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## ARTICLES

### ASSIMILATION, MARRIAGE, AND LESBIAN LIBERATION

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## I. INTRODUCTION

For lesbian and queer legal theorizing,<sup>1</sup> the question of assimilation has long been pertinent.<sup>2</sup> As in other legal movements, there is a tension within the lesbian and queer quest for legal reform. On the one hand, we acknowledge a legal reform movement that accepts the basic tenets of our legal system but seeks inclusion for those it represents. On the other hand, some argue that this is insufficient, dispute some of the core beliefs of our legal system, and seek restructuring rather than mere inclusion.

One convenient shorthand for this debate is assimilation, a term that is familiar in both legal and nonlegal theorizing. In the lesbian and queer context, the term “assimilation” has been used from a sociological perspective to describe

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1. While this Article seeks to include all sexual minorities, sexual minority advocacy, and scholarship by its use of the term “queer,” it focuses on lesbian advocacies and theories.

2. For example, in the early 1950s, the Mattachine Society, a homosexual rights group, confronted the issue of assimilation. The founders of the organization were influenced by Marxist ideologies and developed an analysis of homosexuals as an oppressed cultural minority. As believers in a theory of social change that stressed action by masses of people on their own behalf, the founders kept the society focused on mobilizing a large gay constituency and welding it into a cohesive force capable of militancy. See JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES 1940-1970* 63 (1983) (describing history and developments of homosexual culture in the United States). Nevertheless, after the Mattachine Society grew in size and in diversity of viewpoint, an internal struggle took place with members who preferred a more assimilationist tone, perhaps best summed up at a divisive conference by the statement that “we know we are the same . . . no different than anyone else. Our only difference is an unimportant one to the heterosexual society, *unless we make it important.*” *Id.* at 79. This view, which ultimately prevailed, is described by lesbian theorist Margaret Cruikshank as “integrationist,” viewing social rejection as the problem, not society’s oppressive institutions. MARGARET CRUIKSHANK, *THE GAY AND LESBIAN LIBERATION MOVEMENT 67-68* (Roger S. Gottlieb ed., 1992). As John D’Emilio summarizes, in its first few years, “the Mattachine Society had confronted issues that would surface again and again as areas of heated debate in the gay movement,” including “whether homosexuals and lesbians should accommodate themselves to the mores of society or assert their difference,” which pitted “radicals” against “conservatives.” D’EMILIO, *supra* at 90-91.

the normalization process of those with minority sexual identities.<sup>3</sup> The term “heteronormativity,” especially as developed by Michael Warner, also captures some of these same concerns.<sup>4</sup> Elsewhere, I have used the term “domestication” to describe this process, preferring it because of its gendered connotations.<sup>5</sup> Recently, legal scholar Kenji Yoshino has categorized various types of queer assimilation, including conversion, passing, and covering.<sup>6</sup> Importantly, however, at its core, the queer assimilation controversy involves not only issues of sexual identity, but conflicts about the process and degree of possible or desirable change.<sup>7</sup> Although many issues are implicated in the assimilationist debates,<sup>8</sup> the issue of same-sex marriage is emblematic because of its tremendous

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3. See, e.g., Amy Hequembourg & Jorge Ardití, *Fractured Resistances, The Debate Over Assimilationism among Gays and Lesbians in the United States*, 40:4 THE SOCIOLOGICAL QUARTERLY 663 (1999) [hereinafter *Fractured*] (discussing assimilation debates in gay and lesbian communities).

4. See MICHAEL WARNER, *Introduction to FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* vii, xxi (Univ. of Minn. Press 1993) (describing heteronormativity arising from heterosexual culture’s ability to interpret itself as co-extensive with society, as “the elemental form of human association, as the very model of inter-gender relations, as the indivisible basis of all community, and as the means of reproduction without which society wouldn’t exist”); see also MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS AND THE ETHICS OF QUEER LIFE* 41-88 (Harv. Univ. Press 1999) (discussing problems associated with “normal” and “heteronormailty”).

5. See RUTHANN ROBSON, *LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW* 119-27 (Firebrand Books 1992) [hereinafter (OUT)LAW] (providing examples of legal domestication of lesbian relationships); RUTHANN ROBSON, *SAPPHO GOES TO LAW SCHOOL* 153-70 (Columbia Univ. Press 1998) [hereinafter *SAPPHO*] (discussing lesbian relationships in law and literature and using term “codification”); Ruthann Robson, *Making Mothers: The Judicial Construction of Lesbian Mothers*, 22 WOMEN’S RTS. L. REP. 101 (2000) [hereinafter *Making Mothers*] (discussing intra-lesbian custody disputes).

6. See Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”* 108 YALE L.J. 485, 504-37 (1998) [hereinafter Yoshino, *Don’t Ask*] (discussing homosexual assimilation as either evasive or visible); Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 784-865 (2002) [hereinafter Yoshino, *Covering*] (discussing conversion, passing, and covering as methods of gay assimilation).

7. As Amy Hequembourg and Jorge Ardití state:

The debate among gay and lesbian activists in the United States regarding assimilationism—the desire of many gays and lesbians to be accepted by mainstream society and be recognized as “couple,” “mother,” “father,” “family,” and so on—illustrates beautifully the ambiguities inherent in efforts to resist and change existing practices of domination, as well as it highlights the paradoxes of what it means to be an agent when we recognize the constituted character of subjectivity. The debate revolves around claims advanced by radical gays and lesbians who suggest, justifiably in our view, that assimilation to the mainstream involves a “domestication” of gay identity, a forsaking of gays and lesbians’ self-definition in terms of desire and its substitution by one based on civic status. The aspiration to be recognized as a normal couple, normal mother, normal father, normal family, involves a “normalization” of gay identity. It forces the formulation and experience of gay identity from one grounded on desire—an unstable, nonrational, multiple ground that “escapes” the practices of categorization in terms of which mainstream society defines sexuality—to one that embraces and makes mainstream categorizations of power its own.

*Fractured*, *supra* note 3, at 663-64 (citations omitted).

8. The military’s “don’t ask, don’t tell” policy is perhaps the most obvious. See generally Yoshino, *Don’t Ask*, *supra* note 6, at 538-57 (discussing military’s policy as assimilative strategy).

symbolic import and the tangible benefits it often provides.<sup>9</sup>

The issue of assimilation is not unique to lesbian, gay, bisexual, and transgendered legal theories and litigation, yet too often our attention to other “outsider” jurisprudences<sup>10</sup> has been selective at best. Thus, the first task of this Article is a survey of the current legal theoretical interventions regarding assimilation in legal culture. Part II of this Article analyzes specific themes in legal scholarship regarding assimilation. Part III then distills three of these themes into concerns for lesbian legal theory: the problem of constitutional equality, the consideration of coercion, and, lastly, the more abstract investigation of the state’s interest in questions of assimilation. After a brief history of same-sex marriage and similar legal devices as developed in the United States, Part IV argues that marriage implicates serious and insoluble problems of equality, that the present regime is one of compulsory matrimony, and that the marital status of individuals is linked to the state in disturbing ways. Because the issue of children and child rearing is often coupled with marriage, Part V briefly examines the same concerns raised in the context of marriage in relation to lesbian parenting. Finally, this Article concludes that questions of assimilation with regard to marriage and parenting need to be taken much more seriously in our advocacy, litigation, and scholarship than previously if we are to honor any claim to be a movement that includes liberation among its goals.

## II. ASSIMILATION AND LEGAL CULTURE

Like other minorities, sexual minorities confront ultimate questions about the relationship between members of the minority, or disadvantaged group, and the majoritarian, dominant culture in ways that implicate ultimate meanings of equality and liberation. Assimilation has been an explicit issue for legal theorists and advocates confronting the contours of equality for African-Americans,<sup>11</sup>

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9. *See id.* (describing viewpoint that marriage indicates societal approval as well as bestowing important tangible, health, insurance, and death benefits); Yoshino, *Covering*, *supra* note 6, at 848-49 (outlining marriage as “covering” or “signaling”).

10. Outsider jurisprudence is a term coined by Mari Matsuda. *See generally* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) (analyzing appeal of reparations for past injustice to victims of racism); Mari J. Matsuda *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320 (1989) (examining harm of racist hate messages). Outsider jurisprudence refers to that body of legal scholarship that seeks to incorporate the voices and experiences of traditionally silenced populations into an analysis of mainstream legal systems. *Id.* at 2323. Matsuda explains her choice of the word ‘outsider’ as reflecting a desire to avoid the more popular word ‘minority,’ reasoning that the latter “belies the numerical significance of the constituencies typically excluded from jurisprudential discourse.” *Id.* The philosophical origins of outsider jurisprudence has been traced to European writers Marx, Heidegger, Gramsci, and Foucault. Jean Stefancic & Richard Delgado, *Outsider Jurisprudence and the Electronic Revolution: Will Technology Help or Hinder the Cause of Law Reform?*, 52 OHIO ST. L.J. 847, 847 (1991).

11. *See, e.g.*, Jerome M. Culp, Jr., *Black People in White Face: Assimilation, Culture, and the Brown Case*, 36 WM. & MARY L. REV. 665, 669-70 (1995) (discussing “assimilation assumption” made by Court in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)); Alex. M. Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401, HeinOnline -- 75 Temp. L. Rev 712 2002

Latinos/as,<sup>12</sup> Asian-Americans,<sup>13</sup> Native Americans,<sup>14</sup> Jews<sup>15</sup> and other religious minorities,<sup>16</sup> women,<sup>17</sup> impoverished persons,<sup>18</sup> and disabled persons.<sup>19</sup>

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1417-22 (1993) (discussing implications associated with African-American assimilation).

12. See Drucilla Cornell & William W. Bratton, *Deadweight Costs and Intrinsic Wrongs of Nativism: Economics, Freedom and Legal Suppression of Spanish*, 84 CORNELL L. REV. 595, 598 (1999) (describing how some perceive Latinos as having fallen short of standard of assimilation by maintaining their language, ethnic communication, and other practices). See generally Kevin R. Johnson, "Melting Pot" or "Ring of Fire"?: *Assimilation and the Mexican-American Experience*, 10 LA RAZA L.J. 173 (1998) (discussing Mexican assimilation into American culture and society); George A. Martinez, *Latinos, Assimilation and the Law: A Philosophical Perspective*, 20 CHICANO-LATINO L. REV. 1 (1999) (discussing Latino assimilation into American culture and society).

13. See, e.g., Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863, 890-91 (1993) (commenting on how criticisms of group's assimilation are often racist based, particularly criticism about Asian and Latino insistence on cultural diversity and distinct communities, compared to those similar practices of European immigrant groups).

14. See, e.g., Larry A. DiMatteo & Michael J. Meagher, *Broken Promises: The Failure of the 1920's Native American Irrigation and Assimilation Policies*, 19 U. HAW. L. REV. 1, 2-3 (1997) (discussing failures of government's land allotment and irrigation plans to assimilate Native Americans by making them farmers).

15. See, e.g., Nomi Maya Stolzenberg, *Un-Covering the Tradition of Jewish "Dissimilation": Frankfurter, Bickel, and Cover on Judicial Review*, 3 S. CAL. INTERDISC. L.J. 809, 813-14 (1994) (discussing Jewish attitudes towards assimilation).

16. See, e.g., Nomi Maya Stolzenberg, "He Drew A Circle that Shut Me Out": *Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581, 583-84 (1993) (discussing controversies that arise when fundamentalist Christian parents do not want their children educated in manner that exposes them to diverse viewpoints and teaches tolerance of those viewpoints).

17. See, e.g., Erin Daly, *The Limits of the Constitutional Imagination: Equal Protection in the Era of Assimilation*, 4 WIDENER L. SYMP. J. 121, 166 (1999) (explaining that personality traits do not fall within neat gender classifications, regardless of push to have "women be more like men"); Deborah L. Rhode, *Association and Assimilation*, 81 NW. U. L. REV. 106, 145 (1986) (discussing benefit of altering existing social structures as opposed to assimilating into them so women do not have to "relinquish difference[s]").

18. See, e.g., Larry Catá Backer, *By Hook or By Crook: Conformity, Assimilation and Liberal and Conservative Poor Relief Theory*, 7 HASTINGS WOMEN'S L.J. 391, 407-29 (1996) [hereinafter Backer, Hastings] (describing methods used to assimilate the poor such as welfare reform and the 'Great Society'); Larry Catá Backer, *Poor Relief, Welfare Paralysis, and Assimilation*, 1996 UTAH L. REV. 1, 34-46 (1996) [hereinafter Backer, Utah] (discussing cultural taboos and their relation to assimilation of the poor).

19. The problematizing of assimilation in the context of disability is underdeveloped. The Americans with Disabilities Act, (ADA), codified at 42 U.S.C. §§ 12101-12213, § 12101(a)(1) (1994), has as an explicitly assimilationist purpose—to "bring persons with disabilities into the economic and social mainstream of American life," H.R. REP. No. 101-485, pt. 2, at 22 (1989), reprinted in 1990 U.S.C.C.A.N. 303, 304, accord Statement by President George Bush upon signing S. 933, 26 WEEKLY COMP. PRES. DOC. 1165 (July 30, 1990), reprinted in 1990 U.S.C.C.A.N. 601, 602 (stating that ADA "signals the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life."). While the vast majority of the recent scholarship regarding disabilities uncritically applauds this purpose, important exceptions include Samuel R. Bagenstos, *Subordination, Stigma, and "Disability"*, 86 VA. L. REV. 397, 401, (2000) (acknowledging possible importance of disability culture and arguing that "disability should be understood as a socially defined group status" that possesses a "systematic, socially contingent disadvantage"); Paula Berg, *Ill/Legal: Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law*, 18

Moreover, assimilation is a theme that is implicit in much of the scholarship regarding the relationship between disadvantaged groups and the dominant culture. Each of these confrontations is unique, as is the controversy about assimilation in the sexual minority context.

The most commonly theorized pattern of assimilation—the so-called “melting pot” theory—envisioned immigrants from distant shores coming to the United States to improve their lot and to begin a generational trajectory of assimilation, resulting in the grandchildren of the immigrants being fully assimilated.<sup>20</sup> This theory has been criticized as it relates to more recent immigrants<sup>21</sup> and is obviously inapplicable to the descendants of unwilling immigrants who were “imported” from Africa as slaves and to Native Americans from whose perspective the colonists were immigrants. Moreover, for some minority groups the generational trajectory may be inapposite. In the Jewish context, theorists have adopted the notion of dissimilation to describe the process of rejecting assimilation.<sup>22</sup>

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YALE L. & POL'Y REV. 1, 4, 36 (1999) (demonstrating how regressive definitions of “disability” in ADA doctrine “upholds dominant notions of health, illness, and disability while imposing a particular set of expectations upon individuals deemed to occupy each class,” and thus while ADA does serve purposes of eliminating discrimination, it “also impedes attainment of equality by stigmatizing disabled plaintiffs, undermining political unity among people with disabilities, and legitimizing many forms of disability bias”); Jonathan Drimmer, Comment, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1408-09 (1993) (advocating “reaffirmation of one’s ‘disabled identity,’ as crucial for proper societal acknowledgment of people with disabilities”).

In the nonlegal literature, there is important work arguing for the independence and vitality of deaf culture. See generally HARLAN LANE, *THE MASK OF BENEVOLENCE: DISABLING THE DEAF COMMUNITY* (1992) (advocating a shift in current methodologies of interacting with deaf community).

20. As Kenneth Karst explains, the “melting pot” did not “become part of the national vocabulary” until the production of an eponymous play in 1908, but the idea was “as old as the Nation itself.” Kenneth Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 311-12 (1986). But cf. Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053, 1058 (1994) (stating “[t]he founding vision of America was not that of a multiracial, multicultural, or pluralistic society . . . [t]o the contrary, the first settlers and leaders envisioned a country for pious, God-fearing, white Christians”).

In terms of the generational trajectory of assimilation, Drucilla Cornell and William Bratton explain that the “assimilation story” has as its characters the “most motivated, talented, and intelligent of the world’s dissatisfied people.” Even so:

[O]nly the most clever and ambitious could reconstruct themselves completely within a few years of arrival. . . . Their children, however, would go on to achieve a full American identity and its accompanying economic opportunity. The third generation would complete the process of Americanization; internal ties to the antecedent language and culture would not burden the immigrants’ grandchildren.

Cornell & Bratton, *supra* note 12, at 596-97 (footnotes omitted).

21. Some criticism has been from conservative thinkers who argue that more recent immigrants have “refused” to assimilate, while critiques from more liberal thinkers have noted the inextricably link between racism and assimilation. See Hing, *supra* note 13, at 890, for further discussion of the alleged link between racism and assimilation comparing the identities of older to more recent immigrant groups.

22. According to Stolzenberg, dissimilation “consists of ‘the reupholding of Jewish identity’ by those who appeared to have abandoned traditional Jewish life.” Stolzenberg, *supra* note 15, at 855.

Similarly, sexual minorities might be said to “dissimilate” through the coming out process by which they declare their difference from the heterosexual majority.<sup>23</sup> The appearance of assimilability by sexual minorities has also been part of their threat to mainstream culture, most notoriously voiced in McCarthyism’s warning that there are homosexuals and communists among “us” and we might not perceive them.<sup>24</sup> Despite many experiential differences in assimilation among various groups, there are common motifs that merit exploration. These consist of: (1) the logical necessity for a dominant and idealized group; (2) the coercive nature of assimilation; (3) the implication of the constitutional interests of equality; (4) the majoritarian use of both assimilation and anti-assimilation for repressive purposes; (5) the co-existence and distinction between segregation and separatism; and (6) the disagreements within minority communities regarding the virtues of assimilation.

#### *A. The Dominant and Idealized Group*

First, and perhaps most obviously, in order to logically exist, assimilation must posit a dominant group (which may or may not be the majority group), which may shift depending upon the disadvantaged or minority group. Importantly, this dominant group is highly idealized; ideals that later become normative. Thus, as it might be stereotypically posited, this dominant group member is not only a white male, preferably of British descent, he is also Protestant but not fundamentalist, able-bodied and healthy, and employed in a professional status. He is married with two children, follows sports, has a dog, is not effeminate or fussy about food and has a keen sense of competition. This character is idealized—or stereotyped—but becomes the measure against which assimilation occurs or does not occur.

This idealized version of dominant group members is evident in gender jurisprudence, which concerns whether any women, as well as which women, can be assimilated into male culture. In fact, the entire so-called sameness/difference debate that has been pronounced in feminist legal theory from its beginnings is a

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She further argues that this process of dissimulation was

exemplified by the generation of German Jewish intellectuals from the Weimar period who confronted the tension between the universalistic culture of liberalism, into which they were themselves raised or initiated, and the particularism of traditional Jewish life. The process of ‘dissimulation’ for them involved a return to a Jewish tradition that they had never directly participated in.

*Id.*

23. See Ruthann Robson, *Beginning from (My) Experience: The Paradoxes of Lesbian/Queer Narrativities*, 48 HASTINGS L.J. 1387, 1394-96 (1997), for a discussion of the importance and ubiquity of “coming out” in lesbian theorizing.

24. See JOHN D’EMILIO, *The Homosexual Menace: The Politics of Sexuality in Cold War America*, in MAKING TROUBLE: ESSAYS ON GAY HISTORY, POLITICS, AND THE UNIVERSITY 57, 64 (Harv. Univ. Press 1992) (stating “[s]ince Communists bore no identifying physical characteristics, they were able to infiltrate the government and commit treason against their country.... [h]omosexuals, too, could escape detection and thus insinuate themselves into every branch of government”).

version of the assimilation conflict.<sup>25</sup> Likewise, litigating the exclusion of women from all male institutions necessarily implicates the question of women's assimilability.

For example, discussing the exclusion of women from all male private clubs,<sup>26</sup> Deborah Rhode quotes a male club manager justifying the exclusion by stating that "if a man has business deals to discuss, he doesn't want to sit next to a woman fussing about how much mayonnaise is in her chicken salad."<sup>27</sup> As Rhode correctly notes, such stereotypes tend to become "self-reinforcing" because "no women are present to counteract the assumption that males' luncheon conversation focuses on mergers while females' fixates on mayonnaise."<sup>28</sup> Equally important, however, is the unstated presumption that men will not be discussing mayonnaise—or the linking of high cholesterol foods with heart attacks—at lunch. Men are constructed as inhabiting an idealized realm beyond such petty concerns as health and mortality.

Similarly, in *United States v. Virginia (VMI)*,<sup>29</sup> the Virginia Military Institute's (VMI) justification for excluding women rested in part upon a presumption that an adversarial model of education was not appropriate for women; a justification that the trial court found valid.<sup>30</sup> Again, much of the discussion and argument revolved around dispelling the notion that women were not capable of thriving in an adversarial environment. When the case reached the United States Supreme Court, Justice Ruth Bader Ginsburg, writing for the majority, concluded that the state of Virginia could not categorically exclude women "from an extraordinary educational opportunity afforded to men."<sup>31</sup> Ginsburg further noted the inadequacy of the state's argument because not all males thrive in this adversarial environment. The stated goal of VMI was to produce a superior type of man, "citizen soldiers" who would be "imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American democracy and free enterprise system, and ready . . . to defend their country in time of national

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25. See Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984-1985), for perhaps the best known articulation of this conundrum. Attempts to reconceptualize the debate include Joan W. Scott, *Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism*, in CONFLICTS IN FEMINISM 134, 138 (Marianne Hirsch & Evelyn Fox Keller eds., 1990); Joan C. Williams, *Dissolving the Sameness/difference Debate: A Post-modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296 (1991) (describing when focus shifts from sameness/difference debate to plethora of multiple viewpoints available to individual, sameness dissolves into differences and vice versa).

26. This issue came before the Court in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). The Court held that the Jaycees were subject to the Minnesota law that prohibited sex discrimination in places of public accommodation, rejecting the Jaycees claims of First Amendment association rights to exclude women. *Id.* at 628-29.

27. Rhode, *supra* note 17, at 122-23.

28. *Id.* at 123.

29. 518 U.S. 515 (1996) [hereinafter *VMI*].

30. *VMI*, 518 U.S. at 592-93 (Scalia, J., dissenting).

31. *Id.* at 547.



peril.”<sup>32</sup> For Ginsburg, women must be afforded the same opportunity to become idealized men as that afforded men.<sup>33</sup> Thus, the notion of the dominant and idealized group, such as citizen-soldiers, becomes the group to which outsiders such as women are to be assimilated.

### B. *The Coercive Nature of Assimilation*

Second, the structure of assimilation is hierarchal. In the VMI example, assimilation would not be at issue if there were two kinds of educational institutions that were equally valued: one competitive and one more cooperative.<sup>34</sup> As it presently operates, however, assimilation is a reciprocal but unilaterally coercive process. It is reciprocal because both sides participate, but it is coercive because only the members of the disadvantaged group must strive to meet the normative standards set by the dominant group, which has the power and the ability to accept or reject members.

Assimilation is coercive not merely because it is unilateral, but because it carries a set of survival incentives and concomitant penalties. As Larry Catá Backer describes it in the context of welfare and public benefits, there is an “assimilation imperative” that requires the poor to pay for any financial assistance by conforming to the ideals of capitalism.<sup>35</sup> The award of benefits requires the division of impoverished persons into categories of deserving and undeserving, a separation accomplished with reference to a particular dominant model. Workfare and refusal to increase grants for additional children are just two aspects of the coercive power of assimilation evidenced in recent “welfare reform.”<sup>36</sup> It is not unusual to believe that the “most useful thing welfare can do

32. *Id.* at 545.

