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Celebrating the Differences That Could Make a Difference: United States v. Virginia and a New Vision of Sexual Equality

Courtney Megan Cahill
Florida State University College of Law

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Celebrating the Differences That Could Make a Difference: *United States v. Virginia* and a New Vision of Sexual Equality

COURTNEY MEGAN CAHILL*

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I. INTRODUCTION

I have taught Sexuality and the Law for the past five years, and each year when I begin the marriage section in that course my students, who as

* Associate Professor of Law, Roger Williams University, School of Law. Ph.D. (Princeton University); J.D. (Yale Law School); B.A. (Columbia University). I would like to thank the School of Law at Roger Williams University for providing financial assistance to complete this project, my research assistant, Arthur DeFelice, and the *Ohio State Law Journal* for sponsoring this wonderful symposium. All errors are my own.

veterans of Constitutional Law are well versed in the right to marry cases, almost uniformly expect to read *Loving v. Virginia*.¹ And why should I be surprised? That canonical marriage case struck down Virginia's anti-miscegenation statute—a marriage prohibition if there ever was one²—under the federal Constitution's due process and equality guarantees. In so doing, the *Loving* Court observed that “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men,”³ and made a simple yet profound statement that lends itself so beautifully to the marriage equality controversy: that for the government to distribute the right to marry to some but not to all, “is surely to deprive *all the State's citizens* of liberty without due process of law.”⁴ Indeed, coupled with the now routine tendency to draw analogies between race and sexual orientation,⁵ as well as with the late Mildred Loving's remarks that “all Americans, no matter their race, no matter their sex, no matter their sexual orientation, should have that same freedom to marry,”⁶ the Supreme Court's opinion in *Loving* offers an invaluable way for any teacher, of law or otherwise, to initiate a robust conversation about marriage equality and about how official discrimination harms everyone, not just those who are most tangibly affected by it.

All that being said, and despite the very good reasons for doing so, I do not begin the section on marriage equality in my course with *Loving v. Virginia*, even as I do exhaustively cover that foundational case throughout it. Rather, I rely on a more recent “Virginia” case to frame the conversation

¹ 388 U.S. 1 (1967).

² Unlike contemporary exclusionary marriage laws, which simply prohibit same-sex marriage, anti-miscegenation laws of the sort at issue in *Loving v. Virginia* both prohibited and criminalized interracial marriage. See *Loving*, 388 U.S. at 4–5 (summarizing Virginia's civil and criminal anti-miscegenation laws).

³ *Id.* at 12.

⁴ *Id.* (emphasis added).

⁵ See, e.g., Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 115, 115 (David Kairys ed., 3d ed. 1998); Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 *UCLA L. REV.* 1467, 1484–1503 (2000); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 *N.Y.U. L. REV.* 197, 202 (1994) (discussing the taboo against homosexuality and the taboo against miscegenation in analogous terms); Marc S. Spindelman, *Reorienting Bowers v. Hardwick*, 79 *N.C. L. REV.* 359, 430–39 (2001) (discussing the race/sexual orientation analogy and its criticisms).

⁶ See Mildred Loving, *Loving for All: The 40th Anniversary of the Loving v. Virginia Announcement* (June 12, 2007), available at http://www.freedomtomarry.org/pdfs/mildred_loving-statement.pdf (remarks of Mildred Loving on the fortieth anniversary of *Loving v. Virginia*).

about marriage equality with my students. It is a case that, to my students' initial puzzlement, did not involve a marriage prohibition (criminal or civil) at all. Nor, for that matter, did it involve governmental action that implicitly targets sexual minorities, as marriage prohibitions unarguably do.⁷

Instead, that landmark case, *United States v. Virginia*, involved a form of sex (rather than sexual orientation) discrimination.⁸ I tell my students that it is well understood that *Virginia* is an unmistakable part of the law's sex equality canon, in large part because of the "ambitious" account of sex equality found in that decision's majority opinion, authored by Justice Ginsburg⁹—for whom *Virginia*, according to some commentators, was a decision that "she had hoped the Court would one day arrive at when she first started arguing cases of [sex] discrimination in the 1960s."¹⁰ Far less understood, I continue, is how that foundational *sex* equality case might also constitute an integral part of the law's *sexuality* equality canon, as it will in our class. I tell them, in short, that *United States v. Virginia*, no less than *Loving v. Virginia*, is, or at least should be, an indispensable part of any examination of what is considered by some to be the "gay civil rights" issue of our time.¹¹

To be sure, on a superficial level, the issue in *Virginia* stands in an inverse relationship to that of marriage equality. The United States brought *Virginia* on behalf of those women who wanted the Virginia Military Institute (VMI), a state institution which categorically excluded women from

⁷ See, e.g., *Varnum v. Brien*, 763 N.W.2d 862, 885 (Iowa 2009) ("By purposefully placing civil marriage outside the realistic reach of gay and lesbian individuals, the ban on same-sex civil marriages differentiates implicitly on the basis of sexual orientation.").

⁸ *United States v. Virginia*, 518 U.S. 515, 534 (1996) (holding that the categorical exclusion of women from a state military institute violated the federal Constitution's Equal Protection Clause and that the state's creation of a separate and unequal school for women failed to remedy that constitutional violation).

⁹ Cass R. Sunstein, *The Supreme Court 1995 Term: Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 74 (1996) [hereinafter Sunstein, *Leaving Things Undecided*] (calling *Virginia* an "ambitious opinion"); see also CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 165 (2001) [hereinafter SUNSTEIN, ONE CASE AT A TIME] ("In several ways, *United States v. Virginia* was an ambitious, nonminimalist opinion.").

¹⁰ ROSEMARY C. SALOMONE, SAME, DIFFERENT, EQUAL: RETHINKING SINGLE-SEX SCHOOLING 165 (2003) (remarks of Mark Tushnet, then Dean of the Georgetown University Law Center).

¹¹ See Keith Richburg, *California Ruling Shows Hurdles Remain for Gay Marriage*, WASH. POST, May 27, 2009, at A4 (quoting Evan Wolfson, executive director of Freedom to Marry), available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/26/AR2009052600363.html>.

admission since its founding in 1839,¹² to become a mixed-sex institution. Gay rights organizations, by contrast, are currently bringing marriage equality cases throughout the United States on behalf of those individuals who want marriage to become a single-sex institution—in addition to remaining a cross-sex institution, of course.

These differences aside, the VMI and marriage equality issues share more than they might appear to at first blush. First, they both concern institutions, VMI and marriage, respectively, the latter of which the law has long conceptualized in metaphorical terms *as* an “institution.”¹³ Second, just as the institution of VMI once did, the institution of marriage makes sex absolutely relevant, insofar as the question of which couples may enter into its privileged space depends entirely on what their legal sex is.¹⁴ Third, just as supporters of VMI’s single-sex requirement argued that VMI’s uniqueness would be destroyed were it to become mixed sex,¹⁵ so too do supporters of traditional marriage argue that marriage’s uniqueness will be destroyed were it to become single sex.¹⁶

¹² *Virginia*, 518 U.S. at 520.

¹³ *See, e.g.*, *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (“Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature.”). For a more recent example, see *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 955 (Mass. 2003) (referring to marriage as an “esteemed institution”).

¹⁴ For the argument that exclusionary marriage laws constitute an impermissible form of sex discrimination, see, e.g., Koppelman, *supra* note 5, at 14. Only one court to date has agreed. *See Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993) (finding that Hawaii’s opposite-sex marriage law constituted a presumptively unconstitutional form of sex discrimination under the state constitution and remanding the case to the lower court to apply heightened scrutiny to that law).

¹⁵ *See Virginia*, 518 U.S. at 540 (summarizing the Commonwealth’s claim that VMI’s unique program would be “destroy[ed]” were it forced to accommodate women as well as its claim that “[m]en would be deprived of the unique opportunity currently available to them” should women be admitted into VMI); *United States v. Virginia*, 766 F. Supp. 1407, 1414 (W.D. Va. 1991) (“It has been established that if VMI were to admit women, . . . its uniqueness would be lost.”).

¹⁶ For courts that have upheld exclusionary marriage laws on the ground that marriage is either “uniquely” male/female or a “unique” relationship whose traditional structure the state has a legitimate interest in preserving, see *Milberger v. KBHL, LLC*, 486 F. Supp. 2d 1156 (D. Haw. 2007) (stating that “special attention to the ‘unique status’ of marriage underscores the need for additional caution when granting rights contingent upon marriage to unmarried partners”); *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 726 (Cal. Ct. App. 2006) (citing *In re Kandu*, 315 B.R. 124, 145 (Bankr. W.D. Wash. 2004)); *Nat’l Pride at Work, Inc. v. Governor of Mich.*, 732 N.W.2d 139, 150 (Mich. Ct. App. 2007) (“In Michigan, marriage is recognized as inherently a unique relationship between a man and a woman”) (quotations omitted); *Lewis v. Harris*, 875 A.2d 259, 276 (N.J. Super. Ct. App. Div. 2005) (Parillo, J., concurring); *Seymour v.*

Still, more important than the structural and substantive continuities between the VMI and marriage equality issues is the reasoning that drives Justice Ginsburg's majority opinion in *Virginia*, reasoning that might be, even if it thus far has not been, used as a lens through which to consider what sexual equality claims in the area of marriage might look like. More specifically, in the words of Professor Cass Sunstein, Justice Ginsburg's "ambitious" ¹⁷ majority opinion in *Virginia* "offer[s] a particular understanding of sex equality," ¹⁸ one that both acknowledges (indeed, celebrates) the reality of biological and social differences between the sexes *and* maintains that the government cannot rely on such differences to justify why it is constitutionally permissible to deny equal opportunity to members of either sex.¹⁹ Put most simply, Justice Ginsburg's *Virginia* opinion makes more than clear that differences between the very individuals whom the government is treating differently need not defeat, nor be an impediment to, equality claims under the Constitution.

Holcomb, 790 N.Y.S.2d 858, 864 (Sup. Ct. 2005) (stating that "the Legislature was [not] irrational in recognizing what is considered a unique and distinct social benefit derived from heterosexual marriage, to wit: natural procreation and child-rearing"); *Andersen v. King County*, 138 P.3d 963, 1002 (Wash. 2006). Uniqueness rationales have also driven exclusionary marriage amendments. Alabama's amendment, for instance, which was passed in June 2006 by a wide margin of 81%, provides that "marriage [i]s 'inherently a unique relationship between a man and a woman.'" *Bailey v. Faulkner*, 940 So. 2d 247, 257 n.11 (Ala. 2006). Likewise, Michigan found that "[a]s a matter of public policy, this state has a special interest in encouraging, supporting, and protecting that unique relationship in order to promote, among other goals, the stability and welfare of society and its children." *Nat'l Pride at Work, Inc. v. Governor of Mich.*, 732 N.W.2d 139, 148 n.8 (2007) (quoting MICH. COMP. LAWS § 555.1 (2005)). Similarly, Protect Marriage Arizona, the organization responsible for Arizona's (unsuccessful) same-sex marriage initiative in 2006, remarked that the "driving motive and purpose" behind that amendment was to "protect[] marriage by precluding redefinition of the term 'marriage' and by precluding marriage imitations that would undermine the unique status of marriage." Response Brief of Real Party in Interest/Appellee at 4, *Ariz. Together v. Brewer*, 149 P.3d 742 (Ariz. 2007) (No. CV-06-0277-AP/EL). Even Massachusetts, prior to the Supreme Judicial Court's opinion in *Goodridge v. Department of Public Health* striking down that jurisdiction's cross-sex marriage limitation on state constitutional grounds, proposed an amendment in 2002 the text of which read: "It being the public policy of this Commonwealth to protect the unique relationship of marriage . . . only the union of one man and one woman shall be valid or recognized as a marriage in Massachusetts." Opinion of the Justices to the Acting Governor, 780 N.E.2d 1232, 1233 n.2 (Mass. 2002).

¹⁷ SUNSTEIN, ONE CASE AT A TIME, *supra* note 9, at 165; Sunstein, *Leaving Things Undecided*, *supra* note 9, at 74.

¹⁸ SUNSTEIN, ONE CASE AT A TIME, *supra* note 9, at 165.

¹⁹ Sunstein, *Leaving Things Undecided*, *supra* note 9, at 76–77.

In ways and for reasons that this Essay will discuss in greater detail below, however, the rhetoric and the reasoning of marriage equality arguments tend to de-emphasize, rather than acknowledge, difference,²⁰ be it the differences between gays and straights, between same-sex and cross-sex relationships, or between the families of gays and those of straights. Not only is this “no-differences” model, as this Essay will later refer to it, both descriptively inaccurate and normatively undesirable, it is also curious that advocates for marriage equality continue to rely so heavily on it in light of the fact that Justice Ginsburg’s celebration of difference reasoning from *Virginia* demonstrates that individuals need not be similarly situated to each other *in all respects* in order to receive equal treatment and equal opportunity by the government. While *Virginia* might be about educational, rather than marital, opportunity, and about gender, rather than sexual orientation, discrimination,²¹ it offers at least the foundation for a sexual and marriage equality jurisprudence, one that until now has had little, if any, room to flourish at least in part because of the kinds of arguments that gay advocates have made to courts in marriage equality litigation. For this reason, this Essay submits, *United States v. Virginia*, and Justice Ginsburg’s theory of sex equality found therein, should be an integral part of the marriage equality canon—no less so than the perhaps more immediately relevant *Virginia* marriage case that was decided nearly thirty years before it.

This Essay will proceed as follows. Before considering the role that *Virginia* could play in shaping marriage equality arguments and marriage equality jurisprudence, Part II will first examine the no-differences paradigm that has informed the social, cultural, and legal understanding of same-sex marriage. To that end, it will provide examples of the way in which (1) the public has conceptualized gay marriage as but a same-sex version of its heterosexual counterpart and (2) advocates for marriage equality have tended to collapse same-sex relationships into their cross-sex counterparts for the purpose of securing an even-handed distribution of the right to marry by the government. Part III will then challenge, from a descriptive/factual

²⁰ By “marriage equality arguments” this Essay intends those arguments deployed by gay rights advocates on behalf of same-sex couple plaintiffs in marriage equality litigation.

²¹ At least on its face, as one could argue that *Virginia* also implicates sexual orientation. For instance, one of the arguments that the Commonwealth put forth in support of its exclusionary policy was that VMI’s single-sex environment fulfilled one of the aims of single-sex colleges more generally, namely, to encourage students “to invest more energy in academic pursuits . . . because they have few opportunities to dissipate energy in courtship activities.” *United States v. Virginia*, 766 F. Supp. 1407, 1435 (W.D. Va. 1991). Such a statement is predicated on the heterosexual presumption that “courtship activities” of any variety are not taking place in single-sex educational environments.

perspective, the no-differences model that has emerged from the legal, political, and social controversy over marriage for same-sex couples. More specifically, this Part will show that that model is descriptively inaccurate insofar as a number of studies of both same-sex couples and the families that they share suggest that myriad differences do indeed exist between those couples/families and their cross-sex counterparts, differences that the no-differences model either woefully under-represents or completely distorts.

Given the descriptive/factual shortcomings of the no-differences model, Part IV will suggest that advocates turn to a new model for sexuality/marriage equality advocacy, one that accepts, if not celebrates, perceptible differences even while arguing for equal treatment and equal opportunity. That model, this Part will argue, should look to the vision of difference on which Justice Ginsburg's *United States v. Virginia* majority opinion in part rests. It will show that Justice Ginsburg's "ambitious" vision of difference in *Virginia*, while largely absent from pro-marriage equality arguments, is by no means incompatible with the claim that exclusionary marriage laws violate constitutional equality guarantees. Moreover, this Part will address the possible reasons why marriage traditionalists have invoked Justice Ginsburg's "inherent differences" passage²² in support of exclusionary marriage laws, and will challenge their contention that the author of *Virginia*, based on her remarks with respect to inherent sex difference, would support such laws. Indeed, this Essay will submit that, if anything, Justice Ginsburg's *Virginia* opinion should be deployed by marriage progressives in support of arguments why exclusionary marriage laws are unconstitutional, rather than the other way around. After setting forth the no-differences model in Part II, exposing its descriptive/factual shortcomings in Part III, and offering a new model for sexuality/marriage equality advocacy and jurisprudence in Part IV, this Essay will finally consider in Part V the normative value of turning to Justice Ginsburg's celebration of difference in *Virginia* as a way to start thinking about the importance of difference in the areas of marriage equality and sexuality law more generally.

II. MARRIAGE EQUALITY AND LIKE-STRAIGHT REASONING/THE NO-DIFFERENCES MODEL

In 1993, before the marriage equality movement was in full force, Professor Nancy Polikoff, a self-described "lesbian feminist,"²³ commented

²² *United States v. Virginia*, 518 U.S. 515, 533–34 (1996).

