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# Misconstructing Sexuality in Same-Sex Marriage Jurisprudence

Jeffrey Kosbie\*

## ABSTRACT

*Drawing on sociology, queer studies, and legal scholarship, this Comment develops a textual methodology to study sexuality in court opinions. In particular, this methodology uses inconsistencies between opinions to highlight how courts rely on cultural assumptions. This Comment applies this methodology to eighteen state same-sex marriage cases, identifying four analytic models of sexuality: sexuality consists only of behaviors; sexuality belongs to lesbians and gays; society should regulate sexuality; and marriage forms a normatively desirable model for sexuality. These models contribute significantly to public discourse over the meaning of sexuality. Applying sociological insights to narrow judicial models of sexuality suggests that courts fail to recognize the diversity of sexuality and its importance to individual identities. This Comment argues that courts should protect same-sex marriage through equal protection, rather than due process, in order to maximize individual autonomy with respect to sexuality. Finally, the Comment considers recent opinions that make progress towards broader judicial understandings of sexuality.*

## INTRODUCTION

¶1 *Baker v. Nelson* suggests that “[t]he institution of marriage as a union of man and woman . . . is as old as the book of Genesis,”<sup>1</sup> while *Jones v. Hallahan* explains that “[two women] are prevented from marrying . . . by their own incapability of entering into a marriage as that term is defined.”<sup>2</sup> *Standhardt* recognizes “that a *homosexual person’s* choice of life partner is an intimate and important decision,” but also emphasizes that “the only sexual relationship capable of producing children is one between a man and a woman.”<sup>3</sup> And *Goodridge* reasons that the “laws of *civil* marriage do not privilege procreative heterosexual intercourse between married people above every other form of

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<sup>1</sup> *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971).

<sup>2</sup> *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973).

<sup>3</sup> *Standhardt v. Superior Court ex rel. Cnty. of Maricopa*, 77 P.3d 451, 459, 462 (Ariz. Ct. App. 2003) (emphasis added).

adult intimacy and every other means of creating a family.”<sup>4</sup> These cases all decide the same legal issue—whether same-sex couples can marry—but incorporate different assumptions about the meaning of sexuality and marriage.

This Comment examines sexuality in state same-sex marriage opinions, but its implications are broader. Federal courts dealing with same-sex marriage have cited state precedents.<sup>5</sup> State courts addressing other areas of the law cite propositions developed in same-sex marriage cases to broaden<sup>6</sup> or narrow<sup>7</sup> discussions of sexuality.<sup>8</sup> Perhaps more importantly, same-sex marriage opinions influence public discourse in various ways. The media may directly describe and cite them,<sup>9</sup> and activists may celebrate them.<sup>10</sup>

<sup>4</sup> *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003) (emphasis added).

<sup>5</sup> *Perry v. Schwarzenegger* overturned California’s Proposition 8, recognizing that marriage respects the “dignity, respect, and stature . . . accorded to all other officially recognized family relationships,” while domestic partnerships designate a “lesser stature.” 704 F. Supp. 2d 921, 994 (N.D. Cal. 2010), *stay granted pending appeal*, No. 10-16696, 2010 WL 3212786 (9th Cir. 2010) (citing *In re Marriage Cases*, 183 P.3d 384, 434, 445 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5 (amended 2008)). *Gill v. Office of Personnel Management* rejected an argument about children’s welfare because denying same-sex couples the right to marry “prevent[s] children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure.” 699 F. Supp. 2d 374, 389 (D. Mass. 2010) (citing *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 964 (Mass. 2003)) (overturning part of federal Defense of Marriage Act (DOMA)).

<sup>6</sup> For example, following *Kerrigan*’s description of broad legislative intent in adding sexual orientation to state antidiscrimination laws, a later Connecticut case held that a plaintiff could state a hostile work environment claim based on sexual orientation harassment. *Patino v. Birken Mfg. Co.*, No. CV054016120S, 2009 WL 1624365, at \*12 (Conn. Super. Ct. May 15, 2009) (noting that *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008) held that gays and lesbians are a “quasi-suspect” class entitled to equal protection).

<sup>7</sup> For example, in deciding whether the state’s Sex Offenders Registration Act violated a fundamental right, *People v. Cintron* noted that *Hernandez* held that marrying a partner of the same-sex was not a fundamental right. *People v. Cintron*, 827 N.Y.S.2d 445, 453 (N.Y. Sup. Ct. 2006) (citing *Hernandez v. Robles*, 855 N.E.2d 1, 9 (N.Y. 2006)). After citing *Hernandez*, the court explained, “[i]f the right to enter into a same sex marriage is not considered fundamental, the right to avoid stigmatization as a sex offender where defendant has not engaged in any express sexual conduct most certainly cannot rise to this [fundamental] status.” *Id.*

<sup>8</sup> *Goodridge* has been cited by various subsequent Massachusetts cases that deal with issues of sexuality. *See, e.g.*, *Parker v. Hurley*, 474 F. Supp. 2d 261, 275 (D. Mass. 2007) (citing *Goodridge* for proposition that state policies may improperly burden “a very real segment of the community for no rational reason” in support of conclusion that state has a rational interest in assigning school children to read a book that depicts gay families in a positive fashion); *Albright v. Morton*, 321 F. Supp. 2d 130, 138 (D. Mass. 2004) (citing *Goodridge* for proposition that state law should not give effect to private biases in support of conclusion that labeling someone “homosexual” is not per se defamatory); *Charron v. Amaral*, 889 N.E.2d 946, 950–51 (Mass. 2008) (citing *Goodridge* for proposition that marriage is the only way to access certain state benefits in support of conclusion that these benefits cannot be extended retroactively to an unmarried same-sex couple).

<sup>9</sup> *See, e.g.*, Robert Barnes & Ashley Surdin, *California Supreme Court Strikes Bans on Same-Sex Marriage*, WASH. POST, May 16, 2008, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/05/15/AR2008051500589.html> (explaining ruling *In re Marriage Cases* and reactions on both sides); Anemona Hartocollis, *New York Judges Reject Any Right to Gay Marriage*, N.Y. TIMES, Jul. 7, 2006, at A1, available at <http://www.nytimes.com/2006/07/07/nyregion/07marriage.html> (describing reactions to *Hernandez v. Robles*).

<sup>10</sup> *See* Jeffrey B. Kosbie, *Shared Identity Discourse and Mobilization Around Marriage Equality*, in ALTERED STATES (Mary Bernstein & Verta Taylor eds.) (forthcoming 2011) (on file with author) (describing how activist rhetoric shifted to “It’s Wrong to Vote on Rights” after *Goodridge* provided same-sex marriage rights in Massachusetts).

Politicians frequently offer views on same-sex marriage.<sup>11</sup> State legislatures and the District of Columbia have debated same-sex partner rights.<sup>12</sup> Local governments have created domestic partner registries and benefits for government employees.<sup>13</sup>

These public debates about same-sex marriage describe marriage and sexuality in normative terms. Proponents of same-sex marriage describe marriage as a civil institution of state rights and benefits, or a fundamental right based on social recognition of committed partnerships. Sexuality is irrelevant to the rights and benefits of marriage. Opponents of same-sex marriage focus on tradition, procreation, raising children, and the state's right to define normative social structures. The state should only sanction sexuality through marriage.<sup>14</sup> Through their significant role in shaping and defining the public discourse, same-sex marriage opinions contribute to the assumptions about marriage and sexuality underlying these debates.<sup>15</sup>

By examining the eighteen state cases to address same-sex marriage over the past forty years,<sup>16</sup> I seek to make two key contributions to the study of same-sex marriage jurisprudence and studies of law and sexuality more broadly. First, I argue that courts' discussions of sexuality draw on and reflect underlying cultural assumptions about sexuality. The way these assumptions are legitimized may be more important than the actual legal decisions in the cases. I suggest a partial textual methodology for studying sexuality. Second, I evaluate courts' discussions of sexuality within same-sex marriage jurisprudence. I conclude that most present same-sex marriage opinions are based on

<sup>11</sup> See, e.g., Patrick Healy, *If Elected . . . Hopefuls Differ as They Reject Gay Marriage*, N.Y. TIMES, Nov. 1, 2008, at A1, available at <http://www.nytimes.com/2008/11/01/us/politics/01marriage.html> (discussing views of Presidential candidates Obama and McCain).

<sup>12</sup> See, e.g., Valerie Richardson, *New Hampshire Legalizes Same-Sex Marriage*, WASH. TIMES, June 4, 2009, at A03, available at <http://www.washingtontimes.com/news/2009/jun/04/new-hampshire-legalizes-same-sex-marriage/?page=1> (describing legislative debate in New Hampshire); Ian Urbina, *D.C. Council Approves Gay Marriage*, N.Y. TIMES, Dec. 16, 2009, at A28, available at <http://www.nytimes.com/2009/12/16/us/16marriage.html> (describing vote by D.C. City Council); Karl Vick, *Gay Marriage Bill Suffers a Decisive Defeat in N.Y. State Senate*, WASH. POST, Dec. 3, 2009, at A09, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/02/AR2009120203910.html> (noting the unexpectedly wide margin in New York Senate vote).

<sup>13</sup> See Robin C. Miller, Annotation, *Validity of Governmental Domestic Partnership Enactment*, 74 A.L.R.5TH 439 (1999) (listing cases on the validity of various local ordinances).

<sup>14</sup> See Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1769 (2005) (arguing that marriage licenses sex because historically any sex outside of marriage could be subject to criminal laws).

<sup>15</sup> See Kosbie, *supra* note 10 (contrasting how pro same-sex marriage activists responded to *Goodridge* by focusing on constitutional rights, while anti same-sex marriage activists argued that the people should be allowed to vote on same-sex marriage).

<sup>16</sup> I only analyzed cases that squarely addressed same-sex marriage. I used WestLaw Key Number 92k4385 (Same-sex marriage) and Lexis Headnote Family Law / Marriage / Validity / Same-Sex Marriages to develop a list of all relevant cases. I excluded cases that did not directly challenge marriage laws. See, e.g., *De Santo v. Barnsley*, 476 A.2d 952 (Pa. Super. Ct. 1984) (holding that two males cannot enter common law marriage in denying plaintiff's suit to divorce his former partner); *B. v. B.*, 355 N.Y.S.2d 712 (N.Y. Sup. Ct. 1974) (annulling marriage between female-to-male transsexual and natural female because transsexual had no male sexual organs and so was considered female by the court); *Storrs v. Holcomb*, 666 N.Y.S.2d 835 (N.Y. App. Div. 1997) (dismissing suit to compel county registrar to issue marriage license to male same-sex couple for failure to add state Attorney General as a necessary party); *In re Marriage of J.B. and H.B.*, No. 05-09-01170-CV., 2010 WL 3399074 (Tex.App. Aug. 31, 2010) (holding that Texas court did not have subject matter jurisdiction to hear divorce petition of same-sex couple married in Massachusetts). I also reviewed opinions for citations to other relevant cases. See *infra* Appendix (listing all eighteen cases chronologically and briefly describing doctrinal basis of decision).

narrow understandings of sexuality. At a minimum, courts should be aware of how certain language may legitimate narrow cultural understandings of sexuality.

¶5 Part I of this Comment lays out my methodological and theoretical framework. I highlight many of the relevant concerns for any textual approach to studying sexuality.

¶6 Part II argues that courts should protect same-sex marriage based on the equal protection doctrine. Beyond the legal doctrine, I argue that courts should avoid using language that may interfere with individual autonomy with respect to sexuality. I do not present this as a legal argument, but rather as a consideration of the effects—intended or unintended—of certain language choices.

¶7 Next, Part III outlines the history of state same-sex marriage court decisions. I organize cases together based on major doctrinal issues that they address.

¶8 Part IV is the analytic core of the Comment, examining how courts embed narrow assumptions about sexuality into same-sex marriage opinions. This Part illustrates judicial constructions of sexuality with as much empirical detail as possible. It then examines these constructions, arguing that most are based on narrow assumptions about sexuality.

¶9 Part V examines how recent cases have moved towards greater respect for autonomy with respect to sexuality. These cases draw on broader assumptions about the meaning of sexuality. I conclude by emphasizing how this Comment speaks to studies of law and sexuality more broadly.

## I. THEORIES OF SEXUALITY AND METHODOLOGY

¶10 Drawing on sociology of law and sexuality, I argue that law plays a central role in the social construction of sexuality and marriage. From this, I develop a textual methodology to study how court opinions construct sexuality.

### A. *Sexuality and Marriage Are Socially Constructed*

¶11 Sexuality encompasses sexual identity and expression, attraction and orientation, behaviors and practices, social attitudes and norms, and legal and political structures constraining individual identities.<sup>17</sup> I use social constructionist theories of sexuality to understand the relationship between the individual and social aspects of sexuality.

¶12 Many people identify as straight, gay, lesbian, bisexual, queer, or another category, but these labels do not have any fixed meaning. Societies define and construct different categories over time.<sup>18</sup> In the United States today, we might consider any man who has

<sup>17</sup> I do not argue for a single definition of sexuality or consider all of the debates in the literature. See INTRODUCING THE NEW SEXUALITY STUDIES: ORIGINAL ESSAYS AND INTERVIEWS (Steven Seidman, Nancy Fischer & Chet Meeks eds., 2006), for a collection of essays and interviews about the meaning of sexuality. In his influential book, Steven Seidman argues that the law, media, and social and political structures regulate sexuality. See STEVEN SEIDMAN, THE SOCIAL CONSTRUCTION OF SEXUALITY (2003) [hereinafter SOCIAL CONSTRUCTION OF SEXUALITY]. Sexuality “is not just one thing” and includes a broad range of behaviors and emotions. See *id.* at 53; see also EDWARD O. LAUMANN, JOHN H. GAGNON, ROBERT T. MICHAEL & STUART MICHAELS, THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES 3–34 (1994) (sexuality is socially constructed and related to race, class, and gender).

<sup>18</sup> For example, Barry Adam and Elizabeth Armstrong both discuss how this process of social construction happened in U.S. history. See BARRY D. ADAM, THE RISE OF A GAY AND LESBIAN MOVEMENT (1987) (discussing how a gay identity emerged in the U.S.); ELIZABETH A. ARMSTRONG, FORGING GAY

sex with another man to be “gay,” but this is not true across different times and cultures. For example, in some Latin cultures, sexuality is defined in terms of “active” and “passive” instead of gay and straight.<sup>19</sup> In the early United States, “heterosexuality” and “homosexuality” were not categories at all.<sup>20</sup> Sex between two women or two men was considered deviant behavior equal to adultery and other sexual sins.<sup>21</sup>

¶13 The federal government played an active role in constructing the homosexual as a deviant political identity.<sup>22</sup> A 1950 Senate Subcommittee report commented that “[o]ne homosexual can pollute a government office.”<sup>23</sup> Similarly, in March of 1950, the State Department classified homosexuals as a “security risk.”<sup>24</sup> The state did not merely describe some preexisting category of “homosexual;” the state created the category that it described. A man who had sex with another man went from being someone who engaged in deviant behavior to being a homosexual. Homosexual became an identity that could be used to describe sexuality.

¶14 The state is not the only actor constructing sexuality. Social and cultural norms also play a role. Today, being gay or homosexual carries much less stigma than it once did. Our cultural understanding of what it means to be gay has shifted. State regulations of homosexuality have also changed, but the causal relationship between law and culture

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IDENTITIES: ORGANIZING SEXUALITY IN SAN FRANCISCO, 1950–1994 (2002) (focusing on how particular organizations played a role in forming gay identities in San Francisco).

<sup>19</sup> See Tomás Almaguer, *Chicano Men: A Cartography of Homosexual Identity and Behavior*, in MEN’S LIVES 433, 435 (Michael S. Kimmel & Michael A. Messner eds., 6th ed. 2004) (“It is primarily the anal-passive individual (the *cochón* or *pasivo*) who is stigmatized for playing the subservient, feminine role. His partner (the *activo* or *machista*) typically . . . gains status among his peers in precisely the same way that one derives status from seducing many women.”). But see LIONEL CANTÚ, JR., THE SEXUALITY OF MIGRATION: BORDER CROSSINGS AND MEXICAN IMMIGRANT MEN 154–155 (Nancy A. Naples & Salvador Vidal-Ortiz eds., 2009) (noting that “activo” and “pasivo” labels were seen as archaic by a group of Latino interviewees).

