SLIGHTING THE SEX-DISCRIMINATION CLAIM IN *HOLLINGSWORTH V. PERRY*

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Among the many ways that *Hollingsworth v. Perry*[1] has made history is through the district court's holding on what I will call the "sex-discrimination claim" (or "theory")—that is, the claim that discrimination against same-sex couples is a form of *sex* discrimination. With Chief Judge Vaughn R. Walker's ruling, the United States District Court for the Northern District of California became the first court to hold that a state's ban on same-sex marriage[2] discriminated against lesbian, gay, and bisexual individuals on the basis of *sex*, in addition to discriminating against them based on sexual orientation, in violation of the Fourteenth Amendment to the United States Constitution.[3]

The ruling on this issue came as a surprise to many observers, given that the sex-discrimination theory had not, with rare exception, proven successful in the many state court cases where it had been tested—including in California, where the state supreme court, considering the theory as a matter of state law, unanimously rejected it in 2008.[4] Given the theory's poor track record, I did not believe that the *Perry* district court's ruling would alone suffice to shift the course of marriage equality litigation with respect to this issue. However, I did expect the sex-discrimination theory to gain *some* sort of boost, given that *Perry*—one

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1. Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *cert. granted sub nom.* Hollingsworth v. Perry, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

2. Article I, Section 7.5 of California's Constitution, known as "Proposition 8," provides that "[o]nly marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, § 7.5.

3. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d at 996. Other courts had reached similar conclusions on sex-discrimination claims under state law. *See, e.g.*, Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993) (plurality opinion) (requiring application of strict scrutiny to denial of marriage licenses to same-sex couples), *superseded by constitutional amendment*, HAW. CONST. art. 1, § 23; Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998) (finding Alaskan Constitution required application of strict scrutiny to denial of marriage licenses to same-sex couple), *superseded by constitutional amendment*, ALASKA CONST. art I, § 25.

4. *In re* Marriage Cases, 183 P.3d 384, 439–40 (Cal. 2008), *superseded by constitutional amendment on other grounds*, CAL. CONST. art. I, § 7.5. *See generally* Clifford J. Rosky, Perry v. Schwarzenegger *and the Future of Same-Sex Marriage Law*, 53 ARIZ. L. REV. 913, 926–28 & n.96 (2011) (collecting cases and noting limited success of sex-discrimination theory); Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 168–69 & n.454 (2010) (collecting cases and observing that "[e]ven courts that have decided in favor of plaintiffs in same-sex marriage cases have almost universally avoided the question of whether limiting marriage to 'one man, one woman' reflects or reinforces sex-role stereotypes").

of the most important and high-profile same-sex marriage decisions ever issued—seemed, on a first read at least, to breathe some real life into it. Perhaps courts would still reject the theory, but surely some judges would feel obliged post-*Perry* to at least *address* the sex-discrimination claim in some meaningful way.

I was sorely mistaken. With minor exception, subsequent decisions addressing LGB rights, including marriage equality, have not only refused to accept the sex-discrimination claim, but they have generally shunted it aside with little reasoning or ignored it altogether[5]—including in cases where LGB-equality advocates have prevailed.[6] Plaintiffs in some recent cases, moreover, have not even advanced the argument—a marked change in strategy from earlier years.[7]

Why is this? It is not as if the *Perry* district court decision as a whole has been ignored. Even after the Ninth Circuit decided the appeal, judges have continued to cite the district court for various factual and legal propositions.[8] Was the sex-discrimination claim really so inherently unappealing and unpersuasive that the *Perry* district court's landmark ruling on that issue would have virtually *no* effect on subsequent cases?

Perhaps. But upon closer study of the opinion, I came to believe that the court's explanation of the sex-discrimination theory, while bold in some respects, is simply too truncated, too fragmented, and too incomplete to garner the serious attention it would otherwise deserve. The ruling that Proposition 8 discriminates based on sex looks like an after-thought, inserted after an already compelling ruling on other issues was complete. Given the weight of authority that existed against the sex-discrimination theory, it would have taken a more comprehensive treatment of the issue for the court's analysis of it to have any

5. *See, e.g.*, Jackson v. Abercrombie, Civ. No. 11–00734, 2012 WL 3255201, at *27 (D. Haw. Aug. 8, 2012) (rejecting *Perry* and holding that a statute limiting marriage to "a man and a woman" was "gender-neutral on its face"); Dragovich v. U.S. Dep't of the Treasury, 848 F. Supp. 2d 1091, 1104 (N.D. Cal. 2012). *But see In re* Balas, 449 B.R. 567, 577–78 (Bankr. C.D. Cal. 2011) (concluding that the federal Defense of Marriage Act is "gender-biased" because it deprives same-sex couples of federal benefits on the basis of their gender).