²³ Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1536 (1993).

that the lesbian and gay community's "desire to marry" represented "an attempt to mimic the worst of mainstream society."²⁴ Other left-leaning and progressive academics have echoed these sentiments, noting, for instance, that the marriage movement has tended to project an image of marriage that "replicates the heterosexual one, rather than challenging or altering it."²⁵ Perhaps less surprisingly, this belief that marriage for same-sex partners amounts to a form of mimicry has been fully embraced by marriage traditionalists no less than it has been by those who would likely self-identify as progressive (albeit for very different reasons);²⁶ indeed, the rhetorical

²⁴ *Id.*

²⁵ Suzanna Danuta Walters, *Wedding Bells and Baby Carriages: Heterosexuals Imagine Gay Families, Gay Families Imagine Themselves*, in THE USES OF NARRATIVE: EXPLORATIONS IN SOCIOLOGY, PSYCHOLOGY, AND CULTURAL STUDIES 48, 54 (Molly Andrews et al. eds., 2004). For commentators who have considered the extent to which current pro-marriage equality rhetoric has come to echo or replicate conservative marriage idiom and the image of marriage that that idiom projects, see generally Lisa Duggan, *The New Homonormativity: The Sexual Politics of Neoliberalism*, in MATERIALIZING DEMOCRACY: TOWARD A REVITALIZED CULTURAL POLITICS 175, 187–88 (Russ Castronovo & Dana D. Nelson eds., 2002) (stating that the neoliberal marriage rhetoric championed by Andrew Sullivan and others projects a "role for marriage" that "sound[s] an awful lot like the dangerous mixture of 'moral education, psychotherapy and absolution'" that has long marked conservative marriage idiom and criticizing Sullivan in particular for adopting a purely imitative conception of marriage as, in his words, the "'mirror image of the happy heterosexuality I imagined around me'"); Courtney Megan Cahill, *"If Sex Offenders Can Marry, Then Why Not Gays and Lesbians?": An Essay on the Progressive Comparative Argument*, 55 BUFF. L. REV. 777, 777 (2007); Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 246–47 (2006) (stating that "enough of the arguments" recently deployed by same-sex marriage advocates "echo[] a longing for a kind of contemporary coverture, whereby one or both previously individuated subjects are dissolved into a joint legal and economic unit by and through the institution of marriage"). For an opposing view, see Mae Kuykendall, *Resistance to Same-Sex Marriage as a Story About Language: Linguistic Failure and the Priority of a Living Language*, 34 HARV. C.R.-C.L. L. REV. 385, 390 (1999) ("Gay marriage speech is sincere and is not in any rigorous sense 'mimicry' of heterosexual marriage speech."); Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 587 (1994) ("What many gay people do not want is an all-or-nothing model imposed on their lesbian or gay identity; they want both to be gay *and* married, to be gay *and* part of the larger society. For these lesbians and gay men, being gay is not just about being different, it is also about being equal. Their deeply-held convictions about how they want to live their lives and liberation are not mere mimicry. They are entitled to respect within our community as well as by the state." (citations omitted)).

²⁶ See generally Courtney Megan Cahill, *The Genuine Article: A Subversive Economic Perspective on the Law's Procreationist Vision of Marriage*, 64 WASH. & LEE L. REV. 393, 416–23 (2007) (summarizing conservative counterfeiting rhetoric).

claim that marriage for sexual minorities represents a kind of fraud, counterfeit, or degraded imitation was so common in the political discourse surrounding marriage for gays and lesbians just a few years back that most people probably did not think all that much of it.²⁷ As conservative author, columnist, and marriage equality opponent, Shelby Steele, remarked not too long ago: “[t]he true problem with gay marriage is that it consigns gays to a life of mimicry and pathos.”²⁸

Aside from the longstanding association between homosexuality and counterfeit, one that dates back at least to the thirteenth century and without a doubt to well before that,²⁹ where did this idea that marriage for same-sex partners (and for gays and lesbians generally) represents a kind of mimicry or even parody come from? The following two sections address two possible reasons why marriage for same-sex couples has been conceptualized as a kind of mimicry by commentators from all walks of political and social life: first, the image of same-sex marriage that has been projected in the public domain by the news media sometimes looks like a same-sex replica of its heterosexual counterpart (or at least a replica of what the media *imagines* heterosexual marriage to look like); and second, the arguments that have been routinely deployed by gay advocates in marriage equality litigation, and embraced by some courts, almost uniformly follow what Professor Marc Spindelman has referred to as a “like-straight” reasoning, one that posits that gays deserve marriage because they are no different than their straight counterparts.³⁰ Indeed, the image of same-sex marriage that has emerged from both the public imagining of it and the pro-marriage equality discourse about it partakes of a no-differences model, one that posits a one-to-one correspondence on nearly every level between gays and straights, between same-sex and cross-sex relationships, and between the families of gays and those of straights.

²⁷ *See id.*

²⁸ Shelby Steele, *Selma to San Francisco?*, WALL ST. J., Mar. 18, 2004, at A16.

²⁹ *See* Cahill, *supra* note 26, at 431–36 (discussing the historical antecedents of the contemporary claim that same-sex relationships are a counterfeit of the real thing).

³⁰ Marc Spindelman, *Homosexuality's Horizon*, 54 EMORY L.J. 1361, 1365–66 (2005) [hereinafter Spindelman, *Homosexuality's Horizon*] (summarizing the *Goodridge* court's embrace of the like-straight argument that drove gay and lesbian advocates' litigation strategy in that case); Marc Spindelman, *Sodomy Politics in Lawrence v. Texas*, JURIST, June 12, 2003, available at <http://ssrn.com/abstract=556724> [hereinafter Spindelman, *Sodomy Politics*] (summarizing the like-straight arguments that drove advocates' litigation strategy in *Lawrence v. Texas*).

A. *The Public Image of Gay Marriage (or the Ozzie and Ozzie Phenomenon)*

Last April, Benoit Denizet-Lewis wrote a feature article for *The New York Times Magazine* entitled *Young Gay Rites*, a piece whose principal objective was to answer the following question: Why had so many “[young] gay men” rushed to the altar, so to speak, in Massachusetts since *Goodridge v. Department of Public Health* was decided in 2003—700 to be exact—when, as the old saw goes, most men, and indeed most young men, have to be dragged kicking and screaming to that symbolically fraught place?³¹ Moreover, what was it about the legal recognition of marriage for same-sex couples in Massachusetts that made that relationship so attractive and enticing not just to young men, defined by Denizet-Lewis as aged twenty-nine and under, but to young gay men—a group that, unlike its stereotypically cohabitation-obsessed lesbian counterparts, is stereotypically averse to even a “second date?”³² Finally, in addition to exploring those interrelated questions, *Young Gay Rites* also aimed to capture how gay men in their twenties, for whom supposedly “no model for how to build a young gay marriage” existed, would “choose to construct and maintain their unions.”³³ “What would their marriages look like? And would the expectation of monogamy, a longstanding cornerstone of heterosexual marriage, be a requirement for their marriages as well?” Denizet-Lewis queried.³⁴

To answer these questions, Denizet-Lewis spent a few months “with a handful of young married and engaged gay couples,” an extremely limited sample, by his own admission, since “[a]ll were college-educated and white.”³⁵ With respect to the article’s overarching question—why would so many gay, young, white, college-educated men in their twenties rush to the altar—Denizet-Lewis mostly tells his readers what that phenomenon, at least in his view, is not: either a political or social “reaction” to something (homophobia, for instance)³⁶ or a “repudiation” of something (including “the

³¹ Benoit Denizet-Lewis, *Young Gay Rites*, N.Y. TIMES, April 27, 2008, (Magazine), at 28.

³² This is colloquially known as the “U-haul Syndrome, a long-joked-about tendency of lesbians to move in together on the second date.” Marcia Munson & Judith P. Stelbourn, *Introduction* to THE LESBIAN POLYAMORY READER: OPEN RELATIONSHIPS, NON-MONOGAMY, AND CASUAL SEX, 1, 3 (Marcia Munson & Judith P. Stelbourn eds., The Haworth Press, Inc. 1999).

³³ Denizet-Lewis, *supra* note 31, at 33.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 35.

gay world fashioned by previous generations of men—men who reacted to oppression and homophobia in the '70s and '80s by rejecting heterosexual norms and 'values,' particularly around sex and relationships").³⁷ Rather, as Denizet-Lewis relates, the featured couples appeared to be interested in marriage for many of the same reasons that heterosexual couples often are, namely, to formalize an emotional bond and "to communicate their love to each other."³⁸

With respect to the other questions posed by *Young Gay Rites*—What will the model for those gay marriages be? What will they look like? And will "monogamy's law"³⁹ play as powerful (and repressive) a role in them as it has in their heterosexual counterparts?—Denizet-Lewis captures a range of intimate possibilities in the *textual* portion of his article. One couple, for instance, "vowed to be monogamous."⁴⁰ Another couple, by contrast, was quite candid about having an "open" relationship; in one of the spouse's words, "We're open to exploring our sexuality together in a way that makes us both comfortable."⁴¹ Indeed, and as reported by Denizet-Lewis, "[n]egotiating questions surrounding monogamy was a critical issue for *most* of the young married and engaged couples" whom he interviewed; in his words, "for several of the couples I spent time with[], there is no use pretending they aren't attracted to other people."⁴² In addition, none of the couples—again, at least in the textual portion of the article—fell into stereotypical "male/female" or "husband/wife" roles. Quite the contrary, "[m]ost of the couples insisted [that] they shared [domestic] responsibilities in 'an egalitarian way.'"⁴³ While one of the spouses "occasionally referred to himself as a 'gay housewife,'"⁴⁴ other "young gay married men bristled at the notion that they would fashion their domestic lives around heterosexual

³⁷ *Id.*

³⁸ *Id.* at 34. Interestingly, something that Denizet-Lewis neglects to consider is that perhaps part of the reason why so many young gay men in Massachusetts are seeking to formalize, or have formalized, their relationships through marriage is because of the significant amount of privilege and status associated with that social structure, privilege and status with which the college-educated and "European American" cohort that was the exclusive focus of Denizet-Lewis's study would very likely be acquainted. Denizet-Lewis, *supra* note 31, at 33.

³⁹ Elizabeth F. Emens, *Monogamy's Law: Compulsive Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 277 (2004).

⁴⁰ Denizet-Lewis, *supra* note 31, at 34.

⁴¹ *Id.* at 35.

⁴² *Id.* (emphasis added).

⁴³ *Id.*

⁴⁴ *Id.*

stereotypes”⁴⁵—that old “canard” that in all same-sex relationships there must of necessity be a “man” and a “wife.”⁴⁶

What is most fascinating about Denizet-Lewis’s piece, however, is what appears not in the text of the article but rather in the photos that accompany it, photos that function simultaneously as an intriguing gloss on, and as a curious counterpoint to, Denizet-Lewis’s written words. Indeed, if one were to look just at the photos that attend *Young Gay Rites*, including *The New York Times Magazine*’s front cover photo for that issue, one would likely expect to read an article that is quite different in substance and in tenor from the one that Denizet-Lewis actually provides. Whereas Denizet-Lewis captures a range of possibilities when setting forth what gay marriage might look like—sometimes non-monogamous, sometimes monogamous, sometimes non-traditional, sometimes traditional—and whereas his subjects almost uniformly project an egalitarian image of marriage that is unburdened by conventional male/female or husband/wife roles, the photos themselves communicate a strikingly traditional and stereotypically heterosexual image of that institution. Moreover, whereas Denizet-Lewis provides a fairly realistic portrayal of marriage between young men, or at least between the privileged white young men that are featured in his article, the photos are decidedly idealistic and highly stylized throwbacks to the 1950s, or at least to what our culture might imagine a 1950s marriage to look like.

For instance, all of the pictures, and most notably the cover photo, have an air of unreality about them; the subjects, which are stilted and manikin-like, are staged in a tableau that looks more suburbia circa 1955 than it does contemporary Boston. The cover in particular features a characteristically “American” scene in saturated colors: the suburban summer barbeque. Two very handsome, white, and prototypically “American” men with slicked back hair, full smiles, khaki pants, and collared shirts are pictured barbequing over a table draped with a red and white-checked tablecloth in the backyard of a house in the suburbs on a vibrant summer day. The only text on the cover page, aside from *The New York Times Magazine* logo, reads: “The Newlywed Gays!”⁴⁷

If it were not for the fact that the Denizet-Lewis article is not even remotely critical of the gay marriage movement that it identifies or of the

⁴⁵ *Id.*

⁴⁶ John Cloud, *Are Gay Relationships Different?*, TIME, Jan. 17, 2008, available at <http://www.time.com/time/magazine/article/0,9171,1704660,00.html> (“Researchers have long noted that because gender roles are less relevant in gay and lesbian relationships—it’s a canard that in most gay couples, one partner plays wife—those relationships are often more equal than heterosexual marriages. Both guys do the dishes; both women grill the steaks.”).

⁴⁷ Denizet-Lewis, *supra* note 31, at cover.

couples whom it features, one would be inclined to think that the *Times* was engaging in satire by staging such a scene and by making such a proclamation. However, the article is not only uncritical of gay marriage, but also neutral with respect to the kinds of marital relationships that its subjects had either entered or were about to enter, even the more traditional same-sex marriages that tend to replicate what our culture often imagines heterosexual marriage to look like (i.e., male breadwinner and female homemaker). Moreover, and as a close friend recently reminded me, *The New York Times*, while left leaning, is not exactly *The Onion*. For that reason, it is highly unlikely that the photos were intended by the *Times*'s editors to function as an independent social/cultural/political indictment of, or as an ironic commentary on, either marriage between men or marriage as an institution.

The photography that accompanies the article continues this leitmotif of 1950s Ozzie and Harrietesque domestic bliss. Two of the four photos feature a white married couple, Joshua and Benjamin, the former of whom referred to himself in the article, perhaps only partially in jest, as a "gay housewife."⁴⁸ In each photo, Joshua assumes domestic roles stereotypically associated with women or wives, whereas Benjamin assumes domestic roles stereotypically associated with men or husbands. In the first photo, which appears on the first page of the article, Joshua is frolicking around the den with a vacuum cleaner, brimming with smiles and light on his feet in slippers, while his husband, Benjamin, throws him a smile from the leather chair in which he sits, legs crossed, reading a book at the end of a hard day, dog resting listlessly at his feet.⁴⁹ In the second photo, Joshua prepares dinner—perhaps according to the *A Great American Cook* cookbook that appears at the bottom of the frame—with a smile that is part sheepish, part "Look at what I did, honey!" while his husband, slightly taller, watches with a look of proud approval, his arm draped firmly around Joshua's shoulder.⁵⁰

Of the other two photos that accompany the piece, one features an engaged couple, Marc and Vassili, in what appears to be a very traditional wedding photo, with one spouse standing and the other sitting in a chair even as both don tuxedos and boutonnieres.⁵¹ The other photo, an outlier of sorts in this tableau of (admittedly strained) domestic bliss, is of Aaron, a gay twenty-six-year-old recently divorced from another man. Curiously, the article itself portrays Aaron as a cheerful enough divorcee who has certainly moved on: Denizet-Lewis meets Aaron at a party that the latter attends with a

⁴⁸ *Id.* at 35.

⁴⁹ *Id.* at 28–29.

⁵⁰ *Id.*

⁵¹ *Id.* at 31.

new boyfriend.⁵² The photo, however, depicts Aaron eating alone at a dining room table, blank-eyed and staring vacantly into space as he eats what appears to be a rather pathetic and paltry bowl of tomato soup.⁵³ While on one level the photo of Aaron is quite unlike the other photos, on another level it is of a piece with them, as the misery of divorce portrayed in it is no less stylized than was the bliss of marriage that preceded it.

Cognitive linguist, George Lakoff, might say that the visual tableaux of connubial bliss that go along with the Denizet-Lewis piece have the effect of “framing” the way that we conceptualize gay marriage.⁵⁴ Under this view, visual media, no less than words, have the tremendous power not only of capturing how individuals might already think about marriage between same-sex partners, but also of influencing and changing how they think about that relationship moving forward.⁵⁵ Even though Denizet-Lewis offers a fairly nuanced portrayal of what a marriage between two young men might look like, the photos that accompany his piece both reflect and reproduce hackneyed stereotypes about marriage—and, interestingly enough, hackneyed stereotypes about heterosexual marriage rather than about gay marriage. Indeed, the visual imagery that the *Times* deploys to frame and represent marriage between men is striking for two reasons: first, because it evokes an image of marriage that no longer exists—if, indeed, it ever existed at all; and second, because it suggests that marriage between members of the same sex can only be conceptualized, and thereby understood, through a heterosexual lens, as something that is like traditional cross-sex marriage in all ways save for the fact that it is not, in fact, a cross-sex relationship.

First, and as mentioned above, the imagery that accompanies *Young Gay Rites* is striking because it idealizes or romanticizes a time, the 1950s, that was not particularly hospitable to gays and lesbians (indeed, far from it).⁵⁶ In

⁵² *Id.* at 60.

⁵³ Denizet-Lewis, *supra* note 31, at 32.

⁵⁴ According to Lakoff, “[f]rames are the mental structures that allow human beings to understand reality—and sometimes to create what we take to be reality.” Moreover, frames “facilitate our most basic interactions with the world—they structure our ideas and concepts, they shape the way we reason, and they even impact how we perceive and how we act.” GEORGE LAKOFF, THINKING POINTS: COMMUNICATING OUR AMERICAN VALUES AND VISION 25 (2006) [hereinafter LAKOFF, THINKING POINTS]; *see also* GEORGE LAKOFF, DON’T THINK OF AN ELEPHANT: KNOW YOUR VALUES AND FRAME THE DEBATE: THE ESSENTIAL GUIDE FOR PROGRESSIVES (2004); GEORGE LAKOFF, MORAL POLITICS (2002).

⁵⁵ *See* LAKOFF, THINKING POINTS, *supra* note 54, at 26.

⁵⁶ *See, e.g.*, JOHN D’EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUALITY MINORITY IN THE UNITED STATES 1940–1970 40 (1983) (summarizing how “[t]he Cold War and its attendant domestic anticommunism provided the setting in which a sustained attack upon homosexuals and lesbians took place”);

a letter to the editor, for instance, one reader of the article expressed her disbelief that the *Times* chose a 1950s leitmotif for a piece about contemporary marriage for sexual minorities when history had clearly shown that the 1950s were not “especially welcoming to gays and lesbians.”⁵⁷ Moreover, the imagery idealizes or romanticizes a time which, according to some historians, never truly existed according to that idealized or romanticized vision in the first place.