<sup>20</sup> See JOHN D’EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES : THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970 10, 53–79 (1983) (discussing social construction of homosexuality as a sexual identity in the United States); see also JONATHAN NED KATZ, GAY AMERICAN HISTORY: LESBIAN & GAY MEN IN THE U.S.A. (rev. ed. 1992) (discussing history of homosexuality in the United States from the colonial period through the present); SOCIAL CONSTRUCTION OF SEXUALITY, *supra* note 17, at 43–52 (discussing the social construction of heterosexuality as a sexual identity).

<sup>21</sup> See D’EMILIO, *supra* note 20, at 10 (“Colonists . . . did [not] conceive of homosexual acts as different in essence from other sexual transgressions.”).

<sup>22</sup> For example, during World War II, the Army began to target homosexuals rather than homosexual behavior. See STEPHEN M. ENGEL, THE UNFINISHED REVOLUTION: SOCIAL MOVEMENT THEORY AND THE GAY AND LESBIAN MOVEMENT 22 (2001). See generally Allan Bérubé, *Marching to a Different Drummer: Lesbian and Gay GIs in World War II*, in HIDDEN FROM HISTORY: RECLAIMING THE GAY & LESBIAN PAST 383, 383–394 (Martin B. Bauml Duberman, Martha Vicinus & George Chauncey eds., 1989) (discussing how wartime changes were critical to the emergence of homosexuality as an identity).

<sup>23</sup> ADAM, *supra* note 18, at 58 (quoting a 1950 Senate subcommittee report entitled “Employment of Homosexuals and Other Sex Perverts in Government”). Similarly, President Eisenhower signed an executive order making suspected homosexuality a reason to investigate and dismiss government employees. Exec. Order No. 10,450, 18 Fed. Reg. 2489 (Apr. 27, 1953) (Security Requirements for Government Employment); see also ADAM, *supra* note 18, at 58 (noting that between 1947 and 1950, 1,700 applicants for government jobs were turned down because of homosexuality and 420 people were forced to resign from government jobs); DAVID CARTER, STONEWALL: THE RIOTS THAT SPARKED THE GAY REVOLUTION 14 (2004) (discussing the executive order).

<sup>24</sup> ENGEL, *supra* note 22, at 27.

is not clear.<sup>25</sup> Moreover, at any one time different cultural norms construct sexuality in different ways. Norms of homosexuality as deviant and acceptable exist in the same society. Gay might mean different things in different parts of the country.<sup>26</sup> The crucial point here is that some combination of social structures, cultural norms, and state activity constructs multiple possible meanings behind different sexual identity categories.

### 1. Individual Identity Formation

¶15 If sexuality is socially defined, individuals still play a large role in defining their own identities. I assume that sexual desires, feelings, and attractions are largely beyond an individual's conscious control.<sup>27</sup> Whether they are based on biology, upbringing, socialization, or some other mechanism, they are not a matter of choice in our traditional understanding. When I talk about individual choice, I do not mean to suggest that individuals are choosing their sexual attractions and desires. Instead, I refer to the manner in which many people align their personal thoughts, desires, and behaviors with cultural categories.<sup>28</sup> A woman who has only had sex with men might identify as straight. But that same woman might identify as bisexual or a lesbian, even if she is not presently attracted to other women. Individuals form identities by drawing on the various cultural norms available. For some people, identities do not match up neatly with behavior or desires.<sup>29</sup>

¶16 Sexuality matters in different ways to different people. To some people, sexuality is a fundamental part of their identity. To others, sexuality is of marginal importance. People may identify as hypersexual or asexual. People may identify as straight, gay, lesbian, bisexual, queer, or they may refuse to identify with any category.<sup>30</sup> Some gays and lesbians may think of themselves as having actively chosen to identify as gay or

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<sup>25</sup> For example, *Lawrence* decriminalized sodomy based on constitutional privacy rights. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). This decision may have been based, at least in part, on growing cultural acceptance of gays and lesbians. On the other hand, this decision may also have prompted greater acceptance of gays and lesbians.

<sup>26</sup> See, e.g., MARY L. GRAY, *OUT IN THE COUNTRY: YOUTH, MEDIA, AND QUEER VISIBILITY IN RURAL AMERICA* (2009) (arguing that understandings of sexuality in rural areas are markedly different than in urban areas).

<sup>27</sup> See LAUMANN, GAGNON, MICHAEL & MICHAELS, *supra* note 17, at 148–171 (discussing the relationship between social norms and subjective sexual preferences).

<sup>28</sup> See Randall L. Sell, *Defining and Measuring Sexual Orientation: A Review*, 26 ARCHIVES SEXUAL BEHAV. 643 (1997) (explaining that sexual orientation consists of at least two components of behavior and attraction, which do not line up neatly like some researchers have assumed).

<sup>29</sup> See Wayne H. Brekhus, *Social Marking and the Mental Coloring of Identity: Sexual Identity Construction and Maintenance in the United States*, 11 SOC. FORUM 497 (1996) (arguing that sexual identities do not always match sexual orientation because social norms pressure people to identify in particular ways); Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989) (arguing that equal protection analysis should not depend on showing that sexuality means the same thing to all lesbians and gays).

<sup>30</sup> Many queer theorists argue that sexuality is non-linear. See, e.g., ANNAMARIE JAGOSE, *QUEER THEORY: AN INTRODUCTION* 72–100 (1996) (defining queer theory as a critique of essentialist understanding of sexuality). A linear scale assumes that sexuality only describes sexual attraction and any individual can be located along a scale based on how attracted they are to men or women. *Id.* Non-linear theories claim that sexual attraction cannot be described only on the basis of gender, and moreover sexuality is not only about sexual attraction. See Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 267 (Carole S. Vance ed., 1992).

lesbian,<sup>31</sup> while others may feel like they had the identity of gay or lesbian thrust upon them. Some men who have sex with men consider themselves straight or heterosexual.<sup>32</sup> How people identify may change over time. Moreover, race, gender, and class may all intersect with how people identify as straight, lesbian, gay, or any other category.<sup>33</sup> For example, black men who have sex with men are often described as on the “down low,” and treated as a threat to black heterosexual women.<sup>34</sup>

¶17 Law and politics intersect with culture to form the relevant context for individual identity formation. For example, before the Stonewall Riots in 1969, the term “gay” was not commonly associated with homosexuality.<sup>35</sup> Post-Stonewall, radical gay liberation activists chose to use the term gay partially to signify their new political orientation. To these activists, “coming out” became a central part of their identity and politics.<sup>36</sup> The choice to identify as gay was partially in reaction to the legal marginalization of gays and lesbians and the perceived political complacency of past activists.<sup>37</sup>

¶18 While individuals draw on different cultural norms to define their sexuality, they are not freely choosing between available norms. When the State Department labeled “homosexuals” a security risk, it imposed an identity on many unwilling people. This imposition does not require the power of law. When youth use the term gay or lesbian as an insult, they may also be imposing an identity on someone. Even when sexuality is not directly imposed on people, identity categories are not neutral or equal. Gay, straight, bisexual, lesbian, and queer all carry their own value judgments. The cultural norms act as a constraint on individual choice—identity choices entail consequences. Black men who have sex with men may not identify as gay because of perceived costs of that identity.<sup>38</sup>

¶19 Court opinions form part of the structure of social norms that influence how individuals develop sexual identities. As far as possible, courts should not use language that legitimizes certain meanings of sexuality. However, courts need to follow the law in addressing the case before them. Given this tension, courts should at least be aware of how their use of language matters. In some of the opinions I discuss, courts intend to attack homosexuality, but in others courts appear unaware of how particular language choices reinforce cultural norms and values attached to sexuality.

<sup>31</sup> This is not to say that they choose the underlying sexual attractions.

<sup>32</sup> See Almaguer, *supra* note 19, at 7 (“[I]s the man who lives with his wife and children, but from time to time has casual or anonymous sex with other men, homosexual? Many men in this situation, when interviewed for the purposes of AIDS research, did not identify themselves as homosexual.”).

<sup>33</sup> See Mignon R. Moore, *Lipstick or Timberlands? Meanings of Gender Presentation in Black Lesbian Communities*, 32 SIGNS 113 (2006) (arguing that the relationship between sexuality and gender presentation is not the same for black lesbians as it is for white lesbians).

<sup>34</sup> See Russell K. Robinson, *Racing the Closet*, 61 STAN. L. REV. 1463 (2009) (examining HIV/AIDS and role of race for black women and black men who have sex with men).

<sup>35</sup> See ENGEL, *supra* note 22, at 39–46 (discussing the gay liberation movement).

<sup>36</sup> *Id.* at 45.

<sup>37</sup> Similarly, present coalitions—lesbian, gay, bisexual, and transgender—developed as activists fought over who should be represented in the gay rights movement as it marched on Washington. AMIN GHAZIANI, *THE DIVIDENDS OF DISSENT: HOW CONFLICT AND CULTURE WORK IN LESBIAN AND GAY MARCHES ON WASHINGTON* (2008). Law and politics provided part of the cultural backdrop to these debates. *Id.*

<sup>38</sup> See Robinson, *supra* note 34, at 1496 (discussing social constraints on black men who identify as gay).

## 2. Marriage is Socially Constructed

¶20 As with sexuality, marriage is socially constructed. Marriage has been variously based on money, sex, children, kin, social order, and individual romantic interest over the course of Western history.<sup>39</sup> Marriage today continues to hold symbolic power as a marker of achievement and prestige, but people feel free to marry later, end unhappy marriages, and forgo marriage altogether.<sup>40</sup> As young adults are increasingly likely to leave their parents' house before marriage, they also feel more independent and are more likely to enter interracial or same-sex unions.<sup>41</sup> The changing meaning of marriage makes it an ideal issue with which to investigate relationships between law and sexuality.<sup>42</sup>

### B. Methodology

¶21 The social construction of sexuality plays a significant role in the study of same-sex marriage opinions. Judicial opinions help form the set of culturally available scripts that people draw on in forming their own identities. Identity should be understood as an *output* shaped by the law, rather than as an *input* into what the law should be.<sup>43</sup> The specific language that courts use matters because the language reflects and reinforces cultural norms.

¶22 I use the case of *Bradwell v. Illinois*<sup>44</sup> to illustrate how identity is an output, constructed by the court. Explaining why Illinois could prevent women from practicing law, the case acknowledges that “many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state,” but states that “[t]he paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother.”<sup>45</sup> *Bradwell* does not merely describe women as a category;

<sup>39</sup> In her book, E.J. Graff devotes a chapter to each of these, ultimately concluding that our modern understanding of marriage as a romantic institution with free choice to enter and exit is a recent historical creation. See E.J. GRAFF, *WHAT IS MARRIAGE FOR?: THE STRANGE SOCIAL HISTORY OF OUR MOST INTIMATE INSTITUTION* (1999). Since the 1960s, states have changed gendered assumptions inside of marriage, reduced regulations of sex outside of marriage, and introduced no fault divorce. NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 11–33 (2008). These changes are largely in response to the feminist movement. *Id.*

<sup>40</sup> See ANDREW J. CHERLIN, *THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY* (2009) (developing idea of “marriage-go-round” to describe de-institutionalization of marriage and changes in intimate relationships). See also STEPHANIE COONTZ, *MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY OR HOW LOVE CONQUERED MARRIAGE* (2005) (offering a historical look at the relationship between marriage and romantic intimacy).

<sup>41</sup> MICHAEL J. ROSENFELD, *THE AGE OF INDEPENDENCE: INTERRACIAL UNIONS, SAME-SEX UNIONS, AND THE CHANGING AMERICAN FAMILY* 88–92 (2007) (tracing rise in interracial and same-sex unions to the rising independence of young adults).

<sup>42</sup> For example, Kathleen Hull claims that same-sex couples use marriage-like rituals to create symbolic meaning of the law even without access to the formal institution of marriage. KATHLEEN E. HULL, *SAME-SEX MARRIAGE: THE CULTURAL POLITICS OF LOVE AND LAW* (2006).

<sup>43</sup> Here I draw on linguistic anthropology, which suggests that identity can be understood “as the emergent product rather than the pre-existing source of linguistic and other semiotic practices.” Mary Bucholtz & Kira Hall, *Identity and Interaction: A Sociocultural Linguistic Approach*, 7 *DISCOURSE STUD.* 585, 588 (2005).

<sup>44</sup> *Bradwell v. Illinois*, 83 U.S. 130 (1872).

<sup>45</sup> *Id.* at 141.

it constructs women as properly confined to the domestic sphere. Not only are women unfit for practicing law, they need to be protected by having a separate sphere in the house.<sup>46</sup> Despite the Court's assumptions, there is no natural category of women as separate and distinct from men. The Court is one actor that created gender as a meaningful category, based on the idea of separate spheres. The specific language used mattered because it was based on cultural norms.

¶23 As people read judicial opinions, they engage them in a textual manner. Opinions offer a sort of narrative to directly describe potential meanings behind sexuality.<sup>47</sup> The discursive power of legal texts to shape identities depends on how these texts are read and understood. While some lawyers may treat court decisions as only a source of legal rules, many non-legal actors reading them will react to how the text describes sexuality.<sup>48</sup> My approach to studying the same-sex marriage opinions thus entails a critical focus on the text itself with an eye towards how the text is directed to an audience.

¶24 In studying how same-sex marriage cases draw on specific cultural assumptions, I particularly look for inconsistencies across and within cases. These inconsistencies reveal the different assumptions judges make about sexuality. In many states, the law does not appear to offer settled answers regarding how to best protect sexuality or marriage rights. This indeterminacy of law may be beneficial by allowing judges to adapt old laws to new social situations.<sup>49</sup> In deciding how to apply law in an unsettled area, judges make assumptions about what the law should do and how it fits in society.<sup>50</sup> Rather than look for new overarching rules that could synthesize these inconsistencies, I treat inconsistencies as evidence of where judges have made assumptions about sexuality.

¶25 I read closely the text of all the majority opinions in the state same-sex marriage cases. I analyzed the text at several levels, including individual word choice, sentence construction, structure, and tone.<sup>51</sup> I also considered the relationship between text and

<sup>46</sup> See Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 814–817 (1990) (discussing *Bradwell* and the “separate spheres” ideology).

<sup>47</sup> Cf. Bucholtz & Hall, *supra* note 43 (reviewing linguistic anthropology literature that traces role of language in creating identity).

<sup>48</sup> Sociology of law uses the concept of “legal consciousness” to describe how people understand and make sense of the law. See Laura Beth Nielsen, *Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens About Law and Street Harassment*, 34 LAW & SOC'Y REV. 1055, 1058 (2000). People may have ideas of what is or is not “legal” that do not match the formal laws on the books. See *id.* Thus, to a non-legal audience, the legal rules announced in a case may not matter to legal consciousness. Cf. *id.* at 1085–1088 (finding that attitude towards the First Amendment does not explain individual's opinions on legal regulation of offensive speech).

<sup>49</sup> Describing the indeterminacy of family law as a “double-edged” sword, Kimberly Richman argues for “cautious optimism” with respect to family law. KIMBERLY D. RICHMAN, *COURTING CHANGE: QUEER PARENTS, JUDGES, AND THE TRANSFORMATION OF AMERICAN FAMILY LAW* 7 (2009). She suggests that “a feminist approach to legal indeterminacy . . . [should be] wary of the potential for abuse by biased judges but strategically and ideologically welcoming of the space afforded by this indeterminacy to respond to diversity and change in meaningful ways.” *Id.*

<sup>50</sup> *Id.* at 3 (discussing the “best interest” standard in child custody cases).