33. Ginsburg’s opinion in *VMI* does not address the consequences to women if they should achieve the goal of becoming ideal men. *See id.* at 550-51 (stating that since women are capable of performing activities required of men for admission to VMI they should not be denied admission). Women who become “ideal men” are gender nonconforming, a situation that could bring its own sort of discrimination. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (holding that female plaintiff stated cause of action for sex discrimination under Title VII based upon her allegations that she was terminated for not being sufficiently feminine).

34. *See* Daly, *supra* note 17, at 155-57, for an elaboration of this example whereby two colleges are hypothesized, the University of Adversity and the University of Connection.

35. Backer, Hastings, *supra* note 18, at 392, 399-400. This view allows Backer to critique both conservative and liberal ideologies of welfare “reform.” *Id.* at 391. Backer suggests that both liberals and conservatives accept the existence of poverty because they have too much at stake to debate and reform the systems that give rise to poverty. Backer, Utah, *supra* note 18, at 32.

36. While there have been reforms in welfare and “public assistance” laws since the first Aid to Families with Dependent Children (AFDC) laws were adopted, “Welfare Reform” is consistently linked to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 100 Stat. 2105 (1996). The Act, known as PRWORA, fundamentally altered federal policy towards the poor by abolishing AFDC and replacing it with block grant funding to the States. The reasoning behind the changes was delineated in H.R. REP. NO. 104-651, at 8 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2183, 2189, which found that “[t]he welfare system contradicts fundamental American values that ought to be encouraged and rewarded: work, family, personal responsibility and self-sufficiency.” *Id.* at 2185. The report indicated that PRWORA would discourage out-of-wedlock children by ending “bonuses for families on welfare that have additional children,” and by requiring

for the poor is to press middle-class values upon them.”<sup>37</sup> This pressing occurs by awarding or withholding subsistence benefits. More fundamentally, pressure is exerted by the maintenance of an economic system that countenances and depends upon a percentage of impoverished people for its vitality.

With the faith-based initiative from President Bush,<sup>38</sup> we can expect more coercive assimilationist strategies directed at impoverished persons. While the government may have its economic agendas, the “faith-based” institutions have the additional mandate of religious indoctrination. Thus, under the newest Bush regime, it may not be enough to accept the beliefs of the middle class: One may also need to accept particular religious beliefs in order to receive food or shelter.<sup>39</sup>

Identification of the coercion inherent in assimilation has not been limited to discussions of the poor. As Daina Chiu notes, Asian-American difference was managed not only by attempts at exclusion, but by a “coercive assimilation” based upon beliefs that Asian culture was inferior.<sup>40</sup> In support of her conclusion, Chiu discusses the historical ordinances and statutes that criminalized Chinese living arrangements in close quarters, regulated laundries in wooden buildings, levied fines for laundry operators who did not use horse

teenagers who gave birth out of wedlock “to live with an adult and remain in school to continue receiving benefits.” *Id.* at 2186. The Report also states that “[w]elfare. . . is converted to a work program,” and lauds both the expansion of current disqualification rules for failure to participate in employment or training and the additional disqualifications built into the new (PRWORA) legislation. *Id.*; see also 42 U.S.C. §§ 602(a)(1)(A)(ii) and (iii) (2002); 42 U.S.C. § 607 *et seq.* (2002) (both establishing mandatory work requirements). See *infra* notes 386-97 and accompanying text for a discussion of “welfare reform” and marriage.

37. Backer, Utah, *supra* note 18, at 42 (citing Paul Taylor, *Carrots and Sticks of Welfare Reform*, WASH. POST, Feb. 4, 1992, at A13 (noting comments of state assemblyman Wayne R. Bryant regarding New Jersey’s discussion to deny increase in welfare benefits to recipients upon birth of additional children).

38. See Michiko Kakutani, *Faith Base: As American as Second Acts and Apple Pie*, N.Y. TIMES, Feb. 4, 2001, § 4, at 1 (discussing “faith-based” initiatives proposed by Bush during his first weeks in office); Marc Lacey, *Bush Fleshes Out Details of Proposal to Expand Aid to Religious Organizations*, N.Y. TIMES, Jan. 31, 2001, at A15 (discussing details of President Bush’s proposal to aid religious organizations that provide social services to poor).

39. While Backer has argued that the current thinking about poverty is based upon Christian ideologies including the sins of sloth and sex, the assignation of “public charity” to private religious organizations removes even the minimum protections from coercive assimilation that occur when such functions are governmental. See Backer, Utah *supra* note 18, at 34-35 (arguing that modern American ideas about welfare are based on Christian ideals). As a recent report regarding Bush’s “faith-based” initiatives stated:

The cornerstone of the president’s plan is that religious programs will not be required to censor their religious teachings in order to receive government contracts. . . . While Mr. Bush was governor of Texas, the state gave \$8,000 to a job training program that required students to study Scripture and taught them that accepting Jesus Christ as their savior would help them prepare for employment. . . . The job training program in Texas was the only one in the county. . . .

Laurie Goodstein, *In God We Trust. In Government We Hope for the Best.*, N.Y. TIMES, Feb. 4, 2001, § 4, at 3.

40. Chiu, *supra* note 20, at 1074-75.

drawn carriages, effectively barred deceased Chinese from being returned to China for burial, and prohibited Chinese from fishing.<sup>41</sup> Importantly, however, Chiu also stakes out an area of perhaps lesser egregiousness—guilty liberalism—which she describes as a presumption of assimilation if there exists a coincidence of interests.<sup>42</sup> For example, Chiu argues that although Asian-Americans may seem to be “model minorities” who have adopted white American values of “hard work and success,” the root of Asian-Americans’ behavior is not “American values of individualism and self-reliance” but a “broader sense of values set in a different context,” including “enhancement of the family and significant others.”<sup>43</sup> In this instance, coercive assimilation functions not as determinative of behavior, but as an interpreter of behavior. This may be milder, but it remains coercive.

### C. The Constitutional Interests of Equality

Third, assimilation implicates the constitutional interests of equality. Assimilation’s relationship to the Fourteenth Amendment’s mandate against denial of “equal protection of the law” is related to formal equality. As Julie Nice explains, there is a foundational antimony in equal protection jurisprudence between assimilation and anti-subordination principles.<sup>44</sup> The assimilationist approach employed in equal protection doctrine protects the discrimination it seemingly denounces by obscuring the existence of a dominant group that functions as the standard.<sup>45</sup> The result of this approach is to ensure equality not only based on the dominant group as the normative measure, but for members of the dominant group as individuals.

Under the equal protection principle of consistency as articulated by Justice Sandra Day O’Connor in *Adarand Constructors, Inc. v. Peña*,<sup>46</sup> the standard of review under the equal protection clause does not vary depending upon whether a disadvantaged group is benefited or burdened.<sup>47</sup> Thus, under current equal protection doctrine, it is just as constitutionally egregious for a public university to reserve one of its seats for an African-American as it would be to exclude all African-Americans.<sup>48</sup>

41. *Id.* at 1077.

42. *Id.* at 1081.

43. *Id.* at 1082-83 (citing Ronald Takaki, *A Tale of Two Decades: Race and Class in the 1880s and the 1980s*, in *RACE IN AMERICA: THE STRUGGLE FOR EQUALITY* 402, 408 (Herbert Hill & James E. Jones, Jr. eds., 1993)).

44. Julie Nice, *Equal Protection’s Antimonies and the Promise of a Co-Constitutive Approach*, 85 *CORNELL L. REV.* 1392, 1394 (2000) (describing “foundational” antimony of equal protection jurisprudence as being issue of whether equal protection’s ultimate end should be to “eliminate subordination or to promote assimilation”).

45. *See id.* at 1395 (discussing progressive critiques of conservatives’ “assimilationist” approach to equal protection requirement).

46. 515 U.S. 200 (1995) (plurality opinion).

47. *Adarand*, 515 U.S. at 224, 229-30 (discussing standard of strict scrutiny applied to claims of unequal protection by persons of any race).

48. As the dissenting opinion by Justice Stevens in *Adarand* noted, this principle of consistency

A strict assimilationist view denies the validity of equal protection classes; there are only classifications. As Justice Scalia pronounced in *Adarand*, “[i]n the eyes of the government, we are just one race here. It is American.”<sup>49</sup> On this view, the problem with the government’s affirmative action program at issue in *Adarand* is that it disrupts the assimilationist mandate. Such a governmental interest might never be compelling<sup>50</sup> and might not even be legitimate enough to satisfy the lowest rational basis review. This is consistent with the assimilationist perspective of equal protection, which requires a neutrality that leaves dominant social arrangements undisturbed.

While the focus of this Article is on equality concerns, assimilation also invokes other constitutional considerations that may seem at odds with equality.<sup>51</sup> Notably, the First Amendment’s clauses regarding freedom of association and free exercise of religion<sup>52</sup> might be construed as anti-assimilationist.

Freedom of association is one argument deployed by those who wish to exclude minorities. This argument was unsuccessfully used by an all male club

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disintegrates if the affirmative action remedy is directed at a nonracial group. *Id.* at 247 (Stevens, J., dissenting). For example, although the Fourteenth Amendment was undoubtedly intended to end discrimination against former slaves, a public university’s attempt to remedy discrimination against the descendants of former slaves would be subject to strict scrutiny, while the school’s attempt to remedy discrimination against women would be subject to the lesser scrutiny accorded to gender classifications. *See id.* at 247 (discussing inconsistency of utilizing intermediate scrutiny in gender discrimination cases and strict scrutiny in racial discrimination cases). Thus, a public university that desired to reserve a portion of its class for sexual minorities would have the lowest constitutional obstacle—rational basis—needing to show only that it had a legitimate interest in seeking to remedy discrimination against sexual minorities and that its reservation of a percentage of its seats was rationally related to that interest.

49. *Id.* at 239 (Scalia, J., concurring).

50. Compare Justice Scalia’s concurring opinion in *Adarand*, where he “join[s] the opinion of the Court . . . except insofar as it may be inconsistent with the following: [i]n [his] view, government can never have a ‘compelling interest’ in discriminating on the basis of race in order to ‘make up’ for past racial discrimination in the opposite direction,” *id.* at 239 (Scalia, J., concurring) (citation omitted), with the plurality opinion in *Adarand*, stating:

The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it . . . . When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the “narrow tailoring” test this Court has set out in previous cases.

*Adarand*, 515 U.S. at 237 (plurality opinion).

51. *See generally* Jack Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws* 76 U. DET. MERCY L. REV. 189, 191 (1999) (outlining conflicts between equality and First Amendment and arguing for concept of “self realization” as way to resolve conflict). *See also* Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1, 3-4 (2000), for argument that “expressive identity” is a way to resolve the conflict.

52. The First Amendment provides “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

resisting an application of a state prohibition of sex discrimination,<sup>53</sup> and more successfully used by organizers of a St. Patrick's Day Parade<sup>54</sup> and the Boy Scouts,<sup>55</sup> both wishing to exclude sexual minorities.<sup>56</sup> The constitutional interest in freedom of association can also protect minority groups who seek to avoid the encroachment of majoritarian values. In fact, prohibitions against sex or sexual orientation discrimination could be (re)interpreted as majoritarian values and the all male clubs or other exclusionary institutions as beleaguered minorities resisting "assimilation."<sup>57</sup>

The First Amendment's protection of religion can also provoke a conflict between religious and sexual freedom, as in cases in which landlords seek constitutional insulation from state anti-discrimination housing laws.<sup>58</sup> The importance of the First Amendment's protection of religion is also evident in the political arena, as in the exclusion of religious institutions from the proposed legislation prohibiting sexual orientation discrimination.<sup>59</sup> Additionally, the First

53. See *Roberts v. United States Jaycees*, 468 U.S. 609, 612 (1984) (upholding state statute prohibiting sex discrimination against First Amendment challenge by all male club).

54. See *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 559 (1995) (holding that organizers of Boston's annual St. Patrick's Day Parade had First Amendment right to exclude gay/lesbian group despite state law prohibiting sexual orientation discrimination).

55. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (holding that Boy Scouts had First Amendment right to exclude gay men as members despite state law prohibiting sexual orientation discrimination).

56. See *supra* notes 54-55.

57. A fervent expression of this view occurs in Justice Scalia's dissenting opinion in *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting). Scalia characterizes Colorado's Amendment Two, prohibiting localities or other governmental entities from adopting sexual orientation discrimination, as a "Kulturkampf," and criticizes the Court for taking the side of the "Templars," "the lawyer class from which the Court's Members are drawn." *Id.* at 636, 652.

58. See *infra* note 410 and accompanying text for a discussion of landlord cases.

59. The Employment Non Discrimination Act (ENDA) has been introduced in Congress several times. See, e.g., S. 1276, 106th Cong. (1999); S. 869, 105th Cong. (1997); S. 2056, 104th Cong. (1996); S. 2238 103rd Cong. (1994) (available at <http://thomas.loc.gov>). ENDA was proposed as an alternative to the failed attempt at amending Title VII to include sexual orientation and was designed to offer the same protections as Title VII. See J. Banning Jasiunas, Note, *Is ENDA the Answer? Can a "Separate but Equal" Federal Statute Adequately Protect Gays and Lesbians from Employment Discrimination?*, 61 OHIO ST. L.J. 1529, 1545-46 (2000) (discussing EDNA as alternative to failed attempts at amending Title VII); Sharon M. McGowen, *Recent Development: The Fate of ENDA in the Wake of Maine: A Wake-Up Call to Moderate Republicans*, 35 HARV. J. ON LEGIS. 623, 624-25 (1998) (discussing history of EDNA in 104th and 105th Congresses). The statute itself is "simple and straight forward. A covered entity may not use the fact of an individual's sexual orientation in making employment decisions." *Employment Non Discrimination Act of 1997: Hearings on S. 869 Before the Senate Comm. on Labor and Human Resources*, 105th Cong. 141 (1997) [hereinafter *Hearings*] (statement of Chai Feldblum, Associate Professor of Law and Director of Federal Legislation Clinic, Georgetown University Law Center)(discussing application of EDNA).

The religious exemption in ENDA, however, is far broader than that found under Title VII, exempting all but solely for-profit activities. See S. 869, 105th Cong. § 9(a)-(b) (1997) (stating "this Act shall not apply to a religious organization" unless "the duties of position pertain solely to activities of the organization that generate unrelated business taxable income" under the Internal Revenue Code); see also *Hearings, supra* (written Statement of Chai Feldblum). There is no requirement that a particular sexual orientation be a bona fide occupational qualification and thus under ENDA religious

Amendment is relevant to some claims regarding marital practices.<sup>60</sup>

If constitutional law embodies the national ideology,<sup>61</sup> then the jurisprudential contours of Fourteenth and First Amendment doctrine are relevant to the discussion of assimilation. The task, however, is to untangle constitutional doctrine as pronounced by the United States Supreme Court from wider concerns regarding equality and assimilation.<sup>62</sup>

#### *D. Both Assimilation and Anti-Assimilation Can Be Repressive*

Unfortunately, neither assimilation nor anti-assimilation is inherently progressive. While liberals may tend to favor assimilation, it can be just as coercive as anti-assimilation. Both assimilation and anti-assimilation are ideologies that can be implemented in ways that are conservative and repressive.

For example, in the Native American context, the majoritarian quest for assimilation led to the removal of Native American children from their homes in an effort to “tame the savages.”<sup>63</sup> This removal first occurred through explicit

groups would be free to discriminate on the basis of sexual orientation unless the position is “solely” one involved in a for-profit function of the religion or religious group.

60. See *infra* notes 274-93 and accompanying text for a discussion of Mormon polygamy.

61. See Karst, *supra* note 20, at 373 (arguing Constitution reflects underlying values of American civic culture).

62. It is interesting to compare the Canadian Charter of Rights and Freedoms provision, Const. Act 1982, pt. I, § 15 (Canadian Charter of Rights and Freedoms), Schedule B to the Canada Act, 1982, ch. 11 (U.K.), reprinted R.S.C. 1985 Appo. II, No. 44 §§ 44, 35, 35(1), which provides for ‘equality without discrimination’ and which includes a specific affirmative action provision. As Justice Claire L’Heureux-Dubé has explained, this has meant that the Canadian Supreme Court, unlike the United States Supreme Court, has concluded that:

[E]quality isn’t just about being treated the same, and it isn’t a mathematical equation waiting to be solved. Rather, it is about equal human dignity, and full membership in society.

It is about *promoting* an equal sense of self-worth. It is about treating people with equal concern, equal respect, and equal consideration. These are the values that underlie equality.

These are the values that are offended when we discriminate, consciously or not.

Claire L’Heureux-Dubé, *A Conversation About Equality*, 29 DENV. J. INT’L L. & POL’Y 65, 69 (2000). This is not, however, to argue that the Canadian interpretation is the apex of equality, for it has certainly been subjected to critiques, including the areas of sexuality and family law. See, e.g., Lori G. Beaman, *Sexual Orientation and Legal Discourse: Legal Constructions of the “Normal” Family*, 14 CAN. J.L. & SOC’Y 173, 181-87 (1999) (arguing that Supreme Court of Canada incorporates assumptions about nature of family life as relevant factor in its assessment of meaning of word “spouse”); Susan B. Boyd, *The Impact of the Charter of Rights and Freedoms on Canadian Family Law*, 17 CAN. J. FAM. L. 293, 297, 313-27 (2000) (surveying impact of Charter which contains government action requirement on “private” family law); Winifred Holland, *Intimate Relationships in the New Millennium, The Assimilation of Marriage and Cohabitation?*, 17 CAN. J. FAM. L. 114, 127-51 (2000) (discussing Charter challenges to privileging of marriage over cohabitation and problems with incremental reform); Bruce Ryder, *The Little Sisters Case, Administrative Censorship, and Obscenity Law*, 39 OSOODE HALL L.J. 207, 208 (2001) (arguing that Supreme Court of Canada failed to adequately protect sex equality concerns when it rejected Charter challenge to censorship of lesbian and gay pornography).

63. See, e.g., Patrice Kunesh, *Transcending Frontiers: Indian Child Welfare in the United States*, 16 B.C. THIRD WORLD L. J. 17, 22-30 (1996); Jose Monsivais, *A Glimmer of Hope: A Proposal to Keep the Indian Child Welfare Act of 1978 Intact*, 22 AM. INDIAN L. REV. 1, 2-7 (1997) (both discussing

policies administered by the Bureau of Indian Affairs, which forced Native children to attend boarding schools for eight years, during which time the children were not permitted to speak their native language, wear native clothes or keep their hair long.<sup>64</sup> State welfare agencies administered a later policy, which removed children as abused and neglected, often based on poverty or cultural practices such as extended kinship systems, which did not view parental responsibility in the same terms as the dominant white culture.<sup>65</sup> Majoritarian belief in the non-assimilability of “brave,” “high-spirited,” and “fierce” Native Americans, however, gave the majority constitutional comfort when it denied Native Americans the rights of property ownership.<sup>66</sup>

Similarly, in the immigrant context, an assimilationist mandate can lead to English-only policies.<sup>67</sup> The Alabama state constitutional amendment declaring English the official state language and interpreted as prohibiting the translation of the written drivers license test is based upon a sentiment that one language will foster unity.<sup>68</sup> On the contrary, anti-assimilationist beliefs can lead to

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history of forced child removal). As these articles note, the government has attempted to stop this policy by passage of The Indian Child Welfare Act of 1978. 25 U.S.C. §§ 1901-1963 (1978).

64. See B.J. Jones, *In Their Native Lands: The Legal Status of American Indian Children in North Dakota*, 75 N.D. L. REV. 241, 247-48 (1999) (analyzing historical federal policy towards American Indian children); Kunesh, *supra* note 63, at 23 (describing early assimilation politics of Bureau of Indian Affairs).

65. See Kunesh, *supra* note 63, at 23-24 (discussing effect of federal policies on American Indian families). The extent to which the state welfare practices have been ameliorated is doubtful; as one recent commentator notes: “an Indian child in North Dakota is over eight times more likely to be placed in foster care than a non-Indian child.” Jones, *supra* note 64, at 246 (citing *Indian/Non-Indian Comparisons: By Several Demographic, Program, and Health Variables*, A REPORT FROM THE NORTH DAKOTA DEPARTMENT OF HUMAN SERVICES AND STATISTICS 2, 7 (1997)).

66. *Johnson v. McIntosh*, 21 U.S. 543, 589-90 (1823).

67. For discussions of English-only policies, see generally Raechel L. Adams, *English-Only in the Workplace: A New Judicial Lens Will Provide More Comprehensive Title VII Protection*, 47 CATH. U. L. REV. 1327 (1998) (exploring and defining national origin discrimination through English-only rules); Steven W. Bender, *Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U. L. REV. 1027 (1996) (analyzing and proposing returns for non-English-speaking consumer protection laws); Christopher David Ruiz Cameron, *How the García Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347 (1997) (describing refusal of judicial system to recognize discriminatory nature of English-only policies); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991) (analyzing potential application of antidiscrimination law to accent-bias); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269 (1992) (reviewing history of laws regarding American cultural groups’ interactions involving language); Madeleine Plasencia, “*Suppressing the Mother Tongue*”—*Anti-Subordination and the Legal Struggle Over Control of the Means of Communication*, 53 U. MIAMI L. REV. 989 (1999) (describing interrelationship between language, identity, and self-esteem); John Hayakawa Torok, *Finding the Me in LatCrit Theory: Thoughts on Language Acquisition and Loss*, 53 U. MIAMI L. REV. 1019 (1999) (discussing importance of language diversity through actor’s personal and intellectual history).

68. Amendment 509 to the Alabama Constitution provides that English is the official language of Alabama and empowers the state legislature to pass legislation to enforce the English language mandate. ALA. CONST. amend. 509.

immigration exclusions such as the infamous Chinese Exclusion Act<sup>69</sup> and disparately low quotas.<sup>70</sup>

Gender provides yet another example. The integration of women into the professions, including the legal profession, is telling. The underlying basis for the exclusion of women was that women had a “natural and proper timidity and delicacy” that rendered women unfit “for many of the occupations of civil life,” including the practice of law.<sup>71</sup> In short, women could not be assimilated to the demands of legal practice. The removal of formal barriers, however, revealed a different problem: an assimilationist program that requires women to conform to male based standards of performance.<sup>72</sup>

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The Eleventh Circuit Court of Appeals found that the amendment could not be applied to testing for drivers licenses based upon the State's receipt of federal funds. *Sandoval v. Hagan*, 197 F.3d 484, 487-88 (11th Cir. 1999). See Christian A. Garza, Note, *Measuring Language Rights Along a Spectrum*, 110 YALE L.J. 379 (2000), for a discussion of the case. The United States Supreme Court, granted certiorari and reversed. *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (rev'd). In an opinion written by Justice Scalia, the Court held that the prohibition in section 601 of Title VI, 42 U.S.C. § 2000d (2001), which prohibits discrimination based on race, color, or national origin in covered programs and activities, prohibits only *intentional* discrimination. *Id.* at 280-81 (emphasis added). The Court further held that the language of section 602, which commands the regulating agencies to issue rules under which the Department of Justice prohibited employing methods that have a disparate impact, does not contain a private right of action to enforce its prohibitions. *Id.* at 285-92. Scalia reasoned that the statute provides for the enforcement of the regulations through the issuing agencies, and that the language of section 602 “focuses neither on the individuals protected nor even on the funding recipients being regulated but on the agencies that will do the regulating.” *Id.* at 289.

