Latta, et al. v. Otter, et al. Nos. 14-35420 & 14-35421

Sevcik, et al. v. Sandoval, et al. No. 12-17688

BERZON, Circuit Judge, concurring:

I agree that Idaho and Nevada's same-sex marriage prohibitions fail because they discriminate on the basis of sexual orientation and I join in the Opinion of the Court. I write separately because I am persuaded that Idaho and Nevada's same-sex marriage bans are also unconstitutional for another reason: They are classifications on the basis of gender that do not survive the level of scrutiny applicable to such classifications.

I. The Same-Sex Marriage Prohibitions Facially Classify on the Basis of Gender

"[S]tatutory classifications that distinguish between males and females are 'subject to scrutiny under the Equal Protection Clause.'" *Craig v. Boren*, 429 U.S. 190, 197 (1976) (quoting *Reed v. Reed*, 404 U.S. 71, 75 (1971)). "To withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* "The burden of justification" the state shoulders under this intermediate level of scrutiny is "demanding": the state must convince the reviewing court that the law's "proffered justification" for the gender classification "is 'exceedingly persuasive.'" *United States v. Virginia*, 518 U.S. 515, 533 (1996)

("*VMI*"). Idaho and Nevada's same-sex marriage bans discriminate on the basis of sex and so are invalid unless they meet this "demanding" standard.

A. Idaho and Nevada's same-sex marriage prohibitions facially classify on the basis of sex.[1] Only women may marry men, and only men may marry women.[2] Susan Latta may not marry her partner Traci Ehlers for the sole reason that Latta is a woman; Latta could marry Ehlers if Latta were a man. Theodore Small may not marry his partner Antioco Carillo for the sole reason that Small is a man; Small could marry Carillo if Small were a woman. But for their gender, plaintiffs would be able to marry the partners of their choice. Their rights under the states' bans on same-sex marriage are wholly determined by their sex.

A law that facially dictates that a man may do X while a woman may not, or

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[1] "Sex" and "gender" are not necessarily coextensive concepts; the meanings of these terms and the difference between them are highly contested. *See, e.g.*, Katherine Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. Pa. L. Rev 1 (1995). For present purposes, I will use the terms "sex" and "gender" interchangeably, to denote the social and legal categorization of people into the generally recognized classes of "men" and "women."

[2] Idaho Const. art. III § 38 ("A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state."); Idaho Code § 32-201(1) ("Marriage is a personal relation arising out of a civil contract between a man and a woman . . . ."); Nev. Const. art. I, § 21 ("Only a marriage between a male and female person shall be recognized and given effect in this state."); Nev. Rev. Stat. § 122.020 ("[A] male and a female person . . . may be joined in marriage.").

vice versa, constitutes, without more, a gender classification. "[T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether [a policy] involves disparate treatment through explicit facial discrimination does not depend on why the [defendant] discriminates but rather on the explicit terms of the discrimination." *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991).[3] Thus, plaintiffs challenging

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[3] *UAW v. Johnson Controls* was a case brought under Title VII of the Civil Rights act of 1964, which, inter alia, bans employment policies that discriminate on the basis of sex. Title VII provides it is

> an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; (2) to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a). The Supreme Court has "analog[ized]" to its decisions interpreting what constitutes discrimination "because of" a protected status under Title VII in analyzing Fourteenth Amendment equal protection claims and vice versa. *See, e.g.*, *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 133 (1976), *superseded by statute on other grounds as recognized in Johnson Controls*, 499 U.S. at 219 ("While there is no necessary inference that Congress . . . intended to incorporate into Title VII the concepts of discrimination which have evolved from court decisions construing the Equal Protection Clause of the Fourteenth Amendment, the similarities between the congressional language and some of those decisions surely indicate that the latter are a useful starting point in interpreting the former."). As the Court has explained, "[p]articularly in the case of defining the

policies that facially discriminate on the basis of sex need not separately show either "intent" or "purpose" to discriminate. *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 277–78 (1979).

Some examples help to illuminate these fundamental precepts. Surely, a law providing that women may enter into business contracts only with other women would classify on the basis of gender. And that would be so whether or not men were similarly restricted to entering into business relationships only with other men.

Likewise, a prison regulation that requires correctional officers be the same sex as the inmates in a prison "explicitly discriminates . . . on the basis of . . . sex." *Dothard v. Rawlinson*, 433 U.S. 321, 332, 332 n. 16 (1977). Again, that is so whether women alone are affected or whether men are similarly limited to serving only male prisoners.[4]

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term 'discrimination,'" Title VII must be interpreted consistently with Fourteenth Amendment equal protection principles, because Congress does not define "discrimination" in Title VII. *See Gilbert*, 429 U.S. at 133; *see also* 42 U.S.C. § 2000e. I therefore rely on Title VII cases throughout this Opinion for the limited purpose of determining whether a particular classification is or is not sex-based.

[4] *Dothard* in fact dealt with a regulation that applied equally to men and women. *See* 433 U.S. at 332 n. 16 ("By its terms [the regulation at issue] applies to contact positions in both male and female institutions."); *see also id.* at 325 n. 6. *Dothard* ultimately upheld the sex-based discrimination at issue under Title VII's "bona fide occupational qualification" exception, 42 U.S.C. § 2000e-2(e), because of the especially violent, sexually charged nature of the particular prisons involved

Further, it can make no difference to the existence of a sex-based classification whether the challenged law imposes gender homogeneity, as in the business partner example or *Dothard*, or gender heterogeneity. Either way, the *classification* is one that limits the affected individuals' opportunities based on their sex, as compared to the sex of the other people involved in the arrangement or transaction.

As Justice Johnson of the Vermont Supreme Court noted, the same-sex marriage prohibitions, if anything, classify *more* obviously on the basis of sex than they do on the basis of sexual orientation: "A woman is denied the right to marry another woman because her would-be partner is a woman, not because one or both are lesbians. . . . [S]exual orientation does not appear as a qualification for marriage" under these laws; sex does. *Baker v. State*, 744 A.2d 864, 905 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part).