6. The Ninth Circuit's decision on appeal provides one obvious example of a pro-LGB ruling that declined to address the sex-discrimination theory; the court ruled for plaintiffs on other grounds. Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012). *See also* Diaz v. Brewer, 656 F.3d 1008, 1010 (9th Cir. 2011). *Cf.* Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 982 n.4 (N.D. Cal. 2012) (agreeing with the district court in *Perry* that the statutory refusal to recognize same-sex marriage constitutes discrimination based on sex, but declining to review the statute in question on that basis, instead analyzing it solely as discrimination based on sexual orientation).

7. *See, e.g.*, Plaintiff's Memorandum of Law in Opposition to Defendant-Intervenor's Motion to Dismiss at n.2, Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10 Civ. 8435), 2011 WL 3754422.

8. *See, e.g.*, Pedersen v. Office of Pers. Mgmt., No. 3:10–CV–1750, 2012 WL 3113883, *20 (D. Conn. July 31, 2012) (citing the district court decision in *Perry* as an example of a decision that has "concluded that homosexuals have suffered a long and significant history of purposeful discrimination"); Donaldson v. State, No. DA 11-0451, 2012 WL 6587677, *48 (Mont. Dec. 17, 2012) (Nelson, J., dissenting) (citing the district court decision in *Perry* for, *inter alia*, the proposition that a person generally does not choose his or her sexual orientation).

meaningful impact on subsequent cases.[9]

This is not to say that the future of the sex-discrimination theory depended on *Perry* alone; needless to say, many factors contribute to a theory's success or failure. But *Perry* is an important case, and it is one of few to accept the sex-discrimination claim; therefore, its manner of doing so should not be deemed insignificant. It should, however, be considered a disappointment.

In this brief comment on *Perry*, I will offer a critique of the way the district court handled the sex-discrimination claim. To do so, I will first briefly sketch out some of the most common arguments advanced by advocates pursuing the claim. I will then point out where the district court in *Perry* adopted or approximated those arguments, and where it missed, misplaced, or mishandled them.

The purpose here is not to provide a complete or even thorough defense of the sex-discrimination theory itself, much less convert those who reject it. Given space constraints, I assume that the reader is, like Chief Judge Walker and myself, sympathetic to the claim that prohibitions on same-sex marriage constitute a form of sex discrimination.[10] I aim to demonstrate, however, that even though the district court drew renewed attention to the often-maligned sex-discrimination theory, its analysis of that issue does not provide an adequate or appropriate model for advocates, litigants, and jurists hoping to advance the theory in other cases or other areas of litigation, including on appeal in *Perry* itself.[11]

9. A more comprehensive treatment of the issue might also have led the *Perry* plaintiffs to pursue the sex-discrimination claim more vigorously on appeal. Their merits brief to the Supreme Court, however, abandons the claim. *See* Brief for Respondents, Hollingsworth v. Perry (U.S. petition for cert. granted Dec. 7, 2012) (No. 12-144). More surprisingly, the brief does not even mention the district court's ruling in their favor on this issue. *Id.* at 9–11. Their brief in opposition to certiorari had included the sex-discrimination claim. *See* Brief in Opposition, Hollingsworth v. Perry (U.S. petition for cert. granted Dec. 7, 2012) (No. 12-144) 2012 WL 3683450 at *29-*30.

10. For more complete defenses of the sex-discrimination theory, see ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW 53–71 (2002), and Mary Anne Case, *What Feminists Have to Lose in Same-Sex Marriage Litigation*, 57 UCLA L. REV. 1199 (2010). *Cf.* Suzanne B. Goldberg, *Sticky Intuitions and the Future of Sexual Orientation Discrimination*, 54 UCLA L. REV. 1375, 1403–04 (2010). For a critique, see Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471 (2001). Professor Koppelman responds directly to Professor Stein in *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 UCLA L. REV. 519 (2001).

