBATE OVER GAY EQUALITY* (2005) (providing a concise historical analysis of the social forces that led to changes in the institution of marriage and the pursuit of same-sex marriage by lesbians and gay men).
51. *Id.* at 71-77.
52. For an analysis of the ways in which state-sanctioned recognition of relationships, same-sex or otherwise, harms those outside such relationships and the queer-theoretical basis for opposing such state recognition see generally MICHAEL WARNER, *THE TROUBLE WITH*
analyze the logic and underpinnings of same-sex marriage bans, it is first necessary to understand more about the prohibitions on same-sex marriage themselves.

All state legislation and constitutional amendments prohibiting same-sex marriage employ the categories of sex or gender to accomplish their goal. While media and popular discourse refer to ‘gay marriage’ and ‘same-sex marriage’ interchangeably, it is important to note that the legal prohibitions rely exclusively on “sex” or “gender” (rather than sexualities such as gay, lesbian, homosexual, etc.), which raises the question of these categories’ relationship to each other and to sexuality.

Put simply, sex is to gender as male and female are to masculine and feminine. Sex is biological, gender social; sex is a noun, gender an adjective. In society, power, privilege, dignity, freedom, and safety are socially distributed in sex-unequal ways. Male supremacy, however, is not uniformly distributed, and gender helps to explain the ways in which stigma and inequality track with what is deemed socially appropriate masculinity. That is, genders are differentially valued in society, such that masculine characteristics are valued and feminine devalued, but in a contextual way that always considers gender appropriateness in relation to sex. While a hierarchy exists of masculine men over feminine women, masculine or butch women are socially scorned precisely for being masculine and effeminate men are despised for their gender non-conformity with their sex.

While useful and theoretically coherent distinctions between sex and gender exist, the two categories are interrelated in important ways, and American law has generally shown an ignorance of the distinctions between sex and gender. However, Supreme Court jurisprudence has at times captured both

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53. See supra notes 4-5.
54. For an eloquent elaboration of this understanding, see Mary Anne Case, Disaggregating Gender from Sex and Sexual Orientation- The Effeminate Man in the Law and Feminist Jurisprudence, 105 YALE L.J. 1 (1995).
55. On the social definition and operation of gender generally, see generally Case, supra note 54; Catharine A. MacKinnon, Feminism, Marxism, Method, and the State: An Agenda for Theory, 7(3) SIGNS 515-544 (1982) (articulating an understanding of sex/gender as based fundamentally hierarchical and created by relations of inequality); Candace West & Don Zimmerman, Doing Gender, 1 GENDER & SOCIETY 125 (1987) (offering an analysis of the relationship between the social enforcement of social notions of gender as determined in relation to biological sex). I share Mary Anne Case’s conviction of the terminological importance of referring to men who are seen as manifesting characteristics conventionally coded feminine as “effeminate” and not simply “feminine.” As Case explains, “the negative valuation implicit in the term [‘effeminate’]... reflects a cultural reality I find unwise to ignore even in choice of terminology. Thus, the lack of parallelism between the terms ‘masculine woman’ and ‘effeminate man’ accurately mirrors the relative value placed in our society both on the respective qualities and on the persons manifesting them.” Case at 3 n.4.
56. For an authoritative account of the co-constitutive nature of sex and gender and the way sexuality is gendered and gender sexualized see CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 126-54 (1991).
57. Perhaps the most famous example of this willingness to substitute sex and gender for each
categories under the rubric of what is generally understood to be sex in that some cases that may present issues of gender discrimination can also coherently be understood as sex discrimination. For example, the plaintiff in *Price Waterhouse v. Hopkins*, who was passed over for a partnership position at an accounting firm because she was not sufficiently feminine, can be seen to have suffered gender discrimination. She was also discriminated against on the basis of sex, however, under the theory that but for her sex her masculinity would not have been problematic.

Given this background, the discussion of "gays" or "gay marriage" raises unsettled issues about the definition of the phenomenon in question. The modern categories of homosexuality, heterosexuality, gay, lesbian, straight, etc. are historical, social, and cultural constructs, and remain ambiguous in twenty-first century America. Although these categories are multidimensional, they are generally thought to involve some combination of same-sex desire, behavior, self-definition, identification and gender-inversion. While categories such as ‘lesbian,’ ‘gay,’ or ‘homosexual’ contain significant inherent ambiguities, it is important to remember that although these terms and identities lack fixed and settled meaning, ambiguity in no way prevents the stigmatization, persecution and denigration of people who have sex with people of the same sex and people who have passionate, sexual and intimate relationships and identifications with members of their own sex.

Law is far from the only source of disadvantage and disempowerment for lesbian women and gay men in modern America, but it does play an important role in the expression and reinforcement of heteronormativity. Heteronormativity—succinctly and potently defined by Cathy Cohen as "both those localized practices and centralized institutions that legitimize and privilege heterosexuality and heterosexual relationships as fundamental and 'natural' in society"—subordinates lesbians and gays along with those perceived to be lesbian or gay. One of the many ways in which the law contributes to this other is Ruth Bader Ginsburg's account of how she chose to use "gender" instead of "sex" when arguing in front of the Supreme Court at the advice of a secretary who told her that "gender" would avoid any distracting associations the nine men on the Court would have from reading and talking about "sex." See Ernie Freda, *Washington in Brief: Clinton's Old Underwear Full of Tax Holes*, ATLANTA J. & CONST., Dec. 29, 1993, at A8.

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58. See Case, supra note 54.
subordination is the legislative regulation of marriage based on a criteria widely regarded as central to or definitive of sexuality: sex-object choice. It is significant that the basis for marriage regulation is sex-based because in Federal Equal Protection jurisprudence sex/gender is a quasi-suspect classification that is subject to heightened scrutiny whereas sexuality and sexual identity hold no such status. In practice, that is, same-sex marriage prohibitions take aim at lesbian women and gay men through sex/gender-based categorizations which, as developed below, work to preserve a system of male dominance by prohibiting the potential challenge that same-sex marriages present to the gender norms central to sex inequality.