<sup>51</sup> See, e.g., *Hernandez v. Robles*, 855 N.E.2d 1, 10 (N.Y. 2006) (word choice of “sexual preference”); *Baker v. State*, 744 A.2d 864, 883 (Vt. 1999) (sentence construction describing personal benefits of marriage but still written in very legal tone); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (opinion structure begins with deconstruction of role of sexuality in marriage, emphasizing how sexuality is central to daily life); *Conaway v. Deane*, 932 A.2d 571 (Md. 2007) (opinion tone is very clinical and removed).

legal rules.<sup>52</sup> I coded all of the opinions for themes dealing with sexuality. While my initial codes were based on concerns suggested by the literature on sexualities, I refined the coding based on emergent themes. In coding cases I particularly looked for how cases describe identities and for inconsistencies within and across cases. Once I finished reading and coding cases, I grouped codes into the analytic themes I identify in Parts IV and V. I then reviewed all of the examples identified with each theme, looking for common approaches to judicial construction of sexuality. My analysis aims to develop the full empirical complexity of these cases and move past the opinions as mere sources of legal rules.

¶26 I reviewed opinions from the highest court to decide every case. The highest courts have the most salience to non-judicial actors, so their decisions are more relevant to my concern with how individuals understand and respond to the courts.<sup>53</sup>

## II. SAME-SEX MARRIAGE BASED ON EQUAL PROTECTION

¶27 Courts can determine whether laws are constitutional, but they are supposed to defer to the legislature on matters of social policy.<sup>54</sup> If sexuality is a matter of social policy, then courts should only apply constitutional and legal principles to determine if same-sex couples can marry without considering what sexuality means.<sup>55</sup> As a legal matter, I argue that courts can and should protect same-sex marriage based on constitutional principles. Equal protection doctrine is more suited for this purpose than fundamental rights doctrine.<sup>56</sup> Moreover, I argue that courts should minimize language that legitimizes narrow cultural discourses about sexuality. They should apply equal protection analysis in a way that recognizes that sexuality has different cultural and individual meanings.

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<sup>52</sup> Court opinions construct sexuality both through their text and through structural implications of their doctrine. Cf. Deborah Widiss, Elizabeth Rosenblatt, & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461 (2007) (using structural implications of same-sex marriage opinions to expose gender stereotypes in the opinions).

<sup>53</sup> Typically this means I reviewed the final opinion deciding a case. In *Baehr v. Lewin*, the Supreme Court of Hawaii remanded the case to the intermediate court of appeals. In this case, I reviewed the supreme court opinion and not the opinion on remand. See *infra* note 107 and accompanying text.

<sup>54</sup> The Supreme Court has explained that it should be careful in creating new rights, “lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.” *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); see also *Andersen v. King Cnty.*, 138 P.3d 963, 968 (Wash. 2006) (applying this argument in same-sex marriage context).

<sup>55</sup> *In re Marriage Cases* notes the relation of marriage to policy questions, but emphasizes that the court can protect same-sex marriage based on constitutional doctrine. *In re Marriage Cases*, 183 P.3d 384, 398–99 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5 (amended 2008) (“[O]ur task . . . is not to decide . . . a matter of policy . . . but instead only to determine whether the difference in the official names of the relationships violates the California Constitution.”) (emphasis omitted).

<sup>56</sup> Courts often combine legal analysis of equal protection and fundamental rights in marriage cases. While the legal rules may overlap, courts still discuss the concepts separately and draw on different cultural norms in discussing fundamental rights and equal protection. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 953 (Mass. 2003) (“In matters implicating marriage, family life, and the upbringing of children, the two constitutional concepts [of equal protection and the fundamental rights of liberty and due process] frequently overlap, as they do here.”). See *infra* notes 108–109, for further discussion of due process and equal protection in same-sex marriage cases.

¶28 Individual identities are formed through a combination of autonomous choices and social constraints. The law should maximize individual autonomy with respect to sexuality. While a formal legal argument for sexual liberty or autonomy is beyond the scope of my paper,<sup>57</sup> I am concerned with how court language may have real-world consequences for autonomy. I bring up issues of autonomy to consider how court language is potentially restricting what individuals are choosing in ways that the courts may not even recognize.

#### A. *Fundamental Rights and Marriage*

¶29 The Supreme Court has considered marriage to be a fundamental right for over a century. In 1888, *Maynard v. Hill* described marriage as “the foundation of the family and of society, without which there would be neither civilization nor progress.”<sup>58</sup> In *Meyer v. Nebraska*, the Supreme Court recognizes the right “to marry, establish a home and bring up children” as central to the Due Process Clause.<sup>59</sup> Marriage is “an association that promotes a way of life”<sup>60</sup> and is “fundamental to the very existence and survival of the race.”<sup>61</sup> In *Loving v. Virginia*, the Court famously declares that, “The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”<sup>62</sup>

¶30 In *Zablocki v. Redhail*, the Supreme Court struck down a Wisconsin law requiring prior court approval for marriage for anyone with outstanding child support obligations.<sup>63</sup> The Court stated that:

It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. . . . [I]t would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.<sup>64</sup>

¶31 Finally, in *Turner v. Safley*, the Supreme Court overturned a law prohibiting prison inmates from marrying.<sup>65</sup> The opinion explains that “emotional support and public commitment . . . are an important and significant aspect of the marital relationship

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<sup>57</sup> I believe that protecting sexuality based on an individual liberty interest is consistent with the concerns I raise in this Comment. Because my main concern is how courts use language that limits sexuality, I do not formally make the legal argument for a liberty interest. See Katherine M. Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685 (2008), for an argument that courts should protect same-sex marriage based on a liberty interest in sexual self-identity.

<sup>58</sup> *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

<sup>59</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>60</sup> *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

<sup>61</sup> *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

<sup>62</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>63</sup> *Zablocki v. Redhail*, 434 U.S. 374 (1978).

<sup>64</sup> *Id.* at 386.

<sup>65</sup> *Turner v. Safley*, 482 U.S. 78 (1987).

. . . [and] most inmate marriages are formed in the expectation that they ultimately will be fully consummated.”<sup>66</sup>

¶32 State courts describing same-sex marriage as a fundamental right use similar language as the federal cases discussed above.<sup>67</sup> Marriage is protected as a fundamental right because the court assumes that intimate sexual relationships, expressed through marriage, contribute to some core sense of personal identity. By only treating a marital relationship as fundamental, the courts privilege a particular type of relationship as contributing to identity. These cases define marriage as a central goal in life. They draw on a cultural script that may even define being single as a personal failure. While the courts likely do not intend to equate being unmarried with failing in some aspect of life, the references to the centrality of marriage reinforce norms of marriage as a personal success.

¶33 There is also an assumption of sexuality as private and hidden in these cases. By treating marriage as connected to the right to privacy, these cases represent sexuality as properly limited to a private sphere. Sexuality means intimate sexual behavior that occurs in private. Marriage is protected because it is connected to intimate sexual behavior.

¶34 It is true that many people consider marriage to be an important life event. People structure their intimate relationships around marriage. Marriage status helps define a person; marriage is seen as an achievement.<sup>68</sup> Plaintiffs in same-sex marriage cases present fundamental rights arguments to the courts, and many of these plaintiffs likely understand marriage as important to their own identities and sexuality. However, not everyone considers marriage fundamental to their identity. A growing segment of the population chooses to remain unmarried, even if they are in a long-term relationship.<sup>69</sup> People may view marriage in instrumental terms. People may understand family as centered around friends, roommates, brothers and sisters, or other relatives, rather than centered around marriage.<sup>70</sup> Sexual intimacy might be separate from emotional and financial support. When courts protect marriage as a fundamental right, they reinforce cultural norms that marginalize non-traditional families and anyone who does not think of marriage as a central life goal, for whatever reason.

### B. Equal Protection and Marriage

¶35 Courts should protect same-sex marriage through the equal protection doctrine. Equal protection does not require the same assumptions as fundamental rights about the connection between marriage and sexuality. Courts can focus on whether the state has an interest in restricting access to a particular set of rights and benefits.<sup>71</sup> Same-sex

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<sup>66</sup> *Id.* at 95–96.

<sup>67</sup> *See, e.g.,* Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 948 (2003) (“Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society.”).

<sup>68</sup> *See* CHERLIN, *supra* note 40, at 9.

<sup>69</sup> *See id.* at 5.

<sup>70</sup> *See* POLIKOFF, *supra* note 39, at 123–145 (arguing that rights and benefits should be provided to all families, not only married couples).

<sup>71</sup> *See, e.g.,* Baker v. State, 744 A.2d 864 (Vt. 1999) (holding that state must provide rights and benefits to same-sex couples).

marriage can be protected under equal protection doctrine whether or not marriage is fundamental to society.<sup>72</sup>

¶36 There is a largely unrecognized tension in equal protection doctrine. As first described in *Carolene Products*, the Supreme Court establishes suspect classifications to provide a “more searching judicial inquiry” in cases of “prejudice against discrete and insular minorities.”<sup>73</sup> In order to establish a suspect classification, the Court considers the history of discrimination against a group.<sup>74</sup> However, established suspect classifications protect anyone on the basis of a particular trait that “frequently bears no relation to ability to perform or contribute to society.”<sup>75</sup> For example, the Supreme Court held that affirmative action and school diversity plans might discriminate against whites on the basis of race.<sup>76</sup>

¶37 Discrimination against blacks is prohibited by equal protection because blacks are a “discrete and insular minorit[y].”<sup>77</sup> Discrimination based on race is prohibited by equal protection because it is a trait unconnected “to ability to perform or contribute to society.”<sup>78</sup> These are both legitimate concerns, yet the Court largely fails to distinguish between them. Discrimination based on race is conflated with discrimination against blacks. Similarly, discrimination based on gender is conflated with discrimination against women. And discrimination based on sexual orientation is conflated with discrimination against gays and lesbians. This is not limited to the courts. People often use race to mean black (or other minority groups), gender to mean women, and sexuality to mean gays and lesbians.<sup>79</sup>

¶38 In protecting same-sex marriage based on equal protection, courts should stress that “[s]exual orientation plainly has no relevance to a person's ability to perform or contribute to society.”<sup>80</sup> Courts should use “sexual orientation” or “sexuality” as the basis of classification, rather than “same-sex couples” or “gay persons.”<sup>81</sup> Admittedly,

<sup>72</sup> Courts may continue to intertwine equal protection and fundamental rights analysis in same-sex marriage cases, as did the court in *Goodridge*. See *supra* note 56. Nevertheless, equal protection doctrine is sufficient on its own to support same-sex marriage.

<sup>73</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

<sup>74</sup> See *infra* note 109, for a full discussion of equal protection criteria.

<sup>75</sup> *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

<sup>76</sup> See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (holding that Seattle’s plan to racially balance public schools discriminated against white students on the basis of race); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (holding that University of Michigan’s diversity plan discriminated against white students on the basis of race). Similarly, the Court used sex classifications to hold that men must be admitted to a women’s nursing school. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

<sup>77</sup> *Carolene Prods. Co.*, 304 U.S. at 153 n.4.

<sup>78</sup> *Frontiero*, 411 U.S. at 686.

<sup>79</sup> In her book, Patricia Hill Collins argues that race, gender, and sexuality must be understood as intersecting systems that shape everyone’s lives. PATRICIA HILL COLLINS, *BLACK SEXUAL POLITICS: AFRICAN AMERICANS, GENDER, AND THE NEW RACISM* (2005). She illustrates the limits of past feminist research that focused only on women and anti-racist research that focused only on blacks. *Id.*

<sup>80</sup> *Watkins v. U.S. Army*, 847 F.2d 1329, 1346 (9th Cir. 1988), *withdrawn en banc*, 875 F.2d 699 (9th Cir. 1989) (citing *Frontiero*, 411 U.S. at 686) (internal quotation marks omitted).

<sup>81</sup> Compare *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded on other grounds by constitutional amendment*, CAL. CONST. art. I, § 7.5 (amended 2008) (holding that sexual orientation is a suspect classification), with *Andersen v. King Cnty.*, 138 P.3d 963, 976 (Wash. 2006) (“[W]e decline to conclude that gay and lesbian persons constitute an inherently suspect class”), and *Hernandez v. Robles*, 855 N.E.2d 1, 11 (N.Y. 2006) (“Those who prefer relationships with people of the opposite sex and those who prefer

present equal protection doctrine requires courts to consider gays and lesbians as a group in order to establish sexual orientation as a protected category.<sup>82</sup> However, courts can consider the treatment of gay and lesbians in the context of the broader argument that sexual orientation “bears no relation to ability to perform or contribute to society.”<sup>83</sup> For example, the Supreme Court of California specifically frames its discussion of gays and lesbians as evidence for its conclusion that sexual orientation should be considered a suspect classification.<sup>84</sup>

¶39 In some cases, the Supreme Court focuses on immutability as the touchstone of suspect classification: discrimination based on “characteristic[s] determined solely by the accident of birth . . . would seem to violate ‘the basic concept of our system that legal burdens should bear some relation to individual responsibility.’”<sup>85</sup> Many state courts follow this logic to decide that sexual orientation should not be a suspect classification. For example, *Conaway* holds that sexual orientation is not a suspect classification because there is insufficient evidence showing that it is determined “solely by the accident of birth.”<sup>86</sup> The court focuses on extensive medical literature that fails to determinatively prove, in the court’s opinion, that sexual orientation is biological or natural.<sup>87</sup> *Conaway*’s reference to medical literature highlights the medicalization and pathologization of homosexuality.<sup>88</sup> This use of medical studies treats gays and lesbians as medically deviant and draws on cultural norms that treat sexual attraction as a matter of individual choice.<sup>89</sup>

¶40 Instead of looking to such studies, *courts* can and should deemphasize immutability as a criterion for suspect classification.<sup>90</sup> *Watkins* explains:

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relationships with people of the same sex are not treated alike . . . . This case thus presents the question of what level of scrutiny should be applied to legislation that classifies on this basis.”)

<sup>82</sup> I agree with legal scholars who argue that equal protection analysis should focus on social structures instead of individuals. Conflation of groups and classifications is part of this problem in equal protection doctrine. See Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995), for an argument that sex discrimination law should prohibit social structures that create and enforce sex hierarchies, instead of looking for discrimination “because of” sex.

<sup>83</sup> *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

<sup>84</sup> *In re Marriage Cases*, 183 P.3d at 440–44 (determining that discrimination on the basis of sexual orientation is subject to strict scrutiny).

<sup>85</sup> *Frontiero*, 411 U.S. at 686 (citing *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972)).

<sup>86</sup> *Conaway v. Deane*, 932 A.2d 571, 614 (Md. 2007) (citing *Frontiero*, 411 U.S. at 686).

<sup>87</sup> “The issue of the immutability of sexual orientation, however, is the subject of a multitude of recent studies and nationwide debate. . . . We note only that there does not appear to be a consensus yet among ‘experts’ as to the origin of an individual’s sexual orientation.” *Id.* at 614, n.57 (reviewing an extensive list of medical studies).

<sup>88</sup> See *Conaway*, 932 A.2d at 614, n.57 (discussing several studies from psychology and other medical fields).

<sup>89</sup> While individuals may have some choice of identity labels, underlying attraction and desire are not a matter of choice in this sense. See *supra* notes 27–29 and accompanying text.