69. Act of May 6, 1882, ch. 126, 22 Stat. 58, *repealed by* Chinese Exclusion Repeal Act of Dec. 17, 1943, ch. 344, 57 Stat. 600. Even the first naturalization acts were race-based. See, e.g., Act of Mar. 26, 1790, ch. 3, 1 Stat. 103 (limiting naturalization to “free white person[s]”), *amended by* Act of July 14, 1870, ch. 254, 16 Stat. 254, 256 (extending naturalization to people of African descent). Immigration was linked with citizenship, and in *United States v. Wong Kim Ark*, the Court upheld the exclusion of a person born in the United States who was returning from China, based upon his Chinese ancestry as an exclusion from eligibility for citizenship and, thus, rendering the Fourteenth Amendment inapplicable. 169 U.S. 649, 650 (1898). For general discussions of the Chinese Exclusion Acts and other anti-Asian immigration policies, see generally Kitty Calavita, *The Paradoxes of Race, Class, Identity, and “Passing”*: *Enforcing the Chinese Exclusion Acts, 1882 - 1910*, 25 LAW & SOC. INQUIRY 1 (2000); Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-70*, 72 CAL. L. REV. 529 (1984); John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws*, 3 ASIAN L.J. 55 (1996).

70. The Immigration and Nationality Act of 1965, 8 U.S.C. §§ 1101-1525 (1999), eliminated the national quota system, largely in favor of a family-based preference system, which disproportionately discriminates against sexual minorities who do not qualify for spousal preferences with their same-sex partners. See generally Amy Brownstein, *Why Same-Sex Spouses Should be Granted Preferential Immigration Status: Reevaluating Adams v. Howerton*, 16 LOY. L.A. INT'L & COMP. L. REV. 763 (1994) (explaining how U.S. law approaches the issue of same-sex marriages for immigration purposes); Christopher A. Duenas, Note, *Coming to America: The Immigration Obstacle Facing Binational Same-Sex Couples*, 73 S. CAL. L. REV. 811 (2000) (proposing removal of immigration barriers faced by same-sex couples); Brian McGloin, Comment, *Diverse Families with Parallel Needs: A Proposal for Same-Sex Immigration Benefits*, 30 CAL. W. INT'L. L.J. 159 (1999) (proposing creation of new immigration status category for partners of same sex couples).

71. *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873) (Bradley, J., concurring).

72. See generally LANI GUINIER, MICHELLE FINE & JANE BALIN, *BECOMING GENTLEMEN*: HeinOnline -- 75 Temp. L. Rev 724 2002



Thus, neither assimilationist nor anti-assimilationist policies guarantee liberation for minorities. Examined together, they send a message of the necessity for conformity. Inclusion requires conformity; if one is perceived as not conforming, one will be excluded.

### *E. Segregation and Separatism*

Not only can the seemingly disparate strategies of assimilation and anti-assimilation be used to accomplish the same ultimate goal, but anti-assimilation itself is a divergent phenomenon. Depending upon the source of the anti-assimilation impulse, it can include the apparent opposites of segregation and separatism.

In the African-American context, segregation was most notoriously exercised pursuant to laws that mandated its practice, for example, the Louisiana statute upheld in *Plessy v. Ferguson*<sup>73</sup> that required railroads to have separate cars for whites and blacks.<sup>74</sup> The illusion of “separate but equal” was finally dispelled by the Court’s 1954 unanimous opinion in *Brown v. Board of Education*,<sup>75</sup> authored by Justice Earl Warren, which concluded that segregation was unconstitutionally harmful, rejecting “[a]ny language in *Plessy v. Ferguson* contrary to this finding.”<sup>76</sup> The unremitting reality of segregation is generally considered the basis for the Civil Rights Movement and for the Civil Rights Act of 1964.<sup>77</sup> Yet the benefits of integration for African-Americans are subject to debate. For example, Sonia Jarvis argues that the implementation of *Brown* has negatively affected African-American school children in terms of a deprivation of role models, loss of self-esteem, biases in curriculum, racial tracking, and other problems.<sup>78</sup> In the university context, Jerome Culp discusses the

WOMEN, LAW SCHOOL & INSTITUTIONAL CHANGE (1997) (arguing how culture of legal education alienates, demoralizes, and ultimately changes women).

73. 163 U.S. 537 (1896).

74. See *Plessy*, 163 U.S. at 552 (upholding constitutionality of a Louisiana statute providing separate but equal accommodations for white and African-American races).

75. 347 U.S. 483 (1954).

76. *Brown*, 347 U.S. at 494-95.

77. The motivating purpose of the Civil Rights Act of 1964 was to prohibit segregation, although the statute uses the language of “discrimination.” Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241. See Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal AntiDiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 487-88 (2000) (footnotes omitted) (analyzing historical developments of Civil Rights Act of 1964 from *Brown* decision as an effort to continue to reduce practices of segregation by “outlawing racial discrimination by business establishments and employers”).

78. Sonia R. Jarvis, *Brown and the Afrocentric Curriculum*, 101 YALE L.J. 1285, 1286-88 (1992). Similarly Jerome Culp notes:

Forced desegregation of southern schools often resulted in the unnecessary elimination of the jobs of excellent black teachers and all of the “black” cultural aspects of schools that had been segregated for black children. The existing power structure viewed black teachers as inferior and black schools as “too black” for white children. Black children were made to bear a disproportionate share of the cost of integration—leaving their schools and friends for what became, in many situations, hostile territory.

controversy that occurred when black students at the University of North Carolina wanted to create a black cultural center on campus.<sup>79</sup> As Culp states, “[b]lack students who sit together in an effort to create a community in a world where their interests and views are often excluded are seen as the fundamental problem preventing the success of integration on college campuses.”<sup>80</sup> In theorizing separatism, Bill Ong Hing argues that it has a political or ideological version and a sociological version.<sup>81</sup> In its ideological manifestation, separatism means forgoing reliance on the power structure and engaging in political self-help.<sup>82</sup> The sociological version occurs when people simply feel more comfortable in a separate community.<sup>83</sup> Yet as Hing notes, these two strands are not entirely distinct.<sup>84</sup>

Hing also raises the problem of separatism by racial minorities seeming to exhibit an analogous preference as the one exercised by whites who may want to “live among themselves.”<sup>85</sup> This differentiation between justifiable separatism and unjustifiable separatism also troubles another commentator:

In my view, the likelihood that people will flee to a new, homogeneous community . . . correlates with nothing so much as their dislike for the neighbors they leave behind. This point emerges with special clarity from the most politically significant instance of “exit” in modern America, “white flight” from the cities. Many whites left because they distrusted or hated blacks . . . . There is nothing especially valuable about the motives that bring racists together in homogeneous communities. Of course, some insular communities (such as the Amish or the Satmar Hasidim in Kiryas Joel) do reflect distinctive and demanding world views. But not all separatist groups are ideologically rich in this way, and not all ideologically rich groups are insular. Separatism simply is not a reliable index of ethical integrity.<sup>86</sup>

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Culp, *supra* note 11, at 671.

79. *Id.* at 666-67, 679-81.

80. *Id.* at 679.

81. Hing, *supra* note 13, at 890-91.

82. *Id.* at 895.

83. *Id.* at 897-98.

84. *Id.* at 891-92 (using example of African-Americans in Prince George’s County, Maryland).

85. *Id.* at 898. Hing resolves this tension with a resounding “perhaps,” grounding the preference of a minority group on the experience of oppression and using the example of Japanese-Americans, including elders interned in World War Two. Hing, *supra* note 13, at 898.

86. Christopher L. Eisgruber, *The Constitutional Value of Assimilation*, 96 COLUM. L. REV. 87, 98-99 (1996) (commenting upon Abner S. Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 COLUM. L. REV. 1 (1996)). The Kiryas Joel controversy involved a religious enclave of Satmar Hasidim, described as intensely pious and ultra-orthodox who, in addition to following all Jewish precepts, remove themselves as much as possible from the outside world. See Judith Lynn Failer, *The Draw and Drawbacks of Religious Enclaves in a Constitutional Democracy: Hasidic Public Schools in Kiryas Joel*, 72 IND. L.J. 383, 386-87 (1997) (describing creation of Kiryas Joel enclave community). In pursuing their separatism, the Satmar Hasidim moved to one subdivision in the relatively undeveloped town of Monroe, New York in the early 1970’s. *Id.* They ran afoul of local zoning laws, however, and came into conflict with the Town Board of Monroe. *Id.* at 388. They then successfully petitioned to incorporate the Village of Kiryas Joel composed of 320 acres owned and inhabited entirely by

The implicit requirement for “justifiable separatism” in such a formulation would not be the experience of oppression, but a “distinctive and demanding world view” that exhibits “ethical integrity.” The application of such a standard is extremely troublesome.

An assimilationist perspective would most likely disapprove of both segregation and separatism under a formal equality approach, which cannot distinguish between exclusion of minority groups by dominant groups and the exclusion of dominant groups by minority groups. A casual multiculturalism or pluralism perspective might also view segregation or separatism with disdain. Importantly, however, multiculturalism or pluralism logically depend upon the existence of independent and identifiable separate cultures or entities—and thus without separatism (or perhaps segregation), there can be no multiculturalism.

#### *F. The Disagreement Within Communities*

Last, and obviously, there is substantial disagreement within minority communities about the advisability of assimilationist or anti-assimilationist stances. Communities are diverse not only according to their ability to assimilate, but also regarding their beliefs about the desirability of assimilation. As Kevin Johnson notes, some “Latino intellectuals with high media profiles” such as Linda Chavez, strongly encourage “Hispanics” to assimilate and criticize leaders who they believe encourage ethnic separation.<sup>87</sup>

Arguments among feminists over the strategies and meanings of assimilation and equality have been plentiful. A state statute granting favorable pregnancy leave for prospective mothers, but not to prospective fathers, caused a division among feminist attorneys. One group argued that the statute was sex discrimination akin to earlier protective paternalistic labor legislation.<sup>88</sup> Another group argued that the statute’s recognition that women bearing children were affected in a way that men were not was constitutionally permissible.<sup>89</sup> A similar division occurred regarding a suit against Sears for gender imbalances in its job assignments.<sup>90</sup> Sexual issues such as pornography

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Satmars. *Id.* See Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 691 (1994) (holding that creation of Kiryas Joel school district violated the Establishment Clause of First Amendment).

87. Johnson, *supra* note 12, at 194. Johnson later discusses the fact that Chavez herself experienced the “limits of assimilation” and resigned as president of an organization devoted to ending bilingual education when a “crude anti-Latino memorandum written by the organization’s founder came to light.” *Id.* at 196.

88. See Calif. Fed. Savs. & Loan Ass’n v. Guerra, 479 U.S. 272, 283-84, 290-91 (1987) (holding that California statute did not compel employers to treat pregnant workers better than disabled workers and only outlined minimum benefit standards). See Martha Minow, *Adjudicating Differences: Conflicts Among Feminist Lawyers*, in CONFLICTS IN FEMINISM 149, 150-51 (Marianne Hirsch & Evelyn Fox Keller, eds., 1990), for a discussion of the opposing amicus briefs.

89. *Guerra*, 479 U.S. at 283-84, 288-89.

90. See EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264, 1353 (N.D. Ill. 1986) (holding employer did not discriminate against pregnant women but had proven “legitimate nondiscriminatory reasons” for statistical disparities in hiring practices). The trial involved the expert testimony of two well-regarded historians, Alice Kessler-Harris for the EEOC, and Rosalind Rosenberg for Sears. *Id.*

and prostitution have been so divisive as to be termed the “sex wars,” with one group claiming that pornography and prostitution are violence against women, while another group argues that these practices are, or can be, liberating and equalizing.<sup>91</sup>

In the African-American context, Justice Clarence Thomas has become a focal point for assimilation discourse. One commentator defends his critique of Thomas as being based upon Thomas’ views rather than upon a misinterpretation of Thomas as a “black [man] in white face.”<sup>92</sup> Another commentator defends Thomas himself by arguing against the common myths of Thomas as inauthentically black because of Thomas’ conservative positions.<sup>93</sup>

at 1308, 1314. For discussions of the case, see Ruth Milkman, *Women’s History and the Sears Case*, 12 FEMINIST STUD. 375, 394-95 (1986); Minow, *supra* note 88, at 150; Scott, *supra* note 25, at 138.

91. The origin of the debate over the so-called ‘sex wars’ dates back to the nineteen-eighties, but the essence of the debate remains relevant and provocative to feminist legal scholars today. In its simplest form, the debate revolves around the legal consequences of characterizing women as lacking agency to control their own victimization by male aggression, and it has pitted the anti-pornography camp (composed most notably of Catharine MacKinnon and Andrea Dworkin) against the Feminist Anti-Censorship Task Force (FACT). See generally Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995); Lisa Duggan, *An Historical Overview*, 38 N.Y.L. SCH. L. REV. 25 (1993); Margaret McIntyre, *Sex Panic or False Alarm? The Latest Round in the Feminist Debate Over Pornography*, 6 UCLA WOMEN’S L.J. 189 (1995); Carole S. Vance, *More Danger, More Pleasure: A Decade after the Barnard Sexuality Conference*, 38 N.Y.L. SCH. L. REV. 289 (1993); Robin West, *The Feminist Conservative Anti-Pornography Alliance and the 1986 Attorney General’s Commission on Pornography Report*, 1987 AM. B. FOUND. RES. J. 681 (1987).

MacKinnon, a proponent of what has alternatively been called cultural feminism or dominance feminism, argues that persistent inequality between men and women is manifested in the form of pornography, violence against women, and sexual harassment of women by men. CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 85-92 (1987). This sexualized domination of women by men, she contends, makes it impossible for women to legitimately claim any control over their bodies, sexual desires, or pleasure, since women’s conceptions of themselves are shaped pervasively by the culture of domination to which they are subject. *Id.* at 86-87. Dominance feminism argues that it is meaningless to propose, as anti-censorship feminists do, that pornography is capable of multi-layered interpretations which vary in the levels of harm that they inflict upon women. *Id.* at 91-92. Instead, MacKinnon argues that pornography is indistinguishable from violence against women, and should therefore be repudiated in its totality by feminists. See generally *id.* at 45-62. Standing in opposition to this view are the anti-censorship feminists or feminist sex radicals, perhaps most notably Nadine Strossen. See generally NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN’S RIGHTS (1995).

The critiques of so-called “dominance feminism” argue that dominance feminism’s willingness to characterize all women’s sexual experiences as dangerous or non-consensual is an oversimplification that stifles debate about, and expressions of, women’s sexuality and presents it as a two-dimensional social construct. See Abrams, *supra* at 311 (discussing these critiques). This tendency, they argue, is antiquated at the least, and dangerous at its worst, because it alienates those women whose chosen sexual practices mirror the dominant paradigm and denies all women any agency over their own sexuality. *Id.* As such, it runs the risk of promoting the very victimization it seeks to analyze and dismantle. *Id.*

92. Jerome McCristal Culp, Jr., *To the Bone: Race and White Privilege*, 83 MINN. L. REV. 1637, 1647-48 (1999) (citing DANIEL FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW 128, 182 (1997)).

93. Stephen Smith, former law clerk to Justice Thomas, argues that Thomas has been unfairly portrayed by the media. Stephen F. Smith, *The Truth About Clarence Thomas and the Need for New*

Yet another scholar uses Thomas' concedingly conservative views to argue for an Afrocentric pedagogy.<sup>94</sup>

While such controversies often create "camps" that divide people, it is also true that each of us, as individuals, might also experience ambivalence about the advantages and disadvantages of assimilation. For example, it is easy to label Justice Thomas as assimilationist and to contrast him with another African-American jurist, Judge Higginbotham, who eloquently protested Justice Thomas' nomination to the High Court.

As Margaret Chon describes Judge Higginbotham, the judge for whom she clerked:

Like many lawyers who believed in the promise of the civil rights movement, the Judge had a distinctly bifurcated vision of American law. One vision was the promise of the founding documents of this country, as symbolized by the formal, tidy, and assertive structures of Independence Park. This is the vision of "we the people," of self-evident truths that "all men are created equal." It is the vision of the European Enlightenment, transplanted to America, the ideals of which we are all taught as gospel in elementary school. This is the rational part of the history of America.

The other vision was a profoundly different one, one that disturbs and even enrages those who want to believe in the unsullied purity of the first vision. This is the vision of "we the people of color," the one that is symbolized by the urban decay just a few blocks away from the Independence Hall. It is the vision that caused the Judge, over and over again during his distinguished career, to ask the hard questions, the questions many do not want to hear. This is the irrational history of America, the America that is not taught at all in many cases, but which affects all of us, even today. As the nation was celebrating the constitutional bicentennial celebration with fanfare and self-congratulation, the Judge asked "Did the Declaration of Independence announce a self-evident truth or a self-evident lie?"

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*Black Leadership*, 12 REGENT U. L. REV. 513, 514 (2000). Smith argues that the bashing of Thomas falls into one of three categories. First, is the argument of critics that Thomas is simply a "puppet" of Justice Scalia, another conservative judge nominated by President Reagan. *Id.* at 514. Second, is the argument that Thomas decides cases merely to harm those groups that opposed his nomination to the Supreme Court. *Id.* at 514-15. Third, he is criticized for holding views that no "really black" person could honestly hold. *Id.* One common thread between all these critics is that Thomas's views simply do not matter, and should not be taken seriously. *Id.*

94. Eleanor Brown, *Black Like Me? "Gangsta" Culture, Clarence Thomas, and Afrocentric Academies*, 75 N.Y.U. L. REV. 308, 313 (2000). Brown proposes that:

Justice Thomas's exhortation to seek solutions that may lie within the black community is not incompatible, in spirit, with Afrocentrists' goals to make blacks the subjects of history and human experience. At first glance, this conflation of Thomas's views—often described as conservative—with the theoretical project of Afrocentrism, which some liberal critics view as radically separatist, may seem surprising. However, this Article contends that both viewpoints represent a growing dissatisfaction with the integrationist ideal, as expressed by black intellectuals at opposite extremes of the ideological spectrum.

*Id.*

Such a question both affirms and critiques the prevailing wisdom, for the answer, as the Judge knew, was not an either/or answer.<sup>95</sup>

Judge Higginbotham is justly admired for his great and enduring devotion to equality,<sup>96</sup> as well as his opposition to Clarence Thomas' appointment to the United States Supreme Court.<sup>97</sup> Yet as Margaret Chon portrays him, he had the wisdom to acknowledge the contradictions not only among us, but within each of us.

Thus, it seems to me that however vociferously we advocate either an assimilationist or anti-assimilationist stance, critical theorists each recognize the inherent contradictions in any position. The disagreements within communities are projections of the disagreements within each of us. We recognize the symbiotic relationship between segregation and separatism, even as we realize that both assimilation and anti-assimilation can be exercised in a repressive manner by the dominant culture. We have differing notions of coercion, the constitutional dimensions of assimilation, and the constructions of the dominant group. Recognizing the complexities of the assimilationist discourse in critical theories—whether they be concerned with racial, ethnic, gender, or religious categories—serves to illuminate the problems of assimilation as they appear in lesbian legal theory. This investigation also assists in the identification of what aspects of assimilation, if any, are problematic. The next section pursues these

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95. Margaret Chon, *A Symposium Tribute to Judge A. Leon Higginbotham, Jr.: The Mentor and his Message*, 33 LOY. L.A. L. REV. 973, 980-81 (2000) (citations omitted).

96. At an event honoring Judge Higginbotham after his death, he was praised as the "peoples lawyer" with President Clinton, Lyndon Johnson, and former South African President Nelson Mandela, among other dignitaries, celebrating Higginbotham as one of the 20<sup>th</sup> century's great leaders who spent his life applying the law in pursuit of civil rights and personal liberties. Marcella Bombardieri, *Notables Honor 'People's Lawyer'*, BOSTON GLOBE, Feb. 7, 2000, at B3. Leon Higginbotham, Jr. served as a federal district court judge and Chief Judge of the Third Circuit Court of Appeals before his death in 1998. *Id.* As well as numerous law review articles, his scholarly work includes the books, *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* (1996) (discussing that blacks have left behind midnight hour of slavery, traveled through gray dawn of segregation, and are now in cloudy divide, poised between freedom and inequality) and *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS* (1978) (discussing vacillation of court, state legislature, and even honest public servants in trying to decide whether blacks were people).

97. On November 29, 1991, Higginbotham sent an "open letter" to Justice Thomas, which implored the newly confirmed Justice to remember "the culmination of years of heartbreaking work by thousands" of civil rights activists who preceded him. A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005, 1007 (1992), reprinted in *RACE-ING JUSTICE, EN-GENDERING POWER, ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY* 3 (Toni Morrison ed., 1992). Higginbotham stated that after reading every article Justice Thomas had published and every speech he had given before his confirmation hearing, Higginbotham stated that he "could not find one shred of evidence suggesting an insightful understanding [by Clarence Thomas] on how the evolutionary movement of the Constitution and the work of civil rights organizations [had] benefited [him]" on his rise to the Supreme Court. *Id.* at 1011. He criticized Clarence Thomas for labeling himself as a "black conservative", confessing that he [Higginbotham] was at a loss to understand, other than their own self-advancement, what it was that the so-called "black conservatives" were "so anxious to conserve." *Id.* at 1018.

issues.

### III. LESBIANS & ASSIMILATIONIST/ ANTI-ASSIMILATIONIST PERSPECTIVES

For lesbians within legal culture, the same dynamics as described above for other groups are operative. There is a logical necessity for a dominant and idealized group, although this group may change—at times being heterosexual women, at other times heterosexual men, gay men, and even lesbians who function as “but for” perfect lesbians.<sup>98</sup> For lesbians, as with others, assimilation can possess a coercive cast that implicates the constitutional interests of equality and association.<sup>99</sup> As with other groups, both assimilation and anti-assimilation can be repressive and segregation and separatism co-exist. Lastly, there are certainly vociferous disagreements among us regarding the virtues of assimilation, and like Judge Higginbotham, I suspect that we each harbor our individual conflicts, no matter how stridently we articulate our respective positions.

Moreover, the entire question of assimilation, especially as it regards sexuality, is inflected by Michel Foucault’s theories positing the impossibility of a non-assimilated stance. For Foucault, the subject who resists is a product of the power and discourses that are being resisted: “Where there is power, there is resistance, and yet, or rather consequently, this resistance is never in a position of exteriority in relation to power.”<sup>100</sup> Nevertheless, this observation does not obviate the possibility of resistance.<sup>101</sup> Instead, as a form of intellectual resistance, Foucault suggested a number of scholarly inquiries that might be pursued regarding sexuality.<sup>102</sup>

98. By this phrase I mean lesbians who “but for” their sexuality, are otherwise perfect; they are the “whitest and brightest” among us. See SAPHO *supra* note 5, at 30, 107 (describing “but for” lesbians as perfectly assimilated except for their sexuality); Darren Rosenblum, *Queer Intersectionality and the Failure of Recent Lesbian and Gay “Victories,”* 4 LAW & SEXUALITY 83, 93-94 (1994) (stating that because antidiscrimination law is so limited in scope, sex discrimination has not been recognized with reference to lesbians who are in privileged positions but for their sexuality); Julie Shapiro, *A Lesbian-Centered Critique of Second-Parent Adoptions,* 14 BERKELEY WOMEN’S L.J. 17, 20-21, 35-36 (1999) (expressing concerns that when lesbians use law they conform to ideals of dominant society).