B. The Centrality of Gender Norms to Sex Inequality

While gender norms, expectations, and stereotypes are not strictly speaking the origin of sex inequality, these concepts and beliefs underpin, and are crucial to the maintenance of, the hierarchy of men over women. The law’s participation in codifying and perpetuating these stereotypes is extensive and well documented. To illustrate the notion that law can play a powerful role in perpetuating (as well as in intervening against) gender norms, one example represents a vast number of cases and areas of law: In Bradwell v. Illinois, Myra Bradwell’s petition for admission to the Illinois state bar was denied on the basis sufficient (regardless of whether they dispute their status) to be treated like those who embrace the categories of lesbian or gay. In other words, because of the uncertainty involved in the categories, professing heterosexuality is a poor defense against discrimination, violence, stigma, harassment, etc.

63. While marriage need not involve sex, if we take state defenses to bans on same-sex marriage seriously it is clear that the state considers marriage to be at least in part about sex. That is, the frequently deployed state interest in the advancement of procreation indicates the conflation of marriage and procreation, which in most instances involves sex. Furthermore, because most Americans define lesbian women and gay men as those individuals whose sex partners are of the same sex, it is telling that judges routinely refer to same-sex marriage prohibitions not in the sex or gender terms actually used in the law, but as being about gay, lesbian, or homosexual marriage. Transsexual marriages cases further illustrate law’s near-obsession with procreative sex in marriage. See, e.g., Littleton v. Prange, 9. S.W.3d. 223 (Tex. App. 1999) (invalidating a male-to-female’s marriage with another male in part because authentic sex organs were lacking).

64. See Craig v. Boren, 429 U.S. 190, 197 (1976), for the first articulation of intermediate scrutiny.

65. See, e.g., Romer v. Evans, 517 U.S. 620, 631-636 (1996), for an example of the application of “rational review with bite” to discrimination on the basis of sexual orientation.

66. One need not “be” lesbian or gay to marry or want to marry someone of the same sex. Similarly, self-identified lesbian women can and do marry self-identified gay men in legal “gay marriages” of a sort despite same-sex marriage prohibitions. Notably, feminist and lesbian woman Andrea Dworkin was married to feminist and gay man John Stoltenberg from 1998 until the time of her death in 2005. See Ariel Levy, The Prisoner of Sex, NEW YORK MAGAZINE, June 6, 2005, available at http://newyorkmetro.com/nymetro/news/people/features/11907/ (last visited, Mar. 21, 2006).

67. See generally, MARY BECKER, CYNTHIA GRANT BOWMAN & MORRISON TORREY, FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY (1994) (providing a wide-ranging summary of empirical evidence and theoretical arguments about the relationship of women to various areas of contemporary American law).
of her sex. In a concurring opinion, Justice Bradley wrote that

the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman . . . The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.

Far from extinct, Justice Bradley’s approach of defining women’s status and treatment in law as a reflection of society continues to operate to enforce women’s status today.

Women are confined to subordinate roles and positions in part by pernicious stereotypes that are affirmed by real inequality so that, for example, women’s historical status as primary (or solitary) care-giver for children is thought to imply the correctness, necessity and unchangeability of this status. Similarly, the abuse, vulnerability, dependency and exploitation that often accompanies the institution of marriage is not seen as an issue of sex inequality because these features (if acknowledged) are often seen as natural: their ubiquitous reality taken as proof of their correctness. Whether seen to derive from God, biology, nature, the market or Congress, women’s unequal status (coded as difference) is often seen as unproblematic and the more women for whom a particular status is true, the more it becomes their nature, reality, and responsibility.

While gender norms operate to subordinate women—limiting their options, restricting their possibilities, subjecting them to violence, enforcing their vulnerability, sexualizing their bodies, and denying their full humanity—deviation from gender norms can subordinate both men and women. Men who do not behave in ways understood to be genuinely male, which includes effeminate gender performance and/or same-sex sexuality, are subject to a variety of social, physical, psychological and legal harms. Similarly, women who violate socially-prescribed gender norms are subject to injury and denigration in society and law in ways that are different from feminine women.

68. 83 US 130, 137-139 (1873).
69. Id. at 141 (Bradley, J., concurring).
71. See, e.g., EEOC v. Sears, Roebuck & Co., 839 F.2d 302 (7th Cir. 1988) (finding women’s placement in lower paying jobs to be the result of their preferences and choices rather than the result of social processes).
72. For an important and trenchant analysis of dissent from masculinity see JOHN STOLTENBERG, REFUSING TO BE A MAN: ESSAYS ON SEX AND JUSTICE (1989).
but which can be traced to the same source.\textsuperscript{73}

\textbf{C. Opposition to Same-Sex Marriage as Grounded in Gender Norms}

Gender non-conformity and same-sex sexuality are mutually implicative. As such, same-sex marriage is fundamentally gender transgressive, and thus opposed by the same ideology that enforced women’s gender conformity in \textit{Bradwell}. Because the sociolegal interdiction of same-sex marriage is based on a desire to maintain gender roles that are central to the hierarchy of women over men, same-sex marriage prohibitions express male dominance by subordinating anyone who challenges the notions of gender on which it relies.\textsuperscript{74}

As explicated by Andrew Koppelman, gender non-conformity can be as viciously punished as same-sex sexuality, and same-sex sexuality is thought to be fundamentally inconsistent with prescribed notions of gender.\textsuperscript{75} The price for deviation from gender norms is the accusation of homosexuality, and “[t]he two stigmas, sex-inappropriateness and homosexuality, are virtually interchangeable, and each is readily used as a metaphor for the other.”\textsuperscript{76} In other words, gender is sexualized and sexuality is deeply gendered such that sexuality affirms social understandings of gender. As many people will readily recognize, “the denunciation of feminism as tantamount to lesbianism is depressingly familiar.”\textsuperscript{77} Unpacking this observation, Sylvia Law explains, “the presumption and prescription that erotic interests are exclusively directed to the opposite sex define an important aspect of masculinity and femininity. Real men are and should be sexually attracted to women, and real women invite and enjoy that attraction.”\textsuperscript{78} Put differently, socially, sex with women makes biological men social men, and makes biological women neither social men nor social women. And sex with men makes biological women social women and makes biological men socially female in the sense that their actions are associated with women and inconsistent with masculinity as it is socially inculcated.

