STATE CONSTITUTIONAL DECISION-MAKING AND PRINCIPLES OF EQUALITY: REVISITING *BAKER V. STATE* AND THE QUESTION OF GENDER IN THE MARRIAGE EQUALITY DEBATE

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I. INTRODUCTION

In December 1999, the Vermont Supreme Court issued its decision in *Baker v. State*,[1] which held that the Vermont marriage law allowing only male-female couples to marry violated the "Common Benefits" Clause of the state constitution, and that same-sex couples must either be allowed to enter into marriage, or some alternative union with legal status and benefits substantially equivalent to marriage.[2] The decision led to the first civil union law in the nation, and eventually to the legalization of same-sex marriage in Vermont. In the years immediately following the decision,[3] and still today,[4] the *Baker* decision has received much attention, primarily for its holding that same-sex couples are entitled to the same legal benefits relative to marriage as opposite-sex couples, and also for its historical importance within the larger

* Professor of Law, Vermont Law School. I thank Amy Klind, J.D. Candidate, Seattle University School of Law, 2011, for her outstanding research on this project. I also thank Betsy Crumb, J.D. Candidate, Vermont Law School, 2011, and my assistant Ginny Burnham, for their editing, and the staff at the *Albany Law Review* for all of their hard work, and for their vision of how to commemorate International Women's Day. I would also like to thank Seattle University for providing the research support for this project while I was a visitor there in fall 2010. Of course, all views expressed are my own. I can be contacted at channa@vermontlaw.edu. Justice Denise Johnson retired from the bench in August 2011 after serving as an associate justice on the Vermont Supreme Court since 1990. I am delighted that the *Albany Law Review* was willing to offer some insight into her jurisprudence as we reflect upon her role as the first female justice on the Vermont Supreme Court, and celebrate her many accomplishments.

[1] Baker v. State, 744 A.2d 864 (Vt. 1999).

[2] *Id.* at 877.

[3] Lynn D. Wardle, *The Curious Case of the Missing Legal Analysis*, 18 BYU J. PUB. L. 309, 309 (2004) (noting that "[i]n the first two years and eight months since that decision was rendered . . . *Baker* was cited in at least 266 law review or journal articles").

[4] For example, Westlaw Keycite shows that the case has been cited in 1429 cases and secondary sources. *See generally* WESTLAW, www.westlaw.com (last visited May 9, 2011).

debate over marriage equality.

As both state and federal courts consider questions of marriage equality, the constitutionality of the Defense of Marriage Act, and other legal rights of gay and lesbian citizens, it is an opportune time to revisit the *Baker* decision and to consider what relevance that decision could have to current cases. In this essay, I humbly suggest that the most under-appreciated opinion in *Baker* is Justice Denise Johnson's concurring opinion in which she unequivocally states that denying same sex couples the right to marry is a "straightforward case of sex discrimination."[5] While there has been a great deal of scholarly discussion that discrimination on the basis of sexual orientation is, at its core, discrimination on the basis of gender, this theory has had little impact on courts considering marriage equality.

This essay examines the *Baker* decision with a focus on Justice Johnson's opinion, and explores the current dialogue about the relationship between gender and sexual orientation discrimination. It concludes with a sense that moving forward to issues beyond same-sex marriage, such as sexual identity discrimination and workplace rights, articulating such discrimination within a gendered framework, as well as frameworks of sexual orientation and human rights, might add both depth and dimension to our current understandings of the legal barriers to self-actualization, as we celebrate the 100th anniversary of International Women's Day.

II. *BAKER V. STATE*

The *Baker* case began when three Vermont couples who were denied marriage licenses filed a lawsuit in state court alleging both statutory and constitutional violations.[6] As Beth Robinson, lead counsel in *Baker* has explained, the legal strategy in the case was to get the court to apply a heightened level of scrutiny under the Common Benefits clause, which is the Vermont Constitution's analog to the Equal Protection clause.[7] To that end, the plaintiffs made essentially three arguments: that heightened scrutiny should apply because the marriage law discriminated on the basis of the protected classification of sex; the law discriminated on the basis of

[5] *Baker*, 744 A.2d at 905 (Johnson, J., dissenting in part).

[6] *Id.* at 867–68. For a history of the case, including detailed backgrounds on the plaintiffs, see Beth Robinson, *The Road to Inclusion for Same-Sex Couples: Lessons from Vermont*, 11 SETON HALL CONST. L.J. 237 (2001).

[7] Robinson, *supra* note 6 at 245–46.

the prohibited classification of sexual orientation; and the law discriminated with respect to a fundamental right.[8] Even absent heightened scrutiny, the plaintiffs argued that the state's primary justification for limiting marriage to only opposite-sex couples—the biological begetting of children—wasn't rational, even when one considered that many married couples do not or cannot reproduce, and that the state's interest in providing a stable home to those children was not at all furthered by forbidding same-sex couples who already had children to legally wed.