The statutes' gender focus is also borne out by the experience of one of the Nevada plaintiff couples:

When Karen Goody and Karen Vibe went to the Washoe County Marriage

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in that case, and because the regulation applied only to correctional officers in "contact positions" (i.e. working in close physical proximity to inmates) in maximum security institutions. *See Dothard*, 433 U.S. at 336–37 (internal quotation marks omitted). For present purposes, the salient holding is that the same-sex restriction *was* overtly a sex-based classification, even if it could be justified by a sufficiently strong BFOQ showing. *Id.* at 332–33.

> Bureau to obtain a marriage license, the security officer asked, "Do you have a man with you?" When Karen Vibe said they did not, and explained that she wished to marry Karen Goody, she was told she could not even obtain or complete a marriage license application . . . [because] "[t]wo women can't apply" . . . [and] marriage is "between a man and a woman."

Notably, Goody and Vibe were not asked about their sexual orientation; Vibe was told she was being excluded because of her gender and the gender of her partner.

Of course, the reason Vibe wants to marry Goody, one presumes, is due in part to their sexual orientations.[5] But that does not mean the classification at issue is not sex-based. *Dothard* also involved a facial sex classification intertwined with presumptions about sexual orientation, in that instance heterosexuality. The Supreme Court in *Dothard* agreed that the state was justified in permitting only male officers to guard male inmates, because there was "a real risk that other inmates, deprived of a normal heterosexual environment, would assault women guards because they were women." 433 U.S. at 335. Thus, *Dothard*'s reasoning confirms the obvious: a statute that imposes a sex qualification, whether for a marriage license or a job application, is sex discrimination, pure and simple, even

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[5] The need for such a presumption, as to a factor that does not appear on the face of the same-sex marriage bans, suggests that the gender discrimination analysis is, if anything, a closer fit to the problem before us than the sexual orientation rubric. While the same-sex marriage prohibitions obviously operate to the disadvantage of the people likely to wish to marry someone of the same gender—i.e. lesbians, gay men, bisexuals, and otherwise-identified persons with same-sex attraction—the individuals' *actual* orientation is irrelevant to the application of the laws.

where assumptions about sexual orientation are also at play.

Lawrence v. Texas, 539 U.S. 558 (2003) also underscores why the continuation of the same-sex marriage prohibitions today is quite obviously about gender. *Lawrence* held that it violates due process for states to criminalize consensual, noncommercial same-sex sexual activity that occurs in private between two unrelated adults. *See id.* at 578. After *Lawrence*, then, the continuation of the same-sex marriage bans necessarily turns on the gender identity of the spouses, not the sexual activity they may engage in. To attempt to bar that activity would be unconstitutional. *See id.* The Nevada intervenors recognize as much, noting that *Lawrence* "differentiates between the fundamental right of gay men and lesbians to enter an intimate relationship, on one hand, and, on the other hand, the right to marry a member of one's own sex." The "right to marry a member of one's own sex" expressly turns on sex.

B. In concluding that these laws facially classify on the basis of gender, it is of no moment that the prohibitions "treat men as a class and women as a class equally" and in that sense give preference to neither gender, as the defendants[6] fervently maintain. That argument revives the long-discredited reasoning of *Pace*

[6] Following the style of the Opinion of the Court, *see* Op. Ct. at 9 n. 4, I will refer throughout this Opinion to arguments advanced generally by "defendants," meaning the parties that continue actively to argue in defense of the laws, i.e. the Idaho defendants and the Nevada intervenors.

v. Alabama, which upheld an anti-miscegenation statute on the ground that "[t]he punishment of each offending person, whether white or black, is the same." 106 U.S. 583, 585 (1883), *overruled by McLaughlin v. Florida*, 379 U.S. 184 (1964). *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by Brown v. Board of Education*, 347 U.S. 483 (1954), similarly upheld racial segregation on the reasoning that segregation laws applied equally to black and white citizens.

This narrow view of the reach of the impermissible classification concept is, of course, no longer the law after *Brown*. *Loving v. Virginia* reinforced the post-*Brown* understanding of impermissible classification under the Fourteenth Amendment in a context directly analogous to the present one. Addressing the constitutionality of anti-miscegenation laws banning interracial marriage, *Loving* firmly "reject[ed] the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discrimination." 388 U.S. 1, 8 (1967). As *Loving* explained, "an even-handed state purpose" can still be "repugnant to the Fourteenth Amendment," *id.* at 11 n. 11, because restricting individuals' rights, choices, or opportunities "solely because of racial classifications violates the central meaning of the Equal Protection Clause" even if members of all racial groups are identically restricted with regard to interracial

marriage. *Id.* at 12. "Judicial inquiry under the Equal Protection Clause . . . does not end with a showing of equal application among the members of the class defined by the legislation." *McLaughlin*, 379 U.S. 184 at 191.

If more is needed to confirm that the defendants' "equal application" theory has no force, there is more—cases decided both before and after *Loving*. *Shelley v. Kraemer*, for example, rejected the argument that racially restrictive covenants were constitutional because they would be enforced equally against both black and white buyers. *Shelley v. Kraemer* 334 U.S. 1, 21–22 (1948). In so holding, *Shelley* explained: "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Id.* at 22. *Shelley* also observed that "a city ordinance which denied to colored persons the right to occupy houses in blocks in which the greater number of houses were occupied by white persons, and imposed similar restrictions on white persons with respect to blocks in which the greater number of houses were occupied by colored persons" violated the Fourteenth Amendment despite its equal application to both black and white occupants. *See id.* at 11 (describing *Buchanan v. Warley*, 245 U.S. 60 (1917)).

The same individual rights analysis applies in the context of gender classifications. Holding unconstitutional peremptory strikes on the basis of gender,

J.E.B. explained that "individual jurors themselves have a right to nondiscriminatory jury selection procedures . . . . [T]his right extends to both men and women." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140–41 (1994). "The neutral phrasing of the Equal Protection Clause, extending its guarantee to 'any person,' reveals its concern with rights of individuals, not groups (though group disabilities are sometimes the mechanism by which the State violates the individual right in question)." *Id.* at 152 (Kennedy, J., concurring).