Modern notions of gender seek to control both men and women in ways that maintain men’s hierarchy over women in part through the proscription of same-sex sexuality. The stigmatization of lesbian women and gay men functions as part of a larger system of social control based on gender. Sylvia Law argues, “contemporary legal and cultural contempt for lesbian women and gay men serves primarily to preserve and reinforce the social meaning attached to

\begin{itemize}
\item \textsuperscript{73} Not surprisingly, negative attitudes toward lesbian and gay people correlate strongly with traditional, sexist concepts about the appropriate roles of men and women. \textit{See} Sylvia A. Law, \textit{Homosexuality and the Social Meaning of Gender}, 1988 \textit{Wis. L. Rev.} 187, 221 (1988).
\item \textsuperscript{74} \textit{See generally} SUZANNE PHARR, \textit{HOMOPHOBIA: A WEAPON OF SEXISM} (1988).
\item \textsuperscript{75} Andrew Koppelman, \textit{Why Discrimination Against Lesbians and Gay Men is Sex Discrimination}, 69 \textit{N.Y.U.L. Rev.} 197, 235 (1994).
\item \textsuperscript{76} \textit{Id.}
\item \textsuperscript{77} \textit{Id.}
\item \textsuperscript{78} Law, \textit{supra} note 73, at 196.
\end{itemize}
gender. Under this theory, the disapprobation of homosexual behavior—ranging (recently) from sodomy laws to bans on same-sex marriage to prohibitions on adoption—is a reaction to the violation of gender norms. Furthermore, “the persistence of negative social and legal attitudes toward homosexuality can best be understood as preserving traditional concepts of masculinity and femininity as well as upholding the political, market, and family structures premised upon gender differentiation.”

Same-sex sexuality challenges traditional notions of gender that benefit men over women, or more accurately, benefit the properly masculine over the properly feminine, because families formed by opposite-sex couples form the basis for ubiquitous social units and are supported, encouraged, propagandized, incentivized, and coerced. But same-sex relationships “challenge the notion that social traits, such as dominance and nurturance, are naturally linked to one sex or the other.” While same-sex relationships, attachments, and sex can be characterized by abuse and inequality in much the same way opposite-sex sexuality can, there is also a greater chance for egalitarianism in that (to an extent yet unknown due to insufficient empirical study), same-sex relationships can reject the gender correlates often assumed in and built into opposite-sex relationships. “When homosexual people build relationships of caring and commitment [with another homosexual of the same sex], they deny the traditional belief and prescription that stable relations require the hierarchy and reciprocity of male/female polarity.”

Historical analysis demonstrates the relationship between modern notions of masculinity and femininity and extreme gender anxiety. Similarly, literature on the history of anti-gay legislation reveals that it often developed in conjunction with cultural anxieties about “gender inversion” and the felt societal need to maintain rigid gender norms. To the extent that gender and sexuality are socially sex-based (i.e., determined at least in part by sex-object choice), laws that classify on the basis of sex are implicated in issues of sex, gender, and sexuality, and thereby affect the distribution of social goods, which in turn violates constitutional sex equality guarantees.

79. Id. at 187.
80. Id. at 187-88.
82. Law, supra note 73, at 196.
83. Id. at 218.
III. APPLICATION OF THE EQUAL PROTECTION CLAUSE TO SAME-SEX MARRIAGE

State level equal protection arguments have been a central part of every successful legal case for same-sex marriage. Although equal protection challenges to bans on same-sex marriage have by no measure been uniformly successful, all successful cases for same-sex marriage rights have relied at least in part on an equal protection argument. The successes of and insights offered by equal protection arguments at the state level intimates that a Federal Equal Protection approach could be a productive, viable, and incisive avenue from which to analyze same-sex marriage. Hence, at this point it is helpful to explore what the Federal Equal Protection Clause has been interpreted to mean, the principles it has been said to embody, and, consequently, the realities against which it can effectively intervene if we are to understand the role the Clause could play in same-sex marriage cases.

Cass Sunstein has theorized the operation of Equal Protection guarantees in a way that helps makes sense of their universal involvement in successful same-sex marriage cases. Sunstein argues that, in general, the Equal Protection Clause is more suited to protect novel rights for groups than is substantive due process doctrine in part because substantive due process protects values that are rooted in tradition, while Equal Protection law can protect against those same traditions. The Due Process Clause looks backward and considers relevant whether an existing or time-honored convention, described at the appropriate level of generality, is violated by the practice in question. However,

the Equal Protection Clause looks forward, serving to invalidate practices that were widespread at the time of its ratification and that were expected to endure. The two clauses there operate along different tracks... [the Equal Protection Clause] does not safeguard traditions; it protects against traditions,


89. Id.

90. Id.
however long-standing and deeply rooted.\textsuperscript{91}

While courts may be incredulous about recognizing a right to same-sex marriage in a substantive due process analysis that is deeply concerned with history and tradition, the Equal Protection Clause's aspirational nature makes it more congenial to recognizing inequality where none was thought to exist before.

Sunstein's forward-looking characterization of the Clause is consistent with theories offered by other Equal Protection theorists. Kenneth Karst, for example, believes that it is unnecessary to demonstrate that the framers of the Equal Protection Clause explicitly acknowledged all future implications of the equal citizenship principle that guides the Clause, because they purposefully adopted a principle that is "capable of growth."\textsuperscript{92} Likewise, John Hart Ely's theory of the Equal Protection Clause posits that the framers' intention was to state a general ideal whose specific applications would be supplied by posterity.\textsuperscript{93} While there is disagreement over Sunstein's characterization of the relationship between the Due Process and Equal Protection Clause,\textsuperscript{94} his theory does help make sense of the outcomes of litigation in the limited context of same-sex marriage.