The state argued that under a rational basis review, the law was justified.[9] The principle purpose that the state advanced in justifying the statute was the government's interest in "furthering the link between procreation and child-rearing."[10] Vermont further argued that "since same-sex couples cannot conceive a child on their own, state-sanctioned same-sex unions 'could be seen by the Legislature to separate further the connection between procreation and parental responsibilities for raising children.'"[11]

When the court struck down the marriage statute as unconstitutional, rejecting the state's rationale for the law, the decision was largely hailed as a victory for the plaintiffs. In pertinent part, the court held that

> to the extent that the state's purpose in licensing civil marriage was, and is, to legitimize children and provide for their security, the statutes plainly exclude many same-sex couples who are no different from opposite-sex couples with respect to these objectives. If anything, the exclusion of same-sex couples from the legal protections incident to marriage exposes *their* children to the precise risks that the State argues the marriage laws are designed to secure against. In short, the marital exclusion treats persons who are *similarly* situated for purposes of the law, *differently*.[12]

Yet, despite this ruling, the court refused to grant an immediate remedy of marriage equality, and instead sent the issue back to the legislature to decide whether formal marriage equality, or a parallel statutory structure granting the same rights and responsibilities to same-sex couples, would be the popular will.[13] "We hold that the

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[8] *Id.*
[9] *Baker*, 744 A.2d at 911 (Johnson, J., concurring in part).
[10] *Id.* at 884 (majority opinion).
[11] *Id.* at 881.
[12] *Id.* at 882.
[13] *Id.* at 886.

State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. That the State could do so through a marriage license is obvious. But it is not required to do so . . . ."[14] This paved the way for Vermont's Civil Union law, which created a separate, but arguably equal, legal structure for same-sex couples.

Thus, it has always struck me that there was a curious disconnect between the case's iconoclastic reputation and the actual holding of the case, which was quite moderate, if not conservative. This might explain why the legal analysis in *Baker* has never played any major role in doctrinal and theoretical discussion of marriage equality in either cases or the academic literature. Not only is it restrained in its remedy, but the decision also lacks the kind of precise and careful legal argument that could help guide other courts in grounding decisions on marriage equality on pre-existing theories of equality and inclusion.

The decision, authored by Chief Justice Jeffrey Amestoy, undertook what could be best described as an imprecisely articulated heightened standard of review, finding that "in the light of history, logic, and experience, we conclude that none of the interests asserted by the State provides a reasonable and just basis for the continued exclusion of same-sex couples from the benefits incident to a civil marriage license under Vermont law."[15] This analysis rested primarily on the assertion that all classifications under the Common Benefits clause, whether economic, social, or affecting the rights of particular groups, were subject to heightened scrutiny under the Vermont Constitution.[16] It relied on an amorphous concept of factors and balancing tests, and failed to articulate a standard of review in an analytic framework already familiar to inquiries into invidious discrimination based on group characteristics. Indeed, one only need ponder the majority opinion's final line—beautiful and often quoted—to understand both the celebration and frustration of the opinion itself:

The challenge for future generations will be to define what is

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[14] *Id.* at 887.

[15] *Baker*, 744 A.2d at 886.

[16] *Id.* at 879. Here, the court articulated a three-part test to describe its Common Benefits Clause analysis. In particular, the Court concluded that in analyzing whether a classification violates the Common Benefits Clause, the Court should weigh three factors: "(1) the significance of the benefits and protections of the challenged law; (2) whether the omission of members of the community from the benefits and protections of the challenged law promotes the government's stated goals; and (3) whether the classification is significantly underinclusive or overinclusive." *Id.*

> most essentially human. The extension of the Common Benefits Clause to acknowledge plaintiffs as Vermonters who seek nothing more, nor less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship is simply, when all is said and done, a recognition of our common humanity.[17]

Here, one sees Justice Amestoy intentionally rejecting a framework of difference, and instead trying to universalize the marriage experience to support the outcome. It is the kind of reasoning that both rings true in our hearts and falls deaf on the ears of legal purists.