<sup>90</sup> Janet Halley argues that immutability is not a requirement for suspect classification and is unlikely to become one. See Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 507–508 (1994). She describes arguments based on immutability as a type of pro-gay essentialism, which treats gay identity as biologically determined. *Id.* at 517. She argues that legal advocates should seek a middle ground between pro-gay essentialists and pro-gay constructivists. *Id.* at 546–66. Queer activists particularly argue against ideas of gay essentialism. See, e.g., Joshua Gamson, *Must Identity Movements Self Destruct: A Queer Dilemma*, 42 SOCIAL

Although the Supreme Court considers immutability relevant, it is clear that by ‘immutability’ the Court has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class. People can have operations to change their sex. Aliens can ordinarily become naturalized citizens. The status of illegitimate children can be changed. . . . Reading the case law in a more capacious manner, “immutability” may describe those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically.<sup>91</sup>

¶41 Some state courts have protected sexual orientation as a suspect classification without requiring immutability.<sup>92</sup> By minimizing the role of immutability in suspect classifications, courts leave room for individual understandings of sexuality. Some gays and lesbians do think of their sexuality as immutable and/or biologically determined. Others may think of their sexuality as fluid and/or socially constructed. As *Watkins* argued, for suspect classification purposes the only inquiry should be whether sexuality is “so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change [it].”<sup>93</sup>

¶42 Once courts recognize that sexual orientation has no relation “to ability to perform or contribute to society,”<sup>94</sup> the courts can extend marriage to same-sex couples without deciding whether marriage is a fundamental right. This reliance on equal protection doctrine supports the cultural message that lesbians and gays are equal, downplaying the emphasis on the cultural message that marriage is the only appropriate family model.

### III. DOCTRINAL HISTORY

¶43 Eighteen state cases over the past forty years squarely addressed various statutory and constitutional challenges to laws prohibiting same-sex marriage.<sup>95</sup> Nine cases rejected the statutory and constitutional claims involved,<sup>96</sup> state constitutional amendments preempted three cases,<sup>97</sup> two cases required states to provide the benefits of

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PROBLEMS 390 (1995) (arguing that queer movements must use queer identity as a basis for organization, but paradoxically argue that sexual identity is itself fluid).

<sup>91</sup> *Watkins v. U.S. Army*, 847 F.2d 1329, 1346–47 (9th Cir. 1988), *withdrawn en banc*, 875 F.2d 699 (9th Cir. 1989) (holding sexual orientation is immutable for purposes of suspect classification).

<sup>92</sup> *See, e.g., Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 437 (Conn. 2008) (noting that immutability might be relevant but not required).

<sup>93</sup> *Id.* at 438.

<sup>94</sup> *Frontiero*, 411 U.S. at 686.

<sup>95</sup> *See supra* note 16, for a full discussion of case selection and methodology.

<sup>96</sup> *See Standhardt v. Superior Court ex rel. Cnty. of Maricopa*, 77 P.3d 451 (Ariz. Ct. App. 2003); *Dean v. D.C.*, 653 A.2d 307 (D.C. 1995); *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Conaway v. Deane*, 932 A.2d 571 (Md. 2007); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006); *Andersen v. King Cnty.*, 138 P.3d 963 (Wash. 2006); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

<sup>97</sup> *See Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998), *superseded by constitutional amendment*, ALASKA CONST. art. I, § 25 (amendment effective

marriage but not marriage itself,<sup>98</sup> and four cases required states to extend marriage to same-sex couples.<sup>99</sup> I group decisions based on broad legal issues.<sup>100</sup>

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Beginning with *Baker v. Nelson* in 1971, the earliest state cases rejected same-sex marriage in short opinions that focused on statutory construction and traditional meanings of marriage.<sup>101</sup> Courts in these cases considered whether state marriage statutes that did not explicitly limit marriage to male and female partners should be construed to permit same-sex marriages.<sup>102</sup> *Jones v. Hallahan* was typical in the short treatment afforded these claims: “It appears to us that appellants are prevented from marrying . . . by their own incapability of entering into a marriage as that term is defined.”<sup>103</sup> *Singer* also rejects a claim that because a woman could marry a man but a man could not marry a man, the marriage statute discriminates on the basis of sex under a state Equal Rights Amendment.<sup>104</sup> Plaintiffs in the Washington case analogized their claims to *Loving v. Virginia*, where the Supreme Court held that a law prohibiting blacks from marrying whites was racial discrimination.<sup>105</sup> The court rejected the comparison, writing that *Loving* was not decided on the basis of racial classification but instead on the basis of racial animus targeted at blacks.<sup>106</sup>

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1999); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), *superseded by constitutional amendment*, HAW. CONST. art. I, § 23 (amended 1998); *Li v. State*, 110 P.3d 91 (Or. 2005).

<sup>98</sup> See *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006); *Baker v. State*, 744 A.2d 864 (Vt. 1999).

<sup>99</sup> See *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5 (amended 2008); *Kerrigan v. State*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

<sup>100</sup> See *infra* Appendix (listing all eighteen cases chronologically and briefly describing doctrinal basis of decision).

<sup>101</sup> See *Baker v. Nelson*, 191 N.W.2d 185, 185–86 (Minn. 1971) (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1384 (1966)) (reasoning that the “common usage” of marriage refers to man and woman); *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973) (reasoning that the “common usage” of marriage refers to man and woman); *Singer v. Hara*, 522 P.2d 1187, 1189 (Wash. Ct. App. 1974) (arguing that gendered language of marriage statutes excludes same-sex marriage). *Singer* also held the state’s marriage statute did not discriminate on the basis of sex, in violation of the state’s ERA, because the statute treated men and women the same. *Id.* at 1190–1192.

<sup>102</sup> See, e.g., *Jones*, 501 S.W.2d at 589.

<sup>103</sup> *Id.* at 589.

<sup>104</sup> *Singer*, 522 P.2d 1187 at 1191. See Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994), for background and detailed analysis of using gender discrimination claims to support same-sex marriage.

<sup>105</sup> *Singer*, 522 P.2d at 1191–1192 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

<sup>106</sup> *Id.* at 1191. The court states:

In *Loving*, the state of Virginia argued that its anti-miscegenation statutes did not violate constitutional prohibitions against racial classifications because the statutes affected both racial groups equally. The Supreme Court . . . held that the Virginia laws were founded on an impermissible racial classification and therefore could not be used to deny interracial couples the ‘fundamental’ right to marry. . . .

Although appellants suggest an analogy between the racial classification involved in *Loving* and *Perez* and the alleged sexual classification involved in the case at bar, we do not find such an analogy. The operative distinction lies in the relationship which is described by the term ‘marriage’ itself, and that relationship is the legal union of one man and one woman.

*Id.* (emphasis added).

¶45 Nearly twenty years later, in *Baehr v. Lewin* the Supreme Court of Hawaii became the only state to hold that marriage laws created a sex classification, subject to the strict scrutiny standard of review.<sup>107</sup>

¶46 Several cases, decided mostly since 2000, deny same-sex marriage rights based on due process<sup>108</sup> and equal protection doctrine:<sup>109</sup> *Dean* (D.C. 1995);<sup>110</sup> *Standhardt*

<sup>107</sup> *Baehr v. Lewin*, 852 P.2d 44, 59–67 (Haw. 1993), *superseded by constitutional amendment*, HAW. CONST. art. I, § 23 (amended 1998). Although this opinion was later overturned by a voter-approved constitutional amendment, I focus on textual analysis of the original court opinion. On remand, the intermediate court of appeals held that the state did not have a compelling interest and thus the marriage statutes were unconstitutional. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at \*21 (Cir. Ct. of Haw. Dec. 3, 1996). The Supreme Court of Hawaii affirmed the court of appeals without opinion. *Baehr v. Miike*, 950 P.2d 1234 (Haw. 1997). Before this decision could be implemented, the state amended its constitution to allow the legislature to define marriage. HAW. CONST. art. I, § 23 (amended 1998). The Supreme Court of Hawaii confirmed that the constitutional amendment and protected the original marriage statute:

The passage of the marriage amendment placed HRS § 572-1 on new footing. The marriage amendment validated HRS § 572-1 by taking the statute out of the ambit of the equal protection clause of the Hawaii Constitution, at least insofar as the statute, both on its face and as applied, purported to limit access to the marital status to opposite-sex couples. Accordingly, whether or not in the past it was violative of the equal protection clause in the foregoing respect, HRS § 572-1 no longer is. In light of the marriage amendment, HRS § 572-1 must be given full force and effect.

*Baehr v. Miike*, 1999 Haw. LEXIS 391, at \*6–7 (Haw. 1999).

<sup>108</sup> Due process claims focus on whether there is a fundamental right to marriage. A fundamental right is “a significant component of liberty, encroachments of which are rigorously tested by courts to ascertain the soundness of purported government justifications . . . . [F]undamental rights include voting, interstate travel, and various aspects of privacy (such as marriage and contraception rights).” BLACK’S LAW DICTIONARY (9th ed. 2009). Courts describe fundamental rights as rooted in tradition and history, and essential to the concept of ordered liberty. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding marriage is rooted in tradition and essential to ordered liberty). State courts deciding same-sex marriage cases differ on whether the right in question should be marriage or same-sex marriage, which can influence whether courts find a fundamental right. *Compare Andersen v. King Cnty.*, 138 P.3d 963, 990 (Wash. 2006) (holding that there is no fundamental right to a same-sex marriage because same-sex marriage is not deeply rooted in tradition), *with Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 958–60 (Mass. 2003) (holding that same-sex marriage falls within the fundamental right to marriage because marriage is an institution based on privacy and personal autonomy). The California Supreme Court noted that the characterization of the right influenced the outcome. *See In re Marriage Cases*, 183 P.3d 384, 421 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5 (amended 2008). The court explained:

The flaw in characterizing the constitutional right at issue as the right to same-sex marriage rather than the right to marry goes beyond mere semantics. It is important both analytically and from the standpoint of fairness to plaintiffs’ argument that we recognize they are not seeking to create a new constitutional right—the right to “same-sex marriage”—or to change . . . the existing institution of marriage. Instead, plaintiffs contend that, properly interpreted, the state constitutional right to marry affords same-sex couples the same rights . . . as this constitutional right affords to opposite sex couples. For this reason . . . we consider it appropriate to direct our focus to the meaning and substance of the constitutional right to marry, and to avoid the potentially misleading implications inherent in analyzing the issue in terms of “same-sex marriage.”

*Id.*; *see also* Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184 (2004) (arguing that the federal due process right to marriage includes a positive obligation on the state to recognize at least some relationships as marriage, and so the state cannot claim that marriage is only a civil contract with the state free to choose all parties eligible to enter marriage).

(Arizona 2003);<sup>111</sup> *Morrison* (Indiana 2005);<sup>112</sup> *Anderson* (Washington 2006);<sup>113</sup> *Hernandez* (New York 2006);<sup>114</sup> and *Conaway* (Maryland 2007).<sup>115</sup>

¶47 These courts announced that there is no fundamental right to same-sex marriage because there is no tradition and history of this right. The opinions followed *Singer*<sup>116</sup> by rejecting analogies to the history of interracial marriage. *Standhardt*, for example, explained that the fundamental right to marriage announced in *Loving* was based on a history of marriage as between a man and a woman, necessarily excluding same-sex couples.<sup>117</sup>

¶48 These opinions held that marriage statutes do not violate equal protection based on a rational basis analysis.<sup>118</sup> Some of the equal protection analyses focused on the state's

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<sup>109</sup> Equal protection considers whether the state has a legitimate reason for classifying people on the basis of sexuality for the purposes of defining marriage. Courts only require a rational basis test for most legislation (for example, distinguishing between debtors and creditors). This requires that a law be reasonably related to a legitimate government end; generally courts uphold laws under the rational basis test. *See, e.g., Hernandez v. Robles*, 855 N.E.2d 1, 11 (N.Y. 2006) (deferring to legislature because asserted interest in procreation is sufficient despite weak fit with marriage). Plaintiffs in same-sex marriage cases argue that sexuality should be considered a suspect or quasi-suspect classification, both of which require greater state justifications for its laws. The Supreme Court has held that race, alienage, and national origin are suspect classifications, and gender and illegitimacy are quasi-suspect classifications. *See Dean v. D.C.*, 653 A.2d 307, 338–39 (D.C. 1995) (Ferren, J., dissenting). The Supreme Court has not clarified exact criteria for suspect and quasi-suspect classifications, but often focuses on immutability as the touchstone concern. *Compare City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440–42 (1985) (defining factors for suspect classification without listing immutability), *with Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (focusing on immutability). *See also Watkins v. U.S. Army*, 847 F.2d 1329, 1346 (9th Cir. 1988), *withdrawn en banc*, 875 F.2d 699 (9th Cir. 1989) (concluding that homosexuality should be considered immutable for equal protection purposes because it is central to a person's identity and not easily changed).

If sexuality is a quasi-suspect classification, then marriage laws must survive heightened scrutiny, requiring that the state show that the laws are substantially related to an important government objective. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 431–481 (Conn. 2008) (including an extended discussion of criteria for quasi-suspect classification, determining that sexuality deserves quasi-suspect classification, and that the state's marriage statutes cannot survive heightened scrutiny). If sexuality is a suspect classification, then the state's marriage laws must survive strict scrutiny, requiring that the government show the laws excluding gays from marriage are strictly tailored to a compelling government interest. *In re Marriage Cases*, 183 P.3d 384, 441–52 (Cal. 2008), *superseded on other grounds by constitutional amendment*, CAL. CONST. art. I, § 7.5 (amended 2008) (holding that sexuality is a suspect classification and that the state cannot present a compelling interest to justify excluding same-sex couples from marriage). *See generally* Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985) (arguing that sexual orientation should be considered a suspect classification).

<sup>110</sup> *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995) (citing *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)) (same-sex marriage not deeply rooted in history).

<sup>111</sup> *Standhardt v. Superior Court ex rel. Cnty. of Maricopa*, 77 P.3d 451, 461–64 (Ariz. Ct. App. 2003) (fundamental right of marriage related to procreation and privacy does not cover same-sex marriage).

<sup>112</sup> *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005) (no equal protection violation by classifying marriage based on sexuality).

<sup>113</sup> *Andersen v. King Cnty.*, 138 P.3d 963 (Wash. 2006) (no equal protection violation).

<sup>114</sup> *Hernandez v. Robles*, 855 N.E.2d 1, 9–10 (N.Y. 2006) (same-sex marriage not deeply rooted in history).

<sup>115</sup> *Conaway v. Deane*, 932 A.2d 571 (Md. 2007) (same-sex marriage not deeply rooted in history).

<sup>116</sup> *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

<sup>117</sup> *See Standhardt v. Superior Court ex rel. Cnty. of Maricopa*, 77 P.3d 451, 458, 460 (Ariz. Ct. App. 2003).

<sup>118</sup> *See supra* note 109.

legitimate interests in defining marriage, spending little time dismissing claims that sexual orientation should be a suspect classification.<sup>119</sup> Other opinions engaged in lengthy analyses of the criteria for quasi-suspect classification and particularly the immutability requirement.<sup>120</sup> While still following traditional due process and equal protection concerns, more recent opinions in this group emphasized the court's deference to the legislature.<sup>121</sup>

¶49 In 2005, the Supreme Court of Oregon held that a county official could not issue marriage licenses to same-sex couples because a valid state constitutional amendment defined marriage as between a man and a woman.<sup>122</sup> The court did not decide whether the benefits of marriage might be separated out from the institution because the plaintiffs' original arguments did not address that precise question.<sup>123</sup>

¶50 *Brause* (Alaska 1998),<sup>124</sup> *Baker* (Vermont 1999),<sup>125</sup> *Goodridge* (Massachusetts 2003),<sup>126</sup> and *Lewis* (New Jersey 2006)<sup>127</sup> recognize same-sex relationships, focusing on due process rights rather than equal protection claims. Because these courts find a strong interest in the benefits provided by marriage, they dismiss state claims to restrict marriage to opposite-sex couples. *Baker* and *Lewis* separate the rights and benefits of marriage from the institution itself, holding that the state legislature could choose to create a parallel institution (civil unions) for same-sex couples. *Goodridge* stresses the social significance of marriage as inseparable from the institution, holding in an additional advisory opinion that the legislature cannot create civil unions as a substitute for marriage.<sup>128</sup>

<sup>119</sup> See, e.g., *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995) (noting that there is no majority on equal protection classification, but court agrees that state interests are sufficient); *Standhardt*, 77 P.3d 451 (holding that no equal protection violation because no fundamental right to same-sex marriage).

<sup>120</sup> See, e.g., *Andersen v. King Cnty.*, 138 P.3d 963, 974 (Wash. 2006) ("But plaintiffs must make a showing of immutability, and they have not done so in this case."). See *supra* notes 85–93 and accompanying text, for a discussion of immutability.