99. Scholar Kenji Yoshino has compellingly analyzed what he terms in the “assimilationist bias” of equal protection doctrine as it relates to the military’s “don’t ask, don’t tell” policy regarding sexual orientation. See Yoshino, *Don’t Ask,* *supra* note 6, at 549 (arguing that military’s policy of turning the other way can be dangerous to homosexuals by making them less visible and less likely to achieve heightened security in an equal protection analysis).

100. MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 95 (Robert Hurley trans., Vintage Books ed., 1980).

101. Foucault’s own practices illustrate the possibility of resistance. For example, he participated in many demonstrations against current regimes, assisted refugees from then-Communist Eastern Europe, participated in prison reform, observed the Iranian revolution, and made some excursions into gay activism. See DIDIER ERIBON, *MICHEL FOUCAULT* (1991) for further discussion. See also JAMES MILLER, *THE PASSION OF MICHEL FOUCAULT* (1993), for a full account of Foucault’s life.

102. As Foucault stated:

To return to sex and the discourses of truth that have taken charge of it, the question that we must address, then, . . . is rather: In a specific type of discourse on sex, in a specific form of extortion of truth, appearing historically and in specific places (around the child’s body,

Although not strictly within Foucault's delimitations, this Article's interrogation of the specific arguments surrounding same-sex marriage is perhaps within Foucault's general preference for particularity.<sup>103</sup> Yet this Article resists Foucault, or phrased more specifically, resists Foucault's resistance to lesbians as distinct from gay men,<sup>104</sup> by seeking to place lesbians at the center of the analysis.

Yet before turning to the specific, it is useful to posit a hypothetical stance informed by the controversies in legal culture and oriented toward a general goal of lesbian liberation, however ill-defined. Given the general contours of assimilation, I harbor deep concerns about assimilation in the context of any lesbian legal theory. As argued above, however, a simplistic position of anti-assimilationism is equally problematic. Yet the anti-assimilationist label does capture the three premises that arise from the previous survey of assimilation in legal theory, which I map below. Thus, for lack of a better term, I shall use "anti-assimilationist" to describe the stance developed by this Article.<sup>105</sup>

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apropos of women's sex, in connection with practices restricting births, and so on), what were the most immediate, the most local power relations at work? How did they make possible these kinds of discourses, and conversely, how were these discourses used to support power relations? How was the action of these power relations modified by their very exercise, entailing a strengthening of some terms and a weakening of others, with effects of resistance and counter investments, so that there never existed one type of stable subjugation, given once and for all? How were these power relations linked to one another according to the logic of a great strategy, which in retrospect takes on the general aspect of a unitary and voluntarist politics of sex?

FOUCAULT, *supra* note 100, at 97.

103. In one interview, Foucault expresses this method as "eventualization," defining it as a "making visible a *singularity* at places where there is a temptation to invoke a historical constant, an immediate anthropological trait, or an obviousness that imposes itself uniformly on all." MICHEL FOUCAULT, *Questions of Method (Interview)*, in *POWER: THE ESSENTIAL WORKS OF MICHEL FOUCAULT 1954-1984* 226 (James D. Faubion ed., 1st U.S. ed. 2000).

104. In Foucault's works, lesbians are under-theorized and barely mentioned. In one interview, the suggestion that lesbians had distinct sexual experiences from those of gay men caused Foucault to respond, "[a]ll I can do is explode with laughter," although he did admit that "one would have to speak about the different pressures experienced by men and women who are coming out or are trying to make a life for themselves as homosexuals." James O'Higgins, *Sexual Choice, Sexual Act: Foucault and Homosexuality*, in *POLITICS, PHILOSOPHY, AND CULTURE: INTERVIEWS AND OTHER WRITINGS 1977-1984* 291 (Lawrence Kritzman ed., 1988). Unfortunately, Foucault never did seem to "speak" about these differences. As the feminist philosopher Jana Sawicki notes, "Foucault abandoned the project of writing a history of women's bodies. In many of his later writings, the absence of specific attention to women's sexual and procreative bodies as pivotal targets for the new described forms of power that he described is glaring." JANA SAWICKI, *DISCIPLINING FOUCAULT: FEMINISM, POWER, AND THE BODY* 68 (Routledge ed., 1991).

105. I avoid segregationist or separatist because of the negative valences those terms have acquired. See *supra* notes 73-86 and accompanying text for a discussion of the negative valence of segregation. See SAPPHO, *supra* note 5, at 85, for a brief discussion of accusations of separatism applicable to lesbian legal theory. See Margaret Davies, *Lesbian Separatism and Legal Positivism*, 13 *CAN. J.L. & SOC'Y*, Fall 1998, at 1, 1, for a more textured view of lesbian separatism in legal theory contexts (comparing legal positivism and lesbian separatism). I also avoid diversity, multiculturalism, and pluralism, because they imply that my theorizing is more broad than it is, however, I am using "assimilation" in way that includes some of those positions, as well as being mindful of the inflection of



First, it seems to me that an anti-assimilationist perspective would be one that does not fetishize either equality or freedom of association, but looks to a broader concept, perhaps liberation, which certainly includes sexual freedom but is not limited to sexual matters. As such, this broader concept of liberation is not confined by constitutional theories and doctrines and is willing and able to address fundamental and structural change.

Second, an anti-assimilationist perspective would also recognize and reject the coercive aspects of assimilation, even if the coercion takes the form of positive rewards for those who assimilate. Such a perspective would not privilege those members of the community who can, or do, assimilate or find fault with those who do not assimilate for whatever reasons.

Finally, an anti-assimilationist perspective would insist that success is defined by a marker other than assimilation. Liberation can be such a marker. It is also important, however, to attempt to conceptualize beyond mere liberation “from” the state. Thus, at its most fundamental, a lesbian legal theory anti-assimilationist perspective would interrogate—to paraphrase Foucault—not just how the state and its legal institutions repress individuals, but how our very process of becoming individuals is linked to the state.<sup>106</sup> In other words, when taking as its subject our legal reform advocacy and theorizing, an anti-assimilationist stance would take a hard look at how even our most cherished conceptions of our “selves” are yoked to the state, particularly with the state’s expressions of its power through law.

With these three touchstones of an anti-assimilationist perspective, the next and major portion of this Article considers same-sex marriage and similar legal constructions of coupledness.

#### IV. SAME-SEX MARRIAGE

Same-sex marriage, domestic partnership, civil unions, and other institutions applicable to lesbian coupledness have served as a focal point for debates about assimilation in lesbian and other sexual minority communities. Thus, same-sex marriage is a prime candidate to explore the development of any anti-assimilationist stance, including one consisting of the three touchstones articulated above.

After a brief introduction explicating same-sex marriage and domestic partnership as they have developed in the United States, the next section considers the constitutional contours implicated in this doctrine and theory.

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social class. Cf. Anita Christina Butera, *Assimilation, Pluralism, and Multiculturalism: The Policy of Racial/Ethnic Identity in America*, 7 BUFF. HUM. RTS. L. REV. 1, 2-10 (2001) (distinguishing assimilation, pluralism, and multiculturalism as theories and criticizing each for failing to take into account social class and geographic space).

106. See Michel Foucault, *The Subject and Power*, Afterword to HUBERT DREYFUS & PAUL RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 208, 216 (Univ. of Chi. Press 1982) (positing that “the political, ethical, social, philosophical problem of our days is not to try to liberate the individual from the state, and from the state’s institutions, but to liberate us both from the state and from the type of individualization that is linked to the state”).

Specifically, I examine the manner in which the constitutional concept of “equality” operates erratically with regards to the legal regulation of gender, different-sex domestic partnership, polygamous marriage, and familial marriage (incest). Thus, I conclude that equality is not a successful paradigm for achieving lesbian liberation.

The next portion of the Article considers whether marriage for lesbians possesses any coercive aspects. Because of the tangible economic and legal benefits, as well as the rhetoric promoting marriage in the law and social realms, I conclude that we presently exist under a regime of compulsory matrimony that coerces individuals, especially women, to enter into the institution of marriage. Finally, the Article considers the stake of the state in the marital relations of its people, including lesbians, to interrogate the linking of lesbian identity with state interests.

#### *A. A Brief History of Same-Sex Marriage and Civil Unions*

This section considers the complicated quest for the legal recognition of same-sex couples in the United States. Of the legal demands being made by gay and lesbian activists in the 1970s, perhaps none seemed as outrageous as “homosexual marriage.” Advocating same-sex marriage was viewed as being an “antic” that could cost a person his livelihood.<sup>107</sup> The courts considering

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107. In *McConnell v. Anderson*, the Eighth Circuit described McConnell’s application for a marriage license with his partner as an antic, and reversed the district judge’s decision enjoining the Minnesota Board of Regents from refusing to hire McConnell based upon his homosexuality. 451 F.2d 193, 195 n.4 (8th Cir. 1971). See *McConnell v. Anderson*, 316 F. Supp. 809, 815 (D. Minn. 1970) (issuing injunction prohibiting Board of Regents from refusing to hire plaintiff based upon his sexual orientation). McConnell, a librarian who was offered a position as head of the cataloging division of the St. Paul campus of the University of Minnesota, had challenged the Board of Regents decision not to approve his appointment. *Id.* at 810-11. In rejecting this argument, the court relied in large measure upon the fact that James McConnell and his partner, Richard Baker, sued the county clerk of Hennepin County, Minnesota for a marriage license. *Id.* (This case would eventually reach the Minnesota Supreme Court in *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), discussed *infra* notes 108-13). As expressed by the Eighth Circuit, McConnell desired to “foist tacit approval” of the “socially repugnant concept” of homosexual rights upon the university, and the court ruled that there was nothing to require the university to “accede to such extravagant demands.” *McConnell*, 451 F.2d. at 196.

Similarly, the plaintiff in *Singer v. Hara*, 522 P. 2d 1187 (Wash. App. 1974), discussed *infra* notes 114-19, suffered adverse employment consequences from his same-sex marriage activism. Singer was a clerk typist with the EEOC, the federal agency charged with enforcing anti-discrimination laws based upon numerous categories including “sex,” although the EEOC took the position that discrimination on the basis of sexual orientation was permissible because it was not included in the prohibition of discrimination based upon “sex.” See *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 330 (9th Cir. 1979) (holding Title VII’s prohibition on sex discrimination does not extend to include person’s sexual orientation). In 1972, the Seattle Office of the EEOC summoned John Singer, a clerk typist, to an investigative interview regarding his homosexuality and the “wide-spread publicity” regarding his gay activism. *Singer v. United States Civil Serv. Comm’n*, 530 F.2d 247, 248-49 (9th Cir. 1976). Singer was ultimately discharged pursuant to the federal civil service regulations because of his “immoral and notorious disgraceful conduct.” *Id.* at 249-50. Singer appealed the termination to the Civil Service Commission and eventually brought suit in federal court. *Id.* at 250-51. Upon reaching the Ninth Circuit, the court distinguished precedent that homosexuality alone was not grounds for dismissal. *Id.*

challenges to marriage were unequivocal in their rejection. For example, the Minnesota Supreme Court in *Baker v. Nelson*<sup>108</sup> held that although the marriage statute did not explicitly prohibit same-sex marriage, the word “marriage” was used in the statute as it was commonly used, “meaning the state of union between persons of the opposite sex.”<sup>109</sup> The court noted that the “statute is replete with words of heterosexual import such as ‘husband and wife’ and ‘bride and groom’.”<sup>110</sup> The Minnesota Supreme Court also denied the constitutional challenge to the interpretation of the statute as being limited to heterosexual pairs.<sup>111</sup> In so doing, the court relied upon the link between marriage and procreation, citing the Bible’s book of Genesis.<sup>112</sup> The court was not troubled by the fact that heterosexuals need not possess the desire nor the ability to procreate in order to obtain a marriage license, concluding that a category may be “theoretically imperfect” and remain valid.<sup>113</sup>

The Washington appellate court’s opinion in *Singer v. Hara*<sup>114</sup> is quite similar, although the court had to grapple with the recent adoption of an Equal Rights Amendment to the Washington state constitution.<sup>115</sup> The specter of “homosexual marriage” was a subject being debated in the context of an Equal Rights Amendment (ERA) to the federal constitution, which conservatives used effectively in their ultimately successful quest to defeat the amendment.<sup>116</sup> Yet

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at 252-54 (discussing *Soc’y for Indiv. Rights, Inc. v. Hampton*, 63 F.R.D. 399 (N.D. Cal. 1973); *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969)). Instead, the court declared that *Singer* was “not terminated because of his status as a homosexual or because of any private acts of sexual preference,” but because he publicly flaunted his homosexual way of life while identifying himself as an employee of a federal agency. *Id.* at 255. The court rejected *Singer*’s First Amendment claims by concluding that the government’s interest in promoting the efficiency of public service outweighed *Singer*’s interest in flaunting and advocating homosexuality. *Id.* The United States Supreme Court would later vacate the decision, *Singer v. United States Civil Service Commission*, 429 U.S. 1034 (1977), and remand it to the Ninth Circuit for “reconsideration in light of the position now asserted by the Solicitor General,” with Chief Justice Burger, Justice White, and Justice Rehnquist dissenting. *Id.* at 1034.

108. 191 N.W.2d 185 (Minn. 1971).

109. *Baker*, 191 N.W.2d at 185-86.

110. *Id.* at 186 (quoting MINN. STAT. § 517.08 (1971)).

111. *See id.* at 187 (rejecting petitioner’s equal protection argument that the state does not impose requirement of “proved capacity . . . to procreate” on heterosexual married couples).

112. *Id.* at 186.

113. *Id.* at 187.

114. 522 P.2d 1187 (Wash. App. 1974).

115. *Singer*, 522 P.2d. at 1190. The Washington state ERA, adopted in 1972, provides “Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.” WASH. CONST. art. 31, § 1 (2000).

116. For example, an advertisement by Maine STOP ERA, headed by the notorious Phyllis Schlafly, showed “two men from New York’s Gay Pride parade embracing” with text such as:

What does the word “sex” [in the language of the ERA] mean? The sex you are, male or female, or the sex you engage in, homosexual, bisexual, heterosexual, sex with children. . . or whatever? . . . One thing is for sure: Militant homosexuals from all over America have made the ERA issue a hot priority. Why? To be able finally to get homosexual marriage licenses, to adopt children and raise them to get them to emulate their homosexual “parents,” and to obtain pension and medical benefits for odd-couple “spouses.”

given the ruling in *Singer*, speculations that the ERA would require same-sex marriage were ill-founded.<sup>117</sup> The court stated that the majority of Washington citizens who voted for the amendment did not intend that it include same-sex marriage.<sup>118</sup> Furthermore, the court held that the limiting of marriage to “opposite-sex” couples did not discriminate against the plaintiffs because of their sex, but was simply a product of the state’s recognition that the purpose of marriage is procreation.<sup>119</sup>

Thus, despite the promising precedent of *Loving v. Virginia*,<sup>120</sup> in which the United States Supreme Court finally declared anti-miscegenation marriage laws unconstitutional,<sup>121</sup> and despite the promise of state-ERAs, the same-sex

Mansbridge also notes, such radical conservatism was not always welcome by those who were waging a “tasteful” anti-ERA campaign, such as the president of Maine’s Right to Life, who stated that Schlafly’s advertisement alienated “upscale better educated Republican types” and was unwelcome in light of the “sentiment against homophobia” that was “running high” after two teenagers had “thrown a homosexual man off a bridge, killing him.” *Id.* at 136-37.

117. The argument that the ERA would guarantee same-sex marriages was most notably made in Samuel T. Perkins & Arthur J. Silverstein, Note, *The Legality of Homosexual Marriages*, 82 YALE L.J. 573 (1973), in which the student authors argued that the ERA would establish strict scrutiny for gender classifications and, thus, marriage prohibitions based upon gender would be unconstitutional. Jane Mansbridge provides an interesting analysis of the background of the scholarship and explains how in making their argument, they discounted Senator Birch Bayh’s statement that bans on same-sex marriages were permissible under the ERA “so long as licenses were denied equally to both male and female pairs.” MANSBRIDGE, *supra* note 116, at 129.

118. *Singer*, 522 P.2d at 1194.

119. *Id.* at 1195.

120. 388 U.S. 1 (1967).

121. *Loving*, 388 U.S. at 12. The Court’s decision in *Pace v. Alabama*, 106 U.S. 583, 585 (1883), was considered the precedent for allowing miscegenation statutes, and prior to *Loving*, the Court three times declined to review constitutional challenges to miscegenation statutes. *See Jackson v. Alabama*, 348 U.S. 888, 888 (1954) (memorandum opinion denying certiorari to Alabama Supreme Court opinion, *Jackson v. State*, 77 So. 2d 114, 115 (Ala. 1954), upholding conviction for marital miscegenation against a Fifth and Fourteenth Amendment challenge); *Naim v. Naim*, 350 U.S. 891, 891 (1955) (holding that “inadequacy of the record as to the relationship of the parties to the Commonwealth of Virginia at the time of the marriage in North Carolina and upon their return to Virginia, and the failure of the parties to bring here all questions relevant to the disposition of the case, prevents the constitutional issue of the validity of the Virginia statute on miscegenation tendered here being considered ‘in clean-cut and concrete form, unclouded’ by such problems”); *Naim*, 350 U.S. at 985 (1956) (memorandum opinion explaining that federal question not properly presented). Three years before *Loving*, the Court declared unconstitutional a Florida statute criminalizing interracial cohabitation. *See McLaughlin v. Florida*, 379 U.S. 184, 196 (1964) (invalidating statute prohibiting interracial cohabitation because Florida failed to show that statute was necessary component of state’s ban on interracial marriage).

Considering the applicability of *Loving* to same-sex marriage, the court in *Baker v. Nelson* noted that *Loving* did not indicate that “all state restrictions upon the right to marry are beyond reach of the Fourteenth Amendment” and further reasoned that “in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex.” 191 N.W.2d at 187. Similarly, the court in *Singer v. Hara* rejected the proffered analogy to *Loving* based upon their reasoning that “operative distinction lies in the relationship which is described by the term ‘marriage’ itself, and that relationship is the legal union of one man and one woman.” 522 P.2d at 1191.

The precedential value of *Loving* to restrictions on same sex-marriage remains a topic of

marriage argument suffered a judicial demise. The same-sex marriage issue was subsequently relegated to the background, with nonjudicial strategies regarding domestic partnership gaining prominence.<sup>122</sup>

In the mid-1990s, however, the issue of legalized same-sex marriage regained vigor with the Hawai'i Supreme Court's decision in *Baehr v. Lewin*,<sup>123</sup> holding that the denial of a marriage license to a same-sex couple must be evaluated under the Hawai'i state constitution's equal protection clause, which includes discrimination on the basis of sex.<sup>124</sup> The Hawai'i Supreme Court remanded the case for trial, finding that unless the state could prove a compelling state interest, the denial of a marriage license to same-sex couples constituted a denial of equal protection. At the 1996 trial, the Honorable Kevin Chang found that the sex based classification in the Hawai'i marriage statute was unconstitutional on its face and as applied under the state constitution's equal protection clause.<sup>125</sup>

The possibility of one state recognizing same-sex marriage raised the probability that such marriages would be valid throughout the United States under the full faith and credit clause of the Constitution.<sup>126</sup> In light of this

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contemporary debate. Compare David Oregon Coolidge, *Playing The Loving Card: Same-Sex Marriage and the Politics of Analogy*, 12 *BYU J. PUB. L.* 201, 201-17 (1998) (arguing that *Loving* is apt analogy), with Richard Duncan, *From Loving to Romer: Homosexual Marriage and Moral Discernment*, 12 *BYU J. PUB. L.* 239, 250-301 (1998) (arguing that there are moral differences between race and sexual orientation).

122. For a discussion of domestic partnership benefits, see, e.g., *SAPHO*, *supra* note 5, at 115-16, 128, 139, 162-63; Raymond O'Brien, *Domestic Partnership: Recognition and Responsibility* 32 *SAN DIEGO L. REV.* 163 (1995); Alice Rickel, *Extending Employee Benefits to Domestic Partners: Avoiding Legal Hurdles While Staying in Tune with the Changing Definition of the Family*, 16 *WHITTIER L. REV.* 737 (1995). See also *infra* notes 196-202 and accompanying text for further discussion of domestic partnership benefits.

123. 852 P.2d 44 (Haw. 1993).

124. Article I, section 5 of the Hawai'i Constitution provides, "[n]o person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry. HAW. CONST. art. I, § 5 (1978). In addition to the equal protection claim on which they prevailed, plaintiffs also argued that the denials of marriage licenses to same sex couples was a denial of the right to due process under Article I, section 5, and a denial of the right to privacy under Article I, section 6 of the Hawai'i Constitution which explicitly provides that "the right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest." *Baehr v. Lewin*, 852 P.2d 44, 50 (Haw. 1993) (quoting HAW. CONST. art. I, § 6 (1978)). The court, however, rejected both the due process and privacy claims, concluding that it did not believe that "a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions," or "that a right to same-sex marriage is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed." *Baehr*, 852 P.2d. at 556-57.

125. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Cir. Ct. Haw. Dec. 3, 1996). Lawrence Miike was substituted as the Director of the Department of Health, for the previous director, Lewin. *Id.* at \*1.

126. The Constitution provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. CONST. art. IV, § 1. For a discussion of the relationship between the full faith and credit clause and same-sex marriage in

potential, individual states and then Congress began adopting statutes intended to prevent recognition of legal same-sex marriages. Congress enacted the Defense of Marriage Act (DOMA),<sup>127</sup> which provides that states need not recognize same-sex marriages of other states<sup>128</sup> and further provides that the federal government will only recognize marriages between members of “the opposite sex.”<sup>129</sup> Likewise, individual states enacted laws that sought to defend marriage as strictly a mixed gender enterprise.<sup>130</sup>

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Hawai'i, see generally Robert L. Cordell II, *Same-Sex Marriage: the Fundamental Right of Marriage and an Examination of Conflict of Laws and the Full Faith and Credit Clause*, 26 COLUM. HUM. RTS. L. REV. 247 (1994); Barbara J. Cox, *Same-sex Marriage and Choice-of-law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033 (1994) [hereinafter Cox, *Return Home*]; Deborah M. Henson, *Will Same-sex Marriages Be Recognized in Sister States?: Full Faith and Credit and Due Process Limitations on States' Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii's Baehr v. Lewin*, 32 U. LOUISVILLE J. FAM. L. 551 (1994); Thomas M. Keane, Note, *Aloha Marriage? Constitutional and Choice of Law Arguments for Recognition of Same Sex Marriages*, 47 STAN. L. REV. 499 (1995).