Of particular note is the decision's refusal to identify sexual orientation as a suspect classification under the Common Benefits clause, thereby analogizing to tiered scrutiny under Equal Protection analysis, and articulating a theory of equality that would have been of more persuasive value to both other states and federal courts. This criticism was the point of Justice John Dooley's concurring opinion, in which he takes the majority to task for not approaching the case explicitly as a civil rights case.[18] For Justice Dooley, the case was about sexual orientation and why gay and lesbian Vermonters should have been treated as a suspect class under the Common Benefits clause.[19] As Justice Dooley noted,

> in the end, the approach the majority has developed relies too much on the identities and personal philosophies of the men and women who fill the chairs at the Supreme Court, too little on ascertainable standards that judges of different backgrounds and philosophies can apply equally, and very little, if any, on deference to the legislative branch.[20]

For Justice Dooley, the most persuasive and enduring analysis would have addressed directly the question of sexual orientation discrimination implicit in the marriage statute, while preserving the latitude of the legislature to create distinctions that did not implicate otherwise unprotected groups.[21] Thus, Justice Dooley's concurrence is relatively formalistic and doctrinally precise, especially in comparison to Justice Amestoy's more meandering analysis.[22]

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[17] *Id.* at 889.
[18] *Id.* at 890 (Dooley, J., concurring).
[19] *Id.* at 893.
[20] *Baker*, 744 A.2d at 897 (Dooley, J., concurring).
[21] *Id.* at 889–90.
[22] *See id.* at 889–97.

To the extent that the *Baker* decision did recognize that same-sex couples were entitled to the same benefits of marriage as opposite-sex couples, the decision's place in history is well-deserved. But to the extent that the remedy it offered was not marriage equality, but rather a remand to the legislature to provide either marriage or a parallel structure to marriage, its place in history is less admirable, at least in terms of its justification for suggesting that a separate-but-equal structure for same-sex marriage would be constitutional. Such a justification might have been easier to rationalize had the court not applied heightened scrutiny, but since it applied such scrutiny, its remedy was incongruent with its substantive rationale. To that end, the case leaves some ambivalence about both its legal usefulness and its ultimate outcome.

III. JUSTICE JOHNSON'S CONCURRING AND DISSENTING OPINION

It is within and perhaps because of this ambivalence about the reasoning and legal outcome of *Baker* that Justice Denise Johnson's opinion has been largely overlooked by both commentators and courts. Yet, Justice Johnson's opinion is notable for two reasons. First, she was the only dissenter from the majority's remedy and she strongly criticized the decision "to send plaintiffs to an uncertain fate in the political cauldron," and declared that she "would grant the requested relief and enjoin defendants from denying plaintiffs a marriage license based solely on the sex of the applicants."[23] She goes on to argue, "[t]hat remedy would provide prompt and complete relief to plaintiffs and create reliable expectations that would stabilize the legal rights and duties of all couples."[24] Here, those who have long-objected to the court's deference to the legislative process to fashion alternative remedies for civil rights violations will find much in the opinion to draw upon.

Second, and most importantly, is that Justice Johnson articulates a theory that limiting marriage to only opposite-sex couples is sex discrimination.[25] In doing so, she provides not only an alternative legal framework for analyzing questions of marriage equality, but she also exposes why marriage in its traditional form served the interests of men, and thus she understands that the struggle for marriage equality is larger than just the question of the rights of

[23] *Id.* at 898 (Johnson, J., dissenting in part).
[24] *Id.*
[25] *Id.* at 905–06.

gay and lesbian citizens.[26] Marriage equality is fundamentally a question of individual rights, not group rights, which broadens its political and moral appeal beyond any particular political agenda.

Johnson makes two arguments relative to gender. First, and somewhat obviously, the marriage statute itself is sex-based on its face.[27] She blatantly rejects the state's argument that

> the marriage statutes do not discriminate on the basis of sex because they treat similarly situated males the same as similarly situated females. Under this argument, there can be no sex discrimination here because "[i]f a man wants to marry a man, he is barred; a woman seeking to marry a woman is barred in precisely the same way. For this reason, women and men are not treated differently."[28]

Justice Johnson finds this argument unpersuasive, suggesting that if both a man and a woman want to marry the same person, one could, and the other could not, based purely on their sex.[29] This argument is logical and straightforward, but not entirely satisfactory only in that it doesn't appeal to the deeper question of why such a classification would exist in the first place.

In fairness, Justice Johnson was not the first judge to articulate the theory that marriage discrimination is sex discrimination on its face. In 1993, the Hawaiian Supreme Court made a similar argument that such statutes are facially discriminatory.[30] In applying strict scrutiny to sex-based classifications under the Hawaiian Constitution's Equal Rights Amendment, the court found its marriage statute presumptively unconstitutional.[31] Relying on *Loving v. Virginia*, the plurality explained how the mere existence of the gendered classification, even when applied equally to both sexes, constituted sex discrimination in the same way that Virginia's marriage law prohibited both blacks and whites from marrying each other.[32] But there is little in the *Hawaii* opinion that explains why such a classification confines both men and women to traditional gender roles, and why it supports male hierarchy within the context of marriage.

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[26] *Id.* at 908 (explaining how historically, a woman's legal existence was based on her husband).

[27] *Baker*, 744 A.2d at 905–06 (Johnson, J., dissenting in part).

[28] *Id.* (quoting Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 19 (1994)).

[29] *Id.*

[30] Baehr v. Lewin, 852 P.2d 44, 60–61 (Haw. 1993).