<sup>121</sup> See, e.g., *Hernandez v. Robles*, 855 N.E.2d 1, 9, 12 (N.Y. 2006) (holding that state marriage statute does not violate due process or equal protection, but stressing court's deference to the legislature on policy issues).

<sup>122</sup> This case began when the Multnomah County officials began issuing marriage licenses to same-sex couples. *Li v. State*, 110 P.3d 91, 94 (Or. 2005). The circuit court held that the marriage statute violated equal protection, and thus same-sex couples must be granted the right to marry. *Li v. State*, No. 0403-03057, 2004 WL 4963162 (Cir. Ct. of Or. Apr. 29, 2004), *rev'd*, 110 P.3d 91 (2005). The legislature amended the state constitution while the case was on appeal to the state supreme court. See OR. CONST. art. XV, § 5a (amended 2004). Following the amendment, the supreme court refused to consider whether the benefits of marriage could be separate from the institution and held that the marriage licenses issued by Multnomah County were never valid. *Li*, 110 P.3d at 390, 397.

<sup>123</sup> *Li*, 110 P.3d at 98.

<sup>124</sup> *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998), *superseded by constitutional amendment*, ALASKA CONST. art. I, § 25 (amendment eff. 1999). Only the trial court heard this case because of the intervening constitutional amendment.

<sup>125</sup> *Baker v. State*, 744 A.2d 864 (Vt. 1999) (holding that the state must provide the benefits of marriage to same-sex couples).

<sup>126</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (marriage is a fundamental right).

<sup>127</sup> *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006) (holding that state must provide equal rights to same-sex couples but civil unions are acceptable).

<sup>128</sup> *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004).

¶51 Finally, the most recent cases, *Kerrigan* (Connecticut 2008),<sup>129</sup> *In re Marriage Cases* (California 2008),<sup>130</sup> and *Varnum* (Iowa 2009),<sup>131</sup> all hold that sexual orientation is a quasi-suspect or suspect classification for equal protection purposes. Based on more stringent equal protection analyses, these courts held that the state does not have a valid interest in denying marriage to same-sex couples. Although these opinions discuss the social significance of marriage and potential due process claims, their reasoning focuses heavily on equal protection and the state's failure to justify any classifications based on sexual orientation.<sup>132</sup> In addition to securing same-sex marriage, these cases have potential ramifications for other issues by setting a standard for measuring equal protection claims based on sexual orientation.<sup>133</sup>

#### IV. NARROW CONSTRUCTIONS OF SEXUALITY AND MARRIAGE

¶52 This Part identifies four analytic themes within the same-sex marriage jurisprudence of state courts: (1) sexuality is about acts or behavior; (2) sexuality belongs to lesbians and gays; (3) society should regulate sexuality; and (4) marriage is normatively desirable. Although I separate these themes for analytic purposes, they overlap both conceptually and as they are used in the opinions. I develop these themes by focusing on the various ways in which they are used.<sup>134</sup> My discussion of each theme has two goals. First, I answer the empirical question of how courts are constructing sexuality. Second, I evaluate how courts draw on cultural norms that impose limited ideas of sexuality.

<sup>129</sup> *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (holding that sexual orientation is a quasi-suspect class).

<sup>130</sup> *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5 (amended 2008) (sexual orientation is a suspect class).

<sup>131</sup> *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (holding that sexual orientation receives heightened scrutiny but not deciding suspect or quasi-suspect classification).

<sup>132</sup> Iowa's Supreme Court, for example, discussed the fundamental right of marriage in addition to equal protection. *Id.* at 873 ("Yet, perhaps the ultimate disadvantage expressed in the testimony of the plaintiffs is the inability to obtain for themselves and for their children the personal and public affirmation that accompanies marriage."). However, the structure and tone of the opinion stressed equal protection as the basis for the decision. *Id.* at 878 ("So, today, this court again faces an important issue that hinges on our definition of equal protection. . . . How can a state premised on the constitutional principle of equal protection justify exclusion of a class of Iowans from civil marriage?"). Similarly, California's Supreme Court held that strict scrutiny applied to the state marriage statutes based on both a fundamental right to marry which included same-sex marriage and based on suspect classification under equal protection analysis for sexual orientation; however, the actual strict scrutiny analysis was all discussed in terms of equal protection. See *In re Marriage Cases*, 183 P.3d at 451 ("[Tradition] cannot properly be considered a compelling state interest for equal protection purposes.").

<sup>133</sup> This may be critical in California. When state voters approved Proposition 8, amending California's Constitution to define marriage as between a man and a woman, they reversed the court on the definition of marriage. However, *In re Marriage* also held that sexual orientation is a suspect classification, subject to strict scrutiny. Proposition 8 did not change this holding. Regardless of the final outcome of the federal *Perry v. Schwarzenegger* case, this holding on suspect classification will remain valid in California.

<sup>134</sup> See *supra* Part I.B, for a discussion of methodology.

### A. *Sexuality is About Acts or Behavior*

¶53 Under this construction, sexuality is treated as being only a set of acts or behaviors. Courts draw on cultural discourses that describe sexuality only in terms of sexual acts. For example, many people would describe a woman who has sex with other women as a lesbian. Romance, attraction, and feelings do not matter. A woman who has sex with other women might not personally identify as a lesbian, but discourses that define sexuality around behavior would label her a lesbian.

¶54 In the earliest opinions, homosexuality was not mentioned as a category at all. In 1971, in *Baker v. Nelson*, the Supreme Court of Minnesota wrote, “The questions for decision are whether a marriage of two persons of the same sex is authorized by state statutes and, if not, whether state authorization is constitutionally compelled.”<sup>135</sup> Throughout this opinion, the court refers only to the choice of two individuals to enter a same-sex relationship.<sup>136</sup> This reduces sexuality to the behaviors involved in (sexual) partner choice.<sup>137</sup> Baker’s homosexuality is erased: Baker is not a homosexual but a man in a relationship with another man. The court draws on cultural norms that defined sexuality based exclusively on behavior. In the process, the court constructs a set of behaviors as indicative of a deviant identity.

¶55 While most courts no longer engage in this explicit erasure of homosexuality, many still engage in various degrees of defining sexuality as based on sex or specific behaviors. Some opinions impute a high degree of choice to enter same-sex relationships. *Standhardt* explains, “This court does not dispute that a homosexual person’s choice of life partner is an intimate and important decision.”<sup>138</sup> By writing about choice of life partner, the court reduces sexuality to an active choice to enter particular relationships.<sup>139</sup> The court implicitly draws on cultural norms that assume that gays and lesbians choose their underlying attractions.<sup>140</sup>

¶56 This construct recurs in more recent opinions. In 2006, the New York Court of Appeals wrote that the plaintiffs “also say that discrimination on the basis of sexual preference should trigger heightened scrutiny.”<sup>141</sup> Use of the word “preference” implies a choice with respect to underlying sexual attraction and behavior.<sup>142</sup> The language of

<sup>135</sup> *Baker v. Nelson*, 191 N.W.2d 185, 185 (Minn. 1971).

<sup>136</sup> *See id.*

<sup>137</sup> It is true that courts always limit their discussion, necessarily reducing the social world to a small set of relevant legal facts. Here, the court has defined sexual orientation as irrelevant, thus constructing the legal inquiry as based on sexual behaviors. This focus on sexual behavior reinforces social norms of sexuality as about behavior, regardless of the correct legal analysis. *Cf.* Widiss, Rosenblatt & NeJaime *supra* note 52, at 487–89 (arguing that courts reinforce sex stereotypes by holding that same-sex marriage prohibitions do discriminate on the basis of sex, even if the conclusion may arguably be legally justified under an “equal application” theory).

<sup>138</sup> *Standhardt v. Superior Court ex rel. Cnty. of Maricopa*, 77 P.3d 451, 459 (Ariz. Ct. App. 2003).

<sup>139</sup> As noted above, it is true that everyone could be described as making a choice of life partner. In fact, this is protected as part of the fundamental right of marriage. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967). However, by focusing on choice of life partner as the defining characteristic of sexuality, the court is reducing sexuality to only a behavior.

<sup>140</sup> *See supra* Part I.A (discussing social constructionist theories and degree of choice in constructing identity).

<sup>141</sup> *Hernandez v. Robles*, 855 N.E.2d 1, 10 (N.Y. 2006).

<sup>142</sup> This point is most clearly expressed by conservative scholars’ opposition to the term “sexual orientation.” *See, e.g.,* Robert H. Knight, *How the Concept of “Sexual Orientation” Threatens Religious*

“sexual preference” is tied to a cultural discourse that assumes that gays and lesbians are choosing a deviant lifestyle. If homosexuality is merely a preference, then it may not deserve protection.<sup>143</sup> By treating sexuality as only the act of sex, the court erases the social and cultural norms and interactions surrounding sexuality.

¶57 The phrase “same-sex couples” remains shorthand for defining sexuality around homosexual behavior, even as courts move away from explicitly defining gays and lesbians based on their sexual activity. In discussing the social turmoil in America surrounding homosexuality, the *Morrison* opinion only uses the label “same-sex couples,” but never discusses “homosexuality” or “gays and lesbians.”<sup>144</sup> This reduces a debate about sexuality to a debate about the propriety of same-sex partnerships. Although the *Morrison* court’s use of relationships moves beyond mere sexual acts, this usage continues to rest on behaviors. *Morrison* frames the cultural debate solely in terms of whether it is acceptable for people to engage in certain sexual behaviors.

¶58 It is true that same-sex couples are the plaintiffs in these cases, and thus courts could write about the plaintiffs as same-sex couples without limiting gay and lesbian identities to sexual behavior. Here it is instructive to examine the California opinion. *In re Marriage Cases* discusses “same-sex couples” many times, but only in sentences where it is directly comparing same-sex couples to opposite-sex couples.<sup>145</sup> In other places, the opinion discusses “sexual orientation.”<sup>146</sup> Thus, the court discusses same-sex couples while managing to avoid the implication that sexuality is a choice of attractions and relationships. The court contributes to a cultural discourse of sexuality as more complex than only behaviors.

¶59 By contrast, *Baker* and *Brause* use language that reflects cultural ideas of gays and lesbians as choosing particular sexual behavior and attraction. In *Baker*, the Vermont Supreme Court writes, “Thus, the statutes exclude anyone who wishes to marry someone of the same sex.”<sup>147</sup> Similarly, *Brause* claims, “The question presented by this case is whether the personal *decision* by those who *choose* a mate of the same gender will be

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*Liberty*, 4 LIBERTY U. L. REV. 503, 513 (2010) (“The term ‘sexual preference,’ which implies volition, began to give way to ‘sexual orientation’ in . . . the latter half of the twentieth century.”) Knight argues that the term “sexual orientation” is used strategically to promote “the idea that homosexuality is normal, healthy, and should be promoted.” *Id.* at 503.

<sup>143</sup> “Sexual orientation” has largely replaced “sexual preference” based upon the growing cultural acceptance that gays and lesbians are not choosing their underlying sexual attractions. *See id.* (noting and arguing against this acceptance).

<sup>144</sup> *See Morrison v. Sadler*, 821 N.E.2d 15, 19 n.3 (Ind. Ct. App. 2005).

<sup>145</sup> *See In re Marriage Cases*, 183 P.3d 384, 400 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5 (amended 2008) (“[The statute] has drawn a distinction between the name for the official family relationship of opposite-sex couples (marriage) and that for same-sex couples (domestic partnership).”); *id.* at 402 (“[T]hat gay individuals and same-sex couples are in some respects ‘second-class citizens’ who may, under the law, be treated differently from, and less favorably than, heterosexual individuals or opposite-sex couples.”).

<sup>146</sup> *See id.* at 442 (“Because a person’s sexual orientation is so integral an aspect of one’s identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment.”); *id.* at 443 (“In sum, we conclude that statutes imposing differential treatment on the basis of sexual orientation should be viewed as constitutionally suspect under the California Constitution’s equal protection clause.”).

<sup>147</sup> *Baker v. State*, 744 A.2d 864, 880 (Vt. 1999).

recognized as the same fundamental right.”<sup>148</sup> While both decisions support the plaintiff’s claims, they focus on the behavior of entering a same-sex partnership as the relevant consideration. I recognize some tension in my analysis here. The courts in *Brause* and *Baker* likely did not intend to suggest that gay and lesbian sexuality is only about particular behaviors. It is possible to read these statements as being only descriptions of the parties to the cases. However, these statements could also be read to reinforce cultural norms of gays and lesbians choosing certain behaviors.

¶60 Some opinions reflect more obvious tension over whether sexuality refers to behavior or identity.<sup>149</sup> For example, the Supreme Court of Connecticut wrote, “[W]e treat them as individuals seeking the right to marry *the same-sex partner of their choice*.”<sup>150</sup> This sentence is descriptively true: the plaintiffs are seeking the right to marry. By adding “the same-sex partner of their choice,” the court reinforces the idea of choosing sexual behaviors. Choice could refer generally to how people choose a romantic partner, or it could refer to notions of lesbians and gays choosing to be attracted to someone of the same sex.

¶61 *Andersen* struggles with a similar tension between identity and behavior: “[S]ixteen individuals, *eight couples*, sought marriage licenses from King County.”<sup>151</sup> The sentence begins by identifying individuals, but then labels these individuals as part of same-sex couples. It is not clear why the court felt it was relevant to define the plaintiffs as individuals and as couples. One reading of this text is that the plaintiffs’ homosexuality is defined based on their same-sex relationships. This is likely not the meaning intended by the court. In all of these opinions, I am pushing how language choices might reinforce cultural norms that the court does not intend to endorse.

¶62 This tension is most obvious in the *Goodridge* decision, where the Supreme Judicial Court of Massachusetts goes to lengths to avoid essentializing sexuality, but then later in the opinion does precisely that: “The department [of public health] argues that this case concerns the rights of couples (same-sex and opposite-sex), not the rights of individuals. This is incorrect. The rights implicated in this case are at the core of individual privacy and autonomy.”<sup>152</sup> Here the court is careful to specify its concern with individual identity and not with the behavior of entering a relationship. However, later in this opinion, the court wrote, “The ‘marriage is procreation’ argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage.”<sup>153</sup> Despite the court’s earlier care, here lesbians and gays are explicitly reduced to being people who engage in gay sex. It is not clear why the court wrote this at all. The court could have dismissed the procreation argument without writing about it as an unbridgeable difference. While gays and lesbians may have different feelings, attractions, social relationships, family structures, and

<sup>148</sup> *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at \*4 (Alaska Super. Ct. Feb. 27, 1998), *superseded by constitutional amendment*, ALASKA CONST. art. I, § 25 (amendment effective 1999) (emphasis added).

<sup>149</sup> See *supra* notes 17–38 and accompanying text, for a complete discussion of the relationship between identity and behavior.

<sup>150</sup> *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 412 n.2 (Conn. 2008) (emphasis added).

<sup>151</sup> *Andersen v. King Cnty.*, 138 P.3d 963, 970 (Wash. 2006) (emphasis added).

<sup>152</sup> *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 957, n.15 (Mass. 2003).

<sup>153</sup> *Id.* at 962.

cultural understandings, they are reduced to their inability to have procreative sex, “the one unbridgeable difference.”

¶163 Some people think about sexuality in terms of only behavior. Sexuality might only mean sex. But other people think of sexuality more broadly. By focusing on sexuality as a set of behaviors, courts reinforce a particular cultural discourse. The language used in opinions may act as a constraint on individual autonomy to define sexuality.<sup>154</sup> Moreover, to the extent that courts assume that sexuality is about acts and behaviors, their equal protection analysis will likely be limited.