For instance, historian of the family, Professor Stephanie Coontz, has argued that “[l]ike most visions of a ‘golden age,’ the ‘traditional family’ . . . evaporates on closer examination. It is an ahistorical amalgam of structures, values, and behaviors that never coexisted in the same time and place.”⁵⁸ With respect to the whitewashed image of the 1950s family in particular, Coontz writes: “The happy, homogeneous families that we ‘remember’ from the 1950s were . . . partly a result of the media’s denial of diversity.”⁵⁹ Moreover, “[t]he reality of these families was far more painful and complex than the situation-comedy reruns or the expurgated memories of the nostalgic would suggest.”⁶⁰ “Contrary to popular opinion,” she continues, “‘Leave it to Beaver’ was not a documentary.”⁶¹ To be sure, the *Times*’s invocation of a 1950s family form is especially perplexing considering that homosexuality was thought to pose a threat to that very form at that very time, as 1950s political rhetoric routinely linked together homosexuality, “deviant family or sexual behavior,” sedition, and communism.⁶²

Second, and more pertinent here, the imagery that accompanies *Young Gay Rites* is striking because it strongly suggests that marriage between same-sex partners (or at least between two men) is naturally viewed through

WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1998); William N. Eskridge, Jr., *A Jurisprudence of “Coming Out”: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 *YALE L.J.* 2411, 2424–25 (1997) (discussing the “antihomosexual Kulturkampf of the 1950s”); William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946–1961*, 24 *FLA. ST. U. L. REV.* 703, 708 (1997).

⁵⁷ Letters, *N.Y. TIMES*, May 11, 2008, (Magazine), at 6.

⁵⁸ STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* 9 (1992).

⁵⁹ *Id.* at 31.

⁶⁰ *Id.* at 29.

⁶¹ *Id.*

⁶² *Id.* at 33; see also D’EMILIO, *supra* note 56, at 41 (“As the anticommunist wave in American politics rose, it carried homosexuals with it.”); see also *id.* at 43 (stating that “[t]he homosexual menace continued as a theme of American political culture throughout the McCarthy era” and that “[r]ight-wing organizations combined their attacks on communists with calls for the ejection of homosexuals from government”).

an idealized and romanticized heterosexual lens. As described above, the cover photo depicts two men having a summer barbecue. Not only is the family barbecue an iconic image of the 1950s heterosexual family,⁶³ but barbecuing itself has long been considered to be one of those things that the man of the house—and, in particular, the heterosexual man of the house—uniquely does. Several commentators, for instance, have noted that “there is a masculine overtone to the [barbecue] grill”⁶⁴ and that barbecuing falls within the “prototypically male realm,” one that also includes “car repairs” and “sports.”⁶⁵ Moreover, Professor Melissa Murray, who has recently provided a nuanced and thorough interpretation of the “Yes on 8” movement’s media strategy in California prior to the passage of Proposition 8,⁶⁶ observes that one of the “Yes on 8” television advertisements predictably concluded with a “post-election barbecue,” one where Tom, the heterosexual husband character, “man[ned] the grill” (no pun likely intended).⁶⁷ Along with the iconic barbecue, Murray observes, the ads invoked other familiar images that dealt with traditional gender roles within marriage;⁶⁸ their collective objective, she argues, was to “appeal[] to gender traditionalists with subtle visual cues.”⁶⁹ Fascinatingly, then, the image of marriage that opens up an article whose aim, in part, is to investigate just what marriage between two men will look like⁷⁰ replicates the image of marriage that concludes an ad whose aim, in part, is to present to the public

⁶³ See COONTZ, *supra* note 58, at 31 (stating that “suburban ranch houses and family barbecues were the carrots offered to white middle class families that adopted the new norms” of the 1950s).

⁶⁴ See Jennifer Lee, *The Man Date: What Do You Call Two Straight Men Having Dinner?*, N.Y. TIMES, Apr. 10, 2005, § 9, at 2.

⁶⁵ Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1211 (1990); see also Nancy D. Polikoff, *Lesbian and Gay Parenting: The Last Thirty Years*, 66 MONT. L. REV. 51, 60 (2005) (stating that the barbecue has been “traditionally associated with the male role”).

⁶⁶ Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, 5 STAN. J. C.R. & C.L. (forthcoming 2009).

⁶⁷ *Id.* at 25–26.

⁶⁸ *Id.* at 26.

⁶⁹ *Id.* at 24.

⁷⁰ At the outset of *Young Gay Rites*, Denizet-Lewis queries: “What would [the] marriages [between the young gay men whom he interviewed] look like? And would the expectation of monogamy, a longstanding cornerstone of heterosexual marriage, be a requirement for their marriages as well?” Denizet-Lewis, *supra* note 31, at 33.

the dangers of abandoning the traditional, and traditionally gendered, definition of marriage.⁷¹

As noted above, the 1950s-style barbecue that frames “*Young Gay Rites*” is just one of the many stereotypically gendered images that appear in that article. It is probably no surprise, then, that for some readers there was a troubling disjuncture between what Denizet-Lewis was actually saying in his article and what the *Times* was attempting to capture in the photography that accompanied it. In the words of the same reader who was quoted above:

I enjoyed Denizet-Lewis’s article. He created a lively and sympathetic read, chronicling the path to marriage and beyond, a path that is not so different for couples of any sexual orientation. But why the colorized, exaggerated photos, mimicking the most clichéd and self-conscious of coupled moments? Why pose Marc and Vassili in tuxedos when they specifically stated that they will sidestep all the trappings associated with ‘traditional’ weddings? Besides the uncomfortable nod to the ‘50s (an era that was not especially welcoming to gays and lesbians), it suggests that gay couples are somehow ‘play acting’ at being married. As a civil celebrant, who has had the great joy to preside over many gay unions in New Jersey, I was offended by the way these couples were depicted, at least visually.⁷²

To add to this reader’s already incisive remarks—remarks that echo those of progressive commentators who have faulted the marriage equality movement for projecting an image of marriage that “replicates the heterosexual one, rather than challenging or altering it”⁷³—one wonders why the *Times* never included a photo of the “two Brandons,” the two engaged young men whose story occupied a sizeable chunk of the article and who evaded the trappings of tradition more than any of the other couples featured in *Young Gay Rites*. That is, among the couples whom Denizet-Lewis interviewed for that piece, the Brandons were the most willing to embrace the prospect of non-monogamy⁷⁴ and the quickest to recognize the “heteronormative” aspects of “traditional . . . married culture.”⁷⁵ Perhaps it is for precisely those reasons that the Brandons had no role in the photography that accompanied the Denizet-Lewis article, photography that was insistent on transposing a(n idealistic) model of heterosexual marriage onto gay marriage, on viewing marriage between two men through an exclusively heterosexual lens, and on adhering to a no-differences model that

⁷¹ See Murray, *supra* note 66, at 26.

⁷² Letters, *supra* note 57, at 6.

⁷³ See Danuta Walters, *supra* note 25, at 54.

⁷⁴ Denizet-Lewis, *supra* note 31, at 34.

⁷⁵ *Id.*

conceptualizes marriage between same-sex partners as but a same-sex version of its cross-sex counterpart. While beyond the scope of this Essay, it is worth mentioning that *The New York Times Magazine's* pictorial treatment of alternative family structures exhibits a pattern of adhering to this no-differences model; the cover photo for an earlier feature article in the *Magazine*, which considered how gays and lesbians have families of their own, also represents the family of two lesbians, two gay men, and the children that one of the women had with one of the men as one that approximates a heterosexual paradigm.⁷⁶ Interestingly, and as the next Section will now discuss in greater detail, this no-differences model has influenced legal arguments in the movement in favor of gay marriage no less than it has visual renderings of that relationship in such leading media outlets as *The New York Times*.

B. *Gay Advocacy and Like-Straight Reasoning/The No-Differences Model*

The domestic/marital tableaux that accompany a high profile piece such as *Young Gay Rites* vividly and visually mirror a larger phenomenon in the marriage equality movement, namely, the tendency to rely on a litigation strategy that posits that same-sex couples, and the families that they share, are just like cross-sex couples in all ways with respect to the right to marry. Professor Marc Spindelman has referred to this line of argumentation as “like-straight” reasoning, defined in greater detail below, and has demonstrated the extent to which that sort of reasoning has driven gay rights litigation strategies across a range of substantive areas, from the sexual autonomy cases (*Lawrence v. Texas*)⁷⁷ to the marriage equality cases (*Goodridge v. Department of Public Health*).⁷⁸ That like-straight reasoning, or the invocation of a no-differences model, has become a stock feature of gay rights litigation is clear upon a survey of the arguments that have been deployed in that litigation. In addition, it is no surprise that like-straight/no-differences arguments are such a familiar feature of gay rights litigation, as they make a great deal of sense for a number of doctrinal and strategic reasons.

Before considering those reasons, however, it is first useful to define like-straight reasoning/the no-differences model and to survey in brief how it has driven the arguments that gay rights organizations have made in litigation dealing with substantive areas such as sexual autonomy and marriage for

⁷⁶ John Bowe, *Gay Donor or Gay Dad?*, N.Y. TIMES, Nov. 19, 2006, (Magazine), at 66–67.

⁷⁷ Spindelman, *Sodomy Politics*, *supra* note 30, at 2.

⁷⁸ See Spindelman, *Homosexuality's Horizon*, *supra* note 30, at 1365.

same-sex partners. Spindelman, who criticizes like-straight arguments largely for reasons other than those suggested here,⁷⁹ defines those arguments simply as the claim that “[l]esbians and gay men are just like heterosexuals.”⁸⁰ For that reason, the argument goes, “lesbians and gay men deserve the same rights and privileges heterosexuals receive, including the right to marry, and for just the same reasons.”⁸¹ Under this view, sameness between gays and straights is a necessary precondition for equal or symmetrical legal treatment; like-straight logic, in other words, “reinforc[es] the abstract logic that to be equal one must be the same”⁸² (the same logic, it turns out, and as Part IV will show, that Justice Ginsburg’s majority opinion in *Virginia* at least partially disrupts vis-à-vis sex equality). Both “seductively simple”⁸³ and “remarkably uncomplicated,”⁸⁴ the proposition that gays are just like heterosexuals and should therefore be treated the same, Spindelman observes, is a nice way to “unite” the independent doctrinal claims that advocates for gay rights commonly deploy in gay rights litigation.⁸⁵

⁷⁹ For instance, Spindelman has argued that like-straight reasoning, which rests on “formal equality logic,” grants “rights only on the terms that the socially privileged [i.e., heterosexuals] have set As legal theorist Catharine MacKinnon has observed: concealed in this approach ‘is the substantive way in which man has become the measure of all things.’ And this man has, substantively, been heterosexual.” *Sodomy Politics*, *supra* note 30, at 3. In addition, like-straight arguments “reinforc[e] the abstract logic that to be equal one must be the same.” *Id.* Most problematic for Spindelman, however, is the power of like-straight arguments (1) to “embrace and advance the idea that heterosexuality (at least at its core) is all good, all happy,” when, in fact, “[a]s feminism has shown, the institution of heterosexuality has hardly been so egalitarian,” *id.*, and (2) to elide the reality of sexual violence in cross-sex and same-sex relationships alike. Like-straight reasoning, under this view, tends to “regard any victory for sex as sweet, even when the sex that prevails is (or includes) sexual viol[ence].” *Id.* at 5. *See also* Spindelman, *Homosexuality’s Horizon*, *supra* note 30, at 1375 (stating that the like-straight reasoning that drove the Supreme Judicial Court of Massachusetts’ opinion in *Goodridge v. Department of Public Health* exhibited an “uncritical solicitude for marriage and the way it has been heteronormatively structured and defined”).

⁸⁰ Spindelman, *Homosexuality’s Horizon*, *supra* note 30, at 1365.

⁸¹ *Id.*

⁸² Spindelman, *Sodomy Politics*, *supra* note 30, at 3.

⁸³ *Id.* at 2.

⁸⁴ Spindelman, *Homosexuality’s Horizon*, *supra* note 30, at 1365.

⁸⁵ *See* Spindelman, *Sodomy Politics*, *supra* note 30, at 2 (stating that attorneys in *Lawrence v. Texas* made both privacy and equality claims in that case, and that “what unite[d] these . . . claims . . . [was] a seductively simple proposition: *gays are just like heterosexuals*”); Spindelman, *Homosexuality’s Horizon*, *supra* note 30, at 1365 (stating that “[f]ollowing a pattern visible and (at last) successful in other recent lesbian and gays rights litigation efforts, lawyers for the lesbian and gay plaintiffs in *Goodridge* argued for

Even just a brief survey of the sorts of arguments that were made to the United States Supreme Court in *Lawrence*, and that have been made to various state supreme courts in marriage equality litigation, reveals how widespread like-straight reasoning/the no-differences model really is. For instance, and as Spindelman points out, the Law Professors' Brief that was filed in *Lawrence* highlighted what in its view was a multitude of similarities between gays and straights. In his words:

Just in case anyone (or anyone who happens to sit on the Supreme Court) should be unaware of the breezy similarities between homosexuals and heterosexuals, the Law Professors' Brief details some of the ways that "gay people," just like heterosexuals, "form couples and create families that engage in the full range of everyday activities, from the most mundane to the most profound." Gay people, for example, "shop, cook, and eat together." Who knew? They "celebrate the holidays together, and share one another's families." And they even "make financial and medical decisions for one another[.]" and "rely on each other for companionship and support." In sum, "[m]any gay couples share 'the duties and the satisfactions of a common home.'" In these and other ways, the Law Professors' Brief affirms, as do many other gay rights briefs in *Lawrence*, that homosexuals are *just like* heterosexuals and, consequently, deserve all the same rights and privileges that heterosexuals have. Guess what: We're human.⁸⁶

Similarly, the briefs that have been filed by advocates in gay rights litigation, and particularly in marriage equality litigation, overwhelmingly have adopted like-straight reasoning/the no-differences model. For instance, advocates have argued that "[s]ame-sex committed relationships deserve to be honored with the same rights and responsibilities that are granted to heterosexual couples,"⁸⁷ that "just as heterosexual relationships arise from existing social and religious practices, so too do the relationships of . . . same-sex couples . . . who are responsible, contributing members of their communities,"⁸⁸ and that "lesbian and gay couples often have stable, committed, and enduring relationships that play the same central role in their

same-sex marriage rights on both liberty and equality grounds. Broadly uniting these formally distinct doctrinal claims was a remarkably uncomplicated proposition: Lesbians and gay men are just like heterosexuals").

⁸⁶ Spindelman, *Sodomy Politics*, *supra* note 30, at 3.

⁸⁷ Brief of Amici Curiae Human Rights Campaign et al. in Support of Plaintiffs-Appellants at 6, *Lewis v. Harris*, 875 A.2d 259 (N.J. Super. Ct. App. Div. 2005) (No. A-002244-O3T5).

⁸⁸ Respondents' Answer to Amici Curiae Briefs at 23, *Woo v. California*, 49 Cal. Rptr. 3d 675 (Ct. App. 2006) (No. A110451) (citation omitted) (internal quotation marks omitted).

lives as they do for heterosexuals.”⁸⁹ More recently, and in response to the traditionalist marriage argument that same-sex couples can be denied the right to marry because same-sex, or “genderless,” marriage is a sub-optimal environment in which to have and raise children,⁹⁰ gay advocates have argued that lesbian and gay couples “can provide stable family environments just as heterosexuals can,”⁹¹ that “children raised by gay and lesbian parents are as likely to be well-adjusted as children raised by heterosexual parents,”⁹² and that “[n]umerous studies of children raised by gay and lesbian parents conducted over the past 25 years . . . show that children raised by lesbian and gay parents are as successful as children raised by heterosexual parents.”⁹³

As mentioned above, the deployment of like-straight arguments in gay rights advocacy, whether in the area of sexual autonomy or that of marriage, makes sense on both a doctrinal and a strategic level. First, like-straight reasoning, or the no-differences model, makes sense from a doctrinal perspective in part because of the formal equality principle on which federal and state constitutional equality guarantees rest. According to that principle and its antecedent philosophical tradition, similarly-situated individuals, and like cases, must be treated alike.⁹⁴ To do otherwise, of course, would be to violate those federal and/or state constitutional equality guarantees.

⁸⁹ Appellants’ Abstract, Brief, and Addendum at 429, Dep’t of Human Servs. v. Howard, 238 S.W.3d (Ark. 2006) (No. 05-814).

⁹⁰ For the use of the term “genderless marriage” to refer to a marriage between members of the same sex, see Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 DUKE J. OF CONST. L. & PUB. POL’Y 1, 4–6, 20–24 (2006); Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 CAN. J. FAM. L. 11, 85–95 (2004). For additional arguments that marriage should be exclusively cross-sex for reasons relating to both procreation and child development, see Lynn D. Wardle, “Multiply and Replenish”: *Considering Same-Sex Marriage in Light of State Interests in Marriage Procreation*, 24 HARV. J.L. & PUB. POL’Y 771, 799–802 (2001); Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833.

⁹¹ Appellants’ Abstract, Brief, and Addendum, *supra* note 89, at 429–30.

⁹² Final Reply Brief of Plaintiffs-Appellees at 40, Varnum v. Brien, 763 N.W.2d 862 (Iowa 2008) (No. 07-1499).

⁹³ *Id.* at 40 n.33.