[31] *Id.* at 67.

[32] *Id.* at 67–68.

It is on this later point that Justice Johnson's opinion is most compelling. Justice Johnson's second argument—that the sex-classification is based in sex-stereotyping—is the most enduring and of most use to current litigation. She writes:

> Viewing the discrimination as sex-based . . . is important. Although the *original* purpose of the marriage statutes was not to exclude same-sex couples, for the simple reason that same-sex marriage was very likely not on the minds of the Legislature when it passed the licensing statute, the *preservation* of the sex-based classification deprives lesbians and gay men of the right to marry the life partner of their choice.[33]

She goes on to discuss the history of marriage as it relates to gender:

> There is no doubt that, historically, the marriage laws imposed sex-based roles for the partners to a marriage—male provider and female dependent—that bore no relation to their inherent abilities to contribute to society. Under the common law, husband and wife were one person. The legal existence of a woman was suspended by marriage; she merged with her husband and held no separate rights to enter into a contract or execute a deed. She could not sue without her husband's consent or be sued without joining her husband as a defendant. Moreover, if a woman did not hold property for her "sole and separate use" prior to marriage, the husband received a freehold interest in all her property, entitling him to all the rents and profits from the property. . . .
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> . . . The question now is whether the sex-based classification in the marriage law is simply a vestige of the common-law unequal marriage relationship or whether there is some valid governmental purpose for the classification today.[34]

In examining what rationale the state had for maintaining gender classifications, she particularly takes to task the state's assertions that:

> (1) marriage unites the rich physical and psychological differences between the sexes; (2) sex differences strengthen and stabilize a marriage; (3) each sex contributes differently

[33] *Baker*, 744 A.2d at 906 (Johnson, J., dissenting in part).

[34] *Id.* at 908–09 (citations omitted).

> to a family unit and to society; and (4) uniting the different male and female qualities and contributions in the same institution instructs the young of the value of such a union.[35]

The state even relied on "Carol Gilligan's *In a Different Voice: Psychological Theory and Women's Development* (1982), to support its contention that there are sex differences that justify the State requiring two people to be of opposite sex to marry."[36] The state then suggested that sex diversity in marriage paralleled arguments that women bring a different voice to legal theory and practice.[37]

When reading this, one most certainly has to ask whether the state was serious when it made such an argument. In many ways, the state simply reiterates a long-held stereotype that women and men are so fundamentally different that there is some biological or ordained role that each must play within the marital context. It is precisely this understanding of the difference in gender roles that has long-justified the exclusion of women from public life. One need only hearken back to Justice Bradley's concurring opinion in *Bradwell v. Illinois*,[38] in which he justified the refusal to allow Myra Bradwell admission to the bar on the grounds that "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of women are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator."[39] The State essentially made the same argument—that there are proper roles of women and men which justify opposite-sex marriage.

Of course, Justice Johnson would have none of this. She responds,

> while it may be true that the female voice or point of view is sometimes different from the male, such differences are not necessarily found in comparing any given man and any given woman. The State's implicit assertion otherwise is sex stereotyping of the most retrograde sort. Nor could the State show that the undoubted differences between any given man and woman who wish to marry are more related to their sex than to other characteristics and life experiences. In short, the "diversity" argument is based on illogical conclusions from stereotypical imaginings that would be condemned by

[35] *Id.* at 909.
[36] *Id.*
[37] *Id.*
[38] Bradwell v. Illinois, 83 U.S. 130 (1872).
[39] *Id.* at 141 (Bradley, J., concurring).

the very case cited for its support.[40]

For Justice Johnson, the marriage law is a vestige of the common-law unequal marriage relationship that could find no other justifications but for those based on improper gender stereotyping, or those otherwise wholly arbitrary.[41] It is not that the legislature intended to exclude same-sex couples to enhance male privilege within marriage, but rather that the justification for the current law had to be based on something other than historical stereotypes of gender roles.[42] To that end, Justice Johnson rejected the state's clearly sexist justifications for the law and thus, as well as striking down the statute, would have immediately granted same-sex couples the right to marry.[43]

Interestingly, the majority, in a very lengthy footnote, takes serious issue with Justice Johnson's gendered analysis.[44] Here the Court make two points: first, that the statute is gender neutral in that it treats both men and women equally—both are prohibited from same-sex marriage, and thus neither sex is discriminated against relative to the other.[45] Second, the Court finds no gender-discriminatory purpose behind what it classified as a gender-neutral law.[46] It notes, in response to Justice Johnson's assertion that the law is based on improper gender stereotyping that,

> [i]t is one thing to show that long-repealed marriage statutes subordinated women to men within the marital relation. It is quite another to demonstrate that the authors of the marriage laws excluded same-sex couples because of incorrect and discriminatory assumptions about gender roles or anxiety about gender-role confusion. That evidence is not before us. Accordingly, we are not persuaded that sex discrimination offers a useful analytic framework for determining plaintiffs' rights under the Common Benefits Clause.[47]