11. Though I criticize the district court's treatment of the sex-discrimination claim, I do not speculate in this comment on the *reasons* for the opinion's shortcomings on this issue. *Cf.* Case, *supra* note 10, at 1228 (criticizing *Perry* plaintiffs' counsel for paying insufficient attention to sex-discrimination arguments in their papers).

I.
HOW DOES A SAME-SEX MARRIAGE PROHIBITION DISCRIMINATE BASED ON SEX?

A. The Formal Equality Rationale

On what rationale does a ban on same-sex marriage, such as California's Proposition 8, constitute discrimination based on *sex*, in addition to (or as opposed to) discrimination based on sexual orientation? The simplest response, which I'll call the "formal-equality rationale," answers the question by looking first to the statutory (or constitutional) language and discerning what sort of classification it creates. Following this method, we quickly see that Proposition 8's text ("Only marriage between a *man* and a *woman* is valid or recognized in California" (emphasis added))—like that of analogous provisions in other states—classifies parties to marriage based on *sex*. As Massachusetts Supreme Judicial Court Justice Greaney commented in reference to a similar Massachusetts law, "That the classification is sex based is self-evident. The marriage statutes prohibit some applicants . . . from obtaining a marriage license . . . based solely on the applicants' gender."[12] We can similarly characterize Proposition 8.[13]

Aside from the plain text, the formal-equality rationale finds powerful support in Supreme Court precedent—most importantly, in the 1967 case of *Loving v. Virginia*, and the 1964 case of *McLaughlin v. Florida*. *Loving* struck down Virginia's anti-miscegenation law, which criminalized marriages between whites and blacks;[14] *McLaughlin* invalidated a state law banning interracial cohabita-

12. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 971 (Mass. 2003) (Greaney, J., concurring). Unlike Justice Greaney, I believe same-sex marriage prohibitions *also* discriminate against LGB people based on sexual orientation, because I understand "discrimination" to include intentionally subordinating state action regardless of the form of classification. But even though we can properly characterize same-sex marriage prohibitions as sexual-orientation discrimination, it remains the case that the law also deems formal sex classifications to be discriminatory and to therefore require justification. It is difficult to see how the text of Proposition 8 formally classifies individuals based on anything but sex when it refers to "a man and a woman."

13. The formal-equality rationale is not new: It arose repeatedly in debates over the failed Equal Rights Amendment in the 1970s, which would have enshrined a sex-discrimination prohibition into the text of the Constitution. Professors Eskridge and Hunter write:

> Because of the obvious formal equality claim that could be used to challenge marriage laws, the debate over the impact of the Equal Rights Amendment became an early venue for gay marriage arguments. [A Harvard law professor told] Congress that "if the law must be as undiscriminating toward sex as it is toward race, it would follow that laws outlawing wedlock between members of the same sex would be as invalid as laws forbidding miscegenation." ERA opponents seized on this argument, and ERA supporters sought to refute it.

WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 114 (3d ed. 2011) (citations omitted). *See also* Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J. L. & GENDER 461, 463–64 (2007).

14. *See* Loving v. Virginia, 388 U.S. 1, 11–12 (1967). *See also* Rosky, *supra* note 4, at 925 (noting the importance of *Loving* to the sex-discrimination argument).

tion.[15] Proponents of the formal-equality rationale persuasively argue that if, as *Loving* and *McLaughlin* teach us, it is *race* discrimination to bar one person from marrying (or cohabitating with) another because of either person's race, it must be *sex* discrimination to bar two people from marrying because of either person's sex.[16]

One common objection to the formal-equality rationale, known as the "equal application" objection, argues that because men *as a class* and women *as a class* receive "identical" treatment (in that members of each class may only enter into different-sex marriages), there is no discrimination based on sex.[17] Put differently, bans on same-sex marriage do not subordinate women to men or subordinate men to women. But this equal-application objection suffers some fatal flaws, and cannot overcome *Loving* and *McLaughlin*.