### B. *Sexuality Marks Gays and Lesbians as Deviant*

¶164 Courts construct sexuality as marking gays and lesbians, limiting sexuality to homosexuality.<sup>155</sup> Implicit in the process of marking gays and lesbians is the proposition that gays and lesbians are deviant. This construction of sexuality as marking gays and lesbians is related to but distinct from the last construction of sexuality as based on behavior. Once courts move beyond sexuality as being only about behavior, they still often only mark gays and lesbians with sexuality.<sup>156</sup> This is often not an explicit choice on the part of courts, but rather implicit in comparisons of “same-sex couples” or “gays” to unmarked heterosexual couples.<sup>157</sup> Courts frequently choose to only mention the sexuality of gays and lesbians. This process works similarly to marking blacks with race and women with gender.<sup>158</sup> While some opinions construct sexuality as both defined by behavior and belonging only to gays, other opinions move beyond sexuality as behavior but still only mark gays.<sup>159</sup> This theme has three distinct sub-themes: sexuality as imposed, sexuality as immutable and discoverable by the court, and sexuality as the same for all gays and lesbians.

¶165 The process of marking is related to the tension in equal protection analysis between protection of “discrete and insular minorities”<sup>160</sup> and protection of traits that “bear[] no relation to ability to perform or contribute to society.”<sup>161</sup> By focusing equal

<sup>154</sup> I refer to autonomy as a normative rather than legal goal.

<sup>155</sup> See SOCIAL CONSTRUCTION OF SEXUALITY, *supra* note 17, for a complete theoretical framework on the social construction of sexuality.

<sup>156</sup> Patricia Hill Collins argues that sexuality cannot be isolated like this, but must be understood as related to race, class, and gender. See COLLINS, *supra* note 79 (focusing particularly on how gender analysis should not only refer to women).

<sup>157</sup> See *id.*

<sup>158</sup> See *id.*; E. Patrick Johnson & Mae G. Henderson, *Introduction: Queering Black Studies/"Quaring" Queer Studies*, in BLACK QUEER STUDIES: A CRITICAL ANTHOLOGY 1 (E. Patrick Johnson & Mae G. Henderson eds., 2005) (comparing how queer studies ignores race and class, while black studies ignores sexuality and gender).

<sup>159</sup> For example, *Standhardt* states: “This court does not dispute that a homosexual person’s choice of life partner is an intimate and important decision.” *Standhardt v. Superior Court ex rel. Cnty. of Maricopa*, 77 P.3d 451, 459 (Ariz. Ct. App. 2003) (defining sexuality based on behavior of “choice of life partner” and marking only gays and lesbians with sexuality). On the other hand, *Kerrigan* states: “[T]he statutory scheme impermissibly discriminates against gay persons on account of their sexual orientation.” *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 412 (Conn. 2008) (deemphasizing behavior but still marking gays and lesbians with sexual orientation).

<sup>160</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

<sup>161</sup> *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

protection analysis on “sexual orientation,” instead of gays and lesbians, courts would minimize how much they mark gays and lesbians with sexuality.<sup>162</sup>

¶166 The most striking illustration of this construction is found in an opinion by the New York Court of Appeals:

Plaintiffs have not persuaded us that this long-accepted restriction is a wholly irrational one, based solely on ignorance and prejudice against homosexuals. . . . As the dissent points out, a long and shameful history of racism lay behind the kind of statute invalidated in *Loving*.

. . . Racism has been recognized for centuries—at first by a few people, and later by many more—as a revolting moral evil.

. . . .

The idea that same-sex marriage is even possible is a relatively new one. Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex. A court should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted.<sup>163</sup>

¶167 Here, the court attempts to distinguish precedent on interracial marriage, but in the process suggests that sexuality only recently emerged when homophobia marked lesbians and gays. In the court’s telling, lesbians and gays became historically relevant only “a few decades ago.” Gays and lesbians are particularly marked with deviance. Racism is immoral, so minorities are not deviant. Homophobia is not immoral, so lesbians and gays are deviant. While the *Hernandez* court may have only intended to summarize the relevant legal facts and history, the language and structure of the excerpt reinforces cultural norms marking gay and lesbian deviance. In particular, the contrast between racism as a “revolting moral evil” and homophobia as not clearly “irrational, ignorant or bigoted” marks gays and lesbians as deviant.

¶168 Although less explicit in the process of labeling, *Kerrigan* explains that “the statutory scheme impermissibly discriminates *against gay persons* on account of their sexual orientation.”<sup>164</sup> This can be read simply as a legal conclusion, which is likely what the court intended. However, I argue that the language can also be read to mark gays and lesbians with sexuality. The court could have written that the scheme discriminates on account of sexual orientation. By adding “against gay persons,” the court potentially assigns sexuality to gays and lesbians.

¶169 In addition to an explicit process of marking gays and lesbians with sexuality, this theme also emerges as meaning that homosexuality is different. The *Morrison* opinion explains: “As we have identified, at least one of the reasons the government [limits marriage to opposite-sex couples] is to encourage ‘responsible procreation’ by opposite-sex couples.”<sup>165</sup> Heterosexuality is defined as ‘responsible procreation’ and

<sup>162</sup> See *supra* notes 71–93 and accompanying text, for a discussion of how courts should use equal protection doctrine in same-sex marriage cases.

<sup>163</sup> *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006).

<sup>164</sup> *Kerrigan v. State*, 957 A.2d 407, 412 (Conn. 2008) (emphasis added).

<sup>165</sup> *Morrison v. Sadler*, 821 N.E.2d 15, 29 (Ind. Ct. App. 2005).

homosexuality implicitly becomes something different. Similarly, *Brause* claims “just as the ‘decision to marry and raise a child in a traditional family setting’ is constitutionally protected as a fundamental right, so too should the decision to choose one’s life partner and have a recognized nontraditional family be constitutionally protected.”<sup>166</sup> Tradition becomes a marker for what is normal; by being nontraditional, same-sex marriage marks lesbians and gays as deviant.<sup>167</sup>

¶70 By marking gay sexuality as different, opinions often assume that sexuality has some fixed content that can be discovered. In particular, by improperly focusing on immutability, courts assume that sexuality is fixed and discoverable.<sup>168</sup> In *Hernandez*, the court dismisses studies of gay and lesbian parenting by claiming that “[w]hat they show, at most, is that rather limited observation has detected no marked differences.”<sup>169</sup> Implicit in this statement is an assumption that sexuality marks lesbians and gays in a particular, consistent manner. Sufficient studies could reveal how sexuality (homosexuality) impacts gay and lesbian parenting. The court thus assumes the role of constructing what sexuality legally means.<sup>170</sup>

¶71 This use of scientific studies raises a related concern that courts construct sexuality through a clinical prism. This is most obvious in *Baehr*, where the majority cites a *medical* dictionary for the proposition that “[a] ‘homosexual’ person is defined as ‘[o]ne sexually attracted to another of the same-sex.’ Taber’s Cyclopedic Medical Dictionary 839 (16th ed. 1989).”<sup>171</sup> The court’s choice to cite a medical dictionary is particularly significant. Homosexuality is treated as a pathological condition. *Baehr* gives medicine greater authority to define sexuality than individual plaintiffs, cultural norms, or any other source. How lesbians and gays understand their own identities becomes irrelevant because medicine carries the authoritative definition of lesbian and gay identity. This quotation ties together several themes. Gays (1) are objects of clinical study, (2) are defined by a type of behavior, and (3) are thus marked as deviant.

¶72 Finally, consistent with discussions of immutability, the process of marking gays with sexuality also results in grouping all gays and lesbians together as a homogenous group. In *Kerrigan*, the Supreme Court of Connecticut writes, “To decide otherwise would be to penalize someone for being unable or unwilling to change [] a central aspect

<sup>166</sup> *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at \*6 (Alaska Super. Ct. Feb. 27, 1998), *superseded by constitutional amendment*, ALASKA CONST. art. I, § 25 (amendment effective 1999).

<sup>167</sup> To many gays and lesbians, same-sex marriage is extremely traditional. See Kosbie, *supra* note 10. Proponents of same-sex marriage implicitly embrace a traditional emphasis on marriage as defining the family. See *id.* Describing same-sex marriage as non-traditional may be offensive. *Id.*

<sup>168</sup> See *supra* notes 90-93 and accompanying text, for an argument that immutability can be deemphasized in equal protection analysis.

<sup>169</sup> *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006); see also *Baker v. State*, 744 A.2d 864, 881 (Vt. 1999) (using social science evidence about gay and lesbian parenting to support conclusion that marriage statute is both over and under inclusive because same-sex couples may become parents and opposite-sex couples might not).

<sup>170</sup> While courts are obligated to make legal decisions, these cases demonstrate that they also have the ability to define terms such as sexuality by deeming certain facts either relevant or irrelevant.

<sup>171</sup> *Baehr v. Lewin*, 852 P.2d 44, 52 n. 11 (Haw. 1993), *superseded by constitutional amendment*, HAW. CONST. art. I, § 23 (amended 1998).

of individual and *group* identity.”<sup>172</sup> Here, the court more consciously constructs homosexuals as a group. Many lesbians and gays understand themselves as belonging to a group defined by shared characteristics. However, other gays, lesbians, and queers do not define themselves based on shared characteristics. If the court’s concern is how sexual orientation “bears no relation to ability to perform or contribute to society,”<sup>173</sup> then the construction of *group* identity should not matter.

### C. Society Should Regulate Sexuality

¶73 Courts use language suggesting that society has a strong and proper interest in regulating the sexual behavior and activity of individuals.<sup>174</sup> Courts draw on social norms and expectations, incorporating them into their analyses of state power to regulate sexuality. In particular, courts might look at legal and social norms of procreation, child rearing, sexual behavior,<sup>175</sup> and acceptance of homosexuality. As sexuality becomes an object of social regulation, individuals lose the right to determine their own sexual identities. Not only does society define proper sexuality, courts demand individual conformity to these social norms.

¶74 Social power and state power over sexuality overlap here, but are conceptually distinct. Social power over sexuality refers to the social structures and norms that define the proper norms of sexuality and sexual behavior.<sup>176</sup> For example, social norms may proscribe sex outside of marriage, sanctioning unwed mothers with stigma and disapproval. While this form of social regulation does not legally prohibit non-marital sex, it remains a powerful social mechanism. Women who engage in non-marital sex are not legally punished, but may face social and moral approbation. State power over sexuality refers to the state’s ability to regulate aspects of sexuality through the general police power. For example, laws on sodomy, marriage and divorce, contraception, child support, families, and healthcare all potentially affect and regulate sexuality similar to the social regulation discussed above.

¶75 Social regulation of sexuality is often implicit in court discussions of state interests in regulating marriage. When courts describe social norms of sexuality, they often give these social norms authority over individual sexuality. Unlike previous themes, social regulation of sexuality emerges with respect to both gays and lesbians and heterosexuals. This happens predominantly based on traditional heteronormative<sup>177</sup> concerns regarding procreation and intimacy in marriage.

<sup>172</sup> *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 439 (Conn. 2008) (emphasis added) (internal quotation marks omitted).

<sup>173</sup> *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

<sup>174</sup> See Halley, *supra* note 29, at 946–63 (outlining legal regulation of homosexuality and relation to social norms).

<sup>175</sup> The Supreme Court has increasingly used the right to privacy to restrict the state’s ability to regulate private sexual behavior. See *Lawrence v. Texas*, 539 U.S. 558 (2003). Before *Lawrence*, sodomy was constitutionally criminalized in some states.

<sup>176</sup> See *supra* note 17 and accompanying text.

<sup>177</sup> Heteronormative refers to social norms and institutions that assume that heterosexuality is natural and proper. This includes an assumption that men and women are fundamentally different. Heteronormative not only describes these norms, but also implies that they are used to sanction non-heterosexual identified persons.

¶76 Opinions from the 1970s drew heavily on traditional morality: “The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.”<sup>178</sup> Sexuality is removed from individual control. There is no room here for any sort of autonomy or individual choice with respect to sexuality. Instead, tradition dictates proper bounds of sexuality through control of procreation and families.<sup>179</sup> Tradition is allowed to stand in for the heteronormative demand of conformity with social expectations of procreation and family.

¶77 While more recent opinions do not refer so explicitly to religion or history, they continue to reflect social norms that assume society should regulate sexuality. In *Andersen*, the Washington Supreme Court explains that “the legislature was entitled to believe that providing that only opposite-sex couples may marry will encourage procreation and child-rearing in a ‘traditional’ nuclear family where children tend to thrive.”<sup>180</sup> This opinion depends on the heteronormative construction of sexuality channeled through family and procreation. The traditional family stands in for social regulation of sexuality. Society properly dictates the bounds of sexuality.

¶78 My concern is not with state regulation of child welfare. The state has an interest in the well-being of children. The state also has an interest in other issues related to sexuality, such as reducing sexually transmitted diseases and preventing sexual violence. State laws should protect child welfare, promote public health, and control sexual violence. I argue that even when the state has a valid interest, the law should not impose constraints on individual autonomy any more than necessary. In the *Andersen* case cited above, the court explicitly uses social norms to deny individual autonomy.

¶79 As already suggested, social regulation and state regulation of sexuality bleed together in these opinions. In *Hernandez*, the New York Court of Appeals writes that “[a] person’s preference for the sort of sexual activity that cannot lead to the birth of children is relevant to the State’s interest in fostering relationships that will serve children best.”<sup>181</sup> Here, social interest in regulation of sexuality and procreation becomes explicitly the proper basis for state regulation of sexuality.<sup>182</sup> This also highlights how court constructions of sexuality have real impact beyond marriage policy: *Hernandez* offers a potential doctrinal hook for regulating gay and lesbian parenting, custody, and adoption rights.

¶80 Social regulation of sexuality is very similar to state regulation of sexuality. Indeed, courts are likely not consciously choosing between them. Nonetheless, there is a distinction. Social regulation reflects greater concern with heteronormative traditions dictating proper sexuality and state regulation reflects greater concern with legislative prerogative. In *Singer*, the Washington Court of Appeals stressed legislative authority to define marriage: “The operative distinction lies in the relationship which is described by the term ‘marriage’ itself, and that relationship is the *legal* union of one man and one

<sup>178</sup> *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971).

<sup>179</sup> *See Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973) (“[Marriage is] the institution whereby men and women are joined in a special kind of social and legal dependence, for the purpose of founding and maintaining a family.”).

<sup>180</sup> *Andersen v. King Cnty.*, 138 P.3d 963, 983 (Wash. 2006).

<sup>181</sup> *Hernandez v. Robles*, 855 N.E.2d 1, 11 (N.Y. 2006).

<sup>182</sup> *Andersen*, 138 P.3d at 969 (“[L]imiting marriage to opposite-sex couples furthers procreation.”).

woman.”<sup>183</sup> Similarly, in *Morrison*, the Indiana Court of Appeals wrote that “[t]he key question in our view is whether the recognition of same-sex marriage would promote all of the same *state* interests that opposite-sex marriage does, including the interest in marital procreation.”<sup>184</sup> Both of these opinions situate the authority to regulate sexuality in legislative authority to control the *state* apparatus of marriage.

¶81 Other opinions bring in state regulation of sexuality through the state’s role in recognizing a marriage. In *Li*, the Oregon Supreme Court explains, “In the state of Oregon, ‘marriage’ is a civil contract entered into *with the consent of the state*, between a man and a woman, competent to so contract, in the presence of two witnesses, solemnized by some one authorized by statute for that purpose.”<sup>185</sup> Similarly, in *Goodridge*, the Supreme Judicial Court of Massachusetts makes the state a party to every marriage. “In a real sense, there are three partners to every civil marriage: two willing spouses *and an approving State*.”<sup>186</sup> Both of these opinions use the state’s role in regulating marriage as a proxy for regulation of sexuality. These opinions reflect the idea that it is proper for the state to demand conformity to particular social norms.

¶82 This use of marriage reflects an underlying tension as the state’s role becomes more about state regulation of marriage and less about regulation of sexuality. The state should be able to regulate certain qualifications for marriage, including age, consent, and degree of blood relations. The state should minimize how these qualifications interfere with individual autonomy to define sexuality. When the *Li* court writes “competent to so contract,”<sup>187</sup> it sets parameters for marriage that do not interfere with individual autonomy. When the same court writes “between a man and a woman,”<sup>188</sup> it limits individual autonomy based on heteronormative social norms.