Thus, the majority misses the key point in Justice Johnson's analysis. Marriage, as traditionally defined as between a man and a woman, was rooted in a broader legal regime that provided

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[40] *Baker*, 744 A.2d at 910 (Johnson, J., dissenting in part).
[41] *Id.* at 911–12.
[42] *Id.* at 906 n.11.
[43] *Id.* at 906–07.
[44] *Id.* at 880–81 n.13 (majority opinion).
[45] *Id.* at 880 n.13.
[46] *Id.*
[47] *Id.* at 880–81 n.13.

married men with control over married women, and relegated the sexes to separate spheres.[48] Despite the fact that a differentiated legal status between husbands and wives has since been removed, the state cannot rely on antiquated notions of gender roles to justify its prohibitions. Thus, the justification that marriage is intrinsically linked to child-bearing and child-rearing, and the justification that sex differences within marriage somehow make for more stable unions, really are based on now antiquated notions about what it means to be a wife and a husband. There is no escaping a traditional marriage's sexist past.

IV. THE MISSING ISSUE IN MARRIAGE EQUALITY CASES

Given Justice Johnson's compelling and almost obvious argument that traditional marriage laws are gender discrimination, both on their face and because of improper gender stereotyping, her reasoning has yet to be persuasive to other courts examining these questions. No majority opinion in either state or federal court has found traditional marriage laws to be either facially sex discrimination or sex stereotyping since *Baker*. There have been only two notable non-majority opinions beyond Justice Johnson's opinion that have adopted this theory.[49] In a concurring opinion in *Goodridge v. Department of Public Health*, the Massachusetts case on that state's marriage law, Justice John Greaney also identified the denial of marriage to same-sex couples as a classification based on sex.[50] "The marriage statutes prohibit some applicants, such as the plaintiffs, from obtaining a marriage license, and that prohibition is based solely on the applicants' gender. As a factual matter, an individual's choice of a marital partner is constrained because of his or her own sex."[51] Justice Greaney also argued that denying marriage to same-sex couples constituted sex stereotyping: "the case requires that we confront ingrained assumptions with respect to historically accepted roles of men and women within the institution of marriage and requires that we reexamine these assumptions."[52]

Similarly, in *Hernandez v. Robles*, Chief Judge Judith Kaye, in

[48] *Id.* at 908–09 (Johnson, J., dissenting in part).

[49] *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 971–972 (Mass. 2003) (Greaney, J., concurring); Hernandez v. Robles, 855 N.E.2d 1, 29–30 (N.Y. 2006) (Kaye, J., dissenting).

[50] *Goodridge*, 798 N.E.2d at 971 (Greaney, J., concurring).

[51] *Id.*

[52] *Id.* at 973.

her dissenting opinion, found that excluding same-sex couples from marriage discriminates on the basis of sex.[53] Judge Kaye did not explicitly define the issue as one of sex stereotyping; however, she did analogize to *Loving*, and thereby suggests that New York's marriage law is invidious discrimination.[54] These are the only reported opinions that echo Justice Johnson's analysis.

This failure to analyze same-sex marriage as a form of sex discrimination is not just confined to legal decision-making. Popular understanding of this question, as often reflected in media analysis, also confines the marriage equality question solely to that of discrimination on the basis of sexual orientation. As Susan Appleton persuasively observes:

> Certainly, I cannot catalog here (or even recall) every examination of same-sex marriage that I have recently encountered in the media. Yet, I feel confident that a sex discrimination or gender equality analysis would have caught my attention, given both the way I have watched family law evolve for almost thirty years as a teacher of the subject and my intense interest in modern family law's approach to gender. Empirical data support my intuitive conclusion. A survey of news articles over the last two years disclosed 28,179 articles about same-sex marriage, with only 64 (or 0.23%) plausibly raising the sex discrimination issue in an explicit fashion.[55]

Appleton goes on to document that despite the fact that many legal scholars, including Sylvia Law,[56] Andrew Koppelman,[57] and Cass Sunstein,[58] have all developed theories which expose the gender hierarchy that sex-restrictive marriage statutes perpetuate, neither courts nor common-discourse have fully embraced such an understanding.[59] Appleton speculates as to the many reasons why

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[53] *Hernandez*, 855 N.E.2d 1, 25 (Kaye, J., dissenting).

[54] *Id.*

[55] Susan Frelich Appleton, Note, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL'Y REV. 97, 101 (2005) (citations omitted).

[56] Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (1988).

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

[58] Sunstein, *supra* note 28, at 1. *See also* John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119 (1999); Sandi Farrell, *Reconsidering the Gender-Equality Perspective for Understanding LGBT Rights*, 13 LAW & SEXUALITY 605 (2004).