City of Los Angeles, Dep't of Water & Power v. Manhart further explains why, even in "the absence of a discriminatory effect on women as a class" or on men as a class, the same-sex marriage bars constitute gender classifications, because they "discriminate against *individual[s]* . . . because of their sex." 435 U.S. 702, 716 (1978) (emphasis added). In that case, the parties recognized that women, as a class, lived longer than men. *Id.* at 707–09. The defendant Department argued that this fact justified a policy that facially required all women to contribute larger monthly sums to their retirement plans than men, out of fairness to men as a class, who otherwise would subsidize women as a class. *Id.* at 708–09. *Manhart* rejected this justification for the sex distinction, explaining that the relevant focus must be "on fairness to individuals rather than fairness to classes," and held, accordingly, that the policy was unquestionably sex

discriminatory. *Id.* at 709, 711.

Under all these precedents, it is simply irrelevant that the same-sex marriage prohibitions privilege neither gender as a whole or on average. Laws that strip *individuals* of their rights or restrict personal choices or opportunities solely on the basis of the individuals' gender are sex discriminatory and must be subjected to intermediate scrutiny. *See J.E.B.*, 511 U.S. at 140–42. Accordingly, I would hold that Idaho and Nevada's same-sex marriage prohibitions facially classify on the basis of gender, and that the "equal application" of these laws to men and women as a class does not remove them from intermediate scrutiny.[7]

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[7] Several courts have so held. *See Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 982 n. 4 (N.D. Cal. 2012) ("Ms. Golinski is prohibited from marrying Ms. Cunninghis, a woman, because Ms. Golinski is a woman. If Ms. Golinski were a man, DOMA would not serve to withhold benefits from her. Thus, DOMA operates to restrict Ms. Golinski's access to federal benefits because of her sex."), *initial hearing en banc denied*, 680 F.3d 1104 (9th Cir. 2012) *and appeal dismissed*, 724 F.3d 1048 (9th Cir. 2013) ; *In re Levenson*, 560 F.3d 1145, 1147 (9th Cir. EDR 2009) (Reinhardt, J., presiding) ("If [Levenson's husband] were female, or if Levenson himself were female, Levenson would be able to add [his husband] as a beneficiary. Thus, the denial of benefits at issue here was sex-based and can be understood as a violation of the . . . prohibition of sex discrimination."); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010) ("Perry is prohibited from marrying Stier, a woman, because Perry is a woman. If Perry were a man, Proposition 8 would not prohibit the marriage. Thus, Proposition 8 operates to restrict Perry's choice of marital partner because of her sex."), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); *Baehr v. Lewin*, 852 P.2d 44, 59 (Haw. 1993) (plurality op.) (a same-sex marriage bar, "on its face, discriminates based on sex"); *Baker*, 744 A.2d at 905 (Johnson, J., concurring in part and dissenting in part) (a same-sex marriage bar presents "a

C. The same-sex marriage prohibitions also constitute sex discrimination for the alternative reason that they impermissibly prescribe different treatment for similarly situated subgroups of men and women. That is, the same-sex marriage laws treat the subgroup of men who wish to marry men less favorably than the otherwise similarly situated subgroup of women who want to marry men. And the laws treat the subgroup of women who want to marry women less favorably than the subgroup of otherwise identically situated men who want to marry women.

The Supreme Court has confirmed that such differential treatment of similarly-situated sex-defined subgroups also constitutes impermissible sex discrimination. *Phillips v. Martin Marietta Corp.*, for example, held that an employer's refusal to hire women with preschool-age children, while employing men with children the same age, was facial sex discrimination, even though all men, and all women without preschool-age children, were treated identically. *See* 400 U.S. 542, 543–44 (1971) (per curiam). And the Seventh Circuit held an airline's policy requiring female flight attendants, but not male flight attendants, to be unmarried was discrimination based on sex, relying on *Phillips* and explaining that a classification that affects only some members of one gender is still sex discrimination if similarly situated members of the other gender are not treated the

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straightforward case of sex discrimination" because it "establish[es] a classification based on sex").

same way. "The effect of the statute is not to be diluted because discrimination adversely affects only a portion of the protected class." *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971).

Of those individuals who seek to obtain the state-created benefits and obligations of legal marriage to a woman, men may do so but women may not. Thus, at the subclass level—the level that takes into account the similar situations of affected individuals—women as a group and men as a group *are* treated differently. For this reason as well I would hold that Idaho and Nevada's same-sex marriage prohibitions facially classify on the basis of gender. They must be reviewed under intermediate scrutiny.

D. One further point bears mention. The defendants note that the Supreme Court summarily rejected an equal protection challenge to a same-sex marriage bar in *Baker v. Nelson*, 409 U.S. 810 (1972), holding there was no substantial federal question presented in that case. But the Court did not clarify that sex-based classifications receive intermediate scrutiny until 1976. *See Craig*, 429 U.S. at 221, 218 (Rehnquist, J., dissenting) (describing the level of review prescribed by the majority as "new," and as "an elevated or 'intermediate' level scrutiny"). As this fundamental doctrinal change postdates *Baker*, *Baker* is no longer binding as to the sex discrimination analysis, just as it is no longer binding as to the sexual

orientation discrimination analysis. *See* Op. Ct. at 9–11.

II. Same-Sex Marriage Bars Are Based in Gender Stereotypes

Idaho and Nevada's same sex marriage laws not only classify on the basis of sex but also, implicitly and explicitly, draw on "archaic and stereotypic notions" about the purportedly distinctive roles and abilities of men and women. Eradicating the legal impact of such stereotypes has been a central concern of constitutional sex-discrimination jurisprudence for the last several decades. *See, e.g.*, *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982). The same-sex marriage bans thus share a key characteristic with many other sex-based classifications, one that underlay the Court's adoption of intermediate scrutiny for such classifications.