The traditions and practices that Sunstein refers to as the aim of the Equal Protection Clause were originally racism and its legacy,\textsuperscript{95} but in the second half of the twentieth century, the Clause was interpreted to confront sexism as well.\textsuperscript{96} Whereas the treatment of race under the Equal Protection Clause evolved into a general standard of strict scrutiny for a suspect classification first introduced in \textit{Korematsu v. United States},\textsuperscript{97} sex/gender began its evolution to analysis as a quasi-suspect classification in \textit{Reed v. Reed}.\textsuperscript{98} Today the Equal Protection Clause guards against laws that employ sex-based classifications, as well as laws that do not facially classify on the basis of sex, but have a disparate impact based on sex.\textsuperscript{99} However, \textit{Washington v. Davis} and \textit{Massachusetts v. Feeney} severely

\textsuperscript{91} Id.
\textsuperscript{92} Kenneth Karst, \textit{Equal Citizenship under the Fourteenth Amendment}, 91 \textit{Harv. L. Rev.} 1, 17 (1977) (citing Alexander Bickel's description of the framers' attitude toward section I of the Fourteenth Amendment generally).
\textsuperscript{94} For a thorough disagreement with Sunstein, see William N. Eskridge, Jr., \textit{A Tribute to Kenneth L. Karst: Destabilizing Due Process and Evolutive Equal Protection}, 47 \textit{UCLA L. Rev.} 1183 (2000).
\textsuperscript{95} See, e.g., infra note 101.
\textsuperscript{96} See infra note 98.
\textsuperscript{97} \textit{Korematsu v. United States}, 323 U.S. 214 (1944).
\textsuperscript{98} \textit{Reed v. Reed}, 404 U.S. 71 (1971). In 1976, the Court held that "[t]o withstand constitutional challenge... classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." \textit{Craig}, 429 U.S. at 197.
\textsuperscript{99} But, importantly, disparate impact alone is not enough to create a finding of unconstitutional sex discrimination. See \textit{Reed}, 404 U.S. at 197 for precedent-setting cases in the facial discrimination tradition. See infra note 100 for ruling cases in the adjudication of constitutional disparate impact jurisprudence.
limited disparate impact doctrine by requiring showings of discriminatory intent tantamount to malice in order for facially neutral laws to be constitutionally violative.\(^{100}\)

Although great diversity exists among the principles offered to guide the interpretations and application of the Equal Protection Clause, scholars have tended to loosely divide theories of the Equal Protection Clause into ‘anticlassification’ and ‘antisubordination’ camps, the former thought to be more formal and concerned with procedure, the latter more substantive and concerned with consequences.\(^{101}\) Reva Siegel argues that the anticlassification/antisubordination dichotomy is false and that the two principles originate from a common concern, but that this concern has been obscured by a process she refers to as “preservation-through-transformation” in which relations of inequality evolve and transform over time so that there is no stable form of status-enforcing state action.\(^{102}\) Modern Equal Protection jurisprudence crystallized at a time when anticlassification and antisubordination principles were unified. However, anticlassification was the rhetoric of choice for pragmatic reasons and because the Court has been rigid in its adherence to this language, confusion has ensued about the meaning and purpose of the Equal Protection Clause.\(^{103}\)

Siegel argues that the struggles over the legacy and meaning of \textit{Brown} alert us to the “many ways in which antisubordination and anticlassification are friends as well as agonists. History shows that antisubordination values live at the root of the anticlassification principle . . . [they] are not foreign to the modern equal protection tradition, but a founding part of it.”\(^{104}\) In the case of \textit{Brown}, the anticlassification understanding is due in part to classification being coextensive with substantive subordination, and the anticlassification element became more popular as a politically expedient response to criticisms of judicial illegitimacy.\(^{105}\) In the context of sex, the Court has implicitly recognized the relationship between classification and subordination: “classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination.”\(^{106}\) The interrelation of anticlassification and antisubordination is visible in the Supreme Court’s gender jurisprudence because it "deemed classification a constitutional wrong in significant part because it might enforce or perpetuate the ‘inferiority’ of women


\(^{103}\) \textit{See supra} note 101, at 1478-1499.

\(^{104}\) \textit{See id.} at 1477.

\(^{105}\) \textit{Id.} at 1498-99.

\(^{106}\) Massachusetts v. Feeney, 442 U.S. 256, 273 (1979) (holding that a statutory classification between veterans and non-veterans that disparately impacted women was a neutral classification).
Indeed, reading prominent works on the Equal Protection Clause through the lens of Siegel’s argument reveals that many theories and interpretations contain elements of both anticlassification and antisubordination. Paul Brest argues that the antidiscrimination principle lying at the core of the Equal Protection Clause “disfavors race-dependent decisions and conduct” which are decisions and conduct “that would have been different but for the race of those benefited or disadvantaged by them.” While this seems to be a purely procedural and formal approach to Equal Protection analysis, Brest identifies material and stigmatic harms that such classifications facially create as rationales for the antidiscrimination principle, thereby linking classification to subordination without explicitly describing his approach as such.

Kenneth Karst’s formulation of the Equal Protection Clause as a guarantee of equal citizenship posits that the substantive core of the Equal Protection Clause “is a principle of equal citizenship, which presumptively guarantees to each individual the right to be treated by the organized society as a respected, responsible, and participating member.”

The essence of equal citizenship is the dignity of full membership in the society. Thus, the principle not only demands a measure of equality of legal status, but also promotes a greater equality of that other kind of status which is a social fact—namely, one’s rank on a scale defined by degrees of deference or regard. The principle embodies “an ethic of mutual respect and self-esteem”; it often bears its fruits in those regions where symbol becomes substance.