[59] Law, *supra* note 56, at 218; Koppelman, *supra* note 57, at 158–60; Sunstein, *supra* note 28, at 16, 23.

this might be so, from questions around the meaning of gay rights and definitions of marriage, to political questions as to how to advance the civil rights of gays and lesbians.[60] What she terms "gender talk" may not be perceived as either useful or helpful, or even necessary, given decisions such as *Baker*, in which the court granted marriage equality without reliance on a gendered argument.[61]

More recently, Deborah Widiss, Elizabeth Rosenblatt, and Douglas NeJaime highlight many of the benefits of seeing the issue as one of sex discrimination. "[S]ex discrimination has the potential to be a particularly powerful tool. It has a logical strength that is easy to grasp: the laws at issue clearly use sex-based classifications in prescribing that a man may only marry a woman and that a woman may only marry a man."[62] Focusing the issue as one of sex discrimination may also find support with people who would not necessarily advocate against discrimination of gays and lesbians. "As a practical matter, it elevates the level of scrutiny applied to discriminatory marriage laws from the rational basis review commonly afforded classifications based on sexual orientation to the heightened intermediate or, in some states, strict scrutiny afforded classifications based on gender."[63] It is their contention that exposing more deliberately the sex-stereotyping implicit in traditional marriage statutes will expose how such statutes are reliant upon notions of the different, and often unequal, roles each gender is expected to perform in the context of marriage.[64]

Other scholars have made similar arguments as to the importance of incorporating gender discrimination arguments beyond just the marriage equality debate. For example, Cary Franklin argues that the anti-stereotyping theory is important for current controversies in sex discrimination law.[65]

> Situating same-sex marriage claims in the context of this broader anti-stereotyping jurisprudence would help to illustrate the constitutional infirmities of the stereotyped justifications courts are increasingly using to uphold the sex

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[60] Appleton, *supra* note 55, at 122–23.

[61] *Id.* at 100.

[62] Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461, 464 (2007).

[63] *Id.*

[64] *Id.*

[65] Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010).

> classification in marriage. It would also highlight a dimension of these cases that often gets lost even when gay and lesbian plaintiffs win—namely that laws restricting the right to marry to "one man, one woman" reflect and reinforce a thickly gendered conception of sex roles and what it means to be a "husband" or a "wife." The enforcement of these roles has deprived women and gay men of equal social status, and it has "impeded both men and women from pursuit of the very opportunities that would have enabled them to break away from familiar stereotypes." It has defined not only men's and women's roles as spouses but also their roles as citizens, workers, parents, and children. Making these connections visible would help to demonstrate that although equal protection claims challenging the marital sex classification itself are relatively new, they are deeply rooted in an antidiscrimination project in which the Court has been engaged for the past forty years.[66]

There is both a pragmatic and principled strand to this argument. It is pragmatic in that, as Franklin asserts, courts, both state and federal, have had a long history of grappling with questions of sex classifications and gender stereotyping.[67] Even though the issues of marriage equality or workplace rights for gay men and lesbians may be recent, courts are not without precedent in routinely striking down classifications that reinforce gender stereotypes.

The argument is also principled in that it bears witness to at least something that is really going on when we confine marriage to heterosexual relationships, or refuse to forbid employers from firing someone because of their actual or perceived sexual preference regardless of their job performance. Both legislative and private discrimination can be motivated by specific animus toward gay men and lesbians because of their intimate and sexual relationships, as much as animus toward people because they aren't the right kind of woman or the right kind of man. This was one problem with the now repealed "Don't Ask, Don't Tell" policy. While some lawmakers and military personnel may be willing to turn a blind eye to what people did in private, they did not want to be confronted with challenges to traditional heterosexually-defined gender roles in public. What was a threat to the status quo is not private sexual

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[66] *Id.* at 172 (quoting Ruth Bader Ginsberg, *Remarks on Women Becoming Part of the Constitution*, 6 LAW & INEQ. 17 (1988)).

[67] *Id.*

conduct, but the public expression of non-traditional gender roles. Homosexuality becomes both a threat to traditional marriage, and a threat to traditional femininity and masculinity (with masculinity always superior), because men won't act like men and women won't act like women. This is the essence of gender-stereotyping—treating people in a discriminatory manner because they cannot or will not conform. To that end, incorporating anti-stereotyping jurisprudence is not only a useful legal strategy, but also an honest and compelling descriptive understanding of what is really going on.