As an initial matter, the "equal application" response rests on the questionable assumption that the experience of marrying (and the right to marry) a woman is *identical* to the experience of marrying (and the right to marry) a man. If the two experiences or rights are not identical, then the claim that the sexes are subject to *identical* restrictions falls apart. As a doctrinal matter, moreover, the equal-restriction argument runs counter to *Loving*, which held that Virginia's anti-miscegenation statute could not be upheld on the rationale that each race was "equally" unable to marry somebody of a different race and was therefore treated "the same."[18] *McLaughlin* similarly rejected an equal-application defense.[19]

Relatedly and more importantly, however, the equal-application response disregards a core premise of our constitutional tradition, which is that constitutional rights belong to individuals and not to classes or groups. If Ms. Perry is denied the right to marry Ms. Stier because of Ms. Perry's sex, then there is sex discrimination at the individual level, and it makes no difference how the law treats the sexes as groups or classes.[20]

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15. McLaughlin v. Florida, 379 U.S. 184, 188–96 (1964).

16. The *Perry* plaintiffs relied on *Loving* to advance the formal-equality rationale before the Ninth Circuit. Brief for Appellees at 72–73, Perry v. Schwarzenegger, 681 F.3d 1065 (9th Cir. 2012) No. 10-16696, 2011 WL 2419868. *See also, e.g.*, Koppelman, *Defending the Sex Discrimination Argument*, *supra* note 10, at 522 n.13 (2001). Koppelman had presented similar arguments in earlier work. *See* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 211 (1994) ("*McLaughlin* thus stands for the proposition (which should be obvious even without judicial support) that if prohibited conduct is defined by reference to a characteristic, the prohibition is not neutral with reference to that characteristic.").

17. *See, e.g.*, *In re* Marriage Cases, 183 P.3d 384, 439–40 (Cal. 2008) (collecting cases that have held that "public or private actions that treat the genders equally but that accord differential treatment . . . to a couple based upon whether they are persons of the same sex or of opposite sexes . . . do not constitute instances of sex discrimination"); Koppelman, *Defending the Sex Discrimination Argument*, *supra* note 10, at 522–23 n.13 (describing and responding to the equal-application argument).

18. *Loving*, 388 U.S. at 11 & n.11. *See also* Rosky, *supra* note 4, at 927–28.

19. *McLaughlin*, 379 U.S. at 188–91 & n.7.

20. *See* Case, *supra* note 10, at 1219–20 (citing McCabe v. Atchison, Topeka & Santa Fe Ry.,

B. Sex Role Stereotyping

A distinct but related form of the sex-discrimination theory relies on a sex-stereotyping rationale.[21] As courts have observed in numerous contexts—including but not limited to marriage—"[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality."[22] The basic argument in the marriage context posits that sex-based restrictions on *who* may marry *whom* reflect and reinforce gender stereotypes about the roles of each sex. Widiss, Rosenblatt, and NeJaime explain:

> Broadly, [the sex-stereotyping] argument is that a restrictive marriage statute discriminates because it relies upon and perpetuates a system under which men and women occupy different marriage and family roles: men must "act like husbands" and women must "act like wives."[23]

To take a more specific example, laws restricting marriage to different-sex couples are often justified by the stereotype that a man brings essential "masculine" characteristics and perspectives to the children of a marriage, and that a woman brings the children essential "feminine" characteristics and perspectives.[24] In other contexts, the Supreme Court has made clear that traditional stereotypes about men's and women's perspectives and roles do not constitute a

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235 U.S. 151, 161–62 (1914)). *See also id.* at 1227–28; Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 970 (Mass. 2003) (Greaney, J., concurring) ("A classification may be gender based whether or not the challenged government action apportions benefits or burdens uniformly along gender lines. This is so because constitutional protections extend to individuals and not to categories of people.").

For a more thorough explication of objections to the formal-equality rationale, along with responses to each objection, see KOPPELMAN, THE GAY RIGHTS QUESTION, *supra* note 10, at 53–71.

21. *See* Widiss, Rosenblatt & NeJaime, *supra* note 13 (exploring the ways in which formal-equality arguments are (and should be) intertwined with arguments about stereotyping).

22. Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005) (alteration in original) (quoting Howell v. N. Cent. Coll., 320 F. Supp. 2d 717, 723 (N.D. Ill. 2004)). In *Dawson*, Judge Pooler made this observation in the context of Title VII sex-discrimination law, where courts have struggled to draw a principled distinction between sex-stereotyping and sexual-orientation discrimination in cases involving plaintiffs perceived to be LGB.