127. Pub. L. No. 104-199, 110 Stat. 2419 (codified as 28 U.S.C. § 1738C (2000)). For scholarly discussions of DOMA, see generally Charles J. Butler, Note, *The Defense of Marriage Act: Congress's Use of Narrative in the Debate Over Same-Sex Marriage*, 73 N.Y.U. L. REV. 841 (1998) (looking at Congressional use of narratives and rhetoric in debate over DOMA); Diane M. Guillerman, Comment, *The Defense of Marriage Act: The Latest Maneuver in the Continuing Battle to Legalize Same-Sex Marriage*, 34 HOUS. L. REV. 425 (1997) (examining both struggle for same-sex marriage in homosexual community, and constitutionality of DOMA); Kevin H. Lewis, Note, *Equal Protection After Romer v. Evans: Implications for the Defense of Marriage Act and Other Laws*, 49 HASTINGS L.J. 175 (1997) (suggesting constitutional problems for DOMA due to Supreme Court *Romer v. Evans* decision); Kristian D. Whitten, *Section Three of the Defense of Marriage Act: Is Marriage Reserved to the States?* 26 HASTINGS CONST. L.Q. 419, 421-22 (1999) (concluding that although Section 3 of DOMA purports to define “marriage” and “spouse” only for federal programs, in practice it unconstitutionally imposes Congress' definitions of “marriage” and “spouse” on states).

128. Pub. L. No. 104-199, 110 Stat. 2419 (codified as 28 U.S.C. § 1738C (1996)).

129. *Id.*

130. See, e.g., ALASKA STAT. § 25.05.013 (Michie 1996) (refusing to recognize marriage entered into by persons of same sex, even if marriage is recognized by another state or foreign jurisdiction, refusing to enforce contractual rights granted by virtue of such marriage, and prohibiting same-sex relationships from being entitled to benefits of marriage); ARIZ. REV. STAT. ANN. § 25-101 (West 1998) (amending void and prohibited marriages section to include Subsection c which voids and prohibits same-sex marriages); ARK. CODE ANN. § 9-11-107 (Michie 1997) (recognizing foreign and out of state marriages with explicit exception of same-sex marriages); DEL. CODE ANN. tit. 13, § 101 (1997) (prohibiting and voiding marriages between persons of same gender in Subsection a, and further qualifying in subsection d, which provides that marriage obtained or recognized outside State between persons prohibited by subsection (a) of this section shall not constitute legal or valid marriage within State); FLA. STAT. ANN. § 741.212 (West 2002) (refusing recognition of marriage between persons of same sex, within or outside Florida, United States, or any jurisdiction, domestic or foreign, for any purpose, and defining marriage for statutory purposes as legal union between one man and one woman as husband and wife); GA. CODE ANN. § 19-3-30 (1997) (prohibiting issuance of marriage licenses to persons of same sex); IOWA CODE ANN. § 595.2 (West 2001) (limiting issuance of marriage licenses to male and female in § 595.2, and further providing in § 595.20 that out of state marriages that do not meet requirements of § 595.2 will be deemed void); KAN. STAT. ANN. § 23-101 (1996) (defining marriage as civil contract between two parties who are of opposite-sex, and deeming as void all other marriages); 1998 Ky. Acts 258 (creating new section to make void any marriage between members of same sex which occurs in another jurisdiction, rendering unenforceable any rights granted by such marriage, and amending existing statute to prohibit as void marriage between members of same sex or

The specter of same-sex marriage also had reverberations in Hawai'i. After much turmoil, the Hawai'i Legislature amended the statute to be gender specific<sup>131</sup> and approved a proposed constitutional amendment that gave itself the power to decide whether to recognize same-sex marriage.<sup>132</sup> The voters ratified the proposed amendment, which is now part of the Hawai'i Constitution.<sup>133</sup> The trial court dismissed its pending case,<sup>134</sup> and it seemed that the legacy of the same-sex marriage controversies in Hawai'i would only be the federal and state statutes "defending" the institution of marriage against same-

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between more than two persons); ME. REV. STAT. ANN. tit. 19-A, § 701 (West 1997) (prohibiting persons of same sex from contracting marriage); MICH. COMP. LAWS ANN. §§ 551.1, 551.272 (West 1996) (stating "marriage is inherently a unique relationship between a man and a woman. As 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" and invalidating marriage between individuals of same sex in state regardless of its being legal in other state); MINN. STAT. ANN. § 517.03 (West 1997) (prohibiting marriage between persons of same sex, and further providing that marriage entered into by persons of same sex, either under common law or statute, that is recognized by another state or foreign jurisdiction, is void in this state and contractual rights granted by virtue of the marriage or its termination are unenforceable in this state); MISS. CODE ANN. § 93-1-1 (1997) (stating marriage between persons of same gender is prohibited and null and void from beginning, regardless of its being valid in other jurisdiction); MO. ANN. STAT. § 451-022 (West 1997) (stating that it is state's public policy to "recognize marriage only between a man and a woman" and prohibiting and invalidating same-sex marriages); MONT. CODE ANN. § 40-1-401 (1997) (prohibiting marriage between persons of same sex); N.C. GEN. STAT. § 51-1.2 (2002) (invalidating all same-sex marriages performed out of North Carolina); N.D. CENT. CODE § 14-03-01 (1997) (recognizing only marriages between male and female, and nullifying same-sex marriages of North Dakota residents which take place out of state); OKLA. STAT. ANN. tit. 43, § 3.1 (West 1997) (refusing to recognize same-sex marriages performed in any state); PA. STAT. ANN. tit. 23, § 1704 (West 1996) (stating it is public policy that marriage be between one man and one woman and voiding same-sex marriages performed in another state); S.C. CODE ANN. § 20-1-15 (Law. Co-op. 1996) (voiding same-sex marriages as against public policy of South Carolina); S.D. CODIFIED LAWS § 25-1-1 (Michie 1996) (stating "[m]arriage is a personal relation, between a man and a woman, arising out of a civil contract to which the consent of parties capable of making it is necessary"); TENN. CODE ANN. § 36-3-113 (2001) (recognizing only marriages between one man and one woman as consistent with public policy, voiding same-sex marriages that occur in another state and providing that "Tennessee's marriage licensing laws reinforce, carry forward, and make explicit the long-standing public policy of this state to recognize the family as essential to social and economic order and the common good and as the fundamental building block of our society"); UTAH CODE ANN. § 30-1-2 (1998) (prohibiting and declaring void marriage between persons of same sex); VA. CODE ANN. § 20-45 (Michie 2000) (prohibiting same-sex marriages and voiding same-sex marriages occurring in another state); WASH. REV. CODE ANN. § 26.04.010 (West 2001) (stating "[i]t is a compelling interest of the state of Washington to reaffirm its historical commitment to the institution of marriage as a union between a man and a woman as husband and wife and to protect that institution); *see also* NEB. CONST. art. 1, § 29 (2001) (allowing that only marriage between man and woman valid or recognized in Nebraska).

131. HAW. REV. STAT. § 572-1 (1999), was amended to provide that a valid marriage contract "shall be only between a man and a woman."

132. The amendment to the Hawai'i Constitution included that "[t]he Legislature shall have the power to reserve marriage to opposite-sex couples." 1997 Haw. Sess. Laws H.B. 117 § 2, at 1247.

133. HAW. CONST. art. I, § 23.

134. *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999) (dismissing action because ratification of state constitutional marriage amendment reserving to Legislature power to define marriage as union of man and woman merited such action).

sex assaults. The Hawai'i Legislature, however, passed the Reciprocal Beneficiaries Act, which grants some of the benefits of marriage to same-sex couples.<sup>135</sup>

The Vermont Supreme Court entered into this national fray at the end of 1999 in *Baker v. State*<sup>136</sup> by considering a challenge to the state's limitation on marriage, which excluded partners of the same sex.<sup>137</sup> Three same-sex couples had applied for marriage licenses and were denied by their respective town clerks.<sup>138</sup> The first prong of the plaintiffs' challenge to this denial was the statutory argument that the Vermont statutes do not limit marriage to opposite-sex couples.<sup>139</sup> The court dispatched this contention with reference to dictionary definitions, other gender-specific Vermont statutes, and the "common understanding that marriage under Vermont law consists of a union between a man and a woman."<sup>140</sup>

The second and ultimately successful argument was that if the Vermont statutes did limit marriage to opposite-sex couples, then the statutes were unconstitutional, specifically violating Vermont's state constitutional "common benefits" clause.<sup>141</sup> In its lengthy opinion, the majority interpreted the common benefits clause of the Vermont state constitution as independent of the equal protection clause of the federal constitution,<sup>142</sup> preceding it by nearly a century

135. HAW. REV. STAT. § 572C-1-7 (2000). The Reciprocal Beneficiaries law states that its purpose is "to extend certain rights and benefits which are presently available only to married couples to couples composed of two individuals who are legally prohibited from marrying under state law." HAW. REV. STAT. § 572C-1.

136. 744 A.2d 864 (Vt. 1999).

137. *Baker*, 744 A.2d at 867.

138. *Id.*

139. *Id.* at 868.

140. *Id.* at 868-69. The court rejected plaintiffs' argument that the court's previous decision allowing a same-sex second-parent adoption, *In re B.L.V.B.*, 628 A.2d 1271 (Vt. 1993), was authority for an expansive interpretation of the marriage statutes. The court reasoned that its holding in *B.L.V.B.* that the "spouse" exception in the Vermont statute allowing for an adoption which did not terminate the "natural" parent's rights extended to the "natural" parent's same-sex partner was consistent with the "general intent and spirit" of the adoption statute, while it was "far from clear that limiting marriage to opposite-sex couples violates the Legislature's 'intent and spirit.'" *Baker*, 744 A.2d at 869.

141. The pertinent provision of the Vermont Constitution provides "[t]hat government is, or ought to be, instituted for the common benefit, protection and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are only part of that community . . ." VT. CONST. ch.1, art. 7. The court in *Baker* noted that the plaintiffs raised additional arguments under both the state and federal constitutions, but that the court's resolution of the issues under the common benefits clause obviated the need for their consideration. *Baker*, 744 A.2d at 870 n.2.

142. *Id.* at 870 (noting that "it is important to emphasize at the outset that it is the Common Benefits Clause of the Vermont Constitution that we are construing, rather than its counterpart, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution"). The Vermont Supreme Court's explicitness is necessary to insulate its decision from United States Supreme Court review under *Michigan v. Long*, 463 U.S. 1032 (1983), in which the Court stated that it would take jurisdiction and assume there was a federal question when "it is not clear from the opinion itself that the state court relied on an adequate and independent state ground and when it fairly



and differing “historically and textually.”<sup>143</sup> The court also stressed the principle that state constitutions may grant greater rights to individuals than required by the federal constitution.<sup>144</sup>

The Vermont Supreme Court in *Baker* was thus able to disavow the tiers of scrutiny relevant under a federal equal protection analysis, thus avoiding the problems of sexual orientation being a classification that merited the lowest level of protection,<sup>145</sup> and whether prohibitions of same-sex marriage were sexual orientation or gender classifications.<sup>146</sup> Similarly, the Vermont Supreme Court

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appears that the state court rested its decision primarily on federal law.” *Id.* at 1042. The Supreme Court indicated that it would favor federal review if the state decision was ambiguous, for it believed this approach would promote the development of the states’ constitutional philosophies and yet preserve the integrity of federal law. *Id.* at 1041. Under the “plain statement” rule, if it appears that the state court rested its decision primarily on federal law, or to be interwoven with the federal law, the Court may reach the federal question on review unless the state court’s opinion contains a plain statement that its decision rests upon adequate and independent state grounds. *Id.* at 1040-41. If however, “the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds,” the Supreme Court will not review the decision. *Id.* at 1041. For critiques of *Michigan v. Long*, see Donald L. Bell, *The Adequate and Independent State Grounds Doctrine: Federalism, Uniformity, Equality, and Individual Liberty*, 16 FLA. ST. U. L. REV. 365, 380 (1988) (courting advisory opinions because “when the Supreme Court presumes jurisdiction over state court case decided on ambiguous grounds, it trusts state court to accept its advice,” but “[w]hether the state court accepts offered advice or not, the Court’s expositions on federal law in such a case are merely advisory since they are not determinative of case’s outcome”); Eric B. Schnurer, *The Inadequate and Dependent “Adequate and Independent State Grounds” Doctrine*, 18 HASTINGS CONST. L.Q. 371, 378-79 (1991) (disrespecting federalism because “rather than presuming that state judges have come to their own reasoned analysis of their own law, however misguided their reliance on federal caselaw as persuasive authority might be, the Court will instead presume that state court judges are simply too lazy to have really independently interpreted their own laws”).

143. *Baker*, 744 A.2d at 870.

144. *Id.* (citing *State v. Badger*, 450 A.2d 336, 347 (Vt. 1982); *State v. Jewett*, 500 A.2d 233, 235 (Vt. 1985); Hans A. Linde, *First Things First, Rediscovering the States’ Bill of Rights*, 9 U. BALT. L. REV. 379, 381-82 (1980); Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 717-19 (1983)).

145. Even under *Romer v. Evans*, 517 U.S. 620 (1996), sexual orientation classifications deserve only rational basis review: there must be a legitimate government interest supporting the law and the governmental classification must be rationally related to furthering that interest. *Id.* at 640 (Scalia, J., dissenting). While *Romer*, like *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439-40 (1985), may be said to focus on the governmental animus to merit application of “heightened rational basis,” or “rational basis with bite” or “rational basis with teeth,” the scrutiny afforded remains on the lowest tier. See, e.g., Raffi S. Baroutjian, Note, *The Advent of the Multifactor, Sliding-Scale Standard of Equal Protection Review: Out with the Traditional Three-Tier Method of Analysis, in with Romer v. Evans*, 30 LOY. L.A. L. REV. 1277, 1314 (1997) (discussing *Romer* as rational basis with bite); Gayle Lynn Pettinga, Note, *Rational Basis With Bite: Intermediate Scrutiny By Any Other Name*, 62 IND. L.J. 779, 800-03 (1987) (criticizing “rational basis with bite” standard); see also William K. Kelley, *Inculcating Constitutional Values*, 15 CONST. COMMENT. 161, 170 (1998) (suggesting that both *Cleburne* and *Romer* would have been decided differently “if the Court had consistently applied the deferential standard of rationality review”); Michael Stokes Paulsen, *Medium Rare Scrutiny*, 15 CONST. COMMENT. 397, 399 (1998) (suggesting that Court may sometimes employ “‘rational basis with bite’ scrutiny”).

146. See *infra* notes 166-70 and accompanying text for a discussion of whether or not gender discrimination and sexual orientation are compelling, and if so, problems which arise from this

was able to distance its state constitutional jurisprudence from the Fourteenth Amendment's substantive due process emphasis on history that proved so devastating to the privacy arguments in *Bowers v. Hardwick*.<sup>147</sup>

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classification.

147. 478 U.S. 186 (1986). In *Bowers v. Hardwick*, the Court applied the Fourteenth Amendment's substantive due process "twin star" test of "implicit in the concept of ordered liberty" and "deeply rooted in this nation's history and tradition" to Hardwick's claim that he possessed a privacy right that was infringed by the Georgia sodomy statute. *Id.* at 191-92. Justice White's opinion for the majority was exceptionally explicit in concluding that any contention that Hardwick's right was "deeply rooted in this nation's history and tradition" or as "implicit in the concept of ordered liberty" was "at best, facetious." *Id.* at 192-94 (supporting this conclusion with "background" of sodomy as criminal offense: it was forbidden by original thirteen states in ratification of Bill of Rights, in 1868 when Fourteenth Amendment was ratified, thirty-two of thirty-seven states had criminal sodomy laws, until 1961 all fifty states outlawed sodomy, and today twenty-four states and District of Columbia criminalizes sodomy performed in private by consenting adults). Justice Burger, in a concurring opinion, added "Western civilization" and Judeo-Christianity to the relevant history, by citing Roman law, Henry VIII, and Blackstone as authorities. *Id.* at 196-97 (Burger, C.J., concurring) (citing Code Theod. 9.7.6; Code Just. 9.9.31; 25 Hen. VIII, ch. 6; 4 WILLIAM BLACKSTONE, COMMENTARIES \*215).

While the Fourteenth Amendment's Equal Protection clause does not require that the right asserted be "deeply rooted in this nation's history and tradition," and the Court in *Hardwick* implicitly stated that it was not reaching any equal protection issues, *id.* at 196 n.8, the due process conclusion of *Hardwick* has been parlayed into a rationale for the denial of any sort of heightened scrutiny for sexual orientation classifications. *See, e.g.*, Padula v. Webster, 822 F.2d 97, 102 (D.C. Cir. 1987) (viewing *Hardwick* as "insurmountable barrier" to equal protection claims based on denial of position as FBI special agent); Ben-Shalom v. Marsh, 881 F.2d 454, 464-65 (7th Cir. 1989) (noting that although Court decided *Hardwick* on due process and not equal protection, anything other than rational basis for homosexuals would lead to "unjustified and indefensible inconsistency"); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (stating that after "*Hardwick* it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm"); High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990) (stating despite *Hardwick's* reliance on due process grounds, it would be incongruous to accord heightened status under equal protection); Equal Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261, 266 (6th Cir. 1995) (explaining how *Hardwick's* proscription of homosexual conduct forecloses suspect class status for practitioners of such conduct). *Cf.* Romer v. Evans, 517 U.S. 620, 641 (1996) (Scalia, J., dissenting) (criticizing majority's opinion for ignoring "inconvenient precedent" of *Hardwick* and arguing that *Hardwick* supplies legitimate governmental interest in equal protection analysis).

For discussions of the relationship between *Hardwick* and equal protection pre-Romer, see Janet Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 920 (1989) (distinguishing between identity and acts and arguing that *Hardwick* only applies to acts); Cass R. Sunstein, *Essay: Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1165-66 (1988) (arguing that if status rather than acts are at issue, then *Hardwick* should not control); Tracey Rich, Note, *Sexual Orientation Discrimination in the Wake of Bowers v. Hardwick*, 22 GA. L. REV. 773, 803 (1988) (contending that strict reading of *Hardwick* would allow necessary higher scrutiny for persecuted class of homosexuals); Stephen Zamasky, Note, *Colorado's Amendment 2 and Homosexuals' Right to Equal protection of the Law*, 35 B.C. L. REV. 221, 250-53 (1993) (arguing that *Hardwick* should not be bar to heightened equal protection of Colorado's Amendment Two).

For discussions of the relationship between *Hardwick* and equal protection post-Romer, see Thomas Grey, *Gay Rights and The Courts: The Amendment 2 Controversy: Bowers v. Hardwick Diminished*, 68 U. COLO. L. REV. 373, 375 (1997) (contending that although *Romer* does not silently overrule *Hardwick*, any reconciliation of two opinions diminishes *Hardwick's* authority); Katherine M. Hamill, Note, *Romer v. Evans: Dulling the Equal Protection Gloss on Bowers v. Hardwick*, 77 B.U. L. REV. 655, 681 (1997) (arguing that *Romer* vitiates power of *Hardwick*).

Given its legal analysis, the conclusion seemed unavoidable that the state marriage laws excluding same-sex couples violated the Vermont state constitution. Yet the Vermont Supreme Court avoided precisely that conclusion. Depending upon one's viewpoint, this failure to find a violation could be characterized as either a politically savvy response similar to the Hawai'i Legislature's reaction to *Baehr*<sup>148</sup> or a mark of cowardice.<sup>149</sup> However motivated, a majority of the Vermont Supreme Court held that the remedy for the denial of "common benefits" to same-sex couples should be wrought by the state legislature.<sup>150</sup>

The decision in *Baker* thus led to the passage of Vermont's Civil Union statute,<sup>151</sup> which limits marriage to "one man and one woman,"<sup>152</sup> but provides for a "civil union" in which "two eligible persons" may establish a relationship to "receive the benefits and protections and be subject to the responsibilities of

The Vermont Supreme Court's strategy is one of a unique distancing from these debates. Without citing *Hardwick*, the court in *Baker* stated:

Finally, it is suggested that the long history of official intolerance of intimate same-sex relationships cannot be reconciled with an interpretation of Article 7 that would give state-sanctioned benefits and protection to individuals of the same sex who commit to a permanent domestic relationship. We find the argument to be unpersuasive for several reasons. First, to the extent that state action historically has been motivated by an animus against a class, that history cannot provide a legitimate basis for continued unequal application of the law. As we observed recently "equal protection of the laws cannot be limited by eighteenth-century standards." Second, whatever claim may be made in light of the undeniable fact that federal and state statutes—including those in Vermont—have historically disfavored same-sex relationships, more recent legislation plainly undermines the contention. [citing repeal of statute criminalized fellatio]. In 1992, Vermont was one of the first states to enact statewide legislation prohibiting discrimination in employment, housing, and other services based on sexual orientation. [citations omitted]. Sexual orientation is among the categories specifically protected against hate-motivated crimes in Vermont. Furthermore, as noted earlier, recent enactments of the General Assembly have removed barriers to adoption by same-sex couples, and have extended legal rights and protections to such couples who dissolve their "domestic relationship."

*Baker v. State*, 744 A.2d 864, 885-86 (Vt. 1999) (citations omitted). The concurring opinion by Justice Dooley reemphasizes the distinction between federal and Vermont law, chastising the majority for relying on any federal law derivative of *Bowers v. Hardwick* because Vermont's "legal climate" is vastly different from that considered by the Court in *Hardwick*. *Id.* at 891 (Dooley, J., concurring).

148. *Baehr*, 852 P.2d. at 44. The court in *Baker* notes that its "opinion provides greater recognition of—and protection for—same sex relationships than has been recognized by any court of final jurisdiction with the *instructive* exception of the Hawai'i Supreme Court in *Baehr*," and then cites HAW. CONST. art. 1, § 23 for the overturning of *Baehr*. *Baker*, 744 A.2d at 888 (emphasis added).

149. *Cf. Baker*, 744 A.2d at 902, 904 (Johnson, J., concurring in part and dissenting in part) (criticizing court for relinquishing duty to remedy constitutional violations because of vague disquietudes and personal speculations, and for abdicating its responsibility). *But cf.* Barbara Cox, *But Why Not Marriage: An Essay on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate but (Un)Equal*, 25 VT. L. REV. 113, 132-33 (2000) [hereinafter Cox, *Separate but Unequal*] (suggesting that interest in maintaining heterosexual and male supremacy may have animated the justices).

150. *Baker*, 744 A.2d at 886-88.

151. VT. STAT. ANN. tit. 15, §§ 1201-1206 (2002).

152. *Id.* § 1201(4).

spouses.”<sup>153</sup> To be “eligible” under the act, the parties must be of the same sex and “therefore excluded from the marriage laws of this state.”<sup>154</sup> The statute also excludes from eligibility polygamous relationships<sup>155</sup> and incestuous relationships.<sup>156</sup> The civil union statute lists the benefits, protections, and responsibilities of the parties.<sup>157</sup> The Vermont statute further provides that

153. *Id.* §1201(2).

154. *Id.* § 1202(2).

155. Section 1202(1) provides that the parties “not be a party to another civil union or a marriage.” *Id.* § 1202(1).

156. Section 1203 provides:

(a) A woman shall not enter a civil union with her mother, grandmother, daughter, granddaughter, sister, brother’s daughter, sister’s daughter, father’s sister or mother’s sister.

(b) A man shall not enter a civil union with his father, grandfather, son, grandson, brother, brother’s son, sister’s son, father’s brother or mother’s brother.

(c) A civil union between persons prohibited from entering a civil union in subsection (a) or (b) of this section is void.

VT. STAT. ANN. tit. 15, § 1203 (2002).

157. Section 1204, entitled “Benefits, Protections and Responsibilities of Parties to a Civil Union,” provides:

(a) Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.