The Supreme Court has consistently emphasized that "gender-based classifications . . . may be reflective of 'archaic and overbroad' generalizations about gender, or based on 'outdated misconceptions concerning the role of females in the home rather than in the marketplace and world of ideas.'" *J.E.B.*, 511 U.S. at 135 (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 506–07 (1975); *Craig*, 429 U.S. at 198–99) (some internal quotation marks omitted). Laws that rest on nothing more than "the 'baggage of sexual stereotypes,' that presume[] the father has the 'primary responsibility to provide a home and its essentials,' while the

mother is the 'center of home and family life'" have been declared constitutionally invalid time after time. *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (quoting *Orr v. Orr*, 440 U.S. 268, 283 (1979); *Stanton v. Stanton*, 421 U.S. 7, 10 (1975); *Taylor v. Louisiana*, 419 U.S. 522 (1975)). Moreover, "gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization." *J.E.B.*, 511 U.S. at 139 n. 11. And hostility toward nonconformance with gender stereotypes also constitutes impermissible gender discrimination. *See generally Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *accord Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (harassment against a person for "failure to conform to [sex] stereotypes" is gender-based discrimination) (internal quotation marks omitted).

The notion underlying the Supreme Court's anti-stereotyping doctrine in both Fourteenth Amendment and Title VII cases is simple, but compelling: "[n]obody should be forced into a predetermined role on account of sex," or punished for failing to conform to prescriptive expectations of what behavior is appropriate for one's gender. *See* Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. Cin. L. Rev. 1, 1 (1975). In other words, laws that give effect to "pervasive sex-role stereotype[s]" about the behavior appropriate for men and

women are damaging because they restrict individual choices by punishing those men and women who do not fit the stereotyped mold. *Nev. Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 731, 738 (2003).

Idaho and Nevada's same-sex marriage prohibitions, as the justifications advanced for those prohibitions in this Court demonstrate, patently draw on "archaic and stereotypic notions" about gender. *Hogan*, 458 U.S. at 725. These prohibitions, the defendants have emphatically argued, communicate the state's view of what is both "normal" and preferable with regard to the romantic preferences, relationship roles, and parenting capacities of men and women. By doing so, the laws enforce the state's view that men and women "naturally" behave differently from one another in marriage and as parents.

The defendants, for example, assert that "gender diversity or complementarity among parents . . . provides important benefits" to children, because "mothers and fathers tend on average to parent differently and thus make unique contributions to the child's overall development." The defendants similarly assert that "[t]he man-woman meaning at the core of the marriage institution, reinforced by the law, has always recognized, valorized, and made normative the roles of 'mother' and 'father' and their uniting, complementary roles in raising their offspring."

Viewed through the prism of the Supreme Court's contemporary anti-stereotyping sex discrimination doctrine, these proferred justifications simply underscore that the same-sex marriage prohibitions discriminate on the basis of sex, not only in their form—which, as I have said, is sufficient in itself—but also in reviving the very infirmities that led the Supreme Court to adopt an intermediate scrutiny standard for sex classifications in the first place. I so conclude for two, somewhat independent, reasons.

A. First, and more obviously, the gender stereotyping at the core of the same-sex marriage prohibitions clarifies that those laws affect men and women in basically the same way as, not in a fundamentally different manner from, a wide range of laws and policies that have been viewed consistently as discrimination based on sex. As has been repeated again and again, legislating on the basis of such stereotypes limits, and is meant to limit, the choices men and women make about the trajectory of their own lives, choices about work, parenting, dress, driving—and yes, marriage. This focus in modern sex discrimination law on the preservation of the ability freely to make individual life choices regardless of one's sex confirms that sex discrimination operates at, and must be justified at, the level of individuals, not at the broad class level of all men and women. Because the same-sex marriage prohibitions restrict individuals' choices on the basis of sex,

they discriminate based on sex for purposes of constitutional analysis precisely to the same degree as other statutes that infringe on such choices—whether by distributing benefits or by restricting behavior—on that same ground.

B. Second, the long line of cases since 1971 invalidating various laws and policies that categorized by sex have been part of a transformation that has altered the very institution at the heart of this case, marriage. Reviewing that transformation, including the role played by constitutional sex discrimination challenges in bringing it about, reveals that the same sex marriage prohibitions seek to preserve an outmoded, sex-role-based vision of the marriage institution, and in that sense as well raise the very concerns that gave rise to the contemporary constitutional approach to sex discrimination.

(i) Historically, marriage was a profoundly unequal institution, one that imposed distinctly different rights and obligations on men and women. The law of coverture, for example, deemed the "the husband and wife . . . one person," such that "the very being or legal existence of the woman [was] suspended . . . or at least [was] incorporated and consolidated into that of the husband" during the marriage. 1 William Blackstone, Commentaries on the Laws of England 441 (3d rev. ed. 1884). Under the principles of coverture, "a married woman [was] incapable, without her husband's consent, of making contracts . . . binding on her or him."

Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring). She could not sue or be sued without her husband's consent. *See, e.g.*, Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 11–12 (2000). Married women also could not serve as the legal guardians of their children. *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) (plurality op.).

Marriage laws further dictated economically disparate roles for husband and wife. In many respects, the marital contract was primarily understood as an economic arrangement between spouses, whether or not the couple had or would have children. "Coverture expressed the legal essence of marriage as reciprocal: a husband was bound to support his wife, and in exchange she gave over her property and labor." Cott, *Public Vows*, at 54. That is why "married women traditionally were denied the legal capacity to hold or convey property . . . ." *Frontiero*, 411 U.S. at 685. Notably, husbands owed their wives support even if there were no children of the marriage. *See, e.g.*, Hendrik Hartog, *Man and Wife in America: A History* 156 (2000).