¶83 Finally, some courts justify non-intervention in state marriage law based on changing state regulations of sexuality. In doing so, courts assume that legislatures should properly regulate sexuality based on changing social norms.<sup>189</sup> It is normatively proper for the state to continually change the law with respect to sexuality. Courts have also used evidence of changing regulations to argue that sexuality should not be understood as static and that courts should properly intervene to prevent discrimination on the basis of sexual orientation.<sup>190</sup> As with other points in my analysis, there is some

<sup>183</sup> *Singer v. Hara*, 522 P.2d 1187, 1191 (Wash. Ct. App. 1974) (emphasis added).

<sup>184</sup> *Morrison v. Sadler*, 821 N.E.2d 15, 23 (Ind. Ct. App. 2005) (emphasis added).

<sup>185</sup> *Li v. State*, 110 P.3d 91, 99 (Or. 2005) (emphasis in original) (citations omitted) (internal quotation marks omitted).

<sup>186</sup> *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003) (emphasis added).

<sup>187</sup> *Li*, 110 P.3d at 99.

<sup>188</sup> *Id.*

<sup>189</sup> See *infra* notes 190–193.

<sup>190</sup> Courts thus emphasize two poles for separation of powers: (1) the court should defer to the legislature on policy, or (2) the court should enforce constitutional protections without deferring to the legislature. For example, in *Conaway*, the court only applied rational basis review to the state’s family law, because “sexual orientation has not come of age as a suspect or quasi-suspect classification.” *Conaway v. Deane*, 932 A.2d 571, 608 (Md. 2007) (emphasizing judicial deference to legislature on non-suspect classifications). On the other hand, *In re Marriage Cases* emphasized the historic role of the court in applying constitutional limitations to state marriage laws. See *In re Marriage Cases*, 183 P.3d 384, 451 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5 (amended 2008). The court explained that “initiative measures adopted by the electorate are subject to the same constitutional limitations that apply to statutes adopted by the Legislature, and our courts have not hesitated to invalidate

tension here. The state has an interest in regulating sexual behavior and courts might merely describe that interest, noting that these regulations change as social norms change. However, this is still problematic if courts use the logic of changing state regulation to restrict individual autonomy. Even where discussions of changing state regulations are not problematic, the discussions highlight the relationship between state and social regulation of sexuality.

¶84 In *Hernandez*, the New York Court of Appeals claims that “[t]he idea that same-sex marriage is even possible is a relatively new one.”<sup>191</sup> This statement is the basis for the court’s decision that the court should defer to the legislature on marriage, implying that the state should regulate unfamiliar expressions of sexuality more than it regulates heterosexuality. Similarly, in *Andersen*, the opinion begins with a lengthy discussion of the proper role of the court vis-à-vis the legislature in regulating sexuality.<sup>192</sup> In deferring to the legislature, the court articulates a proper understanding of sexuality as subject to changing state regulations and fails to protect individual autonomy.<sup>193</sup>

¶85 Recognizing overlapping claims of social and state regulation, *Varnum* raises, *sua sponte*, a discussion of religion.<sup>194</sup> The opinion recognizes that neither the state nor the plaintiffs addressed religion, but writes that religion is culturally understood as the basis of much of marriage law. The opinion explains that the state only has an interest in civil marriage and that religious claims properly belong outside the court.<sup>195</sup> The court’s decision to raise religion of its own accord illustrates the relationship between state and social regulation. Religion could be understood as competing with the state for authority to regulate sexuality and marriage. *Varnum* suggests that the court at least needs to recognize this competing authority in assessing the state’s interests in regulating sexuality. By emphasizing laws of *civil* marriage, *Varnum* recognizes but limits the proper reach of social regulation of sexuality.

¶86 There are times when society properly should regulate sexual behavior. Moreover, courts need to write about regulation of sexuality to decide same-sex marriage cases. My concern here is how particular language in opinions reinforces the idea that society should have authority to regulate all matters of sexuality. While some cases may intend to imply that society should be able to regulate all sexuality, other opinions unintentionally imply this.

#### D. Marriage as a Normative Goal

¶87 Courts construct marriage as a normative goal for intimate relationships and all sexuality.<sup>196</sup> Historically, a married couple with children has been understood as the basis of the family. Many people continue to identify married couples as the basis of the

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measures enacted through the initiative process when they run afoul of constitutional guarantees.” *Id.* at 449.

<sup>191</sup> *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006).

<sup>192</sup> *Andersen v. King Cnty.*, 138 P.3d 963, 968–69 (Wash. 2006).

<sup>193</sup> See *id.* at 984 (“The court’s responsibility, instead, is to assure that DOMA was enacted in accord with constitutional constraints and that the legislature properly exercised its power.”).

<sup>194</sup> See *Varnum v. Brien*, 763 N.W.2d 862, 904–06 (Iowa 2009).

<sup>195</sup> *Id.*

<sup>196</sup> This also occurs outside of same-sex marriage jurisprudence. See *supra* notes 58–70 and accompanying text for a discussion of marriage as a fundamental right.

family. Nonetheless, families and romantic relationships exist in many other forms. By treating marriage as a normative goal, courts emphasize the desirability of the marriage relationship. Marriage becomes an explicit state tool for regulating sexuality. Couples are expected to marry and once married are expected to behave in certain ways.

¶88 There are at least four ways in which courts discuss marriage as a normative goal. First, marriage can be described as appropriately containing sexual intercourse because of concerns that sex is only properly directed at procreation within marriage.<sup>197</sup> This includes the sense that heterosexuality is dangerous and must be contained. If heterosexuals cannot control their sexual desires and behavior, then marriage will do so. Second, marriage is understood as encouraging social stability by supporting long-term relationships.<sup>198</sup> The courts code social stability with assumptions about marriage as the basis for society. Other potential support structures are marginalized. Third, child-rearing is best performed in a marriage because children develop best with both a father and a mother.<sup>199</sup> These first three senses of the normative goals of marriage reflect a judgment that sex outside of marriage is immoral and a concern that the state should encourage a particular family structure.

¶89 Finally, marriage can also be a normative goal in the sense of being a set of benefits and responsibilities available to intimate relationships.<sup>200</sup> In this final sense, courts begin to recast the relationship between marriage and gay and lesbian sexuality.<sup>201</sup> Courts do not deny marriage's role as a social goal, but question whether exclusion of same-sex couples is proper.<sup>202</sup> Even when gays and lesbians gain judicial access to the rights and benefits of marriage, marriage retains its normative status by defining long-term, state-sanctioned, romantic relationships as the ideal expression of sexuality and family.

¶90 Marriage's normative power depends on state power to regulate sexuality. While the last theme examined how courts assume that society should properly regulate sexuality, this theme focuses on how that state regulation is used to normalize marriage. In *Singer*, the Washington Court of Appeals explains that the “[a]ppellants were not denied a marriage license because of their sex; rather, they were denied a marriage

<sup>197</sup> See *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) (“Heterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not. Despite the advances of science, it remains true that the vast majority of children are born as a result of a sexual relationship between a man and a woman, and the Legislature could find that this will continue to be true. The Legislature could also find that such relationships are all too often casual or temporary.”).

<sup>198</sup> See *id.*

<sup>199</sup> See *id.* at 7 (“Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like.”).

<sup>200</sup> See *Baker v. State*, 744 A.2d 864, 883 (Vt. 1999) (“In short, the marriage laws transform a private agreement into a source of significant public benefits and protections.”).

<sup>201</sup> Nancy Polikoff argues that the focus on marriage is inappropriate, even if marriage is fully expanded to gay and lesbian couples, because it limits state protections to particular family types. See POLIKOFF *supra* note 39, at 123. Marriage fails to protect other living arrangements, such as extended families, friends, or group living arrangements where individuals might depend upon each other. See *id.* at 132–43. If the state's interest in marriage is promoting social stability, then the state should not limit the protections of marriage to traditional romantic partnerships. See *id.*

<sup>202</sup> See, e.g., *Varnum v. Brien*, 763 N.W.2d 862, 872 (Iowa 2009) (“[Same-sex couples] seek to declare the marriage statute unconstitutional so they can obtain the array of benefits of marriage enjoyed by heterosexual couples, protect themselves and their children, and demonstrate to one another and to society their mutual commitment.”).

license because of the nature of marriage itself.”<sup>203</sup> State power to issue a marriage license is used to define the contours of marriage as a social goal.<sup>204</sup> Courts that expand marriage rights might similarly stress marriage as a social achievement: “[I]t would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.”<sup>205</sup> *Baehr* recognizes legal rights that support marriage’s position as “the relationship that is the foundation of the family.”<sup>206</sup> By stressing marriage as the foundation of the family and society, the courts reinforce norms that exclude alternate definitions of family.

¶91 In traditional discussions of marriage’s proper role in society, sexuality and the act of sex emerge as dangerous. Marriage becomes a necessary control on heterosexuality. This emerges as courts discuss “hav[ing] an unplanned pregnancy.”<sup>207</sup> The whole state apparatus becomes directed at protecting against dangerous sexuality:

The State . . . may legitimately create the institution of opposite-sex marriage . . . in order to encourage male-female couples to procreate within the legitimacy and stability of a state-sanctioned relationship and to discourage unplanned, out-of-wedlock births resulting from “casual” intercourse.<sup>208</sup>

Because procreation is fundamental to survival of the human race, the state should elevate marriage’s status in order to regulate procreation.<sup>209</sup>

¶92 It is certainly true that unplanned pregnancies are a valid social concern. However, when *Morrison* stresses that marriage is important because “‘accidents’ do happen,”<sup>210</sup> it relies on a cultural norm that assumes intimate relationships should produce children in the context of marriage. Family is defined as a married couple with children. These discussions of unplanned pregnancies assert that: (1) heterosexuality is dangerous and unplanned pregnancies will always occur, (2) opposite sex partners should marry because unplanned pregnancy is better handled within marriage, and (3) marriage is properly based on these heteronormative assumptions because the state’s primary interest is controlling procreation.

¶93 This role of marriage in directing procreation is the one place that heterosexuality is pronounced in these opinions. At first, this seems to contradict earlier arguments that these opinions assign sexuality to lesbians and gays.<sup>211</sup> To be sure, there is some tension

<sup>203</sup> *Singer v. Hara*, 522 P.2d 1187, 1196 (Wash. Ct. App. 1974).

<sup>204</sup> *Mary Anne Case* traces the history of marriage licenses, arguing that the state uses the marriage license to define social norms. *See Case*, *supra* note 14.

<sup>205</sup> *Baehr v. Lewin*, 852 P.2d 44, 56 (Haw. 1993), *superseded by constitutional amendment*, HAW. CONST. art. I, § 23 (amended 1998).

<sup>206</sup> *Id.*

<sup>207</sup> *Standhardt v. Superior Court ex rel. Cnty. of Maricopa*, 77 P.3d 451, 462 (Ariz. Ct. App. 2003).

<sup>208</sup> *Morrison v. Sadler*, 821 N.E.2d 15, 24 (Ind. Ct. App. 2005).

<sup>209</sup> *See Andersen v. King Cnty.*, 138 P.3d 963, 969 (Wash. 2006) (“DOMA [Defense of Marriage Act] is constitutional because the legislature was entitled to believe that limiting marriage to opposite-sex couples furthers procreation, essential to survival of the human race . . .”).

<sup>210</sup> *Morrison*, 821 N.E.2d at 25.

<sup>211</sup> *See, e.g., Kerrigan v. State*, 957 A.2d 407, 412 (Conn. 2008) (using the language “against gay persons on account of their sexual orientation”).

here. The same courts that mark gays and lesbians may recognize straight sexuality in at least some contexts. Juxtaposing these arguments, courts are in fact constructing heterosexuality very differently from homosexuality. Heterosexuality generally remains unmarked, except when it becomes dangerous and threatens ideal family formation. The state's interest in heterosexuality is based on channeling procreation and the family. Gays and lesbians are marked with deviant sexuality, which is inherently dangerous and incapable of "normal" procreation. The state's interest in homosexuality is based on controlling deviance.<sup>212</sup>

¶94 Finally, as they begin to recognize claims for same-sex marriage, courts expand the normative range of marriage to include lesbians and gays. In *Baehr*, the Supreme Court of Hawaii writes "Marriage is a state-conferred legal partnership status, the existence of which gives rise to a multiplicity of rights and benefits reserved exclusively to that particular relation."<sup>213</sup> *Brause* similarly expands marriage's goals: "The court finds that marriage, i.e., the recognition of one's choice of a life partner, is a fundamental right."<sup>214</sup> By refusing to link marriage to procreation, the Alaska Superior Court refuses to define marriage and family exclusively around procreation. Nonetheless, marriage remains a valid institution as the proper model of romantic relationships.<sup>215</sup> In these opinions, lesbian and gay sexuality is no longer deviant. Instead, like heterosexuality, lesbian and gay sexuality is dangerous and must be contained. The state's interest in marriage is transformed from regulation of heterosexuality into regulation of *all* sexuality.

¶95 By distinguishing between the benefits of marriage and the institution of marriage itself, courts deconstruct marriage.<sup>216</sup> The state may claim that marriage protects procreation or child-rearing,<sup>217</sup> but in focusing on the rights and benefits of marriage courts stress marriage as a civil contract. Marriage becomes less about procreation and more about a package of rights and benefits. As a civil contract, marriage remains a normative control on sexuality.

¶96 In *Baker*, the Vermont Supreme Court explains that "the marriage laws transform a private agreement into a source of significant public benefits and protections."<sup>218</sup> The *Goodridge* opinion expands this further to include responsibilities: "For those who choose to marry, and for their children, marriage provides an abundance of legal,

<sup>212</sup> Even some opinions that have not described homosexuality as deviant have still marked it as different in some sense. See, e.g., *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at \*6 (Alaska Super. Ct. Feb. 27, 1998), *superseded by constitutional amendment*, ALASKA CONST. art. I, § 26 (amendment eff. 1999) (discussing "nontraditional" unions).

<sup>213</sup> *Baehr v. Lewin*, 852 P.2d 44, 58 (Haw. 1993), *superseded by constitutional amendment*, HAW. CONST. art. I, § 23 (amended 1998).

<sup>214</sup> *Brause*, 1998 WL 88743, at \*1.

<sup>215</sup> The Vermont Supreme Court made this explicit by discussing social science evidence of the benefits of marriage for gay and lesbian couples. See *Baker v. State*, 744 A.2d 864, 883–84 (Vt. 1999) (including inheritance rights, right to bring wrongful death suit, insurance benefits, presumption of joint ownership of property, and hospital visitation rights).

<sup>216</sup> See, e.g., *id.* at 886.

<sup>217</sup> In more recent cases, states have not always asserted these interests, claiming for example interests in the traditional definition of marriage. See, e.g., *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5 (amended 2008) (Attorney General of California asserts interests in traditional definition of marriage and separation of powers; interveners assert other interests in procreation).

<sup>218</sup> *Baker*, 744 A.2d at 883.

financial, and social benefits. In return it imposes weighty legal, financial, and social obligations.”<sup>219</sup> The state may continue to have an interest in regulating access to this package of benefits, but courts provide greater individual autonomy by casting marriage as a package of civil rights and benefits.

¶197 Thus, when courts are willing to consider the benefits of marriage as distinct from marriage itself, they necessarily emphasize how the state uses civil rights and benefits to reward couples and families conforming to a particular model of romantic relationships. In *Li*, the Supreme Court of Oregon does this through analysis of the marriage statute, writing that “although the text of the measure prohibits same-sex marriage itself, it omits any reference to the *benefits* of marriage.”<sup>220</sup> Courts’ willingness to engage in this deconstruction of marriage may have the added benefit of forcing states to better articulate what they are regulating.

## V. INCREASED RESPECT FOR INDIVIDUAL AUTONOMY

¶198 Increased respect for individual sexual autonomy emerges as a final theme in more recent cases. Typically, broader room for autonomy occurs in cases that grant same-sex couples the right to marry.<sup>221</sup> This has four important consequences: (1) sexuality is allowed to become more public, (2) marriage is separated from its heteronormative patriarchal history, (3) cases provide better reasoning to prevent future political discrimination, and (4) cases provide better doctrine to expand to other issues of sexuality.