It should be noted that not all legal scholars share the views of Appleton, Widiss, Franklin, and others who contend that sex discrimination arguments are appropriate and advisable within this debate. For example, Edward Stein calls into question the validity and strength of considering same-sex marriage statutes as a form of sex discrimination.[68] He considers the issue more appropriately characterized as upholding homophobia rather than discrimination based on sex:

> While sexism plays a role in the justification of laws that discriminate against lesbians, gay men, and bisexuals, homophobia plays a more central role. Sexism and homophobia are mutually supporting but distinct belief systems. It mischaracterizes the nature of laws that discriminate against lesbians and gay men to see them as primarily harming women (or even as harming women as much as they harm gay men, lesbians, and bisexuals). Further, it mischaracterizes laws that discriminate on the basis of sexual orientation to see them as primarily justified by sexism rather than by homophobia.[69]

He considers traditional marriage laws to violate principles of equality because they discriminate on the basis of sexual orientation, and that considering the issue as one of sex discrimination "'closets,' rather than confronts, homophobia."[70]

Stein's point is well-taken. There is no doubt that lesbians and gay men experience discrimination that is often of a different kind of discrimination than straight women experience. Indeed, discrimination on the basis of sexual orientation may, in some instances, benefit straight women—particularly those who conform

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[68] Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471, 472 (2001).

[69] *Id.* at 500.

[70] *Id.* at 504.

to social expectations of how women should be. Stein is also quite right to point out that when the focus is on gender, it is gay men who become the unacknowledged victims. Therefore, it is critical that theories of discrimination, in which misogyny is central to the analysis, do not take precedence over theories of discrimination in which homophobia is central to the analysis.

But it is also true that advancing the legal rights of gay men and lesbians, and advancing the legal rights of women, all pose a threat to traditional male dominance and undermine traditional male masculinity. As Nancy Dowd has articulated in her work on masculinities and feminist theory, "[m]asculinity is defined as much by *men's relationship with other men* as it is with women. Many men feel powerless, not powerful, and this is linked more to their position vis-à-vis other men than to their position in relation to women."[71] In addition, she explains, "some of the *core elements of masculinity norms are negative ones*: not defining what masculinity is, but what it is not. The two key negatives to being a man are not being a girl or woman, and not being gay."[72] Thus, if we accept the premise that masculinity—as a socially constructed set of beliefs about what it means to a man—supports broader male privilege, then we must also accept that any attempt to redefine gender roles, including redefining what it means to be a man as well as a woman, threatens that male privilege, and is threatening to many men. It is at this focal point that both women's rights and gay and lesbian rights intersect.

Thus, while Stein's reluctance to include a gendered analysis in challenges to sexual orientation is understandable, some of his concerns could be mitigated by two intentional analyses. First, as many scholars have noted, there has been a trend in feminist theory to essentialize men—to treat them as all the same (which is usually to treat them as the enemy of women). This explains why gay men are often invisible in gendered analyses, and why there would be an understandable reluctance to rely upon an analytic framework that has neglected the ways in which male privilege has oppressed not only women, but also oppressed gender non-conforming men regardless of their actual sexual preferences.

Second, gendered analyses of discrimination have also been largely focused on white, straight women. Indeed, there has been

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[71] Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L. GENDER & SOC'Y 201, 209 (2008).

[72] *Id.*

much criticism of feminist legal theory for not incorporating the experiences of women of color, and for not examining the impact of age, class, ethnicity, and sexual orientation on women within in legal regimes.[73] Even today, while legal scholars have become much better about seeing the "inter-sectionality" of these dimensions, lesbian and bi-sexual women, and their specific concerns, are often absent from broader feminist discourse.[74] Thus, just as gay men have largely been lumped into the broader category of (white, straight, middle-class, middle-aged) men, so too have lesbian and bi-sexual women been lumped in with the broader category of (white, straight, middle-class, middle-aged) women. It is no wonder then that scholars such as Stein prefer to define the legal analysis as one of sexual orientation discrimination: feminist theory is often guilty of hetero-centrality.

In rethinking Justice Johnson's concurring opinion in *Baker* in light of these concerns of essentialism and hetero-centrality, it is fair to suggest that she is primarily concerned with how traditional marriage gave men greater rights, while stripping women of theirs. The focal point of unequal differentiation is between men and women. Those women, we must assume, could have been straight or gay or bi-sexual, but analytically, Justice Johnson presumes that the emblematic victim of traditional marriage was straight. She does not discuss that non-straight women often had no choice but to enter into heterosexual unions for economic survival, or how a legal regime that defined marriage as only between a man and a woman also could punish, quite severely, women who failed to conform to the expected norm of heterosexuality. Nor does she discuss how traditional marriage, which was rooted in and perpetuated a system of sex stereotyping and gender-norming, could be just as harmful to gender non-conforming men as to gender non-conforming women. Thus, she too is guilty of both essentializing the sexes, and assuming heterosexuality.

These observations should not be read as criticisms of her analysis. Rather, they highlight that to the extent that one employs

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[73] For classic articles on anti-essentialism in feminist theory, see Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 14 WOMEN'S RTS. L. REP. 297 (1992).