There was also a significant disparity between the rights of husbands and wives with regard to physical intimacy. At common law, "a woman was the sexual property of her husband; that is, she had a duty to have intercourse with him." John D'Emilio & Estelle B. Freedman, *Intimate Matters: A History of Sexuality in*

America 79 (3d ed. 2012). Quite literally, a wife was legally "the possession of her husband, . . . [her] husband's property." Hartog, *Man and Wife in America*, at 137. Accordingly, a husband could sue his wife's lover in tort for "entic[ing]" her or "alienat[ing]" her affections and thereby interfering with his property rights in her body and her labor. *Id.* A husband's possessory interest in his wife was undoubtedly also driven by the fact that, historically, marriage was the only legal site for licit sex; sex outside of marriage was almost universally criminalized. *See, e.g.*, Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 Yale L.J. 756, 763–64 (2006).

Notably, although sex was strongly presumed to be an essential part of marriage, the ability to procreate was generally not. *See, e.g.*, Chester Vernier, American Family Laws: A Comparative Study of the Family Law of the Forty-Eight American States, Alaska, the District of Columbia, and Hawaii (to Jan. 1, 1931) (1931) I § 50, 239–46 (at time of survey, grounds for annulment typically included impotency, as well as incapacity due to minority or "non-age"; lack of understanding and insanity; force or duress; fraud; disease; and incest; but not inability to conceive); II § 68, at 38–39 (1932) (at time of survey, grounds for divorce included "impotence"; vast majority of states "generally held that impotence . . . does not mean sterility but must be of such a nature as to render

complete sexual intercourse practically impossible"; and only Pennsylvania "ma[d]e sterility a cause" for divorce).

The common law also dictated that it was legally impossible for a man to rape his wife. Men could not be prosecuted for spousal rape. A husband's "incapacity" to rape his wife was justified by the theory that "'the marriage constitute[d] a blanket consent to sexual intimacy which the woman [could] revoke only by dissolving the marital relationship.'" *See, e.g.*, Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 Calif. L. Rev 1373, 1376 n. 9 (2000) (quoting Model Penal Code and Commentaries, § 213.1 cmt. 8(c), at 342 (Official Draft and Revised Comments 1980)).

Concomitantly, dissolving the marital partnership via divorce was exceedingly difficult. Through the mid-twentieth century, divorce could be obtained only on a limited set of grounds, if at all. At the beginning of our nation's history, several states did not permit full divorce except under the narrowest of circumstances; separation alone was the remedy, even if a woman could show "cruelty endangering life or limb." Peter W. Bardaglio, *Reconstrucing the Household: Families, Sex, and the Law in the Nineteenth-Century South* 33 (1995); *see also id.* 32–33. In part, this policy dovetailed with the grim fact that, at English common law, and in several states through the beginning of the nineteenth century,

"a husband's prerogative to chastise his wife"—that is, to beat her short of permanent injury—was recognized as his marital right. Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117, 2125 (1996).

Perhaps unsurprisingly, the profoundly unequal status of men and women in marriage was frequently cited as justification for denying women equal rights in other arenas, including the workplace. "[S]tate courts made clear that the basis, and validity, of such laws lay in stereotypical beliefs about the appropriate roles of men and women." *Hibbs v. Dep't of Human Res.*, 273 F.3d 844, 864 (9th Cir. 2001), *aff'd sub nom. Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721. Justice Bradley infamously opined in 1887 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." *Bradwell*, 83 U.S. at 141 (Bradley, J., concurring). On this view, women could be excluded from various professions because "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." *Id.* Instead, the law gave effect to the belief that "[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother." *Id.*

As a result of this separate-spheres regime, "'[h]istorically, denial or

curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second.' . . . Stereotypes about women's domestic roles [we]re reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men." *Hibbs*, 538 U.S. at 736 (quoting the Joint Hearing before the Subcommittee on Labor–Management Relations and the Subcommittee on Labor Standards of the House Committee on Education and Labor, 99th Cong., 2d Sess., at 100 (1986)). Likewise, social benefits programs historically distinguished between men and women on the assumption, grounded in the unequal marital status of men and women, that women were more likely to be homemakers, supported by their working husbands. *See, e.g.*, *Califano v. Goldfarb*, 430 U.S. 199, 205–07 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 644–45 (1975).

(ii) This asymmetrical regime began to unravel slowly in the nineteenth century, starting with the advent of Married Women's Property Acts, which allowed women to possess property in their own right for the first time. *See, e.g.*, Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930*, 82 Geo. L. Rev. 2127(1994). Eventually, state legislatures revised their laws. Today, of course, a married woman may enter contracts, sue and be sued without her husband's participation, and own and

convey property. The advent of "no fault" divorce regimes in the late 1960s and early 1970s made marital dissolutions more common, and legislatures also directed family courts to impose child and spousal support obligations on divorcing couples without regard to gender. *See* Cott, *Public Vows*, at 205–06. As these legislative reforms were taking hold, "in 1971 . . . the Court f[ou]nd for the first time that a state law violated the Equal Protection Clause because it arbitrarily discriminated on the basis of sex." *Hibbs*, 273 F.3d at 865 (citing *Reed*, 404 U.S. 71).

This same legal transformation extended into the marital (and nonmarital) bedroom. Spousal rape has been criminalized in all states since 1993. *See, e.g.*, Sarah M. Harless, *From the Bedroom to the Courtroom: The Impact of Domestic Violence Law on Marital Rape Victims*, 35 Rutgers L.J. 305, 318 (2003). *Griswold v. Connecticut*, 381 U.S. 479 (1965), held that married couples have a fundamental privacy right to use contraceptives, and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), later applied equal protection principles to extend this right to single persons. More recently, *Lawrence* clarified that licit, consensual sexual behavior is no longer confined to marriage, but is protected when it occurs, in private, between two consenting adults, regardless of their gender. *See* 539 U.S. at 578.