¶199 The first consequence, more public sexuality, recognizes the importance of sexuality in lived experiences of all persons.<sup>222</sup> Cases that protect same-sex partner rights vary in how much they discuss public expression of sexuality. *Kerrigan* uses a formal, legal tone to protect same-sex marriage rights.<sup>223</sup> The opinion determines that sexual orientation, as a legal category, is a quasi-suspect classification.<sup>224</sup> *Kerrigan* mentions the plaintiffs as the parties that brought the legal challenge to the state’s laws, but does not discuss sexuality in the plaintiffs’ lives.<sup>225</sup> Sexual orientation is defined as a legal category through case law, legal scholarship, and other sources of evidence. For example, in discussing the history of discrimination faced by gays and lesbians, *Kerrigan* focuses on how legislation and court decisions have restricted gays and lesbians.<sup>226</sup>

<sup>219</sup> *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 941 (Mass. 2003).

<sup>220</sup> *Li v. State*, 110 P.3d 91, 98 (Or. 2005) (emphasis in original).

<sup>221</sup> *Baehr* provides a counter-example requiring the state to provide a compelling interest to deny same-sex couples the right to marry, but based on sex discrimination with narrow conception of sexuality as behaviors. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), *superseded by constitutional amendment*, HAW. CONST. art. I, § 23 (amended 1998).

<sup>222</sup> See Johnson & Henderson, *supra* note 158 (discussing critical importance of lived experience to understanding sexuality).

<sup>223</sup> For example, at one point the decision states, “Of course, gay persons have been subjected to such severe and sustained discrimination because of our culture’s long-standing intolerance of intimate homosexual conduct.” *Kerrigan v. State*, 957 A.2d 407, 433 (Conn. 2008).

<sup>224</sup> *Id.* at 431–32.

<sup>225</sup> *Id.* (“For the reasons that follow, we agree with the plaintiffs’ claim that sexual orientation meets all of the requirements of a quasi-suspect classification.”).

<sup>226</sup> *Id.* at 432–434 (citing legal scholarship, the American Psychiatric Association, case law, Surgeon General and other government reports, and state and federal laws).

Sexual orientation is protected as a legal category, but there is no sense of how it matters in individuals' lives.

¶100 To a large extent, the court just did its job: a state supreme court should focus on broad legal questions more than individual plaintiffs. And as a legal matter, *Kerrigan* protects sexual orientation. However, treating sexual orientation as an abstract legal category matters. Sexual orientation becomes something that can and potentially should be thought of as unconnected to peoples' daily lives. The formal, legal tone of *Kerrigan* can be read to reinforce cultural norms that suggest sexuality should be hidden. Even if individuals are free to define their sexuality, it is expected to be private and hidden. To some extent, this complaint is not restricted to sexuality. Courts write about gender, race, and class as abstract legal categories. On this point, it is instructive to compare *Kerrigan* to *Varnum* and *Goodridge*.<sup>227</sup>

¶101 *Goodridge* describes the plaintiffs as “fourteen individuals from five Massachusetts counties.”<sup>228</sup> The court describes the relationships between the plaintiffs, but never labels these as same-sex or gay couples. Later in the opinion, the court notes that “[t]he rights implicated in this case are at the core of individual privacy and autonomy.”<sup>229</sup> Throughout the opinion, sexuality is something that matters to specific plaintiffs, rather than just an abstract legal category.

¶102 Similarly, the Supreme Court of Iowa creates broad space for sexuality.<sup>230</sup> The opinion begins with a discussion of the plaintiffs as individuals “includ[ing] a nurse, business manager, insurance analyst, bank agent, stay-at-home parent, church organist and piano teacher, museum director, federal employee, social worker, teacher, and two retired teachers.”<sup>231</sup> *Varnum* continues to describe the plaintiffs as family members. “Like many Iowans, some have children and others hope to have children. Some are foster parents.”<sup>232</sup> Later, the opinion recognizes sexuality as broader than sexual behavior. “Sexual orientation influences the formation of personal relationships between all people—heterosexual, gay, or lesbian—to fulfill each person’s fundamental needs for love and attachment.”<sup>233</sup> Structurally this opinion also stresses a broader understanding of sexuality. After describing the parties, the decision deconstructs marriage, stressing the ways in which marriage is a public affirmation of a couple’s relationship.<sup>234</sup> The opinion creates marriage as a broad construct for a range of sexuality before discussing equal protection and other concerns.

¶103 Both *Goodridge* and *Varnum* attach sexuality to real people and real lives. Sexuality is more than just a legal question. While *Goodridge* and *Varnum* serve the

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<sup>227</sup> Both Connecticut and Iowa granted same-sex couples the right to marry, but *Varnum* situated sexuality in everyday social relations. Comparing these opinions reveals different assumptions about the role of sexuality in everyday life. Compare *id.* (citing legal scholarship, the American Psychiatric Association, case law, Surgeon General and other government reports, and state and federal laws), with *Varnum v. Brien*, 763 N.W.2d 862, 873 (Iowa 2009) (“Yet, perhaps the ultimate disadvantage expressed in the testimony of the plaintiffs is the inability to obtain for themselves and for their children the personal and public affirmation that accompanies marriage.”).

<sup>228</sup> *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 949 (Mass. 2003).

<sup>229</sup> *Id.* at 957, n.15.

<sup>230</sup> See *Varnum*, 763 N.W.2d 862.

<sup>231</sup> *Id.* at 872.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 893.

<sup>234</sup> See *supra* note 227.

same legal function as *Kerrigan*—determining as a matter of law whether sexual orientation is a suspect classification and whether same-sex couples can claim a right to marriage—they both avoid the formal legal tone of *Kerrigan*. This provides greater affirmation and social support of non-heteronormative sexualities. In particular, *Varnum* uses a public affirmation of sexuality to deconstruct the patriarchal history of marriage. By allowing sexuality to be fully expressed, the court refuses to base marriage on limited notions of sexuality.

¶104 These cases typically hold that sexual orientation is a quasi-suspect or suspect class, creating equal protection doctrine that can be used in future challenges.<sup>235</sup> As one illustration, *Kerrigan* directly recognizes the failure of the political process to protect sexual orientation, “[d]espite the truly laudable effort of the legislature in equalizing the legal rights afforded same sex and opposite sex couples.”<sup>236</sup> This reasoning directly supports any future efforts to address how the political system constrains expressions of sexuality.

¶105 Comparing *Goodridge* and *Varnum* supports my argument for protecting same-sex marriage based on equal protection. While *Goodridge* forcefully protects the right of same-sex couples to marry, it does so on the basis of the strong social values attached to marriage.<sup>237</sup> This rhetorical construction emphasizes the values of marriage more than reasons to protect sexuality. Same-sex marriage is constitutionally protected because marriage itself is fundamentally protected, and the state has no interest in restricting marriage. Marriage remains normatively desirable, and sexuality may not be protected in future cases that do not include a fundamental right.

¶106 *Varnum*, on the other hand, places a strong emphasis on why sexual orientation is a suspect classification.<sup>238</sup> *Varnum* provides a strong rationale for future protection of other claims to expression of sexuality. Same-sex marriage is constitutionally protected because sexual orientation “bears no relation to ability to perform or contribute to society.”<sup>239</sup> The state must meet high barriers to discriminate on the basis of sexual orientation. While *Goodridge* necessarily discusses protection of sexuality,<sup>240</sup> and *Varnum* discusses the social values of marriage,<sup>241</sup> the different emphases reveal potentially different degrees of protecting sexuality.

## VI. CONCLUSION

¶107 In this Comment, I argued that we should be concerned with judicial assumptions about sexuality, provided a methodology to study these assumptions, and criticized the constructions of sexuality in state same-sex marriage opinions. Some same-sex marriage opinions intend to portray gays and lesbians as deviant or otherwise constrain sexuality.

<sup>235</sup> See *supra* notes 129–131 and accompanying text.

<sup>236</sup> *Kerrigan v. State*, 957 A.2d 407, 419 (Conn. 2008).

<sup>237</sup> *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948, 965 (Mass. 2003).

<sup>238</sup> *Varnum v. Brien*, 763 N.W.2d 862, 888–94 (Iowa 2009).

<sup>239</sup> *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

<sup>240</sup> In various places the opinion notes that allowing same-sex couples to marry will protect against “prejudices against persons who are (or who are believed to be) homosexual.” See, e.g., *Goodridge*, 798 N.E.2d at 968. *Goodridge* does not consider whether sexuality should be protected as a suspect classification, so it does not directly consider the question of protection of sexuality.

<sup>241</sup> *Varnum*, 763 N.W.2d at 883–84.

Many opinions appear simply not to consider how they are drawing on particular cultural assumptions about sexuality. But even when opinions intend to protect sexual orientation through equal protection, they may use language that reinforces cultural norms of sexuality or marriage as more limited.

¶108 The most recent same-sex marriage opinions make great strides towards protecting individual autonomy with respect to sexuality. These cases protect individual autonomy by making sexual orientation a suspect classification. Courts in California, Connecticut, and Iowa have used equal protection instead of fundamental rights to extend marriage to same-sex couples. However, these cases could still push equal protection analysis further by focusing on how laws and social structures create and define hierarchies of sexuality. This requires a more fundamental change in equal protection doctrine, but it would allow courts to more broadly recognize the social construction of sexuality.

¶109 Beyond same-sex marriage jurisprudence, the arguments in this Comment are applicable to how courts write about sexuality in all areas of the law. Legal scholars should pay more attention to how the specific language used in these cases matters. Whether or not they recognize it, courts are playing an active role in the construction of sexuality.

## VII. APPENDIX

**Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971).**

Dismissed claim that state marriage laws included same-sex couples because by definition marriage is between a man and a woman.

*Additional procedural notes:* Plaintiffs, Richard Baker and James McConnell, brought suit after applying for a marriage license with the Hennepin County Clerk. While *Baker v. Nelson* was on appeal to the Minnesota Supreme Court, the plaintiffs obtained a marriage license from the Blue Earth County Court Clerk. *McConnell v. Nooner*, 547 F.2d 54, 55 (8th Cir. 1976) (noting the later marriage license was invalidated by *Baker v. Nelson*). An appeal to the U.S. Supreme Court was dismissed for lack of substantial federal question. *See Baker v. Nelson*, 409 U.S. 810 (1972) (NO. 71-1027). McConnell sought federal recognition of this marriage license in two subsequent cases. *See McConnell*, 547 F.2d 54 (denying claim for greater veteran benefits because same-sex partner cannot be dependent spouse if marriage is not recognized by state); *McConnell v. United States*, No. Civ.04-2711, 2005 WL 19458 (D. Minn. Jan. 3, 2005) (dismissing suit to compel IRS to recognize amended return claiming married status, based on claim preclusion from *McConnell v. Nooner* where IRS was originally listed as a defendant).

**Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973).**

Dismissed claim that state marriage laws include same-sex couples because definition of marriage is fundamental and understood.

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

Held that state marriage laws did not violate due process and equal protection clauses of state constitution and did not violate state Equal Right Amendment (for sex discrimination).

**Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).**

Held that there is no fundamental right to same-sex marriage under the state constitution but remanded to the lower court to determine if the state had a compelling interest to justify the marriage statute as a classification based on sex.

*Additional procedural notes:* On remand the intermediate court of appeals held that the state did not have a compelling interest, *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Cir. Ct. of Haw. Dec. 3, 1996), but a state constitutional amendment authorized the legislature to define marriage as between a man and a woman, HAW. CONST. art. I, § 23 (amended 1998).

**Dean v. D.C., 653 A.2d 307 (D.C. 1995).**

Held that gender-neutral marriage statutes did not include same-sex couples and no due process or equal protection claim to same-sex marriage (no majority on constitutional reasoning).

**Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998).**

Held that state marriage statutes violated a fundamental right to choose one's partner.

*Additional procedural notes:* Court set further hearings to require the state to present a compelling interest to justify excluding same-sex couples from marriage. While further court action was pending, Alaska amended its constitution to ban same-sex marriage. ALASKA CONST. art. I, § 25 (amended 1999).

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

Held that denying the rights and benefits of marriage to same-sex couples violated the state constitution's common benefits clause.

*Additional procedural notes:* The Vermont legislature enacted civil unions to comply with this ruling, which did not require full marriage equality.

**Standhardt v. Superior Court ex rel. County of Maricopa, 77 P.3d 451 (Ariz. Ct. App. 2003).**

Held that there is no fundamental right to same-sex marriage, and it is not required by state constitution privacy provisions. No equal protection violation because same-sex marriage is not a fundamental right.

**Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003).**

Held that marriage is a fundamental right, and the state cannot deny that right to same-sex couples. The court did not consider whether sexuality was a suspect classification because it held that the state could not satisfy rational basis review.

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

Held that the state's Defense of Marriage Act did not violate state equal protection or due process guarantees.

**Li v. State, 110 P.3d 91 (Or. 2005).**

Held that state constitutional amendment and previous statutes defined marriage as between a man and a woman. The court refused to formally consider a claim that the benefits of marriage could be separated from the institution.

*Additional procedural notes:* The lower court held that same-sex couples must be given the right to same-sex marriage after a court challenge was initiated when Multnomah County officials began issuing marriage licenses to same-sex couples. *Li v. State*, No. 0403-03057, 2004 WL 4963162 (Cir. Ct. of Or. Apr. 29, 2004), *rev'd*, 110 P.3d 91 (2005). While the case was on appeal to the Supreme Court of Oregon, the state amended its constitution to define marriage as between a man and a woman. *See* OR. CONST. art. XV, § 5a (amended 2004). The decision of the state supreme court was based on this amendment.

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

Held that the state domestic relations law did not violate due process or equal protection and could not be construed to include same-sex couples.

**Andersen v. King County, 138 P.3d 963 (Wash. 2006).**

Held that sexual orientation is not a protected classification for equal protection and statutes satisfy rational basis because of state interest in procreation and child rearing. Marriage statute does not violate due process because there is no history and tradition of same-sex marriage.

**Lewis v. Harris, 908 A.2d 196 (N.J. 2006).**

Held that same-sex marriage was not a fundamental right but that the state must provide the same rights and benefits of marriage to same-sex couples under equal protection analysis.

**Conaway v. Deane, 932 A.2d 571 (Md. 2007).**

Upheld state marriage statutes because they did not classify on the basis of sex; sexual orientation was not a suspect classification; and the right to same-sex marriage was not a fundamental right. Interest in protecting procreation was over and under inclusive, but allowed under rational basis review.

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

Held that sexual orientation is a suspect classification and the state could not meet strict scrutiny for its marriage statutes. Also held that same-sex couples are protected by the fundamental right to marriage, but strict scrutiny analysis not formally based on fundamental rights.

*Additional procedural notes:* This decision was overturned by Proposition 8, a voter approved constitutional amendment. CAL. CONST. art. I, § 7.5 (amended 2008). In the federal case challenging Proposition 8, the Federal District Court held that it violated the equal protection clause of the federal constitution. *See Perry v. Schwarzenegger*, No. C 09-2292 VRW, 2010 WL 3025614 (N.D. Cal. Aug. 4, 2010). This was based on extensive findings of fact that show that the state has no rational basis to provide marriage to opposite-sex couples and not same-sex couples, and the proposition was passed based on animus towards a social group. *Perry* is presently on appeal.

**Kerrigan v. Commissioner of Public Health, 957 A.2d 407 (Conn. 2008).**

Held that sexual orientation is a quasi-suspect classification and gays and lesbians have a legally cognizable injury despite state provision of civil unions. Uniformity of laws with other jurisdictions and traditional definition of marriage are not sufficient state interests to deny same-sex couples right to marry.

**Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).**

Held that sexual orientation is a suspect classification and receives heightened scrutiny. The court did not decide whether sexual orientation received intermediate or strict scrutiny because it held that the state could not meet intermediate scrutiny.