⁹⁴ See, e.g., *Vacco v. Quill*, 521 U.S. 793, 799 (1997) (“[The Equal Protection Clause] embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly.”); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (“The Equal Protection Clause . . . is essentially a direction that all persons similarly situated should be treated alike.”). The ‘like-cases should be treated alike’ idea derives from Aristotle’s discussion of justice in the *Nicomachean Ethics*. THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS, Book V, 1131a25 (J.A.K. Thomson trans., 1976). For a discussion of the law’s implementation of the formal equality principle, see

Unsurprisingly, those who oppose extending marriage rights to same-sex couples have tried to argue that, in their view, exclusionary marriage laws do not violate constitutional equality guarantees precisely because same-sex couples are *dissimilarly* situated from cross-sex couples in all sorts of relevant ways when it comes to marriage, including the ways that the former both have and raise children. For instance, in California's marriage equality case, *In re Marriage Cases*,⁹⁵ one defendant made an unsuccessful threshold argument that the California constitution's equality guarantees did not even apply to the state's cross-sex marriage restriction because "same-sex couples and opposite-sex couples are not 'similarly situated' with regard to the challenged statute's legitimate purpose."⁹⁶ Similarly, in Iowa's recent marriage equality case, *Varnum v. Brien*,⁹⁷ the government tried to argue, again unsuccessfully, that the "[same-sex couple] plaintiffs are not similarly situated to opposite-sex couples so as to necessitate further equal protection analysis because the plaintiffs cannot 'procreate naturally.'"⁹⁸

Whether marriage equality opponents argue that equal protection does not even apply because same-sex and cross-sex couples are so differently situated, or that the differences between same-sex and cross-sex couples in areas such as procreation and the family serve as legitimate reasons for differential treatment, the idea is the same: it does not violate constitutional equality guarantees to prohibit same-sex couples from marrying each other because they are different from those who already do enjoy that right. In light of the formal equality principle that underlies constitutional guarantees of equal protection, then, and in light of marriage traditionalists' attempt to rebut the application of that principle to marriage prohibitions, it makes perfect doctrinal sense that marriage equality advocates would want to emphasize just how similarly situated same-sex couples are to their cross-sex

generally Robin West, *The Missing Jurisprudence of the Legislated Constitution*, in *THE CONSTITUTION IN 2020* 79, 84 (Balkin & Siegel eds., 2009) ("Formal equality is the jurisprudential ideal at the heart of the meaning of adjudicative law. Treating likes alike is what judges do when they are doing their jobs morally and doing them well."); Cass R. Sunstein, *On Analogical Reasoning*, 106 *HARV. L. REV.* 741, 745 (1993) (describing analogical reasoning as a situation where "[t]he law treats A in a certain way" and "[b]ecause B shares certain characteristics with A, the law should treat B the same way"); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 *CAL. L. REV.* 341, 344 (1949); Kenneth I. Winston, *On Treating Like Cases Alike*, 62 *CAL. L. REV.* 1 (1974).

⁹⁵ *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. 1, § 7.5, *as recognized in*, *Strauss v. Horton*, 46 Cal. 4th 364 (2009).

⁹⁶ *In re Marriage Cases*, 183 P.3d at 435 n.54 (summarizing this argument).

⁹⁷ *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

⁹⁸ *Id.* at 882.

counterparts when it comes to marriage. The more advocates can convince courts that the former are just like the latter, at least when it comes to such things as marriage and the family, the more likely those courts will find that marriage prohibitions violate constitutional equality guarantees and the equality principle on which they rest.

In addition, gay advocates' invocation of a no-differences model also makes doctrinal sense from the perspective of determining which level of review should apply to marriage restrictions in the first instance. A significant issue to be litigated before state supreme courts in marriage equality litigation has been which level of judicial review should apply to marriage restrictions that are being subject to state constitutional equal protection challenges. Predictably, in those cases marriage equality advocates have argued that heightened scrutiny should apply to those restrictions because gays and lesbians constitute a suspect class and because sexual orientation constitutes a suspect classification.⁹⁹ To make that argument, advocates have variously reasoned that gays and lesbians (1) have been subject to a history of discrimination, (2) have immutable characteristics, (3) have been (or are) politically powerless, and (4) are being discriminated on the basis of a trait, sexual orientation, that bears no relationship to a person's ability to perform or contribute to society. With respect to the fourth factor, the United States Supreme Court has explained that whether a characteristic is irrelevant to a person's ability to contribute to society should be used by courts when determining, for equal protection purposes, whether any given characteristic is suspect/quasi-suspect or non-suspect. The more irrelevant a characteristic is, the more suspect it is, and vice versa.¹⁰⁰

⁹⁹ See, e.g., Memorandum of Authorities in Support of All Plaintiffs' Motion for Summary Judgment and in Support of All Plaintiffs' Resistance to Defendant's Motion for Summary Judgment at 57–63, *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (No. CV5965) [hereinafter Memorandum of Authorities]; Respondents' Opening Brief on the Merits at 26–39, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999). Of course, advocates have also argued in the alternative that even if sexual orientation does not constitute a suspect class, exclusionary marriage laws are still unconstitutional because they fail to satisfy even rational basis review. See, e.g., Memorandum of Authorities at 76 (“Plaintiffs are entitled to summary judgment on their equal protection and due process claims . . . even if rational basis review applies.”).

¹⁰⁰ See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (stating that race, national origin, and alienage “are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy”); *Frontiero v. Richardson*, 411 U.S. 677, 686–87 (1973) (stating that because “the sex characteristic frequently bears no relation to ability to perform or contribute to society . . . statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members”).

In light of the is-the-classification-irrelevant factor for determining its status under constitutional equality guarantees, it is of little surprise that marriage equality advocates have minimized any possible differences between the sexual majority and the sexual minority. Indeed, it would seem that advocates would have to downplay any differences whatsoever, good and bad alike, between the sexual majority and the sexual minority in order to make the best possible case that gays and lesbians are a suspect class *insofar as their sexual orientation never matters, that is, never affects how they contribute to society*, whether that contribution be positive or negative. In other words, it is not only that marriage prohibitions are unconstitutional because no legitimate distinctions exist between gays and straights when it comes to marriage and the family. It is also that equal protection doctrine more generally compels advocates to argue that one's minority sexual orientation status, like one's race and gender status, should *never be relevant*. The less relevant that a trait is, the less likely that the government will be able to classify on the basis of it without running afoul of constitutional equality protections.

Second, and relatedly, like-straight reasoning makes strategic sense because it has enjoyed success in the courts, some of which have struck down legislation that burdens sexual minorities by invoking the equal protection principle, by downplaying the distinctiveness (and thereby the relevance) of one's sexual minority status, and by adverting to the no-differences model. The *Lawrence v. Texas* majority, for instance, relied on a kind of like-straight reasoning when it stated that “[p]ersons in a homosexual relationship may seek autonomy for these purposes”—“purposes,” the prior paragraph suggests, “relating to marriage, procreation, contraception, family relationships, child rearing, and education”—“*just as* heterosexual persons do.”¹⁰¹ The proposition that gays are just like heterosexuals when it comes to sexual, reproductive, and even perhaps marital autonomy was one that the *Bowers v. Hardwick* majority roundly dismissed as preposterous seventeen years earlier, when it emphasized that “[n]o connection between family, marriage, or procreation, on the one hand, and homosexual activity, on the other,” existed for constitutional purposes.¹⁰²

¹⁰¹ *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (emphasis added).

¹⁰² *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986); *see also* Spindelman, *Homosexuality's Horizon*, *supra* note 30, at 1375–76 (stating that in *Bowers*, “Justice Byron White deemed ‘facetious’ the suggestion that same-sex sexual intimacies deserved protection on a par with decisions involving marriage, family, and procreation. From his perspective, the differential treatment made perfect sense: Same-sex sexual intimacies bore no relation to those obvious public goods to which they were being likened.” (footnotes omitted)).

Just a few months after *Lawrence* was decided, the Supreme Judicial Court of Massachusetts wholeheartedly embraced the no-differences model in *Goodridge*, in which a bare majority of the court ruled that Massachusetts' cross-sex marriage definition violated state constitutional liberty and equality guarantees.¹⁰³ As Spindelman observes, “[l]ike-straight’ reasoning drives Marshall’s *Goodridge* opinion start to end,”¹⁰⁴ as the majority there champions “a definition of marriage that has built into it the idea that lesbians and gay men, hence their relations, are just like heterosexuals, and theirs.”¹⁰⁵ “Exchanging the classic definition’s presumption that heterosexuality and homosexuality are unlike for one that implicitly negates it,” he continues, “*Goodridge* declares the institution of marriage is fundamentally about relationships.”¹⁰⁶

Most recently, in *Varnum*, the Iowa Supreme Court consistently relied on like-straight reasoning when explaining why that state’s cross-sex marriage definition violated state constitutional equality guarantees.¹⁰⁷ At the very beginning of its unanimous opinion, for example, the court made clear just how similarly situated gay and straight Iowans were when it came to marriage, stating, “[l]ike most Iowans, they are responsible, caring, and productive individuals Like many Iowans, some have children and others hope to have children Like all Iowans, they prize their liberties and live within the borders of this state with the expectation that their rights will be maintained and protected.”¹⁰⁸

The remainder of the *Varnum* court’s opinion continues this like-straight/no-differences theme. In response to the argument that gays could be denied the right to marry because they allegedly make sub-optimal parents, for instance, the court reasoned that “[m]any leading organizations, . . . supported the conclusion that gay and lesbian parents are *as effective as* heterosexual parents in raising children”¹⁰⁹ and that “[l]esbian and gay parents are *as likely as* heterosexual parents to provide supportive and healthy environments for children.”¹¹⁰ Moreover, the court variously observed that “[p]laintiffs are in committed and loving relationships, many raising families, *just like* heterosexual couples,”¹¹¹ that “official recognition

¹⁰³ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003).

¹⁰⁴ Spindelman, *Homosexuality’s Horizon*, *supra* note 30, at 1366.

¹⁰⁵ *Id.* at 1367.

¹⁰⁶ *Id.*

¹⁰⁷ *See Varnum v. Brien*, 763 N.W.2d 862, 872 (Iowa 2009).

¹⁰⁸ *Id.* at 872 (emphasis added).

¹⁰⁹ *Id.* at 874 (emphasis added).

¹¹⁰ *Id.* (emphasis added).

¹¹¹ *Id.* at 883 (emphasis added).

of their status provides an institutional basis for defining their fundamental relational rights and responsibilities, *just as it does* for heterosexual couples,”¹¹² and that “for purposes of Iowa’s marriage laws, . . . plaintiffs are *similarly situated in every important respect* [to heterosexual couples], but for their sexual orientation.”¹¹³ Finally, the *Varnum* court agreed with the plaintiffs that sexual orientation constituted something more than a non-suspect class, given that sexual orientation—and, in particular, one’s minority sexual orientation status—was not relevant to one’s ability to contribute to society in any distinctive way.¹¹⁴

C. Moving Beyond Like-Straight Reasoning/The No-Differences Model

Simply because like-straight reasoning/the no-differences model makes sense on a doctrinal and strategic level, however, does not necessarily mean that it is either descriptively accurate or normatively desirable. To be sure, it is of course true that gays are like straights in many significant ways that merit both exposure in the public realm (in prominent media outlets such as *The New York Times*) and serious consideration by courts. Many gays, like many straights, want to enter into long-term, committed relationships. Many gays, like many straights, want to structure those relationships according to conventional roles, with one breadwinner and one homemaker. Many gays, like many straights, desire to have and to raise families, whether biological or not. And many gays, like many straights, want the protections of the law—protections that, unfortunately, are largely available only to those who choose to seek legal recognition of their relationship in the form of marital, domestic partnership, or civil union status.

The point here, however, is that neither gays, nor the intimate relationships that they form with each other, are *just like* straights and their intimate relationships—just like them in all the ways that visual media and litigation arguments suggest that they are. Moreover, and from a more normative standpoint, gay advocates should not have to argue that same-sex relationships are just like their cross-sex counterparts in all significant ways when it comes to marriage and the family in order to secure an even-handed distribution of the right to marry, especially when studies suggest that many same-sex couples and their families *are* different in some rather important ways from many cross-sex couples and their families.¹¹⁵ Cognizable

¹¹² *Id.* (emphasis added).

¹¹³ *Varnum*, 763 N.W.2d. at 883–84 (emphasis added).

¹¹⁴ *Id.* at 890–93. The *Varnum* court applied the four factors set forth above and found that sexual orientation constituted a quasi-suspect classification deserving of heightened judicial review. *See id.* at 896.

¹¹⁵ *See infra* discussion at Part III.

differences, this Essay submits, need not defeat equality claims, even as they have taken a backseat to a no-differences model and its strict formal equality logic.

While not inherently bad, the ideas that gays are just like straights or that same-sex couples are just like cross-sex couples that are expressed in both visual depictions of same-sex marriage and legal arguments made to courts are woefully incomplete and therefore warrants reconsideration. As the next Part will show, abundant research suggests that significant differences between gay and straight relationships exist, differences that get downplayed in marriage equality litigation out of a fear that the mere admission of any difference between same-sex and cross-sex couples would signal the death knell to a constitutional challenge of an exclusionary marriage law for the reasons suggested above. Moreover, not only do empirical studies exist that suggest that same-sex and cross-sex relationships are different in important ways that go unmentioned, but so too does a legal model for incorporating the reality of that difference into a constitutional challenge. That model, as mentioned earlier, is Justice Ginsburg's *United States v. Virginia* majority opinion, one that boldly recognizes the reality of difference as well as the fact that such difference cannot justify unequal treatment. It is a model, this Essay will suggest, on which a new sexuality/marriage equality advocacy and jurisprudence could, and indeed should, rest.

III. THE DESCRIPTIVE SHORTCOMINGS OF LIKE-STRAIGHT REASONING/THE NO-DIFFERENCES MODEL

Even though the no-differences model has shaped the way in which the public sometimes views same-sex marriage as well as the way in which gay advocates routinely cast their arguments in marriage equality litigation, a wealth of sociological and psychological research exists that casts doubt on that model. These studies, which thus far have not made their way into pro-marriage equality briefs for reasons offered below, suggest that significant differences exist between same-sex and cross-sex couples across a range of areas, from interpersonal interactions to parenting, the latter of which, as discussed earlier, has played a prominent role in arguments against marriage equality. Insofar as these studies acknowledge difference on myriad levels, they pose a serious challenge to the progressive no-differences model and to the narrow vision of equality that it produces.

Perhaps the most controversial study to date disputing the no-differences model was published in 2001 by sociologists Judith Stacey and Timothy Biblarz.¹¹⁶ In that study, *(How) Does the Sexual Orientation of Parents*

¹¹⁶ Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159 (2001).

Matter?, Professors Stacey and Biblarz challenge what they refer to as the “‘no differences’ doctrine” that has come to dominate comparative research on lesbian and gay family issues.¹¹⁷ The authors explain that most empirical research on lesbian and gay family life that is sympathetic to it takes a “defensive” stance by aiming to debunk the conservative myth that sexual minorities make bad parents and/or do not parent as effectively as their straight counterparts.¹¹⁸ For that reason, they continue, the objective of most pro-gay comparative empirical work in this area has been to show that lesbian and gay parents are just like heterosexual parents and that lesbian and gay parenting *is no different from* heterosexual parenting.¹¹⁹

In Stacey and Biblarz’s view, such “defensive” pro-gay research not only adheres to a “heterosexis[t]” and “hierarchical model,” one that “implies that *differences* indicate *deficits*,” but also “hampers research and analysis among those who explicitly support lesbigay parenthood” because it fails to investigate “whether (and how) differences in adult sexual orientation might lead to meaningful differences in how individuals parent and how their children develop.”¹²⁰ Indeed, this tendency “to tread gingerly around the terrain of differences,” they argue, “compromises the development of knowledge not only in child development and psychology, but also within the sociology of sexuality, gender, and family more broadly.”¹²¹ “When researchers downplay the significance of any findings of differences,” the authors conclude, “they forfeit a unique opportunity to take full advantage of the ‘natural laboratory’ that the advent of lesbigay-parent families provides for exploring the effects and acquisition of gender and sexual identity, ideology, and behavior.”¹²²

In this article, then, Stacey and Biblarz propose a different approach, one that represents a progressive “[r]ethinking [of] the ‘no differences’ doctrine” that has shaped pro-gay family research;¹²³ in their words, theirs is an “alternative strategy that moves beyond hetero-normativity without forfeiting the fruitful potential of comparative research.”¹²⁴ To that end, the authors meticulously re-examine twenty-one studies of lesbian and gay parenting that were published over a seventeen-year period, from 1981 to 1998.¹²⁵ After

¹¹⁷ *Id.* at 163.

¹¹⁸ *Id.* at 162.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Stacey & Biblarz, *supra* note 116, at 162–63.

¹²³ *Id.* at 163.

¹²⁴ *Id.*

¹²⁵ *See id.* at 167.

doing so, Stacey and Biblarz confirm what both they and a handful of other researchers had suspected, namely, that critical differences between straight and lesbian/gay parenting exist.¹²⁶ Whereas those studies, Stacey and Biblarz tell us, “almost uniformly claim to find no differences in measures of parenting or child outcomes,”¹²⁷ their meta-analysis of those same studies’ findings suggests otherwise. As they put it: “[O]ur careful scrutiny of the findings [the previous studies] report suggests that on some dimensions . . . the sexual orientations of these parents matter somewhat more for their children than the researchers claimed.”¹²⁸

More specifically, after revisiting the previous studies, Stacey and Biblarz argue that they support the conclusion that differences between lesbian/gay and straight parenting exist in three key areas: gender, sexuality, and parenting practices.¹²⁹ First, the authors posit that the sexual orientation of parents can have an influence on the gender identity of children, particularly if those parents are lesbians (or, if one parent, a lesbian).¹³⁰ For instance, Stacey and Biblarz report that according to one study children of lesbian mothers (or of a lesbian mother) “more frequently dress, play, and behave in ways that do not conform to sex-typed cultural norms.”¹³¹ Daughters of lesbian mothers “reported higher aspirations to nontraditional gender occupations,” with “53 percent . . . of the daughters of lesbians aspir[ing] to careers such as doctor, lawyer, engineer, and astronaut, compared with only 21 percent . . . of the daughters of heterosexual mothers.”¹³² Similarly, “[o]n some measures, like aggressiveness and play preferences, the sons of lesbian mothers behave in less traditionally

¹²⁶ *Id.* at 176. For other studies, see Gillian A. Dunne, *What Difference Does “Difference” Make? Lesbian Experience of Work and Family Life*, in RELATING INTIMACIES 189 (Julie Seymour & Paul Bagguley eds., 1999); G. Dorsey Green & Frederick W. Bozett, *Lesbian Mothers and Gay Fathers*, in HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY 197 (John C. Gonsiorek & James D. Weinrich eds., 1991); Charlotte J. Patterson, *Lesbian and Gay Parents and Their Children*, in THE LIVES OF LESBIANS, GAYS, AND BISEXUALS: CHILDREN TO ADULTS 274 (Ritch C. Savin-Williams & Kenneth M. Cohen eds., 1996); Charlotte J. Patterson, *Children of the Lesbian Baby Boom: Behavioral Adjustment, Self-Concepts, and Sex Role Identity*, in LESBIAN AND GAY PSYCHOLOGY: THEORY, RESEARCH, AND CLINICAL APPLICATIONS 156 (B. Greene & G.M. Herek eds., 1994); Celia Kitzinger & Adrian Coyle, *Lesbian and Gay Couples: Speaking of Difference*, 8 THE PSYCHOLOGIST 64 (1995); Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 1025 (1992).