In this passage Karst sees the equal citizenship principle as encompassing classifications that discriminate but also places an important emphasis on the effects of laws beyond their text in the way Siegel describes. Similarly, Karst’s discussion of the law’s role in promoting and perpetuating stigma captures the interrelated concepts of stereotype and subordination, which he argues bear a close relationship to suspect classifications and “go to the heart of the principle of equal citizenship.” Owen Fiss’ proposal that a group-disadvantaging principle should guide the Equal Protection Clause is, too, neither purely about subordination nor classification. The very way that Fiss defines group membership based on the paradigm case of African Americans reveals a concern

109. Id. at 8-12.
111. Id. at 5-6 (quoting JOHN RAWLS, A THEORY OF JUSTICE 256 (1971)) (footnote omitted).
112. Id. at 24.
113. Owen Fiss, Groups and the Equal Protection Clause, 5 PHIL. & PUB. AFF. 107, 147-77 (1976). Fiss describes this principle as “clearly and explicitly asymmetrical, one that talks about substantive ends, and not fit, and one that recognizes the existence and importance of groups, not just individuals.” Id. at 136.
SAME SEX MARRIAGE THROUGH THE EQUAL PROTECTION CLAUSE

with the law’s classificatory powers to stigmatize and produce the dynamics that define groups.114

Given this background, how do the interactive and mutually informing principles of anticlassification and antisubordination apply in the case of same-sex marriage prohibitions? First, the laws in question are facially sex discriminatory. As mentioned above, in the law’s very language it is the sex of the person someone chooses to marry that prohibits what would be legal if they were of the opposite sex.115 In a straightforward “but for” perspective on causation, this discrimination exists in laws prohibiting these marriages because such marriages would be legal but for the sex of one of the participants.

No state law or constitutional amendment banning same-sex marriage uses the terms homosexuality, gay, lesbian or bisexual to do so.116 However, to the extent that sexuality is sex-based and lesbian women and gay men are prohibited from entering into their chosen marriages by a same-sex marriage prohibition, these laws discriminate against lesbian women and gay men both as individuals and as members of their sex group on the basis of sex. Women of all sexualities, as a group, are disproportionately impacted by marriage given the institution’s role in maintaining and enforcing sex inequality, a phenomenon that may be transformed by the recognition of same-sex marriage.117 The disparate impact

114. Id. at 147-54.

115. See infra note 116.


117. I refer here generally to a variety of phenomena including the role of domestic labor performed by women in marriage, the economic status of women in marriage and the frequent economic devastation that befalls them by leaving it, and the realm of marital privacy that seals impunity for abuse within marriage. For a theoretical analysis of issues of
argument is doctrinally viable because the state interests advanced in same-sex marriage fulfill the level of intent set in Feeney.\footnote{118} that a particular course of action must be chosen “at least in part ‘because of,’ not merely ‘in spite of’ its adverse effects upon an identifiable group.”\footnote{119} Even if the legislative history does not explicitly demonstrate that same-sex marriage prohibitions were enacted to subordinate women, state reliance on concepts such as gender complementarity and the hierarchy and asymmetry this implies indicate that these laws are grounded in prohibited sex-role stereotyping.

In the section that follows, I explore the ways in which laws that prohibit same-sex marriage enforce gender-conformity in violation of Constitutional sex equality guarantees.

\textbf{IV. A GENDER-CONSCIOUS SEX EQUALITY APPROACH TO SAME-SEX MARRIAGE}

Supreme Court race precedent indicates that facial discrimination exists in prohibitions of same-sex marriage. Under existing doctrine, the realization that same-sex marriage bans employ a prohibited classification obligates courts to interrogate the state interests behind these laws. When the burden of justification under the Equal Protection tiers of scrutiny is shifted in an inquiry into governmental purpose, substantive inequalities are exposed that further require invalidation of these bans. This approach allows us to incorporate insights about the relationship of the censure of homosexuality to gender inequality without worrying about the complicated definitional issues involved in dealing with homosexuality, because the marriage statutes classify on the basis of sex. In this way, the bans’ reliance on forbidden classifications to target lesbians and gays begins an inquiry into why and how the category of sex is used to regulate those who self-identify as or are perceived to be lesbian or gay.

An approach that recognizes the sex discrimination employed in marriage laws shifts the burden of justification to the state and thus begins a more searching inquiry into the interests and reasons behind the sex-discriminatory laws.\footnote{120} Once a sex-based classification is shown, the law in question is subject to intermediate review under which the sex classification must be shown to be substantially related to important governmental interests in order to survive.\footnote{121} Because it forces the state to provide a strong defense for its marriage law, the sex discrimination strategy confronts the source and function of laws. One place to begin an inquiry into how the Court should approach same-sex marriage prohibitions is to examine the treatment of similar restrictions in anti-

\footnotesize{justices and vulnerability within marriage and the family, see \textit{Susan Moller Okin}, \textit{Justice, Gender, and the Family} (1989).}

\begin{itemize}
\item \textit{See} Feeney, 442 U.S. at 279.
\item \textit{Id.}
\item \textit{Craig, 429 U.S. at 197.}
\item \textit{Id.}
\end{itemize}
miscegenation statutes.122

A. Procedural Equal Protection

The Supreme Court confronted a racial restriction analogous to those prohibiting same-sex marriages in the case of Loving v. Virginia.123 In Loving, the Court invalidated anti-miscegenation laws on the grounds that they unconstitutionally classified on the basis of race in the maintenance of White Supremacy.124 Loving explicitly rejected the notion that a racial classification's "equal application" to both whites and non-whites (prohibiting both groups from marrying each other) amounts to no discrimination at all.125 Such arguments have since been repeatedly rejected in the areas of both race and sex.126 Supporting case law acknowledges the notion that if a statute defines prohibited conduct by reference to a given characteristic, then the law cannot be said to be neutral with respect to that characteristic.127