In the child custody context, mothers and fathers today are generally presumed to be equally fit parents. *See, e.g.*, Cott, *Public Vows*, at 206. *Stanley v.*

Illinois, 405 U.S. 645, 658 (1972), for example, held invalid as an equal protection violation a state law that presumed unmarried fathers, but not unwed mothers, unfit as parents. Later, the Supreme Court expressly "reject[ed] . . the claim that . . . [there is] any universal difference between maternal and paternal relations at every phase of a child's development." *Caban v. Mohammed*, 441 U.S. 380, 389 (1979). Likewise, both spouses in a marriage are now entitled to economic support without regard to gender. *See* Cott, at 206–07. Once again, equal protection adjudication contributed to this change: *Orr*, 440 U.S. at 278–79, struck down a state statutory scheme imposing alimony obligations on husbands but not wives.

In short, a combination of constitutional sex-discrimination adjudication, legislative changes, and social and cultural transformation has, in a sense, already rendered contemporary marriage "genderless," to use the phrase favored by the defendants. *See* Op. Ct. at 12 n. 6. For, as a result of these transformative social, legislative, and doctrinal developments, "[g]ender no longer forms an essential part of marriage; marriage under law is a union of equals." *Perry*, 704 F. Supp. 2d at 993. As a result, in the states that currently ban same-sex marriage, the legal norms that currently govern the institution of marriage are "genderless" in every resepect *except* the requirement that would-be spouses be of different genders. With that exception, Idaho and Nevada's marriage regimes have jettisoned the

rigid roles marriage as an institution once prescribed for men and women. In sum, "the sex-based classification contained in the[se] marriage laws," as the *only* gender classification that persists in some states' marriage statutes, is, at best, "a vestige of sex-role stereotyping" that long plagued marital regimes before the modern era, *see Baker*, 744 A.2d at 906 (Johnson, J., concurring in part and dissenting in part), and, at worst, an attempt to reintroduce gender roles.

The same-sex marriage bars constitute gender discrimination both facially and when recognized, in their historical context, both as resting on sex stereotyping and as a vestige of the sex-based legal rules once imbedded in the institution of marriage. They must be subject to intermediate scrutiny.

III. Idaho and Nevada's Same-Sex Marriage Prohibitions Fail Under Intermediate Scrutiny

For Idaho and Nevada's same-sex marriage prohibitions to survive the intermediate scrutiny applicable to sex discriminatory laws, it must be shown that these laws "serve important governmental objectives and [are] substantially related to achievement of those objectives." *Craig*, 429 U.S. at 197. "The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women." *Hogan*, 458 U.S. at 725–26.

In part, the interests advanced by the defendants fail because they are interests in promoting and enforcing gender stereotyping and so simply are not legitimate governmental interests. And even if we assume that the other governmental objectives cited by the defendants are legitimate and important, the defendants have not shown that the same-sex marriage prohibitions are substantially related to achieving any of them.

The asserted interests fall into roughly three categories: (1) ensuring children are raised by parents who provide them with the purported benefits of "gender complementarity," also referred to as "gender diversity"; (2) "furthering the stability of family structures through benefits targeted at couples possessing biological procreative capacity," and/or discouraging "motherlessness" or "fatherlessness in the home"; and (3) promoting a "child-centric" rather than "adult-centric" model of marriage."[8] The defendants insist that "genderless marriage run[s] counter to . . . [these] norms and ideals," which is why "man-

[8] The defendants also assert that the state has an interest in "accommodating religious freedom and reducing the potential for civic strife." But, as the Opinion of the Court notes, even if allowing same-sex marriage were likely to lead to religious strife, which is highly doubtful, to say the least, that fact would not justify the denial of equal protection inherent in the gender-based classification of the same-sex marriage bars. *See Watson v. City of Memphis*, 373 U.S. 526, 535 (1963) (rejecting the city's proffered justification that delay in desegregating park facilities was necessary to avoid interracial "turmoil," and explaining "constitutional rights may not be denied simply because of hostility to their assertion or exercise").

woman marriage" must be preserved.

The Opinion of the Court thoroughly demonstrates why all of these interests are without merit as justifications for sexual orientation discrimination. I add this brief analysis only to show that the justifications are likewise wholly insufficient under intermediate scrutiny to support the sex-based classifications at the core of these laws.

A. The Idaho defendants assert that the state has an interest in ensuring children have the benefit of parental "gender complementarity." There must be "space in the law for the distinct role of 'mother' [and] the distinct role of 'father' and therefore of their united, complementary role in raising offspring," the Idaho defendants insist. On a slightly different tack, the Nevada intervenors similarly opine that "[s]ociety has long recognized that diversity in education brings a host of benefits to students," and ask, "[i]f that is true in education, why not in parenting?"

Under the constitutional sex-discrimination jurisprudence of the last forty years, neither of these purported justifications can possibly pass muster as a justification for sex discrimination. Indeed, these justifications are laden with the very "'baggage of sexual stereotypes'" the Supreme Court has repeatedly disavowed. *Califano v. Westcott*, 443 U.S. at 89 (quoting *Orr*, 440 U.S. at 283).

(i) It should be obvious that the stereotypic notion "that the two sexes bring different talents to the parenting enterprise," runs directly afoul of the Supreme Court's repeated disapproval of "generalizations about 'the way women are,'" *VMI*, 518 U.S. at 550, or "the way men are," as a basis for legislation. Just as *Orr*, 440 U.S. at 279–80, rejected gender-disparate alimony statutes "as effectively announcing the State's preference for an allocation of family responsibilities under which the wife plays a dependent role," so a state preference for supposed gender-specific parenting styles cannot serve as a legitimate reason for a sex-based classification.

This conclusion would follow "[e]ven [if] some statistical support can be conjured up for the generalization" that men and women behave differently as marital partners and/or parents, because laws that rely on gendered stereotypes about how men and women behave (or should behave) must be reviewed under intermediate scrutiny. *See J.E.B.*, 511 U.S. at 140. It has even greater force where, as here, the supposed difference in parenting styles lacks reliable empirical support, even "on average."[9] Communicating such archaic gender-role stereotypes to children, or to parents and potential parents, is not a legitimate governmental

[9] As one of the plaintiffs' expert psychologists, Dr. Michael Lamb, explained, "[t]here . . . is no empirical support for the notion that the presence of both male and female role models in the home enhances the adjustment of children and adolescents."

interest, much less a substantial one.