23. Widiss, Rosenblatt & NeJaime, *supra* note 13, at 469.

24. *See, e.g.*, *infra* notes 30–32 and accompanying text.

Speaking of homosexuality more broadly, Koppelman posits that

> [t]here is nothing esoteric or sociologically abstract in the claim that the homosexuality taboo enforces traditional sex roles. Everyone knows that it is so. The recognition that in our society homosexuality is generally understood as a metaphor for failure to live up to the norms of one's gender resembles the recognition that segregation stigmatizes blacks, in that both are "matters of common notoriety, matters not so much for judicial notice as for the background knowledge of educated men who live in the world."

Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, *supra* note 16, at 235 (footnote omitted).

permissible basis for a law.[25] Those relying on the sex-stereotyping rationale simply apply this clear Court precedent to a new context—same-sex marriage.

Theorists and jurists have also drawn on historic inequities, most notably the doctrine of coverture,[26] to demonstrate that the strict differentiation of the sexes in marriage today stems from marriage's historical role in subordinating women to men. The historical view reminds us that stereotyping is not just about specifying gender roles, but also (and more importantly) about allocating power.[27] Justice Johnson, for example, relied on this history in the Vermont case of *Baker v. State*, commenting in her concurrence that the sex classification in Vermont's marriage statutes was a "vestige of the historical unequal marriage relationship" and of the "outmoded conception that marriage requires one man and one women [to] creat[e] one person—the husband."[28]

But one need not know the history of marriage to see how sexual orientation and gender stereotypes overlap. Ironically, sometimes the overlap becomes especially evident in the way judges and litigants attempt to *justify* same-sex marriage prohibitions. That is, litigants and judges, in their briefs or opinions explaining why same-sex marriage prohibitions are *not* grounded in stereotypes and discrimination, have quite blatantly (and perhaps unwittingly) relied on stereotypes about the nature and roles of men and women.[29] A particularly egregious example comes from the plurality opinion in *Hernandez v. Robles*, which upheld New York's ban on same-sex marriage.[30] Writing for himself and two other judges on New York's Court of Appeals, Judge R.S. Smith wrote that "[i]ntuition 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

25. *See infra* notes 32, 56–58 and accompanying text.

26. The doctrine of coverture held that "the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband." 1 WILLIAM BLACKSTONE, COMMENTARIES 442. *See also* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 958 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *cert. granted sub nom.* Hollingsworth v. Perry, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

27. Professor Koppelman argues that "[i]n the same way that the prohibition of miscegenation preserved the polarities of race on which white supremacy rested, the prohibition of homosexuality preserves the polarities of gender on which rests the subordination of women." Koppelman, *Why Discrimination Against Lesbians and Gay is Sex Discrimination*, *supra* note 16, at 202.

28. Baker v. State, 744 A.2d 864, 912 (Vt. 1999) (Johnson, J, concurring in part and dissenting in part).

29. Deborah A. Widiss, Elizabeth L. Rosenblatt, and Douglas NeJaime explore this phenomenon in depth in *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, *supra* note 13, at 487–98. *Cf.* Petition for a Writ of Certiorari Before Judgment, at 20, Coalition for the Protection of Marriage v. Sevic, No. 12-689 (D. Nev. Nov. 26, 2012) (arguing in a brief opposing same-sex marriage rights that "[a] genderless marriage regime is and will be socially hostile and politically adverse to . . . the personally and socially valuable statuses and identities of *husband* and *wife*, each of which is a distinct mode of association and commitment that carries centuries and volumes of social and personal meaning" (citation and internal quotation marks omitted)).

30. Hernandez v. Robles, 855 N.E.2d 1, 4 (N.Y. 2006).

like."[31] Though Judge Smith's "intuition and experience" of what each sex is "like" told him that the legislature's bar on same-sex marriage was rational and not grounded in impermissible stereotype or discrimination, it apparently did not occur to him (or the judges joining his opinion) that his intuitive generalization about the nature of each sex might itself be an impermissible stereotype under the law.[32]

II.
THE SEX DISCRIMINATION CLAIM IN THE DISTRICT COURT IN *PERRY*

In light of the number of courts that had rejected or ignored the sex-discrimination theory in prior same-sex marriage cases, the district court's opinion in *Perry* was bound to have little effect on subsequent courts' (or litigants') treatment of the issue unless the court dedicated some serious attention to it. It did not.

