

**Queer 3.0: LGBTQ Rights in the Internet Era**  
**FYS 6** **FALL 2023**

Lecture Notes (Prof. R. Buckmire)  
Monday November 6: "Gender and Marriage"

**READING: Eskridge & Hunter.** "[Baehr v. Lewin](#)" in *Gender, Law and Sexuality*. New York: The Foundation Press, 1997. **799-816.**

We shall be discussing the construction of **gender** and **sex** today, in the context of marriage law.

The cases we will be dealing with are *Baehr v. Lewin*, *Singer v. Hara*, *Zablocki v. Redhail* and *Turner v. Safely*, and, of course, *Loving v. Virginia*.

We shall be analogizing the scientific and social construction of sex and gender with the irrational and sometimes confusing construction of race. However, by looking at the differences in the way that the law has treated interracial marriage from the way it has treated homosexual marriage we will expose and analyze scripts based on these two reified characteristics: race and gender.

For example, just as we asked ourselves "What is the purpose behind anti-miscegenation law?" we should also ask ourselves "What is the purpose behind the ban on same-sex marriage?" Happily, we have the texts of numerous legal decisions in both areas which give us a number of opportunities to analyze the scripts of race and gender.

Today we will be discussing how the motives and beliefs behind gender discrimination are concomitant with the motives and beliefs which lead to sexual orientation discrimination. Similar to the way in which we discussed how ideologies of race were played out in the area of miscegenation law one of the useful ways to consider "cultural ideologies associated with sex" (which we call gender) is also through the examination of marriage.

First let's consider the difference between gender and sex. **Sex** is what we call the characteristic which differentiates between 'male' and 'female.' **Gender** is what we call the cultural and societal associations aligned with sex. How do different characteristics get assigned to (biological) sex as opposed to (cultural) gender? In other words, what are the biological features of sex which "matter"?

If we have established that there is a "gender line" which separates the two halves of the gender binary opposition, masculine and feminine, from each other in a similar way the "color line" separates White from non-White how is this demarcation regulated/enforced?

What (social/legal/political) entities determine that this line is not crossed?

What sanctions occur if the boundaries of appropriate gender expression are breached?

How are these different for the sanctions for crossing the "color line"?

In particular we are trying to see if we can identify similarities (and differences) between how race and gender are constructed by marriage and law. In the case of race, marriage is used as a regulatory device of the "purity" of the race; to maintain the dividing line between White and Other. In this case the dividing characteristic, race, is a social construct, irrationally derived from alleged biological differences which, when examined, are hard to justify. In the case of gender how is marriage used?

What are the rationales behind maintenance of the color line and maintenance of the gender line?

We have already established **that governmental classifications based on gender need to reach an "exceedingly persuasive" standard of heightened scrutiny in order to survive**. A number of sex discriminatory laws by the State have been invalidated since the 1970s. Prior to 1970, laws which classified by sex or gender were routinely upheld.

Currently, there are a [number of ways](#) in which the Government maintains classifications based on sexual orientation and discriminates against the class of lesbians and gay men. Classifications based on sexual orientation are **not** "suspect classifications," but merely receive rational basis scrutiny by Courts. Sometimes it is difficult to differentiate between sex and sexual orientation classifications. In fact, some people would argue that these two ideas are inextricably linked.

Professors Andrew Koppelman and Sylvia Law have been in the vanguard of recognizing the intersection of sexuality and gender discrimination. This interesting theoretical notion has gained currency recently through the Hawaii State Supreme Court's ruling in *Baehr v. Lewin* that the state marriage law preventing same-sex couples to be issued marriage licenses violates the Hawaii state constitutional ban on sex discrimination.

Even though the classification is based on sex, the class that is discriminated against is lesbians and gay men.

In the Hawaii marriage case one of the main arguments is that the nature of the current Hawaii marriage law is **not** a sex classification, but a **sexual orientation** classification. What difference does it make? What does this say about the way that law functions that this point is one of main areas of contention?

**Loving v. Virginia** (1967)

The United States Supreme Court invalidated Virginia's prohibition of different-race marriage as a violation of both the equal protection and due process clauses. The decision explicitly overruled **Pace v. Alabama** (1883 case in which the Court upheld a statute which criminalized interracial adultery more harshly than homoracial adultery). In defense of its anti-miscegenation law, Virginia cited the disapproval of different-race marriage by religious and moral traditions. The Court rejected this argument and characterized the statute as a "repugnant" attempt to "maintain White Supremacy." This decision initiated the "right to marry" line of federal cases (followed up in *Zablocki* and *Turner*).

**Baehr v Lewin** (1993)

The Hawaii State Supreme Court held that the state's denial of marriage rights to same-sex couples is sex discrimination under the state constitution's equal rights amendment and remanded the case for trial to determine whether the discrimination could be justified by a compelling state interest. In December 1996, a Hawaii Trial Court found in **Baehr v. Miike** that the state's interest in supporting the upbringing of children in particular kinds of households unconvincing and ruled that Hawaii must begin issuing marriage licenses regardless of gender. The judge then granted a stay on his decision until the Hawaii Supreme Court could rule on the state's appeal. Before the Hawaii Supreme Court could rule the voters of Hawaii amended their constitution to empower their legislature to restrict marriage to mixed-sex couples, thus voiding the *Baehr* lawsuit.

***Singer v. Hara*** (1974)

The Washington State Court of Appeals upheld against both state and federal constitutional attack Washington's denial of marriage rights to same-sex couples. The court both denied that the marriage law involved a sex classification and used a definitional argument to exclude same-sex couples from the institution of marriage. This was the first reported case to reject an argument that denying same-sex couples the right to marry is sex discrimination in violation of the state constitution's equal rights amendment.

**Zablocki v. Redhail** (1978)

The Court invalidated Wisconsin's bar to remarriage when one partner has unpaid support obligations from a previous marriage. Emphasizing the state's interference with *Loving's* right to marry, the Court held that the law violated the equal protection clause by discriminating in the allocation of this fundamental right.

**Turner v. Safely** (1987)

The Court invalidated Missouri's almost complete bar to marriage by prison inmates. Although the Court deferred to state rules regulating prisoners, it held that denial of the right to marry requires more rigorous justification because the unitive and legal features of marriage are so fundamental in our polity.

## Discussion Questions

1. How is marriage essentialized (i.e. what features of marriage are said to be essential to it in order for it to be called a marriage) in order to maintain the ban on interracial marriage? How is marriage essentialized to maintain the ban on same-sex marriage?
2. What characteristics does the United States Supreme Court ascribe to marriage in *Zablocki* and *Turner*? What impact does the USSC's characterization of marriage have on the question of same-sex marriage?
3. Contrast the language judges use in upholding bans on same-sex marriage to the language used in upholding bans on interracial marriage. Are there similarities? differences?
4. How are constructions of race and gender (through law and marriage) both similar and different?
5. When the USSC holds that the ban on interracial marriage is really a measure to "maintain White Supremacy" what "ideology of race" (Pascoe) are they adopting?
6. What ideology of gender does the ban on same-sex marriage enforce or promote?
7. Try to form an analogy between Lopez' arguments about Whiteness and a corresponding argument about Maleness. Can you do so? In what contexts does the analogy 'work'? In which contexts does it not work?
8. In what ways does The Law deal with gender differences differently than it deals with racial differences? Think of some explanations for the differences. Identify some similarities.
9. How is racial hybridity treated differently now as opposed to in the past? In what contexts (legal, social, cultural, political, etc)?
10. How is sexual hybridity (i.e. intersexuality and transsexuality) treated differently compared to racial hybridity in modern contexts?