(ii) The assertion that preserving "man-woman marriage" is permissible because the state has a substantial interest in promoting "diversity" has no more merit than the "gender complementarity" justification. Diversity is assuredly a weighty interest in the context of public educational institutions, with hundreds or thousands of individuals. But "[t]he goal of community diversity has no place . . . as a requirement of marriage," which, by law, is a private institution consisting only of two persons. *Baker v. State*, 744 A.2d at 910 (Johnson, J., concurring in part and dissenting in part). "To begin with, carried to its logical conclusion, the [Nevada intervenors'] rationale could require all marriages to be between [two partners], not just of the opposite sex, but of different races, religions, national origins, and so forth, to promote diversity." *Id.* Such an absurd requirement would obviously be unconstitutional. *See Loving*, 388 U.S. 1.

Moreover, even if it were true that, on average, women and men have different perspectives on some issues because of different life experiences, individual couples are at least as likely to exhibit conformity as diversity of personal characteristics. Sociological research suggests that individual married couples are more likely to be *similar* to each other in terms of political ideology, educational background, and economic background than they are to be dissimilar;

despite the common saying that "opposites attract," in actuality it appears that "like attracts like." *See, e.g.*, John R. Alford et al., *The Politics of Mate Choice*, 73:2 J. Politics 362, 376 (2011) ("[S]pousal concordance in the realm of social and political attitudes is extremely high."); Jeremy Greenwood et al., *Marry Your Like: Assortative Mating and Income Inequality* (Population Studies Ctr., Univ. Of Penn., Working Paper No. 14-1, at 1, 2014) (Since the 1960s, "the degree of assortative mating [with regard to educational level] has increased."). Further, there is no evidence of which I am aware that gender is a better predictor of diversity of viewpoints or of parenting styles than other characteristics. Such "gross generalizations that would be deemed impermissible if made on the basis of race [do not become] somehow permissible when made on the basis of gender." *J.E.B.*, 511 U.S. at 139–40.

In short, the defendants' asserted state interests in "gender complementarity" and "gender diversity" are not legitimate "important governmental objectives." *See Craig*, 429 U.S. at 197. Accordingly, I do not address whether excluding same-sex couples from marriage is substantially related to this goal.

B. The defendants also argue that their states have an important interest in "encouraging marriage between opposite-sex partners" who have biological children, so that those children are raised in an intact marriage rather than in a

cohabiting or single-parent household. Assuming that this purpose is in fact a "important governmental objective," the defendants have entirely failed to explain how excluding same-sex couples from marriage is substantially related to achieving the objective of furthering family stability.

(i) I will interpret the asserted state goal in preventing "fatherlessness" and "motherlessness" broadly. That is, I shall assume that the states want to discourage parents from abandoning their children by encouraging dual parenting over single parenting. If the asserted purpose were instead read narrowly, as an interest in ensuring that a child has both a mother and a father in the home (rather than two mothers or two fathers), the justification would amount to the same justification as the asserted interest in "gender complementarity," and would fail for the same reason. That is, the narrower version of the family stability justification rests on impermissible gender stereotypes about the relative capacities of men and women.

Discouraging single parenting by excluding same-sex couples from marriage is oxymoronic, in the sense that it will likely achieve exactly the opposite of what the states say they seek to accomplish. The defendants' own evidence suggests that excluding same-sex couples from marriage renders their unions less stable, increasing the risk that the children of those couples will be raised by one parent rather than two.

True, an increasing number of children are now born and raised outside of marriage, a development that may well be undesirable.[10] But that trend began apace well before the advent of same-sex marriage and has been driven by entirely different social and legal developments. The trend can be traced to declines in marriage rates, as well as to the rise in divorce rates after the enactment of "no fault" divorce regimes in the late 1960s and early 1970s. "The proportion of adults who declined to marry at all rose substantially between 1972 and 1998 . . . . [In the same period,] [t]he divorce rate rose more furiously, to equal more than half the marriage rate, portending that at least one in two marriages would end in divorce." Cott, *Public Vows*, at 203. The defendants' assertion that excluding same-sex couples from marriage will do anything to reverse these trends is utterly unsubstantiated.

(ii) The defendants' appeal to biology is similarly without merit. Their core assertion is that the states have a substantial interest in channeling opposite-sex couples into marriage, so that any accidentally produced children are more likely to be raised in a two-parent household. But the exclusion of same-sex couples from

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[10] According to the defendants, "[b]etween 1970 and 2005, the proportion of children living with two married parents dropped from 85 percent to 68 percent," and as of 2008, "[m]ore than a third of all U.S. children [were] . . . born outside of wedlock." *See* Benjamin Scafidi, Institute for American Values, *The Taxpayer Costs of Divorce and Unwed Childbearing: First-Ever Estimates for the Nation and All Fifty States* 7 (2008).

the benefits and obligations of state-sanctioned marriage is assuredly not "substantially related," *Craig*, 429 U.S. at 197, to achieving that goal.

The reason only opposite-sex couples should be allowed to marry, we are told by the defendants, is that they "possess the unique ability to create new life." But both same-sex and opposite-sex couples can and do produce children biologically related only to one member of the couple, via assisted reproductive technology or otherwise. And both same-sex and opposite-sex couples adopt children, belying the notion that the two groups necessarily differ as to their biological connection to the children they rear.

More importantly, the defendants "cannot explain how the failure of *opposite-sex* couples to accept responsibility for the children they create relates at all to the exclusion of same-sex couples from the benefits of marriage." *Baker*, 744 A.2d at 911 (Johnson, J., concurring in part and dissenting in part). For one thing, marriage has never been restricted to opposite-sex couples able to procreate; as noted earlier, the spousal relationship, economic and otherwise, has always been understood as a sufficient basis for state approval and regulation. *See supra* pp. 18–21. For another, to justify sex discrimination, the state must explain why the *discriminatory feature* is closely related to the state interest. *See Hogan*, 458 U.S. at 725–26. The states thus would have to explain, without reliance on sex-

stereotypical notions, why the bans on same-sex marriage advance their interests in inducing more biological parents to marry each other. No such showing has been or can be made.