Just as it was clear to the Loving Court that it was sophistry to claim an anti-miscegenation law constituted equal treatment, it has been clear to several courts encountering same-sex marriage bans that the laws in question do in fact discriminate on the basis of sex. In Brause, the court opined about Alaska's opposite-sex marriage law, "[t]hat this is a sex-based classification can readily be demonstrated: if twins, one male and one female, both wished to marry a woman and otherwise met all of the Code's requirements, only gender prevents the twin sister from marrying under the present law. Sex-based classification can hardly be more obvious."128 Similarly, a concurring opinion in Baker saw sex discrimination where Baehr and Brause also had (and where the Baker majority did not).129 The concurrence argued, "a woman is denied the right to marry another woman because her would-be partner is a woman... Similarly, a man is denied the right to marry another man because his would-be partner is a man... Thus, an individual's right to marry a person of the same sex is prohibited solely on the basis of sex."130

Extending the Loving analogy, to argue that same-sex marriage bans do not discriminate on the basis of sex is to adopt the reasoning of Pace v. Alabama.131 In Pace the Court held that penalties for interracial sex did not deny equal
protection of the laws even when those penalties were more severe than those imposed for adultery or for fornication between persons of the same race.\textsuperscript{3} \textit{Pace} was overruled by \textit{McLaughlin v. Florida}, which invalidated a statute prohibiting an unmarried interracial couple from habitually living in and occupying the same room at night as a denial of equal protection of the laws on the basis of race.\textsuperscript{133} In the same-sex marriage context therefore, it is no response to say that women and men alike are prohibited from same-sex marriage; this merely doubles the discrimination, ignores the use of sex to classify, and refuses to interrogate the structures and ideology supporting the law.\textsuperscript{134}

\textit{Loving}'s insight that the racial segregation and polarization embodied in anti-miscegenation statutes was an expression of White Supremacy has not yet been extended to the same-sex marriage context. While opinions that invalidate same-sex marriage bans employ a sex discrimination analysis consistent with \textit{Loving}, they have not gone beyond a formal, procedural analysis of sex discrimination.\textsuperscript{135} Same-sex marriage cases generally limit the \textit{Loving} analogy to the "but for" stage of equal protection analysis and stop short of engaging in an inquiry into what structures, dynamics, or ideologies the classification in question supports or expresses.\textsuperscript{136} A more appropriate response to laws prohibiting same-sex marriage requires extending the \textit{Loving} analogy in a way that exposes the substantive objection to these laws: they are part of a system that subordinates women.

\textbf{B. Substantive Equal Protection}

An analysis of states' purposes and interests in defending bans on same-sex marriage helps to illuminate the need for a substantive level of sex equality analysis. In \textit{Goodridge}, Massachusetts' rationales for prohibiting same-sex couples from marrying included the need to provide a "favorable setting for procreation" and to ensure the optimal setting for child rearing, defined as "a

\begin{itemize}
  \item \textsuperscript{132} Id.
  \item \textsuperscript{133} 379 U.S. at 188-90.
  \item \textsuperscript{134} Tellingly, in much the same way opponents to the Fourteenth Amendment said it would require interracial marriage, opponents of the federal Equal Rights Amendment said it would require same-sex marriage. Defenders in both instances incorrectly denied the charge. On ERA advocates' denial that it would require same-sex marriage see Note, \textit{The Legality of Homosexual Marriage}, 82 YALE L. J. 573, 583-88 (1973) (The note states that in a letter Professor Thomas Emerson of the Yale Law School "has also expressed his belief that the Equal Rights Amendment was not intended to force the states to grant marriage licenses to homosexual couples and would not be so construed by the courts." Id. at 584. Catharine MacKinnon has publicly stated that before his death, Professor Emerson told her that he never wrote such a letter and that no such letter exists. Catharine A. MacKinnon, Keynote Address at the Moritz College of Law Symposium on \textit{Lawrence v. Texas} (Nov. 7 2003)). On Fourteenth Amendment advocates' denial that it would require interracial marriage see Alfred Avins, \textit{Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent}, 52 VA. L. REV. 1224 (1966).
  \item \textsuperscript{136} Id.
\end{itemize}
two-parent family with one parent of each sex.” As justifications for its restrictive marriage laws, Vermont argued that it had an interest in “uniting men and women to celebrate the ‘complementarity’ [sic] of the sexes and providing male and female role models for children.” Vermont went on to contend that

(1) marriage unites the rich physical and psychological differences between the sexes; (2) sex differences strengthen and stabilize a marriage; (3) each sex contributes differently to a family unit and to society; and (4) uniting the different male and female qualities and contributions in the same institution instructs the young of the value of such a union.138

When the state offers stereotypes and antiquated gender norms that enforce inequality in response to an equal protection challenge, it raises issues that go beyond the procedural sex equality analysis accepted in cases like Baehr or Brause. The Supreme Court has made plain that gender differentiations in the definition of marital obligations are unconstitutional, unless they are shown to be closely related to important state objectives.139 For example, in Stanton v. Stanton the Court invalidated a statue requiring parents to support their sons until age twenty-one, but their daughters only until age eighteen.140 The state defended this law as necessary because men need an education and training to provide a home, a responsibility that women do not have.141 The Court dismissed this argument, holding that a distinction based on “old notions” could not survive an equal protection challenge.142

Judge Johnson’s concurring and dissenting opinion in Baker begins to move the sex discrimination analysis beyond its purely procedural context, gesturing toward growth possibilities for a substantive equality analysis. The opinion states that the state’s attempts to justify its marriage laws are “unrelated to any valid purpose, but rather [are] a vestige of sex-role stereotyping that applies to both men and women, [and therefore] the classification is still unlawful sex discrimination even if it applies equally to men and women.”143 It follows from this analysis that just as other gender stereotypes are subject to heightened scrutiny under the equal protection clause, so too should this element of sex inequality in marriage undergo the same level of scrutiny.