The first sign that the court does not take the sex-discrimination claim seriously comes very early in the opinion, where the court summarizes the plaintiffs' Equal Protection Clause claims. The court explains:

> According to plaintiffs, Proposition 8 violates the Equal Protection Clause because it:
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> 1. Discriminates against gay men and lesbians by denying them a right to marry the person of their choice whereas heterosexual men and women may do so freely; and
> 2. Disadvantages a suspect class in preventing only gay men and lesbians, not heterosexuals, from marrying.[33]

The court fails to make up for this glaring omission of the sex-discrimination claim until the very end of the section, several sentences later. The court writes, "Plaintiffs argue that Proposition 8 discriminates against gays and lesbians on the basis of both sexual orientation and sex."[34] The Court again slights the sex-discrimination claim at the beginning of the Conclusions of Law section, where it summarizes its holding on equal protection without mentioning discrimination based on sex.[35]

Later in the opinion, toward the beginning of the equal protection section of the Conclusions of Law, the court addresses the issue again in a short section en-

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31. *Id.*

32. *See* United States v. Virginia, 518 U.S. 515, 533 (1996) (holding that justifications for sex classifications "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females"). *See also infra* notes 56–58 and accompanying text; Case, *supra* note 10, at 1125-26.

33. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 929 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *cert. granted sub nom.* Hollingsworth v. Perry, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

34. *Id.*

35. *Id.* at 991.

titled "Sexual Orientation or Sex Discrimination."[36] Here, the court concludes (correctly, in my view) that Proposition 8 discriminates both on the basis of sex and sexual orientation—and that these two forms of discrimination are "interrelated."[37] However, the court provides scant explanation of the sex-discrimination argument, undercutting its own conclusion that the statute does indeed discriminate on the basis of sex.

The Chief Judge begins this section by adopting the formal-equality rationale described earlier, writing:

> Perry is prohibited from marrying Stier, a woman, because Perry is a woman. If Perry were a man, Proposition 8 [which bans same-sex marriage] would not prohibit the marriage. Thus, Proposition 8 operates to restrict Perry's choice of marital partner because of her [Perry's] sex.[38]

So far, so good. But the court then jumps immediately into an explanation of how Proposition 8 *also* operates to restrict Perry's rights based on sexual orientation. While that explanation may be compelling, it is premature: The court has not yet fully presented the sex-discrimination theory in the section of its analysis purportedly dedicated to that issue; nor has the court fully presented the formal-equality rationale, which forms only one piece of the sex-discrimination theory. As Clifford J. Rosky has rightly observed, Chief Judge Walker "does not follow through on [the] conclusion that the law discriminates based on sex," and that in the equal protection analysis, the Chief Judge "analyzes Proposition 8 only as a law that discriminates based on sexual orientation."[39]

To flesh out the formal-equality argument, the court could have, first, reminded the reader of the text of Proposition 8, which appears only at the beginning of the opinion, far from the discussion of sex discrimination. In doing so, the court could have reminded the reader more clearly that Proposition 8 technically "classifies" parties to a marriage based on sex, not sexual orientation. With respect to case law affecting the sex-discrimination question, the court could have invoked either *McLaughlin v. Florida* or *Loving v. Virginia*—as virtually every other judge to adopt the sex-discrimination theory has done.[40] Finally, the

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36. *Id.* at 996.

37. *Id.* Unfortunately, the court's description is a bit confusing regarding this "interrelat[ion]"; the court writes, for example, that the sex-discrimination and sexual-orientation-discrimination claims are "distinct," but shortly thereafter deems them "equivalent." The inconsistency is never recognized or resolved.

38. *Id.*

39. Rosky, *supra* note 4, at 917. Professor Rosky lauds the district court for incorporating some of the sex-discrimination arguments into the due-process right-to-marry analysis; while I do not necessarily disagree with Professor Rosky's analysis on due process, I still regret that the arguments pertaining to sex discrimination did not feature more prominently in the section on sex discrimination.