(b) A party to a civil union shall be included in any definition or use of the terms “spouse,” “family,” “immediate family,” “dependent,” “next of kin,” and other terms that denote the spousal relationship, as those terms are used throughout the law.

(c) Parties to a civil union shall be responsible for the support of one another to the same degree and in the same manner as prescribed under law for married persons.

(d) The law of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance shall apply to parties to a civil union.

(e) The following is a nonexclusive list of legal benefits, protections and responsibilities of spouses, which shall apply in like manner to parties to a civil union:

(1) laws relating to title, tenure, descent and distribution, intestate succession, waiver of will, survivorship, or other incidents of the acquisition, ownership, or transfer, inter vivos or at death, of real or personal property, including eligibility to hold real and personal property as tenants by the entirety (parties to a civil union meet the common law unity of person qualification for purposes of a tenancy by the entirety);

(2) causes of action related to or dependent upon spousal status, including an action for wrongful death, emotional distress, loss of consortium, dramshop, or other torts or actions under contracts reciting, related to, or dependent upon spousal status;

(3) probate law and procedure, including nonprobate transfer;

(4) adoption law and procedure;

(5) group insurance for state employees under 3 V.S.A. § 631, and continuing care contracts under 8 V.S.A. § 8005;

(6) spouse abuse programs under 3 V.S.A. § 18;

(7) prohibitions against discrimination based upon marital status;

(8) victim’s compensation rights under 13 V.S.A. § 5351;

(9) workers’ compensation benefits;

(10) laws relating to emergency and nonemergency medical care and treatment, hospital visitation and notification, including the Patient’s Bill of Rights under 18 V.S.A. chapter 42

modification of the terms of civil unions is allowable only to the extent of permissible antenuptial or other marriage agreements,<sup>158</sup> and that dissolutions of civil unions shall “follow the same procedures and be subject to the same substantive rights and obligations that are involved in the dissolution of marriage.”<sup>159</sup>

Amongst lesbians and other sexual minorities, Vermont’s statutory scheme of civil unions is generally considered a positive development.<sup>160</sup> To the extent that there is criticism, it is that the “civil union” imposes a dual system inferior to marriage.<sup>161</sup> While there has certainly been debate regarding the advisability of

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and the Nursing Home Residents’ Bill of Rights under 33 V.S.A. chapter 73;

(11) terminal care documents under 18 V.S.A. chapter 111, and durable power of attorney for health care execution and revocation under 14 V.S.A. chapter 121;

(12) family leave benefits under 21 V.S.A. chapter 5, subchapter 4A;

(13) public assistance benefits under state law;

(14) laws relating to taxes imposed by the state or a municipality;;

(15) laws relating to immunity from compelled testimony and the marital communication privilege;

(16) the homestead rights of a surviving spouse under 27 V.S.A. § 105 and homestead property tax allowance under 32 V.S.A. § 6062;

(17) laws relating to loans to veterans under 8 V.S.A. § 1849;

(18) the definition of family farmer under 10 V.S.A. § 272;

(19) laws relating to the making, revoking and objecting to anatomical gifts by others under 18 V.S.A. § 5240;

(20) state pay for military service under 20 V.S.A. § 1544;

(21) application for early vote absentee ballot under 17 V.S.A. § 2532;

(22) family landowner rights to fish and hunt under 10 V.S.A. § 4253;

(23) legal requirements for assignment of wages under 8 V.S.A. § 2235; and

(24) affirmance of relationship under 15 V.S.A. § 7.

(f) The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage.

*Id.* § 1204.

158. *Id.* § 1205.

159. *Id.* § 1206.

160. See, e.g., Carey Goldberg, *Gay Couples are Welcoming Vermont Measure on Civil Union*, N.Y. TIMES, March 18, 2000, at A7 (reporting general positive response and quoting one person who had objection to marriage as “very patriarchal” but civil unions as “a completely level playing field”); Carey Goldberg, *Gay and Lesbian Couples Head for Vermont to Make it Legal, But How Legal Is It?*, N.Y. TIMES, July 23, 2000, at A12 (describing positive response to civil unions); E. J. Graf, *Civil Unions are Homemaking Here for a Reason*, THE BOSTON GLOBE, Feb. 11, 2001, at E3 (noting that Vermont’s civil union legislation has led to change in social climate, and prophesying that New England will lead movement towards greater acceptance of civil unions); Elizabeth Mehren, *A Historic Day in Vermont as Civil Unions Become Legal*, L.A. TIMES, July 1, 2000, at A1 (stating “scores of couples from around Vermont, and some from outside the state, will descend on town halls” on first day civil union is available); Neil Miller, *For Better, For Worse: Vermont’s Civil Union Legislation has been a Book to Gay Couples*, THE BOSTON GLOBE, June 17, 2001 (Magazine), at 13 (reporting that according to Vermont Department of Vital Statistics, in eleven months law has been in effect, 2,043 civil unions have been validated).

161. See Cox, *Separate but Unequal*, *supra* note 149, at 136-46 (recognizing that Vermont

same-sex marriage as a liberatory goal,<sup>162</sup> the controversy has become less pronounced in recent years.<sup>163</sup> Certainly, there is merit in the argument that marriage is a civil right,<sup>164</sup> even if one does not accept the argument that the right to marry will necessarily guarantee equality in other areas of civil and social life.<sup>165</sup>

Yet I remain suspicious of marriage and the statutory creature of civil unions. My hesitancy to embrace marriage and civil unions springs from an anti-assimilationist perspective that problematizes equality in the context of marriage, interrogates the coercive aspects of the phenomenon of marriage, and questions the manner in which our individualization is linked to the state. These inquiries will be examined in turn.

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statutory structure creates a dual, unequal system); Andrew Sullivan, *State of the Union*, NEW REPUBLIC, May 8, 2000, at 18, 22 (proposing that because institution of civil unions essentially creates two-tiered system, with one marriage model clearly superior to other, it is halfway measure that perpetuates discrimination). Another criticism voiced by some would-be participants is the state's potential misuse of the information. See, e.g., Mubarak Dahir, *State of the Unions*, THE ADVOCATE, May 23, 2000, at 56 (quoting Vermont lesbian as saying civil union law "codifies us as second-class citizens" and expressing "reservations about registering with the government as queer").

162. See, e.g., Andrew Sullivan, *Introduction to SAME-SEX MARRIAGE: PRO AND CON* xvii, xix-xxvi (Andrew Sullivan ed., 1997) (presenting debate over same-sex marriage); Barbara J. Cox, *The Lesbian Wife: Same-Sex Marriage as an Expression of Radical and Plural Democracy*, 33 CAL. W. L. REV. 155, 162-67 (1997) (advocating same-sex marriage); Paula Ettelbrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J.L. & POL'Y 107, 130-38 (1996) (arguing against same-sex marriage as means to liberation); Steven K. Homer, Note, *Against Marriage*, 29 HARV. C.R.-C.L. L. REV. 505, 529 (1993) (arguing against same-sex marriage as means to liberation); 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, 1541-48 (1993) (arguing against same sex marriage as means to liberation); 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, 581-610 (1994) (discussing controversy and defending same-sex marriage as appropriate goal).

163. Accord Carey Goldberg, *Gay and Lesbian Couples Head for Vermont to Make it Legal, But How Legal Is It?*, N.Y. TIMES, July 23, 2000, at A12 (describing change in lesbian and gay communities' attitudes toward marriage and civil union).

164. As I have previously quoted, "[f]rom the perspective of the state, marriage is a civil relation of the highest order; withholding marriage is thus an indication of the status of any persons for whom marriage is not legally available." SAPPHO, *supra* note 5, at 143.

165. Compare Evan Wolfson, *supra* note 162, at 581 (noting how "*Baehr* shifted the very ground underlying gay people's second-class status, and one of the, if not the major, barriers to our full and equal citizenship has cracked wide open"), with Laura F. Edwards, "*The Marriage Covenant is at the Foundation of all Our Rights*": *The Politics of Slave Marriages in North Carolina after Emancipation*, 14 LAW & HIST. REV. 81, 85 (1996) stating:

Conservative white lawmakers saw marriage as a way to consolidate state power over freed people and compel them to fulfill domestic obligations, but African-Americans saw marriage as an effective way to protect the institutional integrity of their families and buttress their claims to a range of public rights . . . . The laws governing marriage and the family formed the central support in a patriarchal legal framework that had justified the subordination of poor white and African-American men as well as women before the war and could still be mobilized to serve the same ends.

*Id.*

### B. Questions of Equality

Constitutional and political interests in equality are integral to the arguments about same-sex marriage and civil unions. Litigation and scholarship advocating same-sex marriage has relied upon equal protection principles with varying degrees of success. A close examination of these constitutional arguments, however, reveals some of the ruptures in the respect and recognition they actually afford to sexual minorities.

Moreover, despite pronouncements of interests in a rigorous application of equal protection doctrine and theory, the advocacy of same-sex marriage has failed to adequately explain or address the exclusion of others from the institutions of marriage or quasi-marital institutions. The first exclusion occurs on the basis of gender, for just as same-sex couples are excluded from marriage, in many instances different-sex couples are excluded from quasi-marital institutions meant to apply to same-sex couples. Equal protection doctrine and our notions of equality have not proved capable of the task of divorcing considerations of gender from marital and quasi-marital institutions. The next subsection thus considers the problem of sex-equality.

Additional ruptures in equal protection doctrine and theorizing in the context of marriage are also evident with regard to two long-standing prohibitions: marriage between relatives and polygamous marriages. These prohibitions are interestingly continued in same-sex marriage regimes, which continue to prohibit marriage between same-sex relatives and limit same-sex unions to two people at one time. Although same-sex marriage advocates have attempted to articulate distinctions between same-sex unions and incestuous or polygamous unions, notions of equal protection and equality are applicable to all of these relationships. Separate subsequent subsections consider prohibitions on marriage between relatives and prohibitions of polygamous marriages.

#### 1. Sex-Equality

When considering the relationship between gender equality and sexual orientation equality, it is important to note that there are serious arguments concerning whether or not sexual orientation discrimination and gender discrimination are commensurate.<sup>166</sup> Nevertheless, even if one believes that

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166. Sexual orientation discrimination as gender discrimination scholarship asserts that contemporary condemnation of homosexual behavior is directed primarily at the violation of prescribed gender roles, not at sexual acts. See Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 188, 196 (noting that “[h]omosexual relationships challenge dichotomous concepts of gender. . . . [t]hese relationships challenge the notion that social traits, such as dominance and nurturance, are naturally linked to one sex or the other”). The relationship between sexual orientation and gender discrimination is most explicitly theorized by Andrew Koppelman. See Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 202 (1994) (stating that “[t]he effort to end discrimination against gays should be understood as a necessary part of the larger effort to end the inequality of the sexes”). Historically “sex,” “gender,” and “sexual orientation,” have been conflated, something that Francisco Valdes argues has “worked for the good of the few and to the detriment of the many.” See Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual*

sexual orientation discrimination is best theorized as gender discrimination, or actually flows from gender discrimination, many problems are apparent. For example, the Hawai'i Supreme Court's recognition of same-sex marriage was predicated entirely upon the rationale of gender equality, but it would be difficult to argue that the court's disavowal of sexual minorities in a torturous and disingenuous footnote is an expression of equality.<sup>167</sup> Under the Hawai'i Supreme Court's opinion, lesbianism is an inconvenient aspect of the case, not something that merits equal treatment.

The Vermont Supreme Court in *Baker* is somewhat more forthright in its recognition and consideration of equality for sexual minorities. Nevertheless, the court primarily uses the language "same-sex couples," although this term is irrelevant given its rejection of the notion that the marriage statute makes a gender classification.<sup>168</sup> Most importantly, however, the court's solution is to decide that sexual minorities are entitled to the state-awarded benefits but not the status of marriage, an institution that remains reserved for heterosexuals. As Barbara Cox has argued, this is a *Plessyesque* separate but (un)equal jurisprudence.<sup>169</sup> Yet the Vermont Supreme Court would presumably reject any

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*Orientation To Its Origins*, 8 YALE J.L. & HUMAN. 161, 161-62 (1996) (tracing and criticizing early formalization of Euro-American sex/gender system). However, I do not believe that this means that sexual orientation is commensurate with gender any more than it means that gender is commensurate with sexual orientation. See SAPPHO, *supra* note 5, at 81-83 (summarizing propositions that conflating gender with sexual orientation could result in profound legal progress for sexual minorities, or alternatively, that it could result in denial of significant legal protection to sexual minorities and to women).

167. The *Baehr* court stated:

"Homosexual" and "same-sex" marriages are not synonymous; by the same token, a "heterosexual" same-sex marriage is, in theory, not oxymoronic. A "homosexual" person is defined as "[o]ne sexually attracted to another of the same sex." TABER'S CYCLOPEDIA MEDICAL DICTIONARY 839 (16th ed. 1989). "Homosexuality" is "sexual desire or behavior directed toward a person or persons of one's own sex." WEBSTER'S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 680 (1989). Conversely, "heterosexuality" is "[s]exual attraction for one of the opposite sex," TABER'S CYCLOPEDIA MEDICAL DICTIONARY at 827, or "sexual feeling or behavior directed toward a person or persons of the opposite sex." WEBSTER'S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE at 667. Parties to "a union between a man and a woman" may or may not be homosexuals. Parties to a same-sex marriage could theoretically be either homosexuals or heterosexuals.

*Baehr*, 852 P.2d at 51 n.11.

168. The majority opinion in *Baker* takes pains to disagree with the concurring and dissenting opinion of Justice Johnson that gender discrimination is an appropriate analysis, concluding that the statute is facially gender-neutral that cannot be traced to a discriminatory purpose. *Baker v. State*, 744 A.2d 864, 880 n.13 (Vt. 1999). As the court states, "It is one thing to show that long-repealed marriage statutes subordinated women to men within the marital relation. It is quite another to demonstrate that the authors of the marriage laws excluded same-sex couples because of incorrect and discriminatory assumptions about gender roles or anxiety about gender-role confusion." *Id.*

169. See generally Cox, *Separate but Unequal*, *supra* note 149. Cox analogizes the Vermont civil union statute to *Plessy v. Ferguson*, 163 U.S. 537 (1896). She argues that just as Justice Harlan, dissenting in *Plessy*, noted that the "thin disguise of 'equal' accommodations for passengers in railroad coaches will not mislead anyone," so too, the "joy of receiving long-withheld governmental recognition and protection cannot lessen the harm caused by the 'thin disguise' of equality the



analogies to *Plessy* on the basis that sexual orientation discrimination is not as “evil” as race discrimination.<sup>170</sup> Indeed, Barbara Cox would agree that “compulsory heterosexuality”<sup>171</sup> and racism are not the same,<sup>172</sup> as would many, if not most, legal scholars.<sup>173</sup> Yet to recognize that race and sexuality have different valences, histories, and experiences, which overlap and coalesce in a variety of ways in specific individuals,<sup>174</sup> is not to accept the court’s rationale for

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Vermont Legislature created by segregating those relationships into the separate institution of civil unions.” Cox, *Separate but Unequal*, *supra* note 149, at 126-27 (quoting *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting)). Furthermore, Cox points to two separate instances in which the separate institution of civil unions is not equal to marriage: civil unions are not recognized by other states and civil unions are not recognized by the federal government. *Id.* at 137-46. Of course, Professor Cox recognizes that under DOMA and state DOMAs, the federal government and many states would not recognize any marriages that Vermont may have permitted between same-sex couples, but she argues that the civil union solution may prevent DOMA and state DOMAs from being challenged. See Cox, *Separate but Unequal*, *supra* note 149, at 140, 145-46. See also *supra* notes 126-30 and accompanying text for a discussion of DOMA.

A similar argument was made pre-*Baker* by same-sex marriage advocate Evan Wolfson, in the context of comparing marriage to domestic partnerships, noting that domestic partnership is “second class” and is “unequal to marriage in the sense that ‘separate but unequal’” is “inherently unequal,” and further that the benefits of domestic partnerships are not equal to those provided married partners. Wolfson, *supra* note 162, at 606-07 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954)).

170. *Baker*, 744 A.2d at 887. The court was responding to the invocation by Justice Johnson of a passage from a case involving the racial desegregation of public parks and recreational facilities, in which the Court declared that the “basic guarantees of our Constitution are warrants for the here and now,” which should be “promptly fulfilled.” *Id.* at 897 (Johnson, J., concurring and dissenting) (quoting *Watson v. City of Memphis*, 373 U.S. 526, 533 (1963)). The majority in *Baker* stated that the analogy between racial discrimination and sexual orientation discrimination “is flawed. We do not confront in this case the evil that was institutionalized racism, an evil that was widely recognized well before the Court’s decision in *Watson* and its more famous predecessor *Brown v. Board of Education*.” *Id.* at 887 (citation omitted).

171. See *infra* notes 345-469 and accompanying text for a discussion of compulsory matrimony.

172. See Cox, *Separate but Unequal*, *supra* note 149, at 128 n.70 (stating “[n]othing in this essay is meant to imply that racism and heterosexism/homophobia are the same” and noting that African-Americans experience generational effects of slavery and Jim Crow laws, while such generational effects are not experienced by lesbians and gay men, whose parents were most likely heterosexual, and that gay men and lesbians are ostracized by their families in ways that African-Americans are not).

173. Cf. Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 586, 603-04 (1997) (criticizing William Eskridge’s recent works on same sex marriage as “a perfect example of gay and lesbian essentialism and the problematic impact it has upon theory” and Marc Fajer’s lack of discussion of racial backgrounds of individuals whose stories he re-tells as implying “a unitary gay experience, one unaffected by racial differences”).

174. See generally Darren Lenard Hutchinson, *Beyond the Rhetoric of “Dirty Laundry”: Examining the Value of Internal Criticism Within Progressive Social Movements and Oppressed Communities*, 5 MICH. J. RACE & L. 185 (1999) (discussing internal criticism in progressive political movements for equality); Darren Lenard Hutchinson, “Gay Rights” For “Gay Whites”?: Race, Sexual Identity, and Equal Protection Discourse, 85 CORNELL L. REV. 1358 (2000) (commenting that sexual orientation discrimination is not treated as racial discrimination even though it should be); Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1 (1999) (addressing issue of “heteronormativity” and dismissal of sexualization of race); Peter Kwan, *Complicity and Complexity: Cosynthesis and Praxis*, 49 DEPAUL L. REV. 673 (2000) (focusing on racial dominance and its interplay with equality of gender and sexual

relegating sexual minorities to a separate institution. Professor Cox's analysis of the separate and "parallel" educational institution offered women by Virginia in *VMI*, and rejected by the Supreme Court, is apposite.<sup>175</sup>

The court in *Baker* would also reject any analogies to *Plessy* on the basis of intent. As the court stated: "Plaintiffs have not demonstrated that the exclusion of same-sex couples from the definition of marriage was *intended* to discriminate against women, or lesbians, or gay men, as racial segregation was designed to maintain the pernicious doctrine of white supremacy."<sup>176</sup> While the question of intent is certainly arguable,<sup>177</sup> even a concession regarding this issue does not

orientation); Peter Kwan, *Invention, Inversion and Intervention: The Oriental Woman in The World Of Suzie Wong, M. Butterfly, and The Adventures of Priscilla, Queen of the Desert*, 5 *ASIAN L.J.* 99 (1998) (denouncing chronic subordination of Asian women in American films); Francisco Valdes, *Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory, and Politics of "Sexual Orientation"*, 48 *HASTINGS L.J.* 1293 (1997) (expressing need to "collectively and mutually" embrace "engagement of race and ethnicity" as sexual orientation legal theory continues to develop); Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities & Inter-Connectivities*, 5 *S. CAL. REV. L. & WOMEN'S STUD.* 25 (1995) (concluding that legal theorists involved in sexual minority scholarship "must learn to negotiate sex and race, as well as sexism and racism"). See also Barbara Smith, *Where's The Revolution? Lesbian and Gay Movement*, *THE NATION*, July 5, 1993, at 12, noting:

'Queer' activists focus on 'queer' issues, and racism, sexual oppression and economic exploitation do not qualify, despite the fact that the majority of 'queers' are people of color, female or working class. When other oppressions or movements are cited, it's to build a parallel case for the validity of lesbian and gay rights or to expedite alliances with mainstream political organizations. Building unified, ongoing coalitions that challenge the system and ultimately prepare a way for revolutionary change simply isn't what 'queer' activists have in mind.

*Id.*; see also *Letters to the Editor*, *SF WEEKLY*, Feb. 14, 2001, at 20 (writing that "[w]hen our 'community' is wrought with racism, sexism, gender bias, classism, ableism, etc., it is crucial that we take a step back and focus on breaking down these systems of oppression within our movement, before we can begin to focus on fighting the conservative right").

175. See Cox, *Separate but Unequal*, *supra* note 149, at 128-31 (citing *United States v. Virginia*, 518 U.S. 515 (1996)). See *supra* notes 29-33 and accompanying text for additional discussion of *VMI*. Her analysis does not escape the racial paradigm of equal protection, however, as Professor Cox emphasizes Justice Ginsberg's comparison in *VMI* between the separate military institution created for women by Virginia and the separate law school established for African-Americans by Texas, previously held unconstitutional by the Court. Cox, *Separate but Unequal*, *supra* note 149, at 129-30 (quoting *VMI*, 518 U.S. at 553-54 (citing *Sweatt v. Painter*, 339 U.S. 629 (1950))). Cox argues:

By excluding women from *VMI*, the government of Virginia encouraged its citizens to believe that they had no place in a school as rigorous as *VMI*. By excluding people of color from the University of Texas Law School, the government of Texas encouraged its citizens to believe that they had no place in a school as demanding as the University of Texas. By excluding same-sex couples from marriage, the government of Vermont is encouraging its citizens that they have no place in an institution as central to society as marriage.

*Id.* at 130. For Cox, Justice Ginsberg's observation that the arguments for preserving all-male educational institutions were "uncomfortably similar" to the arguments for preserving all-white educational institutions, should be extended to a recognition that the arguments for preserving all-heterosexual marriage are also "uncomfortably similar" to the arguments for preserving both the all-male and all-white institutions. *Id.* at 131 (citing *VMI*, 518 U.S. at 535 n.8).

176. *Baker*, 744 A.2d at 887 (emphasis added).

177. As Judge Freeman stated in *Dean v. District of Columbia*, 653 A.2d 307, 360 (D.C. App.

address the problem. The Supreme Court in *Romer v. Evans*<sup>178</sup> noted that animosity toward a specific group cannot constitute a legitimate governmental purpose.<sup>179</sup> Absent such specificity as the Court found in Colorado's Amendment Two,<sup>180</sup> however, present equal protection doctrine does not focus on the protection of members of those groups that have borne the brunt of animus by dominant society, but considers "classifications" rather than classes of oppressed peoples.<sup>181</sup>

An "affirmative action" statute for marriage, perhaps one allowing members of racial minority groups to prove age eligibility under a relaxed standard, would be subject to the same level of scrutiny under current doctrine as the miscegenation statute at issue in *Loving*. The Court's determination in *Loving* that the Virginia statute was a measure "designed to maintain White Supremacy"<sup>182</sup> supported the Court's conclusion not only that the racial classification drawn by the miscegenation statute was "invidious discrimination,"<sup>183</sup> but that the state could not satisfy the necessary governmental interest necessary to sustain the racial classification.<sup>184</sup>

1995) (concurring in part and dissenting in part), "the fact that the legislature, in adopting the marriage statute, did not have homosexuals in mind does not mean the state lacks a discriminatory purpose; an absolute prohibition, whether explicit or implied, resulting in discrimination in fact, has an inherent discriminatory purpose, even if the legislature did not recognize it."