¹²⁷ Stacey & Biblarz, *supra* note 116, at 167.

¹²⁸ *Id.*

¹²⁹ *Id.* at 167.

¹³⁰ *Id.* at 168.

¹³¹ *Id.*

¹³² *Id.* (citation omitted).

masculine ways than those raised by heterosexual single mothers.”¹³³ In the authors’ view, the studies suggest that “the sexual orientation of mothers interacts with the gender of children in complex ways to influence gender preferences and behavior.”¹³⁴ “Such findings raise provocative questions about how children assimilate gender culture and interests,” they continue, “questions that the propensity to downplay differences deters scholars from exploring.”¹³⁵

Second, and more controversially, Stacey and Biblarz maintain that the studies support the claim that parents’ sexual orientation can have an effect on the sexuality of children.¹³⁶ For instance, the authors report that one study of gay fathers and their adult sons provides “evidence of a moderate degree of parent-to-child transmission of sexual orientation.”¹³⁷ Similarly, another study suggests that “young adults reared by lesbian mothers were . . . significantly more likely to report having thought they might experience homoerotic attraction or relationships.”¹³⁸

Third, Stacey and Biblarz contend that the studies support the conclusion that differences exist with respect to the parenting practices of straight and lesbian parents.¹³⁹ For instance, “[c]hildren of lesbian mothers . . . report feeling more able than children of heterosexual parents to discuss their sexual development with their mothers and . . . their mothers’ partners.”¹⁴⁰ In addition, lesbian mothers who conceived through donor insemination (DI) “scored significantly higher than the DI heterosexual fathers on measures of parenting skills, practices, and quality of interactions with children.”¹⁴¹ In fact, in Stacey and Biblarz’s view, the studies suggest that “lesbian co-parents may enjoy greater parental compatibility and achieve particularly high quality parenting skills” than their heterosexual counterparts (i.e., heterosexual mothers and fathers).¹⁴² They contend that the comparative

¹³³ Stacey & Biblarz, *supra* note 116, at 168.

¹³⁴ *Id.* at 170.

¹³⁵ *Id.*

¹³⁶ *Id.* For an opposing view, see Carlos A. Ball, *Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference*, 31 CAP. U. L. REV. 691, 702 (2003) (“I do not believe . . . that we are anywhere near a minimum threshold of plausibility for Stacey’s and Biblarz’s . . . conclusion that parents influence the sexual orientation of their children.”).

¹³⁷ Stacey & Biblarz, *supra* note 116, at 171.

¹³⁸ *Id.* at 170.

¹³⁹ *Id.* at 174.

¹⁴⁰ *Id.* at 175.

¹⁴¹ *Id.* at 174.

¹⁴² *Id.*

strengths of lesbian co-parents have something to do with both gender and sexual orientation. In their words:

[S]exual orientation and gender should be viewed as *interacting* to create new kinds of family structures and processes—such as an egalitarian division of child care—that have fascinating consequences . . . for child development Some of the evidence suggests that two women co-parenting may create a synergistic pattern that brings more egalitarian, compatible, shared parenting and time spent with children, greater understanding of children, and closeness and communication between parents and children. The genesis of this pattern cannot be understood on the basis of either sexual orientation or gender alone. Such findings raise fruitful comparative questions for future research about family dynamics among two parents of the same or different gender who do or do not share similar attitudes, values, and behaviors.¹⁴³

Stacey and Biblarz ultimately conclude not only that “modest and interesting” differences exist between straight and lesbian/gay parents,¹⁴⁴ but also that “the effects of parental gender trump those of sexual orientation,” insofar as the research indicates that “children with two same-gender parents, and particularly with co-mother parents, should develop in less gender-stereotypical ways than would children with two heterosexual parents.”¹⁴⁵ As to the differences, the authors comment that, far from operating as “deficits,” they either “favor the children with lesbigay parents, . . . or represent ‘just a difference’ of the sort democratic societies should respect and protect.”¹⁴⁶ They conclude their study by “recogniz[ing] the political dangers”¹⁴⁷ of pointing out differences between straight and gay parenting, and, in particular, of noting the possible relevance of a parent’s sexual orientation on the development of his or her child’s/children’s own sexuality.¹⁴⁸ Nevertheless, they remark, “[i]t is neither intellectually honest nor politically wise to base a claim for justice on grounds that may prove falsifiable empirically [T]he case for granting *equal rights to nonheterosexual parents should not require finding their children to be identical to those reared by heterosexuals.*”¹⁴⁹

¹⁴³ Stacey & Biblarz, *supra* note 116, at 175 (citations omitted).

¹⁴⁴ *Id.* at 176.

¹⁴⁵ *Id.* at 177.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 178.

¹⁴⁸ *Id.*

¹⁴⁹ Stacey & Biblarz, *supra* note 116, at 178 (emphasis added).

Since Stacey and Biblarz's paper on the differences between straight and gay parenting was published in 2001, social scientists have published a number of other studies that suggest that significant differences exist between straight and gay parenting as well as straight and gay relationships more generally.¹⁵⁰ A *New York Times Magazine* article published just this past November, for instance, cites to recent studies that highlight the differences between straight and gay parenting, differences which, those studies contend, account for the fact that children raised by gays and lesbians are "more tolerant," among other things, than those raised by straight parents.¹⁵¹ Indeed, the author of that article remarks that "[i]t is striking . . . how comparatively rarely children are mentioned as an argument *in favor of* gay marriage,"¹⁵² as studies show that gay parenting tends to promote equality *in* parenting, the latter of which might "also be better for . . . children."¹⁵³

Similarly, in 2003, renowned couples therapist, John Gottman, along with Berkeley psychology professor, Robert Levenson, published two longitudinal observational studies—the first of their kind—that tracked partner interactions in gay and lesbian relationships.¹⁵⁴ Contrary to the stereotype that same-sex relationships are less stable and more volatile than their cross-sex counterparts, Gottman and Levenson found that gay and

¹⁵⁰ While some studies of the differences between gay and straight relationships pre-existed that of Stacey and Biblarz, the vast number of them have been published since 2001. For prior studies, see Lawrence A. Kurdek, *Relationship Outcomes and Their Predictors: Longitudinal Evidence From Heterosexual Married, Gay Cohabiting, and Lesbian Cohabiting Couples*, 60 J. OF MARRIAGE & FAM. 553 (1998) [hereinafter *Relationship Outcomes*]; Lawrence A. Kurdek & J. Patrick Schmitt, *Relationship Quality of Partners in Heterosexual Married, Heterosexual Cohabiting, and Gay and Lesbian Relationships*, 51 J. OF PERSONALITY & SOC. PSYCHOL. 711 (1986).

¹⁵¹ See Lisa Belkin, *What's Good for the Kids*, N.Y. TIMES, Nov. 8, 2009, (Magazine), at 9, 11. Belkin alerts her audience to recent academic studies that investigate the similarities as well as the differences between gay and straight parenting. *Id.* at 9. Those studies include a recent book on the subject by Professor Abbie Goldberg. See ABBIE E. GOLDBERG, *LESBIAN AND GAY PARENTS AND THEIR CHILDREN: RESEARCH ON THE FAMILY LIFE CYCLE* (2009).

¹⁵² Belkin, *supra* note 151, at 9 (emphasis added).

¹⁵³ *Id.* at 11.

¹⁵⁴ John Mordechai Gottman et al., *Correlates of Gay and Lesbian Couples' Relationship Satisfaction and Relationship Dissolution*, 45 J. OF HOMOSEXUALITY 23 (2003) [hereinafter *Correlates*]; John Mordechai Gottman & Robert Wayne Levenson, *Observing Gay, Lesbian and Heterosexual Couples' Relationships: Mathematical Modeling on Conflict Interaction*, 45 J. OF HOMOSEXUALITY 65 (2003) [hereinafter *Observing*].

lesbian relationships were not just “fundamentally different from heterosexual relationships,” but also healthier in many key respects.¹⁵⁵

For instance, compared to heterosexual couples, gay/lesbian couples were more “upbeat in the face of conflict,”¹⁵⁶ using “more affection and humor when they bring up a disagreement.”¹⁵⁷ Moreover, gay/lesbian couples “use[d] fewer controlling, hostile emotional tactics” than their heterosexual counterparts, displaying “less belligerence, domineering and fear with each other than straight couples do.”¹⁵⁸ Finally, “homosexual couples were more positive in their influence on the partner in the positive affect ranges and less negative in their influence on the partner in the negative affect ranges than were heterosexual couples.”¹⁵⁹

Based on these and other observations, Gottman and Levenson conclude that, far from confirming the stereotype of gay/lesbian instability, the studies show that “heterosexual relationships may have a great deal to learn from homosexual relationships.”¹⁶⁰ The authors suggest that at least part of the reason why the gay and lesbian committed relationships that they observed would “differ so much from heterosexual couples” is because same-sex couples “value equality far more than [do] heterosexual couples.”¹⁶¹ “The greater negativity and lowered positivity of heterosexual couples,” they conclude, “may have to do with the standard status hierarchy between men and women, a pattern that research has shown is largely absent in same-sex couples.”¹⁶²

Other studies support Gottman and Levenson’s conclusions that lesbian/gay relationships appear to be stronger and less hierarchical in many key respects than their heterosexual counterparts. For instance, Professor Lawrence Kurdek, one of the first scientists to conduct sophisticated longitudinal (although not observational) research on gay, lesbian, and heterosexual married couples,¹⁶³ has concluded that lesbian/gay couples

¹⁵⁵ Gottman & Levenson, *Observing*, *supra* note 154, at 84.

¹⁵⁶ The Gottman Institute, *12-Year Study of Gay & Lesbian Couples*, <http://www.gottman.com/research/projects/gaylesbian> (summarizing the findings from the *Journal of Homosexuality*’s observational studies); *see also* Gottman & Levenson, *Observing*, *supra* note 151, at 84–88.

¹⁵⁷ The Gottman Institute, *supra* note 156.

¹⁵⁸ *Id.*

¹⁵⁹ Gottman et al., *Observing*, *supra* note 154, at 87.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 87–88.

¹⁶² *Id.* at 88.

¹⁶³ *See* Kurdek, *Relationship Outcomes*, *supra* note 150; *see also* Lawrence A. Kurdek, *Are Gay and Lesbian Cohabiting Couples Really Different From Heterosexual Married Couples?*, 66 J. OF MARRIAGE & FAM. 880 (2004) [hereinafter *Are Gay and*

“reported higher levels of private self-consciousness, openness, and comfort with closeness” than straight couples.¹⁶⁴ Moreover, “[c]ompared to married [heterosexual] partners,” Kurdek found, “lesbian relationships reported more intimacy, more autonomy, [and] more equality.”¹⁶⁵

More recent research likewise suggests that lesbian and gay couples are “more egalitarian than heterosexual couples” when it comes to the division of labor in the household;¹⁶⁶ as one study reports, “being in a same-sex relationship is more important in equalizing housework than is having similar incomes.”¹⁶⁷ “In this regard,” the authors of that report state, “same-sex couples are a model for ways of equalizing the division of housework.”¹⁶⁸ Furthermore, as also observed by Gottman and Levenson, researchers have found that “same-sex couples engage in relationship maintenance behaviors in more egalitarian ways.”¹⁶⁹ This “more egalitarian approach taken by same-sex couples,” one researcher comments, “is an advantage that could benefit straight couples too.”¹⁷⁰

Lesbian Cohabiting Couples]; Lawrence A. Kurdek, *Differences Between Heterosexual-Nonparent Couples and Gay, Lesbian, and Heterosexual-Parent Couples*, 22 J. OF FAM. ISSUES 728 (2001) [hereinafter *Differences Between*].

¹⁶⁴ Kurdek, *Differences Between*, *supra* note 163, at 747.

¹⁶⁵ Gottman & Levenson, *Observing*, *supra* note 154, at 67 (summarizing Kurdek’s findings).

¹⁶⁶ Sondra E. Solomon, Esther D. Rothblum & Kimberly F. Balsam, *Money, Housework, Sex, and Conflict: Same-Sex Couples in Civil Unions, Those Not in Civil Unions, and Heterosexual Married Siblings*, 52 SEX ROLES 561, 572 (2005); *see also* Malley Shechory & Riva Ziv, *Relationships Between Gender Role Attitudes, Role Division, and Perception of Equity Among Heterosexual, Gay and Lesbian Couples*, 56 SEX ROLES 629, 635 (2007) (“As hypothesized, it was found that same-sex couples had more liberal attitudes toward gender roles than heterosexual couples did . . . [W]e found lesbian couples to be more egalitarian than heterosexual couples regarding the household tasks.”).

¹⁶⁷ Solomon et al., *supra* note 166, at 572; *see also* Shechory & Ziv, *supra* note 163, at 636 (“Our results confirm those of Solomon et al. (2005), who found that sexual orientation for both women and men were [sic] a stronger predictor of division of household tasks than was income difference.”).

¹⁶⁸ Solomon et al., *supra* note 166, at 572; *see also* Lisa Belkin, *When Mom and Dad Share It All*, N.Y. TIMES, June 15, 2008, (Magazine), at 74 (discussing studies which have found that, as compared to heterosexual couples, “[l]esbian couples . . . have a more equal division of housework”).

¹⁶⁹ Solomon et al. *supra* note 166, at 573.

¹⁷⁰ *Same-Sex Couples More Likely To Have Satisfying Marital and Family Relations*, THAIINDIAN NEWS, Jan. 13, 2008, http://www.thaindian.com/newsportal/health/same-sex-couples-more-likely-to-have-satisfying-marital-and-family-relations_10012659.html (Jan. 13, 2008) (paraphrasing Robert-Jay Green, executive director of the Rockway Institute).

Based on the empirical studies surveyed above, from those that study how the sexual orientation of parents matters when it comes to raising children to those that examine how labor is divided in a same-sex household, one would expect to find the following sorts of arguments in marriage equality briefs: “While same-sex couples might be *like* cross-sex couples when it comes to the desire to marry, in some critical respects research suggests that they are different from cross-sex couples when it comes to structuring the division of household and parenting labor in a committed relationship. One researcher, for instance, has suggested that, as compared to cross-sex couples, ‘same-sex couples are a *model* for ways of equalizing the division of housework.’”¹⁷¹ Or: “It is unconstitutional to withhold the right to marry from same-sex couples on the basis that cross-sex couples make better parents because research suggests that, if anything, the perceptible differences that *do* exist between lesbian/gay and straight parenting ‘favor the children’ with lesbian/gay parents.”¹⁷² Or finally: “Some quite prominent and renowned scientists have argued that ‘heterosexual relationships may have a great deal to learn from homosexual relationships.’”¹⁷³ As such, same-sex marriage could serve an important educative function.”

To be sure, this is not at all to suggest that hierarchical, unequal, and even abusive same-sex relationships do not exist. Indeed, and as Spindelman has cogently argued, like-straight arguments are problematic not only because they collapse same-sex relationships into cross-sex relationships, but also because they elide the sexual violence that exists in gay and straight communities alike.¹⁷⁴ It is to suggest, though, that like-straight rhetoric profoundly under-represents the realities of gay relationships—whether it is the reality of same-sex sexual violence (as Spindelman argues) or the reality of difference between gays, straights, and the families, if any, that they raise.

While the empirical studies surveyed here certainly do not negate the possibility of inequality and violence within same-sex relationships, they do present a portrait of those relationships that is largely absent in gay rights litigation (and, as *The New York Times Magazine* photo montage suggests, in mainstream media portrayals of gay marriage as well). As discussed in Part II, any acknowledgement of difference between same-sex and cross-sex couples is missing in pro-marriage equality briefs—briefs which, predictably

¹⁷¹ Solomon et al., *supra* note 166, at 572 (emphasis added).

¹⁷² Stacey & Biblarz, *supra* note 116, at 177.

¹⁷³ Gottman et al., *Observing*, *supra* note 154, at 87.

¹⁷⁴ Spindelman, *Sodomy Politics*, *supra* note 30, at 6 (“The tightlipped silence in the gay rights *Lawrence* briefs around the current realities of same-sex sexual violence within the gay community keeps them exactly where male supremacy does and would keep them among heterosexuals: invisible, hidden from public view.”).

enough, largely do not cite to the aforementioned studies.¹⁷⁵ Indeed, the dominant paradigm in both the public representation of gay marriage and the arguments put forward by advocates in favor of that institution is one of no-differences. That being the case, it is not surprising that gay advocates would shy away from empirical studies that suggest otherwise.

With respect to progressive commentators' reception of the Stacey-Biblarz study in particular, Professor Clifford Rosky has recently observed that "[i]n law review articles, legal scholars have generally downplayed the article's finding that there were 'differences' between the children of gay and lesbian parents and the children of heterosexual parents."¹⁷⁶ In fact, he reports, "[t]hey do not acknowledge that the authors found significant differences in children's gender and sexual development at all."¹⁷⁷ To the extent that the Stacey-Biblarz study is cited in pro-marriage equality briefs, it appears almost exclusively to support the propositions that "[e]mpirical research over the past two decades has failed to find any meaningful differences in the parenting ability of lesbian and gay parents compared to heterosexual parents"¹⁷⁸ and that "scientific research has consistently shown that the children of gay parents are no different from other children with respect to their development."¹⁷⁹ As one might expect, the differences that Stacey and Biblarz did uncover are highlighted and embraced instead by those who oppose marriage equality for sexual minorities.¹⁸⁰

Moreover, because the social, cultural, and legal understanding of gay marriage has been so deeply informed by this no-differences paradigm, the benefits or advantages of same-sex relationships—their egalitarianism, for instance—go unnoticed. Recall here the two images of the "gay housewife," Joshua, and his husband, Benjamin, from *The New York Times Magazine*

¹⁷⁵ See *supra* discussion at Part II.