Indeed, an equal protection analysis demonstrates that laws based on gender stereotypes are unconstitutional because they rest on unjust generalizations that deprive individuals of access and opportunities.144 Women’s
forced occupation of certain jobs, schools, and locations through separate sphere ideology, the gendered division of labor, and sex stereotyping have all been found unconstitutional, not simply because they are different, but because they are inferior. A cursory glance at the way sex stereotyping has operated—

forbidding women to become lawyers,145 excusing them from jury duty on the grounds that they should be at home being mothers,146 keeping them out of the Virginia Military Institute,147 and passing them over for partner when they were too masculine148—reveals the way in which law expresses and enforces a hierarchy of men over women, or more accurately, the properly masculine over the properly feminine.149 A sex equality approach to opposite-sex marriage laws affirms that just as the Equal Protection Clause forbids the imposition of what society deems an appropriate job, educational environment, or appearance for a given sex, so too does it forbid the legislation of what is deemed the proper sex for a marital partner.

The concurrence in Baker is significant progress in moving toward a substantive, antisubordination analysis of same-sex marriage prohibitions, but it does not fully expose the historical and continuing inequality of sex stereotyping. It is not just that stereotyping is inaccurate or constraining (although it is), it is also that gender stereotypes are ordered hierarchically in a way that creates, maintains, enforces, and perpetuates the dominance of (appropriately masculine) men over all women and over men who dissent from masculinity. The question for the state to answer, under a sex equality argument, becomes why it has prohibited same-sex marriage—what are the law’s origins, what purpose does it serve, how does it function in reality, and what attitudes keep it on the books?150

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145. Bradwell v. Illinois, 83 U.S. 130 (1873) (ruling that a state has the right to exclude women from practicing law).
146. Hoyt v. Florida, 368 U.S. 57, 62 (1961) (upholding a Florida rule that made it far less likely for women than men to be called for jury service on the grounds that a woman is still regarded as the center of home and family life).
147. United States v. Virginia, 518 U.S. 515 (affirming that the male-only admissions policy of the state-supported Virginia Military Institute violates the Fourteenth Amendment).
149. While three of these four examples found the laws in question to be invalid expressions of stereotyping, these cases illustrate the historical legacy of law’s implication in gender stereotypes. My point is not that law can only be and is always in the business of enforcing unequal gender roles, but rather that law is deeply implicated in sex inequality while holding potential for social change.
150. Related historical developments regarding the legal regulation of the constellations of acts
By challenging laws whose most obvious targets may be lesbian women and gay men, the sex discrimination strategy brings into courts what activists have long seen: the sexism in heterosexism.\textsuperscript{151}

Seen in this light, discrimination against lesbian women and gay men becomes part of a larger structure of male dominance and structural sex inequality. A connection between sex stereotypes and anti-gay same-sex marriage prohibitions emerges. Because the states understand marriage to be inextricably linked to sex, child-rearing, and the maintenance of gender dichotomies through forced realization of complementarity (as their defenses make clear), proscribing same-sex marriage maintains gender dichotomies, socially coded as difference, and treats the dichotomies as hierarchically-ordered inequality.

Hierarchy is often achieved through processes of differentiation and polarization. This has been chronicled in the context of race, perhaps best exemplified by the “one-drop rule.”\textsuperscript{152} Similarly, the hierarchy of males over females is maintained by extreme differentiation of the sexes. The stereotypes embodied by opposite-sex only marriage laws are built on a paradigm of inequality that associates men with superiority and dominance and devalues women. Therefore, marriage restrictions are an instance of sex discrimination, enforcing harmful gender norms. Anti-miscegenation laws helped to maintain the boundary between the races on which the system of racism in part depends.\textsuperscript{153} The compulsory heterosexuality expressed in same-sex marriage bans encourages that women enter (and stay in) relationships with their social unequals; that is, men.\textsuperscript{154} In a similarly dynamic, then, “the hierarchy of whites over blacks is greatly strengthened by extreme differentiation of the races, [just as] the hierarchy of males over females is greatly strengthened by extreme differentiation of the sexes” so that “the prohibition of homosexuality preserves the polarities of gender on which rests the subordination of women.”\textsuperscript{155}

\textit{Loving} was certainly about differentiation and polarization of race, but it was also about sex. White men were not only worried about preserving the purity of the race; they were also concerned about black men having sex with white

collectively known as sodomy date either from their origins in the common law or from the latter half of the twentieth century, developing in conjunction with cultural anxieties about “gender inversion” and the felt societal need to maintain rigid gender norms. See generally, e.g., \textsc{William N. Eskridge, Jr., Gaylaw: Challenging the Apartheid of the Closet} (1999); \textsc{Byrne Fone, Homophobia: A History} 415 (2000); \textsc{Carroll Smith-Rosenberg, Disorderly Conduct: Visions of Gender in Victorian America} (1985).

\textsuperscript{151} See generally \textsc{Stoltzenberg, supra} note 72; \textsc{Pharr, supra} note 74.

\textsuperscript{152} The “One-drop rule” refers to the notion that a person with even a tiny portion of non-white ancestry (“one drop of non-white blood”) should not be classified as “white,” especially legally for purposes of interracial marriage. See generally \textsc{Rachel Moran, Interracial Intimacy: The Regulation of Race and Romance} 2, 27 (2003); \textsc{Ian F. Haney López, White by Law: The Legal Construction of Race} 27 (1996).

\textsuperscript{153} See Koppelman, \textsc{supra} note 75, at 11-12.

\textsuperscript{154} See \textsc{supra} note 117 and accompanying text.

\textsuperscript{155} Koppelman, \textsc{supra} note 75, at 257, 202.
women, and losing their own sexual access to black women. Although white men assumed black women's sexual availability to them under slavery (and long after), the slightest interest by a black man in a white woman was enough to incite a lynch mob. This dynamic helped to construct white women's, black men's, and black women's sexualities in the popular consciousness and, today, reveals something applicable to the same-sex marriage debate. White women were thought to denigrate themselves if they had sex with a black man, and black men were despised for what they did to what were/are seen as white men's women. Similarly, gender nonconformists/lesbians and gays—men who have sex with men the way only women are meant to be had sex with, men who allow themselves to be used as women, women who reject the need for men in sex at all—are demeaned and thought to be despicable as a result of their sexual expression.