Biological parents' inducements to marry will remain exactly what they have always been if same-sex couples can marry. The legal benefits of marriage—taxation, spousal support, inheritance rights, familial rights to make decisions concerning the illness and death of a spouse, and so on—will not change. *See, e.g. Turner v. Safley*, 482 U.S. 78, 95–96 (1987). The only change will be that now-excluded couples will enjoy the same rights. As the sex-based exclusion of same-sex couples from marrying does not in any way enhance the marriage benefits available to opposite-sex couples, that exclusion does not substantially advance—or advance at all—the state interest in inducing opposite-sex couples to raise their biological children within a stable marriage.

(iii) Finally, the defendants argue that "the traditional marriage institution" or "man-woman marriage . . . is relatively but decidedly more child-centric" than "genderless marriage," which they insist is "relatively but decidedly more adult-centric."

These assertions are belied by history. As I have noted, *see supra* pp. 18–24, "traditional marriage" was in fact quite "adult-centric." Marriage was,

above all, an economic arrangement between spouses. *See, e.g.*, Cott, *Public Vows*, at 54. Whether or not there were children, the law imposed support obligations, inheritance rules, and other rights and burdens upon married men and women. Moreover, couples unwilling or unable to procreate have never been prevented from marrying. Nor was infertility generally recognized as a ground for divorce or annulment under the old fault-based regime, even though sexual impotence was. *See, e.g.*, Vernier, I §50, II § 68.

Further, the social concept of "companionate marriage"—that is, legal marriage for companionship purposes without the possibility of children—has existed since at least the 1920s. *See* Christina Simmons, *Making Marriage Modern: Women's Sexuality from the Progressive Era to World War II* 121 (2009). The Supreme Court called on this concept when it recognized the right of married couples to use contraception in 1965. *Griswold*, 381 U.S. at 486. *Griswold* reasoned that, with or without procreation, marriage was "an association for as noble a purpose as any." *Id.*

Same-sex marriage is thus not inherently less "child-centric" than "traditional marriage."[11] In both versions, the couple may bear or adopt and raise

[11] Moreover, if the assertion that same-sex marriages are more "adult-centric" is meant to imply state disapproval of the sexual activity presumed to occur in same-sex marriages, that disapproval could not be a legitimate state purpose. After *Lawrence*, the right to engage in same-sex sexual activity is

children, or not.

Finally, a related notion the defendants advance, that allowing same-sex marriage will render the marriage institution "genderless," in the sense that gender roles within opposite-sex marriages will be altered, is also ahistorical. As I have explained, those roles have already been profoundly altered by social, legislative, and adjudicative changes. All these changes were adopted toward the end of eliminating the gender-role impositions that previously inhered in the legal regulation of marriage.

In short, the "child-centric"/"adult-centric" distinction is an entirely ephemeral one, at odds with the current realities of marriage as an institution. There is simply no substantial relationship between discouraging an "adult-centric" model of marriage and excluding same-sex couples.

III. Conclusion

"Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women." *J.E.B.*, 511 U.S. at 130–31. Idaho and Nevada's same-sex marriage proscriptions *are* sex based, and these bans *do* serve

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recognized as a protected liberty interest. *See* 539 U.S. at 578.

to preserve "invidious, archaic, and overbroad stereotypes" concerning gender roles. The bans therefore must fail as impermissible gender discrimination.

I do not mean, by presenting this alternative analysis, to minimize the fact that the same-sex marriage bans necessarily have their greatest effect on lesbian, gay, bisexual, and transgender individuals. Still, it bears noting that the social exclusion and state discrimination against lesbian, gay, bisexual, and transgender people reflects, in large part, disapproval of their nonconformity with gender-based expectations.[12] That is, such individuals are often discriminated against because they are not acting or speaking or dressing as "real men" or "real women" supposedly do. "[S]tereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women." *Centola v. Porter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002); *see also* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. Rev. 197 (1994). The same-sex marriage prohibitions, in other words, impose harms on sexual orientation and gender identity minorities precisely because they impose and enforce *gender*-normative behavior.

I do recognize, however, that the gender classification rubric does not

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[12] Although not evidently represented among the plaintiff class, transgender people suffer from similar gender stereotyping expectations. *See, e.g.*, *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000) (discrimination on the basis of transgender status is also gender discrimination).

adequately capture the essence of many of the restrictions targeted at lesbian, gay, and bisexual people. Employment discrimination, housing discrimination, and peremptory strikes on the basis of sexual orientation, to name a few of the exclusions gays, lesbians, and other sexual orientation minorities have faced, are primarily motivated by stereotypes about sexual orientation; by animus against people based on their nonconforming sexual orientation; and by distaste for same-sex sexual activity or the perceived personal characteristics of individuals who engage in such behavior. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620 (1996); *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (2014). And those sorts of restrictions do not turn directly on gender; they do not withhold a benefit, choice, or opportunity from an individual because that individual is a man or a woman. Although the gender stereotyping so typical of sex discrimination may be present, *see generally* Koppelman, 69 N.Y.U. L. Rev. 197, those restrictions are better analyzed as sexual orientation discrimination, as we did in *SmithKline*. 740 F.3d at 480–84.

As to the same-sex marriage bans in particular, however, the gender discrimination rubric does squarely apply, for the reasons I have discussed. And as I hope I have shown, the concepts and standards developed in more than forty years of constitutional sex discrimination jurisprudence rest on the understanding

that "[s]anctioning sex-based classifications on the grounds that men and women, simply by virtue of their gender, necessarily play different roles in the lives of their children and in their relationships with each other causes concrete harm to women and to men throughout our society." Deborah A. Widiss et al., *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 Harv. J. L. & Gender 461, 505 (2007). In my view, the same-sex marriage bans belie that understanding, and, for that reason as well, cannot stand.