[74] Amber Ault, *Hegemonic Discourse in an Oppositional Community: Lesbian Feminist Stigmatization of Bisexual Women*, *in* QUEER STUDIES: A LESBIAN, GAY, BISEXUAL, AND TRANSGENDER ANTHOLOGY 204 (Brett Beemyn & Mickey Eliason eds. 1996).

a gendered analysis to questions of marriage equality, workplace discrimination, and other legal barriers to equality for gay men and lesbians, one should not rely upon it exclusively or predominately because it often fails to capture the nuance and complexity of how each of us individually experiences discrimination, and the many dimensions that discrimination can take. Gender is one dimension of discrimination, but not the only one, and for many, not the primary one. To that end, we might think of building legal arguments like we build a three-dimensional grid—with intersecting, yet distinct, lines of reasoning.

V. REVISITING *BAKER*: THE HUMANIST, THE (RADICAL) FORMALIST, AND THE FEMINIST

This three-dimensional grid analogy thus brings us back to the *Baker* decision in its entirety. If we look at each opinion in the case, Justice Amestoy's majority, Justice Dooley's concurrence, and Justice Johnson's concurrence and dissent, we get a sense of what that grid might have looked like had there been more agreement among the court. Justice Amestoy is a humanist: he sees marriage equality as essentially a human right, and his refusal to use suspect classifications in the analysis suggests that one line of the grid must focus on the universality of the human experience and the fundamental right of everyone to make decisions about how and who they love, unencumbered by the state except in those cases in which the state has an extremely good reason for doing so. I have always read Justice Amestoy's opinion more analogously to a fundamental rights analysis than an equal protection analysis, hampered by Vermont's peculiar Common Benefits clause. I have suspected that if the Vermont Constitution mirrored the Federal Constitution, he would have decided the case on due process grounds, similar to Justice Kennedy's opinion in *Lawrence v. Texas*,[75] in which the question of heightened scrutiny was obscured by a more basic sense that individuals should be treated as individuals when making private, personal decisions. Thus, while Justice Amestoy's reasoning may not have been doctrinally precise, it is genuine and heartfelt, and calls on the better part of each one of us—including legislators—to see past our own prejudice. But, on its own, it is incomplete.

That incompleteness then leads us to Justice Dooley's

[75] Lawrence v. Texas, 539 U.S. 558 (2003).

concurrence, in which he, like Stein and other scholars, sees prohibitions on same-sex marriage as rooted in homophobia.[76] Justice Dooley asks us also to see this as a question of civil rights as well as human rights, and points us directly to the experience of gay and lesbian Vermonters as members of a suspect class.[77] Justice Dooley is a formalist—preferring Equal Protection precedent of tiered scrutiny for political and social minorities—and a radical one at that for insisting, unlike in federal precedent, that sexual orientation be treated as a suspect class.[78] For Dooley, the analysis is incomplete unless we bear witness to the primary distinction the legislature has made between heterosexuality and homosexuality, preferring the former over the latter, similar to Jim Crow laws that favored white over black.

Finally, and just as meaningfully, Justice Johnson asks us to also see the implications of traditional marriage on gender equality, and particularly on the ways in which gender stereotyping, which is at the heart of traditional marriage, has unfairly and unjustifiably confined each gender to a particular role within the family and, consequently, within public life.[79] She is the feminist. This analysis is particularly useful if we look ahead to other issues, beyond marriage equality, to laws which protect people from gender non-conformity discrimination. Hers is a world in which the gender of a person and how she expresses it ought not determine her choices. This is analogous, albeit not the same, as Justice Dooley's insistence that the sexual orientation of a person should not determine his or her choices either.

Reexamined in this light, *Baker* is both brilliant and a failure. It was in the court's collective and nuanced understanding of marriage equality that it was brilliant. It was the first, and remains the only, decision to fully articulate such a broad range of theories as to why traditional marriage violates principles of equality. The decision stands as a compelling example of what inter-sectionality looks like in judicial decision-making. But it is a failure in that rather than celebrate each theory of equality as legitimate and reinforcing, the justices saw each theory as mutually exclusive. Perhaps it would have made no difference to the legacy of Justice Johnson's gendered analysis had her colleagues been willing to include, rather than dismiss, her reasoning. It may very well be that the gendered

[76] Baker v. State, 744 A.2d 864, 893 (Vt. 1999) (Dooley, J., concurring in part).
[77] *Id.* at 890–91.
[78] *Id.* at 893.
[79] *Id.* at 908–909 (Johnson, J., dissenting in part).

strand of sexual orientation discrimination is too nuanced and foreign for it to resonate with courts and the public. But it is a real argument, and one that both rings true individually and systemically. This essay has attempted to suggest that gender should neither take precedence to a human rights or sexual orientation framework when approaching issues of equality, nor should it be absent. *Baker*, with both its brilliance and its failure, suggests how both might be done.