The outrage directed at male gender nonconformity results in a man being reduced to the status of a woman, which is understood to be degrading. Miscegenation called into question the distinctive and superior status of being white, and the gender nonconformity of same-sex relations (including but not limited to sexual) threatens the distinctive and superior status of being male. Thus, “[m]ale homosexuals and lesbians, respectively, are understood to be guilty of one aspect of the dual crime of the miscegenating white woman: self-degradation and insubordination.”

Gender role anxiety discriminates against both sexes: against women by reinforcing traditional sex stereotypes, doubly oppressing lesbians with contempt for their challenge to gender conformity; against gay men because they threaten to puncture the gender polarization on which male dominance relies. Put another way, by legally prohibiting men from entering into marriage with other men, the state effectively enforces the notion that men must not ‘act like women’ in a way that undermines the predominant view that men are fundamentally different from, and superior to, women. By legally prohibiting women from entering into marriage with other women, the state effectively enforces the notion that female sexuality exists solely for men and that women must not assume ‘masculine’ roles that challenge the traditional view that they are naturally dependent on and

156. See Moran, supra note 152, at 27; Dorothy E. Roberts, Crime, Race, and Reproduction, 67 Tul. L. Rev. 1945, 1970 (1993) (noting white control of black reproduction under slavery); Bell Hooks, Yearning: Race, Gender, and Cultural Politics 57-64 (1990) (describing the construction of black sexuality, both women’s and men’s, by racial power inequalities that can be traced to slavery); We Are Your Sisters: Black Women in the Nineteenth Century 18-43 (Dorothy Sterling ed., 1984) (documenting the sexual exploitation and abuse of black women under slavery).

158. Id. at 224-26.
159. See supra note 156.
161. Id.
162. Id.
163. Id. at 236.
subservient to men.

The socio-legal interdiction of same-sex sexuality produces gender hierarchy by enforcing a rigid distinction between the genders and by requiring women to marry only men, their social unequals, which creates conditions of dependency, exploitation, abuse and vulnerability. This forced interaction between unequals inherent in any law prohibiting same-sex marriage exposes the need for substantive equality analysis. On the other hand, same-sex sexuality, which often repudiates the gender correlates of power and powerlessness, opposes, or can oppose, gender hierarchy. Therefore, both men and women are substantively discriminated against based on sex by traditional marriage laws that only allow them to marry someone who, on a sex basis, has more or less power than they do.

CONCLUSION

As the racial analogy illustrates, same-sex marriage prohibitions classify on the basis of sex and therefore are subject to intermediate scrutiny under Equal Protection doctrine. When the burden of justification is shifted to the state in this process, justifications are exposed that fulfill the Feeney intent requirement for disparate impact because they are explicitly grounded in gender norms and sex-role stereotypes that subordinate women. Therefore, banning same-sex marriage both formally and substantively violates sex equality guarantees.

Additionally, understanding same-sex sexuality as gender nonconformity allows for an analysis that works backwards to further strengthen the interpretation of same-sex marriage bans as a tool of sex inequality. A law that encourages the marriage of gender unequals by prohibiting the marital union of gender equals preserves the dynamics of polarization and differentiation in ways that stigmatize and materially harm all those deemed socially feminine.

At the dawn of the Equal Protection Clause’s application to sex, Kenneth Karst addressed the scope of the newly acknowledged problem of legal sexism and grasped its vast scope. He speculated on the sweeping work that the equal citizenship principle would inform in ending it, writing that a society free from


165. See supra Sections I and IV.

166. See Karst, supra note 92, at 53-59.
sex inequality had only begun to even be imagined.\textsuperscript{167} However, he was confident that the Equal Protection Clause would have an important role to play in the future as theories of sex equality matured: "The traditional patriarchal stereotypes of 'woman's role' undermines all the equal citizenship values: respect, participation, and responsibility. To the extent that . . . the phenomenon of women's dependency on men is socially imposed the principle of equal citizenship presumptively requires intervention by the courts."\textsuperscript{168}

The argument for same-sex marriage on a sex equality analysis is but one small part of Karst's observation that sex equality requires changes in structures and practices where inequality has long gone unnoticed and unquestioned. Feminists have critically analyzed marriage and the political institution of heterosexuality for at least thirty years, and their ideas linking sexism and heterosexism demand the end of lesbian and gay subordination and the transformation of the inequalities of marital arrangements. Same-sex marriage cases present an opportunity to bring about the latter through progress in the former.\textsuperscript{169}

To explain why the Court may avoid discussing the issues that lie beneath classifications, as courts confronted with same-sex marriages cases have generally done, Siegel argues that issues about stigma, inferiority, and status—power and its deprivations, more generally—are politically provocative in their questioning of the social order and its hierarchies.\textsuperscript{170} "More deeply, interpreting the Constitution to prohibit practices that enforce group inequality raises questions about the privileges of the most powerful in society . . . Of course, these liabilities may not outweigh the benefits and virtues of normative clarity."\textsuperscript{171} I have argued that normative clarity is exactly what is needed from the courts in their treatment of same-sex marriage prohibitions. Opponents of same-sex marriage have been clear in their interest in maintaining the structure of male dominance. They will understand judicial intervention into this structure, should it happen, as an assault on this ideology. In recognizing same-sex marriage, the courts should intervene against sex inequality as authoritatively and decisively as possible.

\begin{footnotes}
\item[167] \textit{Id.} at 53.
\item[168] \textit{Id.} at 55.
\item[169] As alluded to above, the admission of same-sex couples into the institution of marriage will not necessarily transform the institution. See supra note 164. The question of whether the admission of same-sex couples to the institution will transform the institution or the couples, however, I regard as a significantly empirical question, best examined elsewhere.
\item[170] See supra note 101, at 1544-5.
\item[171] \textit{Id.} at 1545.
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