¹⁷⁶ Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J.L. & FEMINISM 257, 336 (2009).

¹⁷⁷ *Id.*

¹⁷⁸ Amicus Curiae Brief of American Psychological Association at 38, *Andersen v. King County*, 138 P.3d 963 (Wash. 2006) (No. 75934-1).

¹⁷⁹ Brief of Amici Curiae Parents, Families & Friends of Lesbians and Gays, Inc. et al. at 18, *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) (Nos. 6589 & 6599).

¹⁸⁰ See, e.g., Brief of Family Research Council as Amicus Curiae in Support of Defendants-Appellants at 33, *Conaway v. Deane*, 932 A.2d 571 (Md. 2007) (No. 44) ("In reality, the same-sex parenting studies show a significant difference in outcome between children raised by heterosexual mothers and those raised by lesbians. Stacey and Biblarz, themselves proponents of same-sex parenting, challenge the intellectual honesty of the reports of 'no differences.'"). Rosky also notes that marriage "[o]pponents like [Lynn] Wardle have welcomed [their] article, which they cite as conclusive proof that gay men and lesbians should not be granted custody, visitation, adoption, or marriage rights." Rosky, *supra* note 176, at 336.

piece on gay marriage in Massachusetts.¹⁸¹ Each photo depicted a conventional gendered division of labor in the household, with Joshua cooking and vacuuming (i.e., performing what culture perceives to be women's work) and with Benjamin reading and looking on (i.e., doing what culture perceives to be those things that the man of the house does).¹⁸² Because these images were so closely tethered to heterosexual norms—or, at least, to what culture imagines those norms to be—and to a no-differences model, they failed to capture not only what is distinctive about many same-sex relationships, but also what research suggests is their unique value, including their tendency to promote an egalitarian work ethic at home. While Joshua and Benjamin might have chosen to structure the division of labor in *their* household in this way, studies suggest that *many* same-sex couples do not (recall Denizet-Lewis's observation that many of his subjects "bristled at the notion that they would fashion their domestic lives around heterosexual stereotypes"¹⁸³). The no-differences paradigm, then, profoundly underrepresents reality, and quite possibly distorts it.

IV. TOWARD A NEW VISION OF SEXUAL EQUALITY: *UNITED STATES V. VIRGINIA* AND THE CELEBRATION OF DIFFERENCE

A serious reconsideration of the no-differences model that has shaped the social, cultural, and legal understanding of same-sex marriage is warranted for two reasons: first, because that model, as Part III has explained, is woefully incomplete; and second, because a model of equality that incorporates difference, as Part V will argue, is normatively desirable. This Part will put forward such a model, one that embraces, rather than rejects, difference, as well as one that understands that differences might enhance, rather than defeat, equality claims. That model, which the author hopes will be one on which a vision of sexual equality might one day rest, will be based in significant part on Justice Ginsburg's *United States v. Virginia* majority opinion, one that recognizes the value of difference even as it rejects the state's attempt to deny individuals equal opportunity on account of it.¹⁸⁴

To that end, Sections A and B will review Justice Ginsburg's majority opinion in *Virginia* and the "distinctive understanding of sex equality" that emerges from it.¹⁸⁵ Section C will then consider the surprisingly limited role that *Virginia* has played in pro-marriage equality briefs and the much more

¹⁸¹ Denizet-Lewis, *supra* note 31, at 29.

¹⁸² *Id.*

¹⁸³ *Id.* at 35.

¹⁸⁴ *United States v. Virginia*, 518 U.S. 515, 533 (1996).

¹⁸⁵ Sunstein, *Leaving Things Undecided*, *supra* note 9, at 74.

pronounced role that Justice Ginsburg's celebrated "differences" passage has played in briefs opposing marriage equality for same-sex partners. Finally, Section D will make the case for incorporating *Virginia* into sexual/marriage equality advocacy and perhaps eventually into a sexual/marriage equality jurisprudence.

A. *United States v. Virginia: Justice Ginsburg's Majority Opinion*

The issue before the Court in *United States v. Virginia* was whether it violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution categorically to exclude women from the Virginia Military Institute (VMI), an all-male state military college and the only public educational institution in Virginia to discriminate on the basis of sex.¹⁸⁶ At trial, the Commonwealth advanced several sex- or gender-related reasons why VMI was unsuitable to women. In particular, the Commonwealth maintained that both "gender-based physiological differences"¹⁸⁷ and "gender-based developmental differences"¹⁸⁸ existed between men and women that would make it difficult, if not impossible, for members of the latter group to satisfy the rigorous physical, psychological, and emotional demands of VMI's adversative method, the training protocol that rendered VMI "distinctive"¹⁸⁹ in a way that contributed to the Commonwealth's overall "objective of educational diversity."¹⁹⁰ Women, in the Commonwealth's view, were so physically, psychologically, and socially different from men that to admit them into VMI would be to change the very thing that made the school unique.¹⁹¹ In turn, because VMI's uniqueness would be lost were it to admit women, the Commonwealth argued, it followed that the school's exclusionary policy satisfied intermediate scrutiny, as it was substantially related to the important state interest of achieving educational diversity—the educational diversity, that is, that a unique school like VMI represented within the educational system of the Commonwealth as a whole.¹⁹²

¹⁸⁶ *Virginia*, 518 U.S. at 550.

¹⁸⁷ *United States v. Virginia*, 766 F. Supp. 1407, 1432 (W.D. Va. 1991).

¹⁸⁸ *Id.* at 1434.

¹⁸⁹ *Id.* at 1413.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 1414.

¹⁹² *Id.* at 1413 ("I find that both VMI's single-sex status and its distinctive educational method represent legitimate contributions to diversity in the Virginia higher education system, and that excluding women is substantially related to this mission.").

In its initial judgment, the Fourth Circuit vacated the district court's ruling on the ground that the Commonwealth failed to advance "any state policy by which it can justify its determination, under an announced policy of [educational] diversity, to afford VMI's unique type of program to men and not to women."¹⁹³ Moreover, the appeals court remanded the case to the district court to compel the Commonwealth "to formulate, adopt, and implement a plan" that conformed "with the Equal Protection Clause of the Fourteenth Amendment."¹⁹⁴ In a final judgment, the Fourth Circuit agreed with the district court that the "plan" that the Commonwealth later devised—opening up a "parallel" institution for women at another school (which turned out to be patently unequal) rather than integrating VMI—was constitutional.¹⁹⁵ Both sides appealed to the Supreme Court, the Commonwealth on the ground that its gender exclusionary policy did not violate, and the United States on the ground that the Commonwealth's remedy did violate, the Equal Protection Clause.¹⁹⁶

In a landmark majority opinion authored by Justice Ginsburg, the Supreme Court affirmed the Fourth Circuit's initial judgment with respect to the constitutionality of VMI's exclusionary program,¹⁹⁷ and reversed the Fourth Circuit's final judgment with respect to the constitutionality of the Commonwealth's proposed remedy.¹⁹⁸ First, in responding to the Commonwealth's sex-related justifications for denying women admission into VMI in the first place, all of which centered on the claim that VMI was "inherently unsuitable to women"¹⁹⁹ because of alleged gender-based physiological, psychological, and social differences between the sexes, Justice Ginsburg stated the following:

Supposed "inherent differences" are no longer accepted as a ground for race or national origin classifications. Physical differences between men and

¹⁹³ *United States v. Virginia*, 976 F.2d 890, 892 (4th Cir. 1992).

¹⁹⁴ *Id.* at 900.

¹⁹⁵ *United States v. Virginia*, 44 F.3d 1229, 1241 (4th Cir. 1995) (concluding that the creation of a separate public school for women is constitutional, assuming that "[t]he opportunities that would be open both to men and women are sufficiently comparable").

¹⁹⁶ *United States v. Virginia*, 518 U.S. 515, 530–31 (1996).

¹⁹⁷ *Id.* at 546 ("Virginia, in sum, has fallen far short of establishing the exceedingly persuasive justification that must be the solid base for any gender-defined classification.") (internal quotation marks and citation omitted).

¹⁹⁸ *Id.* at 555–56 ("In sum, Virginia's remedy does not match the constitutional violation; the Commonwealth has shown no 'exceedingly persuasive justification' for withholding from women qualified for the experience premier training of the kind VMI affords.").

¹⁹⁹ *Id.* at 541.

women, however, are enduring: “[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.”

“Inherent differences” between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity. Sex classifications may be used to compensate women “for particular economic disabilities [they have] suffered,” to “promot[e] equal employment opportunity,” to advance full development of the talent and capacities of our Nation’s people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.²⁰⁰

Conceding that women and men might be different in all sorts of biological, social, and cultural ways, Justice Ginsburg nevertheless made clear that such differences could not function as a liability nor as a reason to deny members of either sex equal opportunity. While differences—or, at least, “physical” or biological differences—might flow from nature, constraints on individual opportunity that are predicated on those differences have the character of artifice, as those constraints are, in her words, “artificial,” and therefore unlike the physical/biological differences that give rise to them.

Justice Ginsburg’s statements in *Virginia* regarding the reality of gender difference anticipate some of her more recent observations on that subject, observations that suggest that the author of *Virginia*’s majority opinion understands gender difference to encompass more than just physical/biological difference. For instance, her remarks regarding the reactions of her eight male colleagues to a case recently decided by the Court that involved a public school’s strip search of a thirteen-year-old girl, *Safford Unified School District v. Redding*,²⁰¹ indicate that she believes that men and women (or at least male and female jurists) have unique interpretive perspectives because of their sex and the individual experiences that flow from it. During oral argument in *Safford*, the male justices could not understand why the strip search of a young female teenager was so objectionable; Justice Breyer in particular remarked that when he was that age “people did sometimes stick things in my underwear” in the locker

²⁰⁰ *Id.* at 533–34 (internal citations omitted).

²⁰¹ *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2644 (2009) (holding, in part, that a public school’s strip search of a thirteen-year-old girl who was suspected of distributing contraband drugs was unreasonable under the Fourth Amendment of the United States Constitution).

room.²⁰² In an interview with Joan Biskupic of *USA Today*, Justice Ginsburg later commented: “They have never been a 13-year-old girl. It’s a very sensitive age for a girl . . . I didn’t think that my colleagues, some of them, quite understood.”²⁰³

During that same interview, Justice Ginsburg also told Biskupic that in two recent employment discrimination cases in which she dissented and which ruled against female claimants alleging a compensation-related Title VII violation, *AT&T v. Hulteen*²⁰⁴ and *Ledbetter v. Goodyear Tire & Rubber Co.*,²⁰⁵ her male colleagues showed “a certain lack of understanding”²⁰⁶ of the kind of bias that women face in the workplace. In addition, she suggested that the current gender imbalance on the Court has real consequences. Not only are “there . . . perceptions that [female justices] have because we are women,”²⁰⁷ she explained, but female justices “can be sensitive to things that are said in draft opinions that (male justices) are not aware can be offensive.”²⁰⁸ These sex-based differences, she continued, are even “sometimes in the outcome” of a decision.²⁰⁹ In a more recent interview for *The New York Times Magazine*, Justice Ginsburg remarked that “women

²⁰² Transcript of Oral Argument at 58, *Safford*, 129 S. Ct. 2633 (No. 08-479), 2009 WL 1064200.

²⁰³ Joan Biskupic, *Ginsburg: The Court Needs Another Woman*, USA TODAY, May 6, 2009, available at http://www.usatoday.com/news/washington/judicial/2009-05-05-ruthginsburg_N.htm; see also Neil A. Lewis, *Debate On Whether Female Judges Decide Differently Arises Anew*, N.Y. TIMES, June 4, 2009, at A16 (summarizing these comments).

²⁰⁴ *AT&T Corp. v. Hulteen*, 129 S. Ct. 1962, 1966 (2009) (holding that an employer does not violate the Pregnancy Discrimination Act when it calculates female employees’ pension benefits under an accrual rule that was in effect before that Act and that gave less retirement credit for pregnancy leave than for medical leave generally).

²⁰⁵ *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621 (2007) (holding that a female employee’s sex-related pay discrimination claim under Title VII of the Civil Rights Act of 1964 was time barred under that Act, which requires plaintiffs alleging pay discrimination to file a claim with the EEOC not later than 180 days after the first instance of the alleged pay discrimination), *superseded by statute*, The Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5, 5–6 (2009) (amending 42 USC § 2000e-5(e)) (providing that “an unlawful employment practice occurs, with respect to discrimination in compensation[,] . . . each time wages, benefits, or other compensation is paid”).

²⁰⁶ Biskupic, *supra* note 203.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

bring a different life experience to the table,”²¹⁰ even as she disagreed (in that same interview) with the notion that female judges will arrive at a certain conclusion simply because “that’s the way women are.”²¹¹

Justice Ginsburg’s recent remarks to the media suggest that she understands “‘inherent differences’ between men and women” to capture far more than just physical difference alone. Of course, that Justice Ginsburg was focused on physical differences between the sexes in her *Virginia* opinion is a plausible interpretation given that it explicitly, and exclusively, highlights gender differences of the “physical” variety.²¹² At the same time, however, in *Virginia* Justice Ginsburg also cites to *Ballard v. United States*,²¹³ a case that addressed not physical differences between the sexes, but rather perspectival differences between them, for what was at issue there were jury qualifications and whether a jury of both sexes was different from a jury of just one sex. In observing that “a flavor, a distinct quality is lost if either sex is excluded” from a jury, the *Ballard* Court very much answered that latter question in the affirmative.²¹⁴ Furthermore, Justice Ginsburg’s inherent differences passage, as noted above, was responding to the Commonwealth’s claim that physical as well as psychological/social/emotional differences between the sexes justified the exclusion of women from VMI.²¹⁵ Thus, coupled with Justice Ginsburg’s recent statements regarding the important role that gender can play in understanding, and perhaps even in judging, cases, both the content and the context of *Virginia*’s inherent differences passage suggest that its author understands gender difference to encompass something more than just physical/biological distinctions alone.

Second, in responding to the United States’ claim that Virginia’s proposed remedy failed to satisfy the constitutional requirements of equal protection, Justice Ginsburg and a majority of the Court agreed. The proposed remedy was unconstitutional because the ostensibly “parallel”

²¹⁰ Emily Bazelon, *The Place of Women on the Court*, N.Y. TIMES, July 7, 2009, (Magazine), at 24.

²¹¹ *Id.* at 25.

²¹² See *United States v. Virginia*, 518 U.S. 515, 533 (1996) (“Physical differences between men and women . . . are enduring.”).

²¹³ *Ballard v. United States*, 329 U.S. 187, 195–96 (1946) (holding that the deliberate exclusion of women from the panel from which petit and grand juries were drawn in a case tried in federal court in California, where women were eligible for jury service, required dismissal of indictment).

²¹⁴ *Id.* at 194 (“The exclusion of one [sex] may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.”).

²¹⁵ See *supra* note 197 and accompanying text.

institution was patently unequal, lacking not only the tangible resources, but also the prestige and the unique experience that VMI offered.²¹⁶ In addition, the majority found that to refuse to provide women with the same experience that the male VMI cadets received would be to perpetuate “generalizations” and stereotypes about the proper roles of men and women in society.²¹⁷ Finally, while recognizing that VMI would have to make minimal adjustments if forced to integrate, particularly with respect to living arrangements, Justice Ginsburg also reasoned that if even just *some women* could satisfy the physical, psychological, and emotional rigors of the adversative method, then that was enough to find that the Commonwealth’s remedy was not a constitutional one.²¹⁸ In the majority opinion’s words: “It is on behalf of *these women* that the United States has instituted this suit, and it is *for them* that a remedy must be crafted.”²¹⁹ Inherent differences between the sexes, in other words, did not really matter if at least *some women* could attend VMI without fundamentally altering what made that institution special.

It is worth noting that this idea that constitutional guarantees of equal protection are designed to protect the unique or exceptional case—i.e., *those women* who *can* satisfy the demands of VMI’s adversative method—is something that Justice Ginsburg would return to in *Gonzales v. Carhart*²²⁰ (and also something with which Justice Scalia strongly disagrees in his *Virginia* dissent²²¹). In *Carhart*, as is well known, Justice Ginsburg vehemently dissented from the Court’s decision to uphold the constitutionality of the federal Partial-Birth Abortion Ban Act of 2003. In responding to the majority’s contention that the Act survived a facial constitutional challenge because respondents failed to show that the ban would be unconstitutional “in a large fraction of relevant cases,”²²² Justice Ginsburg noted that “[i]t makes no sense to conclude that this facial challenge fails because respondents have not shown that a health exception is necessary for a large fraction of second-trimester abortions, including those

²¹⁶ *Virginia*, 518 U.S. at 551–54.

²¹⁷ *Id.* at 550.

²¹⁸ *Id.*

²¹⁹ *Id.* (emphasis added).

²²⁰ *Gonzales v. Carhart*, 550 U.S. 124, 147 (2007) (upholding the constitutionality of the federal Partial-Birth Abortion Ban Act of 2003 on its face).

²²¹ See *Virginia*, 518 U.S. at 596 (Scalia, J., dissenting) (“The Supreme Court of the United States does not sit to announce ‘unique’ dispositions.”).