178. 517 U.S. 620 (1996).

179. *Romer*, 517 U.S. at 634 (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

180. As the Court interpreted it, Colorado's Amendment Two made "a general announcement that gays and lesbians shall not have any particular protections from the law" and that this inflicted "immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it." *Id.* at 635.

181. See *supra* notes 44-62 and accompanying text for a discussion of Equal Protection's lack of protection to oppressed groups.

182. *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (Stewart, J., concurring).

183. *Id.* at 8. The state of Virginia argued that "because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications do not constitute an invidious discrimination based upon race." *Id.* The Court "reject[ed] the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial determinations." *Id.*

184. The Court's analysis is not a model of clarity in this regard. The Court criticizes the state's reliance upon a previous state court decision by stating, "the state court concluded that the State's legitimate purposes were 'to preserve the racial integrity of its citizens,' and to prevent 'the corruption of blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride,' obviously an endorsement of the doctrine of White Supremacy." *Id.* at 7 (citing *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955)). The *Loving* Court's citation does not include the subsequent history of *Naim*, which would reveal a denial of certiorari by the United States Supreme Court. See *Naim v. Naim*, 350 U.S. 891, 891 (1955) (citing *Rescue Army v. Mun. Ct.*, 331 U.S. 549, 584 (1947)). *Rescue Army* held that:

[I]nadequacy of the record as to the relationship of the parties to the Commonwealth of Virginia at the time of the marriage in North Carolina and upon their return to Virginia, and the failure of the parties to bring here all questions relevant to the disposition of the case, prevents the constitutional issue of the validity of the Virginia statute on miscegenation tendered here being considered in clean-cut and concrete form, unclouded by such problems.

*Naim*, 350 U.S. at 891 (citing *Rescue Army*, 331 U.S. at 584) (memorandum opinion stating that federal

The Court's view in *Loving* that the "clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States,"<sup>185</sup> has been banished by the more recent formulation by the Court in *Adarand*. *Adarand* asserted that the Fourteenth Amendment protects "persons, not groups"<sup>186</sup> and the standard of review cannot depend upon the impossible task of distinguishing between "invidious" and "benign" classifications.<sup>187</sup> Thus, unless a statute is neutral and seemingly makes no classification<sup>188</sup>—a construction of the Vermont marriage statute that the Vermont Supreme Court in *Baker* rejected<sup>189</sup>—any legislative intent is relevant only to assessing the potency of the governmental interests and the manner in which they are served by the means chosen.<sup>190</sup> Under *Adarand*, a "bad" intent,

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question not properly presented).

The Court in *Loving* also states that its rejection of the "equal application" argument is a rejection of the rational basis test in favor of the "most rigid scrutiny." *Loving*, 388 U.S. at 8, 11 (quoting *Korematsu v. United States*, 323 U.S. 214, 216 (1944)), and that there is "patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification." *Id.* at 11 (Stewart, J., concurring).

185. *Id.* at 10 (citing, chronologically, *The Slaughter-House Cases*, 83 U.S. 36, 71 (1872); *Strauder v. West Virginia*, 100 U.S. 303, 307-08 (1880); *Ex parte Virginia*, 100 U.S. 339, 344-45 (1880); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961)).

186. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

187. Justice O'Connor, this time writing for the majority, quotes from her plurality opinion in *Croson* that "there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Id.* at 226 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)). Justice Stevens, dissenting, argues with this premise:

The Court's explanation for treating dissimilar race-based decisions as though they were equally objectionable is a supposed inability to differentiate between "invidious" and "benign" discrimination. But the term "affirmative action" is common and well understood. Its presence in everyday parlance shows that people understand the difference between good intentions and bad.

*Id.* at 245 (Stevens, J., dissenting).

188. The problem of a neutral statute which has a discriminatory impact was addressed by the Court in *Washington v. Davis*, 426 U.S. 229 (1976), in which the Court considered a challenge to a District of Columbia test for police officers which had a disproportionate failure rate for minority applicants when compared to non-minority applicants. The Court held that in order to state an equal protection challenge, evidence of discriminatory intent was required in addition to discriminatory impact. *Id.* at 239-42. *Accord Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 n.14 (1977) (noting in addition to impact, there must be invidious discriminatory purpose, although deciding whether such purpose was motivating factor "demands a sensitive inquiry").

189. *Baker v. State*, 744 A.2d 864, 868-69 (Vt. 1999). See *supra* notes 142-47 and accompanying text for a discussion of how the Vermont Supreme Court avoided an equal protection analysis in considering same-sex marriage.

190. The Court in *Adarand* justified its use of the "consistent" standard of strict scrutiny for all racial classifications, whether arguably benign or invidious, by stating that the "point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking." *Adarand*, 515 U.S. at 228. Thus, on this view, the government's intent and motives are not relevant to determine the level of scrutiny, but only to assess whether the government's asserted interests satisfy the compelling standard and whether the racial classification narrowly serves those interests. Importantly, however, this is not the majority view

such as the maintenance of white supremacy or discrimination “against women or lesbians and gay men,”<sup>191</sup> should be relevant only to assail the veracity of any governmental interests proffered by the state.<sup>192</sup>

In sum, constitutional equal protection doctrine raises real doubts regarding Vermont’s civil union solution. Moreover, these doubts arise from notions of formal equality that admittedly have great appeal.<sup>193</sup> Yet the preoccupation with one’s own equality measured against a dominant majority, here sexual minorities measured against heterosexuals, skews our theorizing. One need not abandon equal protection and equal theorizing to gain a different perspective; merely shifting the focus of interrogations regarding equality provides a very different analysis.

While the Vermont Civil Union statute includes sexual minorities, it excludes others through its requirements for civil union status. First, the statute excludes heterosexual couples because they are qualified for marriage under the marital statutes.<sup>194</sup> Whether or not heterosexual couples desire to avail themselves of marriage is irrelevant under the statute. For example, if a heterosexual couple believed that marriage is objectionable because of its patriarchal history, but decided that because a civil union did not partake of that particular history it was a better institution to foster equality among the parties,<sup>195</sup> that belief is not honored under the civil union scheme. Likewise,

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of the Court, for Justice Scalia joined in the Court’s opinion “except insofar as it might be inconsistent” with his concurring opinion. *Id.* at 204. Scalia’s concurring opinion is inconsistent on precisely this point, stating that in his view “government can never have a ‘compelling interest’ in discriminating on the basis of race in order to ‘make up’ for past racial discrimination in the opposite direction.” *Id.* at 239 (Scalia, J., concurring).

191. See *Baker*, 744 A.2d at 887 (commenting on flawed analogy made by plaintiffs comparing sexual discrimination to racism discrimination as means of subordination).

192. Thus, the intent of white supremacy would be relevant to expose the falsity of the state of Virginia’s asserted interest in maintaining racial purity of all races, see *Loving v. Virginia*, 388 U.S. 1, 7 (1967), as the intent of discrimination against lesbians and gays would be relevant to expose the falsity of the state of Vermont’s asserted interests in “furthering the link between procreation and child rearing,” *Baker*, 744 A.2d at 884, “‘promoting child rearing in a setting that provides both male and female role models’, minimizing the legal complications of surrogacy contracts and sperm donors, ‘bridging differences’ between the sexes, discouraging marriages of convenience for tax, housing or other benefits, maintaining uniformity with marriage in other states, and generally protecting marriage from ‘destabilizing changes.’” *Id.* at 884.

193. Using an automobile as an emblem for marriage, the argument might be as follows. One might criticize the Ford Pinto for its design flaws which caused injuries and accidents resulting in protracted litigation, see *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Cal. Ct. App. 1981); Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013 (1991), and refuse to purchase a Ford Pinto. It is easy to imagine, however, one’s reaction to a legal system which limited the availability of Ford Pintos to a certain select group. For those outside the group, the Ford Pinto would become a symbol of their exclusion. See SAPPHO, *supra* note 5, at 149. See *infra* note 371 for an argument using the automobile analogy in the context of coercion in marriage.

194. VT. STAT. ANN. tit. 15, § 1202 (1999). The statute provides that for “a civil union to be established in Vermont, it shall be necessary that the parties to a civil union satisfy” criteria including, in subsection (2), that the parties “[b]e of the same sex and therefore excluded from the marriage laws of this state.” *Id.*

195. See *infra* notes 345-469 and accompanying text for a discussion of compulsory matrimony.

despite the court's emphasis on tangible benefits,<sup>196</sup> if there were tangible benefits that would be lost if the parties married but not if they entered a civil union,<sup>197</sup> that interest is not accommodated. Regardless of whether the parties can articulate any particular injury, the civil union exclusion of heterosexual couples should offend our notions of formal equality in the same manner that the marital exclusion of lesbian and gay couples offends us. The equal protection principle of "consistency," as articulated in *Adarand*, requires that we be just as affronted when members of dominant groups are discriminated against as when members of minority groups are discriminated against.<sup>198</sup>

The exclusion of heterosexual couples by Vermont's Civil Union scheme is not unique. For example, after the Hawai'i legislature reserved marriage for male-female couples,<sup>199</sup> it enacted the Reciprocal Beneficiaries Act, which extends protections to same-sex couples and to some others who are prohibited from entering into marriage, but excludes those who can legally marry.<sup>200</sup>

196. The court in *Baker* concluded that the "legal benefits and protections flowing from a marriage license are of such significance that any statutory exclusion must necessarily be grounded on public concerns of sufficient weight, cogency, and authority that the justice of the deprivation cannot seriously be questioned." *Baker*, 744 A.2d at 884. Specifically mentioning that benefits under Vermont law such as the right to receive a portion of the estate of a spouse who dies intestate and protection against disinheritance through elective share provisions; preference in being appointed as the personal representative of a spouse who dies intestate; the right to bring a lawsuit for the wrongful death of a spouse; the right to bring an action for loss of consortium; the right to workers' compensation survivor benefits; the right to spousal benefits statutorily guaranteed to public employees, including health, life, disability, and accident insurance; the opportunity to be covered as a spouse under group life insurance policies issued to an employee; the opportunity to be covered as the insured's spouse under an individual health insurance policy; the right to claim an evidentiary privilege for marital communications; homestead rights and protections; the presumption of joint ownership of property and the concomitant right of survivorship; hospital visitation and other rights incident to the medical treatment of a family member; and the right to receive, and the obligation to provide, spousal support, maintenance, and property division in the event of separation or divorce. *Id.* at 883-84 (citations to statutes omitted).

197. The California domestic partnership scheme takes a different approach. CAL. FAM. CODE § 297(6) (West Supp. 2002), which states the requirements for domestic partnership, allows the satisfaction of one of the criteria as being met by either "[b]oth persons are members of the same sex" or:

One or both of the persons meet the eligibility criteria under Title II of the Social Security Act as defined in 42 U.S.C. Section 402(a) for old-age insurance benefits or Title XVI of the Social Security Act as defined in 42 U.S.C. Section 1381 for aged individuals. Notwithstanding any other provision of this section, persons of opposite-sexes may not constitute a domestic partnership unless one or both of the persons are over the age of 62.

*Id.* This provision thus recognizes that under the present federal social security regulations, a party could lose certain survivor benefits if she or he remarries.

198. See *supra* notes 46-49 and accompanying text for a discussion of current articulations of the level of scrutiny afforded equal protection analysis.

199. See *supra* notes 131-35 and accompanying text for a discussion of how Hawai'i has considered the question of same-sex marriage, both statutorily and in caselaw.

200. HAW. REV. STAT. §§ 572C-1-572C-7 (2000). The Hawai'i legislature stated in its findings of the Reciprocal Beneficiaries Act that:

[T]here are many individuals who have significant personal, emotional, and economic relationships with another individual yet are prohibited by such legal restrictions from

Likewise, domestic partnership ordinances and policies can limit protection to persons of the same sex,<sup>201</sup> although this seems to be the exception rather than the rule.<sup>202</sup>

The exclusion of opposite-sex couples from quasi-marital relations raises the same sort of equality issues as limiting marriage to opposite-sex couples and has been subject to similar litigation.<sup>203</sup> For example, the City of Chicago's exclusively same-sex domestic partnership policy has been challenged, unsuccessfully, on at least two occasions. In *Cleaves v. City of Chicago*,<sup>204</sup> Mr. Cleaves was terminated from his employment for unauthorized leave and false statements after he took leave to attend the funeral of a man whom he described as his "father-in-law," but who was actually the (step)father of his female

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marrying. For example, two individuals who are related to one another, such as a widowed mother and her unmarried son, or two individuals who are of the same gender. Therefore, the legislature believes that certain rights and benefits presently available only to married couples should be made available to couples comprised of two individuals who are legally prohibited from marrying one another.

*Id.* § 572C-2. This extension, however, is explicitly limited by another subsection which provides, in part, that "[i]n order to enter into a valid reciprocal beneficiary relationship, it shall be necessary that: (1) Each of the parties be at least eighteen years old; (2) Neither of the parties be married nor a party to another reciprocal beneficiary relationship." *Id.* § 572C-4.

201. For discussions of this problem, see generally Dee Ann Habegger, *Living In Sin and the Law: Benefits For Unmarried Couples Dependent Upon Sexual Orientation?*, 33 IND. L. REV. 991 (2000); Paul R. Lynd, *Domestic Partner Benefits Limited to Same-Sex Couples: Sex-Discrimination Under Title VII*, 6 WM. & MARY J. WOMEN & L. 561 (2000); William V. Vetter, *Restrictions On Equal Treatment Of Unmarried Domestic Partners*, 5 B.U. PUB. INT. L.J. 1 (1995); Renee M. Scire and Christopher A. Raimondi, Note, *Employment Benefits: Will Your Significant Other Be Covered?*, 17 HOFSTRA LAB. & EMP. L.J. 357 (2000); Debbie Zielinski, Note, *Domestic Partnership Benefits: Why Not Offer them to Same-Sex Partners and Unmarried Opposite Sex Partners?*, 13 J.L. & HEALTH 281 (1999).

202. See Scire & Raimondi, *supra* note 201, at 369 (citing Shawn Zeller, *All in the So-Called Family*, NAT'L J., September 19, 1998, at 2180-81) (stating "[a]pproximately seven municipalities, including Baltimore, Chicago, New Orleans, and Philadelphia, have allowed only same-sex couples to be covered under domestic partnership benefits. On the other hand, at least thirty-four municipalities, including New York and Detroit, now offer health care benefits broadly to both same-sex and opposite-sex unmarried couples").

203. Municipal domestic partnership policies and ordinances have also been attacked more broadly, by persons who are seeking to have the provision declared invalid rather than to be included within its protections. See, e.g., *Atlanta v. Morgan*, 492 S.E.2d 193 (Ga. 1997) (holding valid revised Atlanta ordinance extending employee benefits to "dependents," which may include domestic partners, as within city's authority); *Atlanta v. McKinney*, 454 S.E.2d 517 (Ga. 1995) (holding invalid original Atlanta ordinance extending employee benefits to "domestic partners" of city employees as exceeding city's authority); *Lilly v. City of Minneapolis*, 527 N.W.2d 107, 113 (Minn. Ct. App. 1995) (holding invalid City Council resolution granting reimbursement for domestic partners' medical costs as exceeding city's authority); *Slattery v. City of New York*, 697 N.Y.S.2d 603, 605 (N.Y. App. Div. 1999) (upholding New York City's domestic partnership ordinance as within city's power and not encroaching on state's exclusive power to regulate marriage).

204. *Cleaves v. City of Chicago* resulted in two reported opinions, *Cleaves v. City of Chicago*, 68 F. Supp. 2d 963 (N.D. Ill. 1999) [hereinafter *Cleaves II*]; *Cleaves v. City of Chicago*, 21 F. Supp. 2d 858, 961 (N.D. Ill. 1998) [hereinafter *Cleaves I*]. See Paul R. Lynd, *supra* note 201, at 593-96, for a cogent discussion of *Cleaves II*.

domestic partner.<sup>205</sup> Acknowledging that Cleaves would have been entitled to leave if his domestic partner was a man, and therefore within the City of Chicago's same-sex domestic partnership ordinance, the district court nevertheless rejected the argument that the termination was sex discrimination in violation of Title VII.<sup>206</sup> The court's reasoning—that the ordinance treats men and women precisely the same—echoes the reasoning of judicial rejections of challenges to marriage by same-sex couples.<sup>207</sup>

More recently, in *Irizarry v. Board of Education*, the Seventh Circuit rejected a constitutional challenge to the Chicago Board of Education's same-sex domestic partnership policy.<sup>208</sup> Richard Posner's opinion for the panel is characteristically filled with rhetorical flourish and social policy, while somewhat scant on legal reasoning. Applying the rational basis test for equal protection because "heterosexuals cohabitating outside of marriage" have not been subject to irrational or invidious discrimination—supported by the "history of disapproval of (nonmarital) cohabitation, and some states still criminalize it"<sup>209</sup>—Posner finds many rational purposes for the policy, including limiting costs,<sup>210</sup> efficiency,<sup>211</sup> and "the nationwide policy in favor of marriage."<sup>212</sup>

205. *Cleaves II*, 68 F. Supp. 2d at 966-67.

206. *Id.* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, prohibits discrimination based upon sex, but the court noted that it does not prohibit discrimination based upon marital status, unless the marital status is combined with sex, as in the case of an airline rule prohibiting female flight attendants from being married, but allowing males to be married. *Cleaves II*, 68 F. Supp. at 967 (citing *Sprogis v. United Air Lines*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

In a similar challenge to a private employer's domestic partnership policy limited to same-sex couples, the court concluded that discrimination on the basis of ability to marry one's partner rather than discrimination on the basis of sex, was at issue and therefore the policy did not violate Title VII. *Foray v. Bell Atlantic*, 56 F. Supp. 2d 327 (S.D.N.Y. 1999).

207. *Compare Cleaves II*, 68 F. Supp. 2d at 967 (providing that excluding unmarried heterosexual couples from domestic partner programs does not violate Title VII because male and female unmarried heterosexual are treated alike), with *Singer v. Hara*, 522 P.2d 1187, 1190-91, 1195 (Wash. Ct. App. 1974) (holding that denying marriage license to homosexual does not violate state Equal Protection clause because male and female homosexuals are treated alike), and *Loving v. Virginia*, 388 U.S. 1, 2-12 (1967) (using similar logic to declare miscegenation statute unconstitutional).

208. 251 F.3d 604 (7th Cir. 2001).

209. *Id.* at 610 (citations omitted).

210. In fact, for the year and a half the policy had been in effect, "only nine employees out of some 45,000 had signed up for domestic-partner benefits." *Id.* at 607. As Judge Posner expresses it:

[b]ecause homosexuals are a small fraction of the population, because the continuing stigma of homosexuality discourages many of them from revealing their sexual orientation, and because nowadays a significant number of heterosexuals substitute cohabitation for marriage in response to the diminishing stigma of cohabitation, extending domestic-partner benefits to mixed-sex couples would greatly increase the expense of the program.

*Id.*

Yet costs are not automatically correlated with number of persons enrolled. As Debbie Zielinski notes, while a company's choice to extend benefits to both same-sex and opposite-sex domestic partners will increase enrollment in a range of one to ten percent, program costs will nevertheless vary, and costs for domestic partners tend to be lower than those for married counterparts, perhaps because of relative youth, better health, and fewer children. Zielinski, *supra* note 201, at 293.

211. While Judge Posner does not use this term, he states that it was "rational for the board to



Preserving the primacy of marriage is the most popular rationale for excluding opposite-sex couples, who can presumably marry, from domestic partnership or similar arrangements.<sup>213</sup> For Posner, the importance of marriage predictably inheres in its tangible benefits.<sup>214</sup> For others, including one gay advocate, the significance of marriage as a “bedrock institution, unique among all other forms of interpersonal relationship,” is attributable not to the concrete benefits, but to a shared recognition of its value as a “good.”<sup>215</sup> Equality is not

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refuse to extend domestic-partnership benefits to persons who can if they wish marry and by doing so spare the board from having to make a factual inquiry into the nature of their relationship.” *Irizarry*, 251 F.3d. at 610.

212. *Id.* at 607.

213. *Accord* Habegger, *supra* note 201, at 1009-10 (discussing conservative argument that bestowing benefits on unmarried heterosexual couples would weaken marriage); Scire & Raimondi, *supra* note 201, at 370 (discussing various proponents of this view including Massachusetts governor Paul Celluci).

214. Posner emphasized a cost-benefit analysis of sex. See RICHARD POSNER, *SEX & REASON* (1992) (applying “positive economic theory of sexual behavior” by discussing sexuality and sexual practices in terms of their costs, such as search costs, and benefits, such as procreation, hedonism, and sociability). This outlook is evident in *Irizarry*:

[S]o far as heterosexuals are concerned, the evidence that on average married couples live longer, are healthier, earn more, have lower rates of substance abuse and mental illness, are less likely to commit suicide, and report higher levels of happiness—that marriage civilizes young males, confers economies of scale and of joint consumption, minimizes sexually transmitted disease, and provides a stable and nourishing framework for child rearing.

*Irizarry*, 251 F.3d. at 607 (citations omitted).

215. James M. Donovan, *An Ethical Argument to Restrict Domestic Partnerships to Same-Sex Couples*, 8 *LAW & SEX*. 649, 652 (1998). Given his view regarding the “superior status” of marriage, *id.* at 654, Mr. Donovan is understandably less than sympathetic to heterosexuals who seek domestic partnership rather than marriage. Responding to the argument that some heterosexuals might not be “ready” to marry, Donovan describes these people as “pathetic” and “overaged children” who “want the perks without the works.” *Id.* at 662. Donovan similarly discounts any philosophical objections based upon the sexist history of the institution, saying that marriage is “decided today by the participating parties” and that “[n]o one forces any couple to structure its private relationship along gender-stereotypical lines.” *Id.* at 663.

This is not to imply, however, that most queer advocates agree with Mr. Donovan’s position. For example, in *Irizarry*, the Lambda Legal Defense and Education Fund filed an amicus brief supporting Ms. Irizarry’s challenge to Chicago’s same-sex domestic partnership policy. *Irizarry*, 251 F.3d at 608-09. Judge Posner explains the situation thusly:

The Lambda Legal Defense and Education Fund has filed an amicus curiae brief surprisingly urging reversal—surprisingly because Lambda is an organization for the promotion of homosexual rights, and if it is the law that domestic-partnership benefits must be extended to heterosexual couples, the benefits are quite likely to be terminated for everyone lest the extension to heterosexual cohabiters impose excessive costs and invite criticism as encouraging heterosexual cohabitation and illegitimate births and discouraging marriage and legitimacy. But Lambda is concerned with the fact that state and national policy encourages (heterosexual) marriage in all sorts of ways that domestic-partner health benefits cannot begin to equalize. Lambda wants to knock marriage off its perch by requiring the board of education to treat unmarried heterosexual couples as well as it treats married ones, so that marriage will lose some of its luster. This is further evidence of the essentially symbolic or political rather than practical significance of the board’s policy. Lambda is not jeopardizing a substantial benefit for homosexuals because very few of them want or will seek the benefit.

only a lesser benefit or good under these theories, but inequality in the form of exclusionary practices is necessary to maintain the special status of marriage.