40. *See, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 971–72 (Mass. 2003) (Greaney, J., concurring) (discussing Loving v. Virginia, 388 U.S. 1 (1967)); Baker v. State, 744 A.2d 864, 906 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part) (citing *Loving*);

court could have noted that by restricting marital decisions based on sex, Proposition 8 triggers heightened (intermediate) judicial scrutiny. The district court does none of these things.

To make matters worse, the court only expressly specifies the type of "classification" at issue when it refers to Proposition 8's supposed classification based on sexual orientation.[41] The court's few citations to *Loving*, moreover, do not appear in the context of the sex-discrimination discussion.[42] Indeed, the "Sexual Orientation or Sex Discrimination" section of the opinion is almost entirely bereft of case law, save a couple of citations to cases that discuss sexual-orientation discrimination without referencing its relation to sex discrimination.[43]

Chief Judge Walker does, thankfully, address the issue of sex stereotypes in *Perry*, and he follows in Justice Johnson's path, in part, by emphasizing their historical roots: "The evidence shows that the tradition of gender restrictions arose when spouses were legally required to adhere to specific gender roles."[44] Proposition 8's ban on same-sex marriage "thus enshrines in the California Constitution a gender restriction that [is] nothing more than an artifact of a foregone notion that men and women fulfill different roles in civic life."[45] Chief Judge Walker finds that "[g]ender no longer forms an essential part of marriage."[46]

The opinion also exposes the ways in which advocates for Proposition 8 exploited fears and stereotypes surrounding sex and gender in the campaign for passage. The Findings of Fact, for example, quote extensively from Proposition 8 advocates who quite brazenly relied on stereotyped notions of the roles of men and women, particularly with respect to child-rearing.[47] One advocate stated that, "God created the woman bride as the groom's compatible marriage companion"; another advocate says in a video that "moms and dads, male and female, complement each other. They don't bring to a marriage and to a family the same natural set of skills and talents and abilities. They bring to children the blessing of both masculinity and femininity."[48] Another advocate of Proposition 8 "[t]hank[ed] God for the difference between men and women" who were

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Baehr v. Lewin, 852 P.2d 44, 61-63 (Haw. 1993) (plurality opinion) (discussing *Loving*). *See also* Conaway v. Deane, 932 A.2d 571, 681 & n.52 (Md. 2007) (Battaglia, J., dissenting) (discussing *Loving*); Hernandez v. Robles, 855 N.E.2d 1, 29-30 (N.Y. 2006) (Kaye, C.J., dissenting) (discussing *Loving*); Andersen v. King County, 138 P.3d 963, 1039 (Wash. 2006) (Bridge, J., concurring in dissent) (discussing *Loving*).

41. *See, e.g.*, *Perry*, 704 F. Supp. 2d at 991 ("Proposition 8 . . . creates an irrational classification on the basis of sexual orientation."). *See also id.* at 997.

42. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 991–92 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *cert. granted sub nom.* Hollingsworth v. Perry, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

43. *See id.* at 996.

44. *Id.* at 998.

45. *Id.*

46. *Id.* at 993.

47. *Id.* at 975–76.

48. *Id.* at 976.

"meant to complete each other physically, emotionally, and in every other way."[49] "Also," the same advocate continued, "both genders are needed for a healthy home."[50] Another advocate warned that "fatherlessness has caused significant problems" and that to allow same-sex marriage would be to "intentionally" create "fatherless homes."[51]

As the district court opinion makes clear, these were not just the opinions of random members of the public. "The key premises on which Proposition 8 was presented" to voters by the official proponents, the court observes, included the idea that "[t]he ideal child-rearing environment requires one male parent and one female parent," as well as the notion that "[m]arriage is different in nature depending on the sex of the spouses."[52] The district court also notes that proponents of Proposition 8 told the public in official ballot materials that "the best situation for a child is to be raised by a married mother and father."[53]

I applaud the district court for calling attention to all of these statements, and others like them. I also appreciate that the district court draws connections between the different-sex requirement of today's marriage laws and the historical inequities epitomized by the doctrine of coverture. The problem, however, is that the district court makes essentially no effort to draw these striking facts and findings to the specific legal conclusion that Proposition 8 discriminates based on sex. That legal conclusion is premised almost entirely on the formal-equality rationale (sans citation), not on a sex-stereotyping theory; the evidence of sex stereotyping, meanwhile, is barely deployed to support the Conclusions of Law, and where it is, the court uses the evidence to shore up *other* arguments that are of the court's primary concern, particularly regarding the fundamental right to marry under the Due Process Clause. Indeed, the court's discussion of sex discrimination quotes *none* of the statements from Proposition 8 proponents emphasizing and extolling the supposedly different roles played by male and female spouses and parents.[54] No statements that are even remotely like them appear in that section; nor are any such statements even cited.[55]