²²² *Carhart*, 550 U.S. at 167–68.

for which a health exception is unnecessary: The very purpose of a health *exception* is to protect women in *exceptional* cases.”²²³

As in *Virginia*, so too in *Carhart* does Justice Ginsburg articulate a vision of law that protects—and perhaps especially protects—the exceptional case. In so doing, she nicely responds to a concurring opinion from the first sex discrimination case ever considered by the Supreme Court, *Bradwell v. Illinois*.²²⁴ There, in agreeing with the Court to uphold the Illinois Supreme Court’s refusal to grant a married woman’s application to practice law in that state, Justice Bradley reasoned that the denial was constitutional in light of the inherent differences between men and women—or, in his memorable locution, “in view of the *peculiar characteristics*, destiny, and mission of woman.”²²⁵ That Mrs. Bradwell, a married woman, wanted to deviate from the so-called norms of her sex by practicing law was of no moment. “[T]he rules of civil society,” Justice Bradwell observed, “must be adapted to the general constitution of things and *cannot be based on exceptional cases*.”²²⁶

B. Virginia’s Vision of Difference: “Ambitious” and “Distinctive”

As mentioned earlier, Sunstein has commented that *Virginia* is “an ambitious opinion” that “offers a distinctive understanding of sex equality.”²²⁷ “The depth of the Court’s opinion in *United States v. Virginia*,” he writes, “can be found in the Court’s understanding of the principle of gender equality.” In recognizing *both* that inherent “biological and social differences between men and women” exist *and* that “these differences are to be ‘celebrate[d,]’ not turned into a source of inequality,” Justice Ginsburg’s majority opinion advances an ambitious conception of gender equality. “Significantly,” Sunstein observes, this conception of gender equality “avoids a claim that women are not biologically or socially different from men. It also avoids a claim that those differences justify unequal treatment.”²²⁸

²²³ *Id.* at 188–89 (Ginsburg, J., dissenting).

²²⁴ *Bradwell v. Illinois*, 83 U.S. 130, 137 (1872).

²²⁵ *Id.* at 142 (Bradley, J., concurring) (emphasis added).

²²⁶ *Id.* at 141–42 (emphasis added); *see also id.* at 141 (“It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, *but these are exceptions to the general rule.*”) (emphasis added).

²²⁷ Sunstein, *Leaving Things Undecided*, *supra* note 9, at 74; *see also* SUNSTEIN, ONE CASE AT A TIME, *supra* note 9, at 165 (noting that the *Virginia* “Court offered a particular understanding of sex equality”).

²²⁸ Sunstein, *Leaving Things Undecided*, *supra* note 9, at 76–77; *see also* SUNSTEIN, ONE CASE AT A TIME, *supra* note 9, at 169 (“The [*Virginia*] Court emphasizes that there

To be sure, Justice Ginsburg's reckoning with difference in *Virginia* is "distinctive" and "particular" because it departs in intriguing ways from Supreme Court precedent on the legal significance of sex/gender difference as well as from some of the dominant feminist critiques of the law's approach to sex/gender difference. First, it departs from Supreme Court precedent on the legal significance of sex/gender difference because it recognizes not only that sex/gender differences exist, but also that such differences cannot be turned into a disadvantage nor relied upon to perpetuate stereotypical ways of thinking about the relative positions of men and women in public life. Unlike *Virginia*, as well as Justice Ginsburg's more recent pronouncements regarding gender difference, prior sex equality cases either did not recognize gender difference or relied on it too much in order to justify unequal treatment—unequal treatment that, in turn, perpetuated gender stereotypes.

In *Reed v. Reed*, for instance, the Supreme Court struck down a sex-based estate administration classification on the ground that it was irrational to assume that women were different from men when it came to administering estates.²²⁹ Insofar as the *Reed* decision "rejected as 'irrational' the view that women might be different from men with respect to their ability to handle the traditionally 'male' responsibilities of estate administration,"²³⁰ it has been characterized by some commentators as "profoundly assimilationist,"²³¹ embracing as it did a no-differences model and its assimilative ideal. Alternatively, in *Michael M. v. Superior Court of Sonoma County*, the Court upheld the constitutionality of a sex-specific statutory rape law on the ground that reproductive differences—the fact that only women could become pregnant—justified the law's differential treatment of the sexes.²³²

Whereas the *Reed* decision flatly rejected the possibility of difference, the *Michael M.* decision arguably could not take its eyes off of it. The *Virginia* decision departs from both. Unlike *Reed*, and like *Michael M.*,

are indeed differences between men and women, some of them biological, some of them social. Its claim is that differences are to be 'celebrated,' and not turned into a source of inequality. Thus the opinion suggests that the problem of sex equality is a problem of second-class citizenship, in which women's differences from men are used, by the state, as a reason for prescribing gender roles in a way that deprives women of equal opportunity.").

²²⁹ *Reed v. Reed*, 404 U.S. 71, 76–77 (1971).

²³⁰ Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1304–05 (1987).

²³¹ *Id.* at 1304.

²³² *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 472–73 (1981).

Virginia recognizes that differences exist. Like *Reed*, and unlike *Michael M.*, *Virginia* demands equality of treatment.

Second, Justice Ginsburg's majority opinion in *Virginia* departs from some of the dominant feminist critiques of the law's approach to sex/gender difference because it offers a kind of third alternative to feminism's two dominant sex equality models, even as it partakes of both. In one sense, the opinion partakes of an asymmetrical equality model. The asymmetrical equality model, Professor Christine Littleton explains, "rejects the notion that all gender differences are likely to disappear, or even that they should," and maintains that the law should attempt to deal with those differences, or at least some of them, in some way.²³³ Whatever "way" that might be depends on which variety of asymmetrical equality one adopts. While some asymmetrical equality model proponents support special rights/special treatment, others support accommodation and acceptance.²³⁴ Of primary importance here, however, is the fact that the asymmetrical equal model recognizes the reality of gender difference and rejects a definition of sex equality that relies on "a 'mathematical fallacy'—that is, the view that only things that are the same can ever be equal."²³⁵

Insofar as Justice Ginsburg's *Virginia* opinion, like her more public remarks, embraces gender difference (biological and social alike), it would not be wrong to say that it exhibits features of the asymmetrical equality model (at least with respect to its understanding of difference). Indeed, it is asymmetrical in the sense that it not only acknowledges gender difference, but "celebrates" it.²³⁶ In this sense, the opinion represents a strong version of asymmetrical equality, as some proponents of that model would only go so far as to say that the law should tolerate difference, not necessarily celebrate it.²³⁷

In another sense, however, Justice Ginsburg's *Virginia* majority opinion also partakes of a symmetrical equality model. That model, Littleton explains, "attempt[s] to equate legal treatment of sex with that of race and deny that there are in fact any significant natural differences between women and men; in other words, to consider the two sexes symmetrically located

²³³ Littleton, *supra* note 230, at 1292.

²³⁴ *Id.* at 1295 ("Asymmetrical approaches include 'special rights,' 'accommodation,' 'acceptance,' and 'empowerment.'").

²³⁵ *Id.* at 1282.

²³⁶ See *United States v. Virginia*, 518 U.S. 515, 533 (1996) ("'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration.").

²³⁷ Littleton, *supra* note 230, at 1295 (observing that "[a]symmetrical approaches to sexual equality . . . argue that any sexually equal society must somehow deal with difference, problematic as that may be").

with regard to *any* issue, norm or rule.”²³⁸ Under the symmetrical equality model, sex-based differences are minimized, if not denied altogether, and the focus instead is on assimilation, which itself “is based on the notion that women, given the chance, really are or could be just like men.”²³⁹ Under this view, Littleton explains, “the law should require social institutions to treat women as they already treat men—requiring, for example, that the professions admit women to the extent they are ‘qualified.’”²⁴⁰

Insofar as Justice Ginsburg’s *Virginia* opinion makes clear that women must be treated in nearly all ways just like men when it comes to being a student at VMI, it would not be wrong to say that it exhibits features of the symmetrical equality model. To be sure, the opinion approximates symmetrical equality not because it minimizes sex-based differences—quite the contrary. Rather, it approximates the symmetrical equality model because it maintains that the Commonwealth must treat eligible females and eligible males the same, notwithstanding their inherent differences, because at least *some women* can satisfy the rigorous demands of the adversative method.²⁴¹ While the majority opinion recognizes that VMI might have to change in some ways were it to integrate,²⁴² it places most of its emphasis on the fact that at least *some women* will be able to satisfy VMI’s physical, psychological, and emotional rigors. As with proponents of symmetrical equality, then, Justice Ginsburg believes that VMI must integrate precisely because at least some of the women who apply there are “qualified.”

The point here, however, is that while Justice Ginsburg’s *Virginia* opinion partakes of both equality models, it fully mirrors neither. Unlike the asymmetrical equality model, *Virginia*’s vision of sex equality does not require that institutions—there, VMI—really change all that much (and sacrifice what renders them unique) in order to accommodate inherent difference. Unlike the symmetrical equality model, *Virginia*’s vision of sex equality does not require that the law view men and women as the same in

²³⁸ *Id.* at 1291. For a notable example of this approach, see Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 WOMEN’S RTS. L. REP. 175, 196 (1982).

²³⁹ Littleton, *supra* note 230, at 1292.

²⁴⁰ *Id.*

²⁴¹ See *Virginia*, 518 U.S. at 542 (“The issue . . . is not whether ‘women—or men—should be forced to attend VMI’; rather, the question is whether the Commonwealth can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords.”); see also *id.* at 550 (agreeing with the lower court that “some women . . . do well under [the] adversative model”) (citation omitted).

²⁴² See *id.* at 550 n.19 (“Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training program.”).

order to be treated equally. To return to Sunstein's careful assessment of what makes *Virginia*'s vision of sex equality a unique one as far as the Supreme Court's sex jurisprudence goes, it "avoids a claim that women are not biologically or socially different from men" and at the same time "avoids a claim that those differences justify unequal treatment."²⁴³

C. *The Role of Virginia's Vision of Difference in Marriage Equality Litigation*

Justice Ginsburg's majority opinion in *United States v. Virginia* has played a noticeably thin role in pro-marriage equality briefs and decisions. With few notable exceptions, briefs filed by advocates for the same-sex couple plaintiffs in marriage equality litigation have largely neglected to cite to the Court's "inherent differences" passage.²⁴⁴ Moreover, that passage has not appeared in any of the four state supreme court decisions that have held that limiting the definition of marriage to cross-sex couples violates state constitutional equality and/or due process guarantees.²⁴⁵ To the extent that pro-marriage equality briefs or pro-marriage equality decisions advert to *Virginia*, they do so instead to support the proposition that the creation of a separate legal status for same-sex couples, such as civil union or domestic partnership recognition, does not cure the constitutional violation of withholding marriage from those couples in the first place. Just as *Virginia*

²⁴³ Sunstein, *Leaving Things Undecided*, *supra* note 9, at 76–77.

²⁴⁴ See, e.g., Brief of Amici Curiae OneIowa et al. at 24–25, *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (No. 07-1499); Brief of Respondents at 43, *Andersen v. King County*, 138 P.3d 963 (Wash. 2006) (No. 75934-1). The conclusion of OneIowa's brief is worth quoting in full:

As the Supreme Court has written in explaining its rejection of most sex-based classifications, there remain differences between the sexes, and the "[i]nherent differences' between men and women . . . remain cause for celebration, . . . not for denigration of the members of either sex or for artificial constraints on an individual's opportunity." So it is with sexual orientation. Just as we celebrate the differences between the genders, so we can recognize and celebrate the different experiences that same-sex and opposite-sex relationships contribute to the complex tapestry of our community. It is time to put behind us the condemnation that has transformed "difference" into "discrimination" and excluded gay men and lesbians from the principles of equal citizenship, fairness and dignity that are their shared birthright.

Brief of Amici Curiae OneIowa, *supra*, at 24–25 (citation omitted).

²⁴⁵ See *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded by* CAL. CONST. art. I, § 7.5, *as recognized in* *Strauss v. Horton*, 93 Cal. Rptr. 3d 591 (Sup. Ct. 2009); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

found that the Commonwealth could not cure the constitutional violation that the Court found in that case by creating a separate (and inferior) institution for women, they argue, neither can the state cure the constitutional violation of restricting marriage to cross-sex couples by creating a separate (and inferior) institution for same-sex couples.²⁴⁶

While scarce in pro-marriage equality arguments, *Virginia's* vision of "inherent differences" has played an active role in arguments deployed by those who oppose marriage equality. For instance, marriage opponents have variously argued to courts that it is not irrational for the state to promote dual-gender marriage and to discourage same-sex marriage because, as "Supreme Court Justice Ruth Bader Ginsburg has pointed out, the 'two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.'"²⁴⁷ In the words of one amicus brief filed in Washington's marriage equality case, "[p]laintiffs wish to live in a world with no gender differences," when in fact even the Supreme Court has stated that "inherent differences" between the sexes not only exist, but are "enduring."²⁴⁸ Or, in the words of another friend of court brief that was filed in Maryland's marriage equality case, it is important to "[a]ppreciat[e] the innate differences between men and women and the unique contributions each sex makes in child-rearing" because "[a]s Supreme Court Justice Ruth Bader Ginsburg has pointed out, . . . '[i]nherent differences between men and women, we have come to appreciate, remain cause for celebration.'"²⁴⁹ These briefs almost uniformly cite to Professor Douglas Kmiec, who has recently called attention to the fact that *even Justice Ginsburg*, a champion of gender equality, has acknowledged that inherent gender difference not only exists but should be "celebrated." In his words:

Justice Ruth Bader Ginsburg has been a thoughtful advocate for gender equality throughout her career, yet, she has written for the Court that the genders are simply not identical . . . In this, Justice Ginsburg fairly rejects the same-sex claim that "the modern individuation of women has resulted in

²⁴⁶ See, e.g., Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment at 48, *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (No. NNH-CV 04-4001813).

²⁴⁷ Brief Amicus Curiae of The American Center for Law & Justice in Support of Respondent Proposition 22 Legal Defense And Education Fund at 12–13, *Marriage Cases*, 183 P.3d 384 (No. S147999).

²⁴⁸ Intervenor's Reply Brief at 18–19, *Andersen*, 138 P.3d 963 (No. 75934-1).

²⁴⁹ Brief of the American Center for Law & Justice, Northeast, Inc., as Amicus Curiae in Support of Defendant-Appellant at 16, *Deane v. Conaway*, No. 2499 (Md. Ct. Spec. App. June 22, 2006).

the kind of fluidity of gender roles for men and women” that makes the presence of both genders within a family unnecessary.²⁵⁰

That marriage progressives would deliberately avoid citing to Justice Ginsburg’s inherent differences passage—or to any of her recent pronouncements on the reality and significance of gender on the Supreme Court—makes sense on a number of levels. First, the passage disrupts the like-straight reasoning/no-differences model on which marriage equality arguments have largely rested. Indeed, there would seem to be little, if any, room for the acknowledgement of difference of any kind, be it sex/gender difference or sexual orientation difference, in a world dominated by the “‘mathematical fallacy’—that is, the view that only things that are the same can ever be equal.”²⁵¹

Second, under one view at least (although not one with which this Essay agrees), the inherent differences passage suggests that the High Court of the Nation views same-sex relationships not only as different from their cross-sex counterparts, but also as less desirable than them. Indeed, by suggesting that differences should be a cause for celebration rather than for the denigration of either sex, and by citing to a case, *Ballard v. United States*, which observes that “a flavor, a distinct quality is lost if either sex is excluded” from democratic institutions like the jury,²⁵² *Virginia* might be read to indicate that VMI would gain something by integrating and by becoming a dual-sex institution (and, by extension, that marriage would lose something by becoming a single-sex community). That being the case, gay advocates might believe that by citing to *Virginia*’s inherent differences language, they are implicitly suggesting that same-sex marriage lacks the “flavor” and “distinct quality” that all institutions—including, of course, marriage—enjoy by virtue of having both sexes in them.

Third and last, the inherent differences passage is susceptible to the same sort of interpretation to which it was put by a majority of the Court in *Nguyen v. INS*.²⁵³ There, the Court upheld the constitutionality of a federal immigration law that made it more difficult for a non-marital child born abroad to one parent who was a United States citizen to claim citizenship through that parent if it was the father rather than the mother.²⁵⁴ The

²⁵⁰ Douglas W. Kmiec, *The Procreative Argument for Proscribing Same-Sex Marriage*, 32 HASTINGS CONST. L.Q. 653, 656 n.6 (2005) (quoting Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy, and Same-Sex Marriage*, 75 N.C. L. REV. 1501, 1606 (1997)).

²⁵¹ Littleton, *supra* note 230, at 1282.

²⁵² *Ballard v. United States*, 329 U.S. 187, 194 (1946).

²⁵³ *Nguyen v. INS*, 533 U.S. 53, 68 (2001).

²⁵⁴ *Id.* at 58–59.

government argued, in part, that the law was constitutional because it advanced the government's interest in ensuring that the non-marital child and the citizen parent "have some demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States."²⁵⁵ Unwed citizen mothers, unlike unwed citizen fathers, automatically established that relationship during pregnancy and birth.²⁵⁶ It therefore followed, in the government's view, that a law that placed additional burdens on unwed citizen fathers when naturalizing their biological children born overseas passed constitutional muster, as such a law did nothing more than reflect the biological/reproductive advantages that women already had over men to begin with.²⁵⁷

A majority of the Court agreed and upheld the law. Writing for the majority, Justice Kennedy reasoned that "[t]here is nothing irrational or improper in the recognition that at the moment of birth . . . the mother's knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father."²⁵⁸ Moreover, citing *United States v. Virginia's* acknowledgement that "[p]hysical differences between men and women . . . are enduring," Justice Kennedy flatly stated, "This is not a stereotype."²⁵⁹ Notwithstanding the dissenting Justices' observation that the law rested on "impermissible stereotypes" of the sort that the Court's prior sex equality jurisprudence had solidly rejected,²⁶⁰ the majority, perhaps again thinking of *Virginia*, concluded that "[t]he difference between men and women in relation to the birth process is a real one."²⁶¹

In light of *Nguyen's* reliance on *Virginia* in support of the proposition that inherent biological difference justifies differential legal treatment of the sexes, it makes sense that gay advocates might want to shy away from *Virginia's* vision of difference in marriage equality briefs, intent as those briefs are on leveling any difference whatsoever between an intimate community of two sexes (cross-sex marriage) and an intimate community of one sex (same-sex marriage). To be sure, the *Nguyen* majority failed to recognize what the *Nguyen* dissent—authored by Justice O'Connor and

²⁵⁵ *Id.* at 64–65.

²⁵⁶ *Id.* at 65.

²⁵⁷ *See id.* at 64–65.

²⁵⁸ *Id.* at 68.

²⁵⁹ *Nguyen*, 533 U.S. at 68 (citing *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

²⁶⁰ *Id.* at 79, 89 (O'Connor, J., dissenting).

²⁶¹ *Id.* at 73 (majority opinion).

joined by Justice Ginsburg—made perfectly clear: that “overbroad sex-based generalizations are impermissible *even when they enjoy empirical support*,”²⁶² that is, even when it appears that “real” biological differences have “real” effects. (It also failed, for that matter, to recognize what *Virginia* made perfectly clear, namely, that even “real” difference is never good enough of a reason to justify unequal treatment that denies equal opportunity.) Nevertheless, given that a majority of the Supreme Court itself has invoked *Virginia* in support of the idea that the government does not violate constitutional equality guarantees when it classifies on the basis of “real” difference, it is understandable that gay advocates might be reluctant to call attention to the sorts of differences surveyed in Part III and to the part of *Virginia* that highlights inherent differences between the sexes.

D. Incorporating *Virginia’s* Vision of Difference into Pro-Marriage Equality Arguments

As with the empirical studies surveyed in Part III, however, just because pro-marriage equality advocates have not used *Virginia’s* vision of difference in marriage equality litigation does not mean that they could not—or, as Part V will argue, that they should not. Apart from a more normative consideration of why it makes sense for gay advocates to turn to Justice Ginsburg’s (and *Virginia’s*) vision of difference in that litigation, which the next Part will undertake, there are more than a few reasons why that vision is not incompatible, and is even compatible, with the argument that exclusionary marriage laws violate constitutional equality guarantees. Whereas some of those reasons relate to what *Virginia* actually said with respect to the role that sex difference should or should not play in public life, others relate to what *Virginia* can be said to stand for in a larger, more symbolic sense.

First, and more narrowly, *Virginia* never said that inherent biological or social differences between the sexes justify unequal treatment by the state—indeed, quite the contrary. As discussed earlier, marriage equality opponents have cited to *Virginia* in support of the proposition that exclusionary marriage laws are constitutional because they rest on the legitimate state interest of privileging gender difference over gender similarity, something which *Virginia* indicated was not only “[i]nherent,” but also worthy of “celebration.”²⁶³ What those oppositional arguments fail to recognize, however, is that *Virginia* also stands for the proposition that inherent difference, while something that both exists and is worthy of celebration, cannot be relied upon by the state to perpetuate stereotypes about the sexes’

²⁶² *Id.* at 76 (O’Connor, J., dissenting) (emphasis added).

²⁶³ *United States v. Virginia*, 518 U.S. 515, 533 (1996).

relative positions in public life or “for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.”²⁶⁴ Inherent difference, in other words, cannot justify governmental treatment that denies equal opportunity. To the extent that cross-sex marriage restrictions deny equal opportunity because of sex and sex stereotypes, which they undoubtedly do, they constitute just the sort of governmental action that *Virginia* explicitly denounces.

In addition, and again, contrary to oppositional marriage arguments that rely on *Virginia* to suggest otherwise, Justice Ginsburg’s majority opinion never once indicates that mixed-sex institutions—VMI, the jury, or marriage—are superior to those of the single-sex variety. Rather, citing *Ballard*, her opinion simply states that “a community made up exclusively of one [sex] is *different from* a community composed of both,”²⁶⁵ *not necessarily better than it*. Indeed, part of what made Justice Ginsburg’s majority opinion in *Virginia* an “ambitious” one, according to Sunstein, was that she left open the possibility that an all-female educational environment would not violate constitutional equality guarantees, as long as it was truly equal in all tangible and intangible respects to its all-male educational counterpart.²⁶⁶ The problem with *Virginia*’s proposed remedy to the constitutional violation that the Court found in that case—the creation of an all-female public institution in Virginia—was that it was not equal in any respect to VMI. If it had been, the author of *Virginia*’s majority opinion suggests, then the Court might have ruled otherwise with respect to the remedial portion of its opinion.

This is all just to say that *Virginia* has been misinterpreted by marriage equality opponents to say something that it does not say and that supposedly renders it incompatible with any sort of pro-marriage equality argument that recognizes difference. Indeed, if anything, *Virginia*’s recognition of the differences between same-sex and mixed-sex communities is quite compatible with some of the findings of social scientists with respect to the differences that exist between same-sex and cross-sex relationships—differences, these scientists speculate, that flow at least as much (if not more) from the same-sex nature of a same-sex relationship as they do from the sexual orientation of its members. Put differently, *Virginia*’s inherent differences passage would only support the empirical data, discussed earlier, that indicate that differences between same-sex and cross-sex couples exist

²⁶⁴ *Id.*

²⁶⁵ *Id.* (emphasis added).

²⁶⁶ See Sunstein, *Leaving Things Undecided*, *supra* note 9, at 77 (stating that *Virginia* “avoids a claim that equal treatment is necessarily required in all contexts” and that “the Court left open the possibility that it would uphold a law that promotes both educational diversity and equal opportunity”).

across a number of important domains—including those domains, such as parenting and the family, that have figured so heavily in marriage equality litigation—in large part because of the single-sex nature of the intimate community that is a same-sex relationship.

Second, and more broadly, it is not just that *Virginia* is not incompatible with a pro-marriage equality position that recognizes the differences between same-sex and cross-sex relationships that flow from gender; it is also that it is eminently compatible with a vision of equality more generally that challenges the mathematical fallacy with respect to equal treatment on the basis of sexual choice. As mentioned earlier, marriage equality advocacy specifically, and gay rights advocacy more generally, rests on a symmetrical model of equality, one that assumes that sameness is a necessary precondition for equal treatment. As far as sex equality is concerned, Justice Ginsburg's *Virginia* opinion in part disrupts this symmetrical model of equality by recognizing that women and men are entitled to equal treatment by the state notwithstanding their inherent biological and social differences.

Although it has not thus far, *Virginia* might symbolically represent, for gay rights advocacy, and perhaps eventually for a gay rights jurisprudence, the possibility of recognizing difference, whether inherent or not, along the axis of sexuality as well as along the axis of sex. Indeed, *Virginia*'s implicit understanding that “similarly situated” need not mean identical in all respects in order to translate into equal treatment by the state might encourage gay advocates to advance legal arguments that recognize, and perhaps even celebrate, the sort of sexual differences that make sexual minorities, the relationships into which they enter, and the families that they raise unique. Moreover, *Virginia*'s mandate of equal treatment notwithstanding sex differences might one day translate into a sexuality jurisprudence that is equally accepting of what Professor William Eskridge has referred to as “benign sexual variation”²⁶⁷ as it now is of sex/gender difference.

V. THE NORMATIVE VALUE OF *VIRGINIA*'S VISION OF DIFFERENCE

The objective of this Essay's previous Parts was to show that the idea of same-sex marriage continues to be informed by a no-differences model by both the legal community and the public more generally, despite the fact that scientists have concluded that differences between same-sex and cross-sex relationships exist, and despite the fact that a model for incorporating the reality of that difference into a legal argument exists—namely, the model offered by the author of *United States v. Virginia*'s majority opinion, Justice

²⁶⁷ William N. Eskridge, Jr., *A Jurisprudence of “Coming Out”: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2412 (1997).

Ginsburg, for whom that decision is considered to be one that “she had hoped the Court would one day arrive at when she first started arguing cases of [sex] discrimination in the 1960s.”²⁶⁸ Having thus elucidated the no-differences model, discussed its shortcomings, and offered an alternative model that draws force from Justice Ginsburg’s landmark sex equality opinion, this Part will now turn to a brief consideration of why gay advocates should embrace the sexual differences equality model that *Virginia* at least theoretically offers. While those reasons are many, this Part will focus on three.

First, and as discussed earlier, gay advocates should not have to sacrifice factual/descriptive accuracy in exchange for equal treatment. As Stacey and Biblarz nicely put it, “the case for granting equal rights to nonheterosexual parents should not require finding their children to be identical to those reared by heterosexuals.”²⁶⁹ The same could be said of the depictions of same-sex relationships that emerge from the legal arguments in marriage equality litigation, namely, that they should not have to look like a same-sex replica of what society imagines a heterosexual relationship to look like. Legal equality, in other words, should not demand that advocates under represent, if not completely ignore, the differences that actually exist between same-sex and cross-sex relationships and between the families of gays and those of straights. To the extent that the author of *Virginia*’s majority opinion embraces sex equality in the face of sex difference both in that opinion and outside of it, she offers the possibility for gay advocates to argue that courts considering the equality claims of sexual minorities, whether in the marriage context or otherwise, should do the same. Moreover, to the extent that commentators and marriage equality advocates alike are interested in making “claims that are not only useful but truthful,”²⁷⁰ it would seem that *Virginia* offers them a strong possibility for making descriptive/factual arguments that are both accurate and have robust antecedents in the Supreme Court’s equality jurisprudence.

Second, recognizing the differences, inherent or not, between same-sex and cross-sex relationships and between the families of gays and those of straights in marriage equality litigation promotes something that the no-differences model woefully fails to: an ethic of cultural pluralism, diversity, and “benign” heterogeneity.²⁷¹ Insofar as our society values diversity in its manifold forms—including racial, religious, sex/gender, and sexuality diversity—we should not hesitate to demand that our legal system do the

²⁶⁸ SALOMONE, *supra* note 10, at 165 (remarks of Mark Tushnet, then Dean of the Georgetown University Law Center).

²⁶⁹ Stacey & Biblarz, *supra* note 116, at 178.

²⁷⁰ Rosky, *supra* note 176, at 348.

²⁷¹ Eskridge, *supra* note 267, at 2412.

same. Effectively forcing marriage equality litigants to succumb to the mathematical fallacy in order to secure equal treatment by the state sends the message that the law values assimilation over difference and homogeneity over heterogeneity when it comes to the equality claims of sexual minorities, where it might be much more tolerant of such difference and heterogeneity in other areas (e.g., religion, gender). To the extent that Justice Ginsburg's *Virginia* opinion in part disrupts the symmetrical equality model and the mathematical fallacy on which it rests vis-à-vis sex equality, it offers the possibility for gay advocates and courts alike to make and to embrace arguments that similarly disrupt the symmetrical equality model vis-à-vis sexual equality, and, in the process, to offer the law "a more genuinely pluralist approach to family diversity"²⁷² than the current marriage equality strategies allow for.

Third and last, acknowledging the differences between same-sex and cross-sex relationships and between the families of gays and those of straights in marriage/sexual equality litigation could result in an image of marriage that is more appealing to those progressives who have faulted the marriage equality movement for being decidedly conservative and unapologetically "imitative" of heterosexual norms and practices.²⁷³ Indeed, progressive commentators have long criticized the marriage movement for projecting an image of marriage that "replicates the heterosexual one, rather than challenging or altering it,"²⁷⁴ and for failing to "validate the differentness of lesbians and gay men."²⁷⁵ Perhaps most notable among them is Michael Warner, who has excoriated the movement for its "rhetoric of normalization,"²⁷⁶ its "mainstreaming project,"²⁷⁷ and its tendency to lapse into "regressive narratives of progress"²⁷⁸—all of which are vividly captured in the "regressive" photography that accompanied Denizet-Lewis's *New York Times Magazine* feature, predicated as it was on visual like-straight reasoning and its no-differences logic. Interestingly, the progressive claim that the

²⁷² Stacey and Biblarz, *supra* note 116, at 164.

²⁷³ See *supra* note 180 and accompanying text.

²⁷⁴ Walters, *supra* note 25, at 54.

²⁷⁵ Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 *LAW & SEXUALITY* 9, 12 n.9 (1991) (discussing Paula L. Ettelbrick, *Since When Was Marriage a Path To Liberation?*, 6 *OUT/LOOK, NAT'L LESBIAN & GAY Q.* 8 (1989)). Hunter rightly observes that as of 1991 "[a]nalogous tensions between equality-based strategies and difference-based strategies have buffeted feminist theory for the last decade." Hunter, *supra*, at 12.

²⁷⁶ MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 60 (1999).

²⁷⁷ *Id.* at 146.

²⁷⁸ *Id.* at 134.

movement for same-sex marriage merely mimics a heterosexual paradigm echoes the radical feminist claim, made not too long ago, that a sex equality movement predicated on a symmetrical equality model merely creates an undesirable situation where “women ape men.”²⁷⁹

That both legal and visual discourse about same-sex marriage has had the power to produce an image of that relationship that is profoundly heterosexual and profoundly regressive is something that this Essay has explored in relative depth. In addition, that the legal arguments that advocates deploy can have as profound an impact on the law as do the legal rules that flow from those arguments is something that Professor Nan Hunter elucidated nearly twenty years ago, when she elegantly observed that:

The impact of law often lies as much in the body of discourse created in the process of its adoption as in the final legal rule itself. What a new legal rule is popularly understood to signify may determine [sic] more of its potential for social change than the particulars of the change in the law. The social meaning of the legalization of lesbian and gay marriage, for example, would be enormously different if legalization resulted from political efforts framed as ending gendered roles between spouses rather than if it were the outcome of a campaign valorizing the institution of marriage, even if the ultimate “holding” is the same. Similarly, the meaning of securing for lesbians and gay men the right to adopt or to raise children is vastly different if understood as reflecting the equal worth of lesbian, gay, and heterosexual role models, rather than as justified by the view that a parent’s sexual orientation has no impact on, and thus poses no danger to, the sexual orientation of a child.²⁸⁰

In other words, how we frame our legal arguments matters. Framing same-sex marriage as but a same-sex version of its cross-sex counterpart not only advances a thin vision of cultural pluralism and family diversity and alienates those who might otherwise be more sympathetic to the idea of a gay marriage movement, but also fails to change the social meaning of marriage, “even if the ultimate ‘holding’”—marriage for gays and straights alike—“is the same.”²⁸¹

Now, this Essay does not suggest that gay advocates could easily rely on Justice Ginsburg’s *Virginia* opinion in support of the proposition that the law should recognize gay marriage because it will transform the institution and alter its social, gendered meaning. Indeed, quite the contrary, as Justice Ginsburg strongly suggests that admitting women into VMI will not change that institution all that much (even if it will change it a little) because at least

²⁷⁹ GERMAINE GREER, *THE FEMALE EUNUCH* 353 (1970).

²⁸⁰ Hunter, *supra* note 275, at 29.

²⁸¹ *Id.*

“some women,” despite their inherent differences, can satisfy the physical and psychological demands that render VMI special.²⁸² What it does suggest, though, is that gay advocates can turn to her landmark sex equality opinion in support of the proposition that the law should recognize gay marriage despite (or perhaps even because of) its differences. At the very least, *Virginia*, as well as its author’s more recent remarks on the reality of gender difference, offer the opportunity of even *having* a conversation about incorporating the idea of difference into the “body of discourse” on which gay advocates could and should rely to change legal rules and secure equal treatment, a conversation that the sheer pervasiveness of the no-differences model and its assimilative logic has left little, if any, room to have.²⁸³

VI. CONCLUSION

The objective of this Essay has been to construct an argument why *United States v. Virginia*, an opinion that some consider to be a (if not the) highpoint of Justice Ruth Bader Ginsburg’s pioneering work on gender equality, deserves as revered a place in the law and sexuality canon as it currently enjoys in the law and gender canon. More narrowly, and in the process of doing just that, this Essay also aimed to challenge the contention that *Virginia*—and, in particular, its famed “inherent differences” passage—supports exclusionary marriage laws insofar as that passage both recognizes and respects the very differences on which those laws ostensibly rest. If even the Supreme Court’s champion of gender equality has recognized both that inherent differences between the sexes exist and that a community of one sex is different from a community of both, or so the traditionalist marriage argument goes, then surely it is not irrational for states to do the same by limiting marriage to a relationship between “inherently different” women and men.

As this Essay has shown, however, that argument seriously misreads what *Virginia* in fact says and stands for: that while gender difference (biological, social) might very well exist, difference alone is an insufficient reason to deny individuals equal treatment and equal opportunity under the law. To the extent that exclusionary marriage laws rest on a justificatory logic that is rooted in the idea of gender difference, they deny both equal treatment and equal opportunity to those who desire to formalize their relationship through marriage. Indeed, it is no doubt perverse to invoke the words of the one Justice on the Court who has been a “thoughtful advocate

²⁸² *United States v. Virginia*, 518 U.S. 515, 550 (1996).

²⁸³ On the assimilative demands that United States equality law places on individuals across a range of identity categories, see generally KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006).

for gender equality throughout her career”²⁸⁴ in support of laws that deny sexuality equality precisely because of gender difference.

This Essay draws to a close by citing to one of the amicus briefs filed in Iowa’s marriage equality case, *Varnum v. Brien*, and authored by one of the participants in this wonderful symposium, Professor Tobias Wolff. That brief cites to *Virginia* in a way that this author hopes will catch on in the years to come, as plaintiffs and their advocates continue to challenge the constitutionality of all laws that discriminate on the basis of sexual preference, including, but surely not limited to, marriage prohibitions. It concludes by reminding the Supreme Court of Iowa that sex-based difference is something that the Supreme Court has already embraced in *Virginia*, thus setting a precedent for courts to do the same with respect to sexual orientation-based difference. “Just as we celebrate the differences between the genders,” the brief observes, “so we can recognize and celebrate the different experiences that same-sex and opposite-sex relationships contribute to the . . . tapestry of our community.”²⁸⁵ In her gender equality jurisprudence as in her more recent public observations, Justice Ginsburg nicely recognizes the ways in which sex-based difference can make a difference, “contribut[ing] to the . . . tapestry”²⁸⁶ of many a community, including educational institutions, juries, and the Supreme Court itself. Advocates for sexuality equality would do well to follow her lead.

²⁸⁴ Kmiec, *supra* note 250, at 656 n.6.

²⁸⁵ Brief of Amici Curiae OneIowa, *supra* note 244, at 25.

²⁸⁶ *Id.*