This is deeply unsatisfying. In precedents the district court fails to cite, the Supreme Court has made clear that gender-based classifications, even where permissible, "must be applied free of fixed notions concerning the roles and abilities of males and females."[56] "Care must be taken," the Court has explained, "in ascertaining whether the statutory objective itself reflects archaic and stereotypic

49. *Id.*

50. *Id.*

51. *Id.* (citations omitted).

52. *Id.* at 930.

53. *Id.*

54. *See id.* at 996.

55. Though the Conclusions of Law repeatedly rely on the Findings of Fact, they do not once refer to Finding of Fact 61, which contains the numerous statements quoted above evincing sex stereotyping from various advocates of Proposition 8. *Cf. supra* note 51 and accompanying text.

56. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724–25 (1982).

notions."[57] In light of these decades-old holdings—which more recent cases have reinforced[58]—there would have been no difficultly in *Perry* for the district court to link its factual findings and observations regarding sex stereotyping to its specific legal conclusion on sex discrimination. Instead, the legal conclusions in the sex-discrimination analysis appear entirely unsupported by case-law, and with no references to the stunning facts from California that could have strengthened the legal conclusions.[59]

In short, the abundant evidence and arguments pointing to impermissible sex stereotyping are deployed by the court to support its analysis *not* of the sex-discrimination question, but of separate legal issues that it considered of greater concern: the due-process right to marry and the equal-protection argument regarding sexual orientation. I do not question that those other issues are critical, but I do question the decision not to refer to sex stereotyping when analyzing sex discrimination. The section specifically dedicated to the question of whether Proposition 8 discriminates based on sex answers that question in the affirmative, but it does so almost as an after-thought, with no reference to the Findings of Fact on sex stereotyping, no express reference to sex "classifications" or the text of Proposition 8, and most remarkably, no citation to any legal authority addressing discrimination based on sex.[60]

As other scholars have addressed at greater length,[61] drawing attention to the link between sex-discrimination and sexual-orientation discrimination can benefit all people, including and especially women, by more clearly exposing the diverse and often-subtle ways in which sexism still pervades our laws and maintains a grip on the public's understanding of women's (and men's) roles in society and in the family. Drawing the connection can also benefit LGB people by more strongly linking their constitutional grievances to forms of discrimination that have already been deemed invidious by decades of case law. Proposition 8 offered the district court an opportunity to draw these links, but the court failed to do so. Instead, its decision sends the troubling message that widespread evidence of sex stereotyping is not relevant to a holding on sex discrimination. It also sends the dangerous message that even where there is widespread evidence of blatant sex stereotyping, and even where the court concludes that a provision discriminates based on sex, this discrimination will not necessarily be of major concern or figure prominently in the analysis. Indeed, the decision supports the

57. *Id.* at 725.

58. *See, e.g.*, Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003). *See also* United States v. Virginia, 518 U.S. 515, 533 (1996) (holding that justifications for sex classifications "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females"). *Cf.* Glenn v. Brumby, 663 F.3d 1312, 1319–20 (11th Cir. 2011) (collecting "foundational" cases from the Supreme Court supporting the principle that "discriminatory state action could not stand on the basis of gender stereotypes").

59. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d at 996.

60. *See id.*

61. *See* sources cited *supra* note 10.

anomalous proposition that the presence of state-sponsored sex discrimination does not necessarily trigger heightened scrutiny where some other (more important?) classification is at issue. It would have perhaps been less dangerous to simply avoid ruling on the sex-discrimination question altogether, since courts may decline to address issues for countless unknown reasons.

Those who believe the sex-discrimination argument worth pursuing should, I suppose, cite the district court in *Perry*, as it remains a precedent on point and technically in their favor. But other decisions and scholarship that take the legal question of sex discrimination more seriously will ultimately lend more persuasive force in this struggle than the superficially appealing sex-discrimination argument from the district court in *Perry*.