## 2. Familial Marriage (Incest)

Civil union and domestic partnership schemes may not only contain gender exclusions, but also incorporate exclusions based upon familial relationships.<sup>216</sup> These exclusions mirror state statutory schemes regulating marriage, which typically declare incestuous marriages void.<sup>217</sup> Additionally, states generally criminalize incestuous marriages and sexual relations.<sup>218</sup>

*Id.* This explanation does not comport with Lambda's "Marriage Project" or its positions as co-counsel or amicus challenging the statutes and seeking same-sex marriage in Hawai'i and Vermont. See Lambda Legal, available at <http://www.lambdalegal.org> (last visited June 1, 2001) (providing legal news regarding Lambda's role in granting homosexual couples civil union rights).

216. See *supra* note 156 for a discussion of Vermont Civil Union statute's prohibition of incestuous marriages. But c.f. *supra* note 200 and accompanying text for a discussion of reciprocal beneficiaries. Similarly, and typically, the relevant portion of the New York City domestic partnership ordinance provides that to be eligible to register for a domestic partnership:

3. Neither of the persons is married; 4. Neither of the persons is a party to another domestic partnership, or has been a party to another domestic partnership within the six months immediately prior to registration; 5. The persons are not related to each other by blood in a manner that would bar their marriage in the state of New York.

NEW YORK CITY, N.Y. CODE § 3-241 (2001).

217. For example, California provides that:

Marriages between parents and children, ancestors and descendants of every degree, and between brothers and sisters of the half as well as the whole blood, and between uncles and nieces or aunts and nephews, are incestuous, and void from the beginning, whether the relationship is legitimate or illegitimate.

CAL. FAM. CODE § 2200 (West 2001). Similarly, New York law provides:

A marriage is incestuous and void whether the relatives are legitimate or illegitimate between either:

1. An ancestor and a descendant;
2. A brother and sister of either the whole or the half blood;
3. An uncle and niece or an aunt and nephew.

If a marriage prohibited by the foregoing provisions of this section be solemnized it shall be void, and the parties thereto shall each be fined not less than fifty nor more than one hundred dollars and may, in the discretion of the court in addition to said fine, be imprisoned for a term not exceeding six months. Any person who shall knowingly and willfully solemnize such marriage, or procure or aid in the solemnization of the same, shall be deemed guilty of a misdemeanor and shall be fined or imprisoned in like manner.

N.Y. DOM. REL. LAW § 5 (Consol. 2001).

218. The California Penal Code criminalizes incestuous marriages:

Persons being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who intermarry with each other, or who commit fornication or adultery with each other, are punishable by imprisonment in the state prison.

CAL. PENAL CODE § 285 (West 2001). As an unspecified felony, the punishment could be up to three years in the state prison, see CAL. PENAL CODE § 18 (West 2001).

In New York, the crime of incest is a class E felony which is punishable by a term not to exceed four years, N.Y. PENAL LAW § 70.02(e) (Consol. 2001) and is defined as:

A person is guilty of incest when he or she marries or engages in sexual intercourse or deviate sexual intercourse with a person whom he or she knows to be related to him or her,

State statutes differ, however, regarding the type of incestuous marriages and sexual relations prohibited.<sup>219</sup> Marriages between persons related by blood—consanguineous relations—are the most uniformly proscribed, though states vary on the degree of relation at which consanguinity becomes irrelevant. For example, the Vermont Supreme Court in *Baker* found it worthwhile to note that Vermont allowed “first-cousin marriages, not uniformly sanctioned in other states.”<sup>220</sup> On the other hand, state laws generally prohibit marriage to one’s parent, grandparent, brother or sister, and aunt, nephew, uncle, and niece,<sup>221</sup> although the prohibition may contain some specific exceptions.<sup>222</sup> Also subject to variation are situations involving partial consanguinity or so-called “half-blood.”<sup>223</sup> Even more problematic than relations by consanguinity are relations by affinity. States lack consensus on whether and to what degree persons related by marriage should be prohibited from marrying each other, as commentators arguing against such prohibitions have noted.<sup>224</sup> An additional complication for

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either legitimately or out of wedlock, as an ancestor, descendant, brother or sister of either the whole or the half blood, uncle, aunt, nephew or niece.

N.Y. PENAL LAW § 255.25 (Consol. 2001).

219. See Carolyn S. Bratt, *Incest Statutes and the Fundamental Right of Marriage: Is Oedipus Free to Marry?*, 18 FAM. L.Q. 257, 298-309 (Appendices) (1984), for a survey of state statutes.

220. *Baker*, 744 A.2d at 885 (citing VT. STAT. ANN. tit. 15, §§ 1-2 (2000)). The point was made in contradiction to the state’s asserted substantial governmental interest in “maintaining uniformity with other jurisdictions.” *Id.*, 744 A.2d at 885. The Uniform Marriage and Divorce Act eliminates the prohibition against marriages between cousins. UNIF. MARRIAGE & DIVORCE ACT § 207 (1998) (noting that Act adopts recent trend of legalizing first cousin marriages).

221. See Bratt, *supra* note 219, at Appendix 302-09 (Appendix B and C) (charting relationships covered in each state’s civil and penal codes); see also UNIF. MARRIAGE & DIVORCE ACT § 207(a) (listing types of prohibited marriages).

222. For example, Rhode Island permits “any marriage which shall be solemnized among the Jews, within the degrees of affinity or consanguinity allowed by their religion.” R.I. GEN. LAWS § 15-1-4 (1996). This presumably refers to Jewish law which not only does not prohibit uncle/niece marriages, but encourages them. MIAMONIDES, THE LAWS OF PROHIBITED RELATIONS, Chapter 2, Law #14 (stating “it is a positive Talmudic commandment that a man should marry the daughter of his sister, and the same commandment applies to the daughter of his brother”). I am appreciative to Salomon (Shlomo) Davis for his translation from the Hebrew of this text.

In a somewhat similar vein, the Uniform Act’s prohibition against uncle/niece aunt/nephew marriages contains an exemption for “aboriginal cultures,” UNIF. MARRIAGE & DIVORCE ACT § 207(3), which the comment explains is intended “to save those special customs of Indian tribes, of Alaskan natives of various ethnic origins, and of Polynesians, which may not accord with the incest taboos of Western culture.” *Id.*

223. See, e.g., *People v. Baker*, 442 P.2d 675, 678 (Cal. 1968) (holding that statutory construction revealed legislative intent to limit crime of incest between uncle and niece to whole blood); *Singh v. Singh*, 569 A.2d 1112, 1121 (Conn. 1990) (describing that because “common meaning” of term uncle and niece encompasses relationship of half-blood as well as whole blood, marriage was void); *State v. Skinner*, 43 A.2d 76, 77 (Conn. 1945) (providing that word “brother” included brother of half blood, and word “sister” included sister of half blood); *State v. Allen*, 304 N.W.2d 203, 207 (Iowa 1981) (holding that defendant’s sexual relations with half-blood sister of his wife fell within criminal incest prohibitions which bars sexual acts between persons related by degrees of consanguinity and affinity).

224. See Martha Mahoney, *A Legal Definition of the Stepfamily: The Example of Incest Regulation*, 8 BYU J. PUB. L. 21, 27 & Appendix (1993) (noting relative consensus among states banning incest among close biological relationships and relative lack of consensus regarding other

both consanguinity and affinity relations occurs when the relation is by adoption.<sup>225</sup>

The uncertainties in marital incest doctrine reflect the dissonant sources of the prohibitions. American proscriptions generally trace their provenance through English common law<sup>226</sup> back to the Bible's book of *Leviticus*,<sup>227</sup> although the Biblical treatment of incestuous relations is not consistently

relationships); Christine McNiece Metteer, *Some "Incest" is Harmless Incest: Determining the Fundamental Right to Marry of Adults Related by Affinity Without Resorting to State Incest Statutes*, 10 KAN. J.L. & PUB. POL'Y 262, 263-65 (2000) (noting lack of consensus on incest laws to argue that states do not have strong interest in denying adults related by affinity right to marriage). *See also* Bratt, *supra* note 219, at 298-302 (Appendix 1) (charting relationships covered in each states' civil and penal codes).

225. *See, e.g.*, *Israel v. Allen*, 577 P.2d 762, 764 (Colo. 1977) (holding that statute could not withstand minimum scrutiny because state did not have legitimate state interest in prohibiting marriage between siblings related by adoption); *State v. George B.*, 785 A.2d 573, 584-85 (Conn. 2001) (interpreting criminal statute prohibiting sexual intercourse between individuals of certain degrees of kinship to encompass adopted as well as blood relatives, because statute prohibiting sexual intercourse between related individuals incorporated degrees of kinship from marriage prohibition statute, which prohibited grandfathers and granddaughters from marrying); *Ex Parte Bourne*, 2 N.W.2d 439, 440 (Mich. 1942) (finding that statute limiting crime of incest to sexual relations between those related by ties of consanguinity meant sexual relationship between stepfather and his stepdaughter was not incestuous); *Miesner v. Geile*, 747 S.W.2d 757 (Mo. Ct. App. 1988) (construing marriage statute which prohibited marriage between uncle and niece to allow marriage between uncle and niece by adoption); *In re Matter of Adoption of Adult Anonymous*, 435 N.Y.S.2d 527, 529-31 (N.Y. Fam. Ct. 1981) (holding that because incest statute was inapplicable to parties without blood ties, adoption proceeding by two homosexual adults wishing to establish legally cognizable relationship was allowable); *State v. Bale*, 512 N.W.2d 164, 166 (S.D. 1994) (determining that legal relationship created by adoption is not one of consanguinity, therefore, sexual relations with adoptive daughter did not constitute incest).

Note, however, that adoption may not sever the ties with the biological family for incest marriage prohibitions. *See, e.g.*, MASS. GEN. LAWS ch. 210, § 6 (1998) (stating that upon entry of adoption decree, "all rights, duties and other legal consequences of the natural relation of child and parent shall . . . except as regards marriage, incest or cohabitation, terminate between the child so adopted and his natural parents and kindred") (emphasis added).

226. English common law, however, did not punish incest as a crime; the criminalization component was a statutory innovation in the United States. *See People v. Baker*, 442 P.2d 675, 678 n.3 (Cal. 1968) (noting "incest was first made a crime in England in 1908") (citing Punishment of Incest Act, 1908, 8 Edw. 7, c. 45 (Eng.)); *Singh v. Singh*, 569 A.2d, 1112, 1115 (Conn. 1990) (stating "initial departure of the American jurisdictions from the English law was to declare incest a crime"). Any punishment for incest in common law England was "left entirely to the ecclesiastical courts." *Id.* at 1115.

227. The Book of *Leviticus* mandates:

None of you shall approach to any that is near of kin to him, to uncover their nakedness: I am the Lord. The nakedness of thy father, or the nakedness of thy mother, shalt thou not uncover: she is thy mother; thou shalt not uncover her nakedness. The nakedness of thy father's wife shalt thou not uncover: it is thy father's nakedness. The nakedness of thy sister, the daughter of thy father, or daughter of thy mother, whether she be at home, or born abroad, even their nakedness thou shalt not uncover. The nakedness of thy son's daughter, or of thy daughter's daughter, even their nakedness thou shalt not uncover: for their nakedness is thine own nakedness.

*Leviticus* 18:6-10 (King James).

condemnatory.<sup>228</sup> Co-existing with the Biblical tradition, some anthropologists, most notably Claude Levi-Strauss, opine that the “incest taboo” is universal to all cultures.<sup>229</sup> The modern science of genetics is atavistically supportive of the Biblical and tribal customs.<sup>230</sup> Lastly, more abstract notions of family unity are blended with the foregoing rationales.<sup>231</sup>

Constitutional challenges to incest statutes are relatively rare. One successful challenge involved a state statute that included relations by adoption. In *Israel v. Allen*,<sup>232</sup> the Colorado Supreme Court declared the provision unconstitutional, holding that the state did not have a legitimate interest in prohibiting the marriage, and thus the statute did not meet minimal constitutional review.<sup>233</sup> More typically, statutes have withstood constitutional challenges premised on equal protection<sup>234</sup> as well as on an individual’s right to privacy.<sup>235</sup> For example, in *State v. Benson*,<sup>236</sup> the Ohio Appellate Court held that there is no fundamental right under the United States Constitution to engage in private acts of consensual sexual intercourse. Thus, a statute prohibiting incest and defining the crime as a sexual contact by a natural parent with a child, by a stepparent with his stepchild, by a guardian with his ward or by a custodian or person in loco parentis with his charge, is not facially unconstitutional as a denial of substantive due process.<sup>237</sup> In the absence of a

228. Apart from the mysterious sources of the spouses for Adam and Eve’s children, as one commentator notes, there are a “remarkable number of liaisons between close kin in the early narratives of the Bible.” Calum Carmichael, *Incest in the Bible*, 71 CHI.-KENT L. REV. 123, 125 (1995). The focus of Carmichael’s piece, however, is an incident of stepmother-stepson incest in the New Testament. *Id.* at 123. *Cf. supra* note 222 (discussing uncle/niece marriages in Jewish law).

229. CLAUDE LEVI-STRAUSS, *The Family, in MAN, CULTURE, AND SOCIETY* 261, 276-78 (Shapiro ed., 1956).

230. In his discussion of incest in the Bible, Carmichael notes that a common explanation for incest rules is that incest leads to “defective offspring,” but that such an explanation is not supported by ancient sources or anthropological evidence. Carmichael, *supra* note 228, at 125-26.

231. See MODEL PENAL CODE § 230.2 cmt. 2 (1986), for a discussion of these rationales and the state rationales in promoting family unity.

232. 577 P.2d 762 (Colo. 1978).

233. *Israel*, 577 P.2d at 764. To the contrary, the Uniform Marriage and Divorce Act includes the prohibition of sibling-by-adoption marriages, supporting this with the statement that there is a “social interest in prohibiting such romantic attachments even if there is no genetic risk.” *Id.*

234. *See, e.g., State v. Buck*, 757 P.2d 861, 864 (Or. Ct. App. 1988) (holding government statute which criminalizes intercourse between step-father and consenting step-daughter over age of eighteen is rationally related to legitimate government purpose of protecting family); *State v. Kaiser*, 663 P.2d 839, 842-43 (Wash. Ct. App. 1983) (holding that inclusion of sexual intercourse with stepchildren under 18 years old within incest prohibition is rationally related to legitimate government objectives of protection of family and does not violate stepparent’s right to equal protection).

235. *See, e.g., Buck*, 757 P.2d at 863-64 (rejecting argument that incest statute violates “federal right to privacy,” reasoning that cases relied upon for argument such as *Roe*, *Loving*, and *Griswold* “protect the family” as does criminal incest statute); *Byrom v. State*, 648 S.W.2d 440, 441 (Tex. Ct. App. 1983) (rejecting argument that state incest statute is unconstitutional because it is “an unwarranted Governmental interference in the private sexual relations of its citizens” as “repugnant and without merit”).

236. 612 N.E.2d 337 (Ohio Ct. App. 1992).

237. *Benson*, 612 N.E.2d at 339-40.

fundamental right, the statute was subject to only minimum judicial scrutiny.<sup>238</sup>

Perhaps in part because of the general lack of success in constitutional challenges against incest prohibitions, same-sex marriage advocates seem to view incest prohibitions, like those against bigamy and polygamy,<sup>239</sup> as lying at the bottom of a slippery slope that must be avoided.<sup>240</sup> The lucid, if relatively few, arguments in legal scholarship directed at challenging incest prohibitions<sup>241</sup> have not been generally accepted. Moreover, when there is some relaxation of the incest regime, as in the reciprocal beneficiary schemes enacted in Vermont and Hawai'i that include familial relationships,<sup>242</sup> such an inclusion may be harshly judged as devaluing intimate same-sex relationships.<sup>243</sup>

Rather than distance ourselves from restrictions on familial marriages, such prohibitions need to be rigorously examined. The proffered explanations for incest prohibitions should be deeply problematic for any same-sex marriage advocate. The citation of *Leviticus*, the same book of the Bible that courts and conservatives use to deprecate lesbians and gay men,<sup>244</sup> should immediately be

238. *Id.*

239. See *infra* notes 294-309 and accompanying text for a discussion of same-sex marriage advocates' attempts to provide basis for legal distinction between homosexuality and bigamy.

240. See, e.g., John Corvino, *No Slippery Slope*, GAY & LESBIAN REV., Summer 2000, at 37 (discussing persistency of poor argument that approval of homosexuality is tantamount to approval of polygamy, bestiality and incest); Mark Strasser, *Loving, Baehr, and the Right to Marry: On Legal Argumentation and Sophistical Rhetoric*, 24 NOVA L. REV. 769, 787-88 (2000) (noting that slippery slope argument was made by those arguing against interracial marriages with regard to incest and polygamy). See *infra* notes 267-344 and accompanying text for a discussion of polygamy.

241. For examples of these arguments see Bratt, *supra* note 219; Mahoney, *supra* note 224; Meter, *supra* note 224.

242. HAW. REV. STAT. ANN. § 572-1 (1)-(7) (Michie 2000) (see *supra* note 135 for text); 15 VT. STAT. ANN. tit. 15 § 1301-1305 (2000) (see *supra* notes 155-57 for text). Additionally, Colorado has been considering a reciprocal beneficiary bill. A Bill for an Act Concerning Probate Procedures for Reciprocal Beneficiaries, S.B. 111, 62d Leg., 2d Reg. Sess. (Colo. 2000).

243. See Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1, 15 (1998) (arguing that inclusion of couples who are related to each other under the schemes undermines recognition of same-sex committed relationships).

244. The pertinent passage in *Leviticus*, 20:13 (King James), provides "[i]f a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination." *Id.*; see, e.g., *U.S. v. Brewer*, 363 F. Supp. 606, 607 (M.D. Pa. 1973) (citing *Leviticus* to show repugnance of sodomy and balancing state's interest of regulating activities in prison against right of privacy in upholding constitutionality of Pennsylvania's criminal sodomy statute); *Doe v. City of Richmond*, 403 F. Supp. 1199, 1202 (E.D. Va. 1975) (citing *Leviticus* when upholding constitutionality of Virginia's criminal sodomy statute, and asserting historical roots of law as satisfying legitimate state's interest); *Ex parte H.H.*, 830 So. 2d 21, 33 (Ala. 2002) (Moore, C.J., concurring) (citing *Leviticus* to reaffirm traditional notion that homosexuality is intolerable evil and denying mother's petition for custody modification because exposure to her homosexual conduct is detrimental to her children); *Harris v. State*, 457 P.2d 638, 648 (Alaska 1969) (referring to *Leviticus* in rejecting claim that state sodomy statute unconstitutional because of its vagueness and stating "sodomy" sufficiently precise to withstand constitutional attack); *Chicoine v. Chicoine*, 479 N.W.2d 891, 896 (S.D. 1992) (Henderson, J. specifically concurring in part; dissenting in part) (giving reference to *Leviticus* in explaining that lesbian mother not fit for visitation because her conduct could contaminate the children but affirming restricted visitation rights); see also *Lumpkin v. Brown*, 109 F.3d 1498, 1499 (9th Cir. 1997) (deciding First Amendment controversy involving statements made by conservative Reverend who used

discounted, lest arguments against the Biblical references in conservative anti-gay opinions such as *Bowers v. Hardwick* become ludicrous.<sup>245</sup> The question of universal taboo should likewise be suspect by same-sex marriage advocates, most trenchantly on the basis that tribal customs should not govern our current cultural mores and constitutional notions any more than *Leviticus* should prevail. Moreover, the very “universality” of incest prohibitions is questionable—the Uniform Marriage and Divorce Act itself contains an exemption for “aboriginal” cultures within the United States whose customs may not accord with the “incest taboos of Western culture.”<sup>246</sup> Furthermore, any appeal to the incest taboo in the work of anthropologists such as Claude Levi-Strauss must be tempered by the work of anthropologist and feminist Gayle Rubin, who persuasively argues that the incest taboo is the origin of gender and sexuality inequality.<sup>247</sup> The

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*Leviticus* to condemn homosexuality and was removed from human rights commission); *Okwedy v. Molinari*, 150 F. Supp. 2d 508, 511 (E.D.N.Y. 2001) (deciding First Amendment controversy which involved *Leviticus* quote on billboard that expressed opinion against homosexuality).

245. The Court in *Bowers v. Hardwick*, rejecting a challenge to Georgia’s sodomy statute, relied upon the fact that “proscriptions” against sodomy have “ancient roots.” 478 U.S. 186, 192 (1986). Justice Burger stressed that “condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards.” *Id.* at 196 (Burger, C.J., concurring).

On the contrary, the dissenting justices spurned the “assertion that ‘traditional Judeo-Christian values proscribe’ the conduct involved” as “an adequate justification” for the state sodomy statute, reasoning that the government’s “invocation of *Leviticus*, Romans, St. Thomas Aquinas, and sodomy’s heretical status during the Middle Ages undermines” the argument that the sodomy statute “represents a legitimate use of secular coercive power.” *Id.* at 211 (Blackmun, J., dissenting).

246. UNIF. MARRIAGE & DIVORCE ACT § 207(3), cmt. (1973).

247. Gayle Rubin, *The Traffic in Women: Notes on the “Political Economy of Sex,”* in TOWARD AN ANTHROPOLOGY OF WOMEN 157, 176-77 (Rayna R. Reiter ed., 1975). Gayle Rubin develops a compelling theory of the development and significance of the incest taboo in pre-state cultures arguing that the incest taboo, a rule which divides the universe into categories of permitted sexual partners and prohibited sexual partners, is the origin of the sexual inequality. *Id.* at 173-77. She concludes that in pre-state societies, anthropologists study and conceptualize kinship systems as the structure of organization within a society. *Id.* at 169. The term ‘kinship systems’ is shorthand for systematic forms of social interaction which encompasses the economic, political, ceremonial and sexual activity of a society. *Id.* It contains the rules that govern the social interactions among members of a group. *Id.* It is within this system of societal organization that Rubin theorizes the incest taboo developed. Rubin, *supra*, at 173-83. By way of explanation, anthropologists have long theorized about the importance of gift exchange between families and groups in these early cultures. *Id.* at 170. The societal significance of the gift exchange lies not in any material benefits conferred, but in the social bond created and affirmed by the exchange between two groups. *Id.* at 173. This culture of gift exchange and reciprocity is then translated to societal rules concerning marriage. *Id.* Marriage is viewed as the most basic form of gift exchange, in which women are the gift. *Id.* Women are transacted by the men of their family. Rubin, *supra*, at 174. In this regard, the incest taboo is to be understood as a mechanism to ensure such exchanges take place between families and between groups. *Id.* at 176-77. The incest taboo forbidding marriages between father and daughter, brother and sister can be viewed in the inverse: it is a rule compelling the mother, sister, or daughter to be given to others. *Id.* at 173. The intermarriage then creates bonds between families that can overcome the interpersonal clashes that might otherwise cause the disintegration of the relationship. *Id.* at 173-74. The blood that flows in the descendants then ties the two groups. *Id.* at 173. The bonds created between the families allowed for the development of larger, more complex societies. Rubin, *supra*, at 174. In this way, the defeat of women at the hands of their male relations is viewed to be a prerequisite for the development of the complex state culture. *Id.*

possibility that the incest taboo also supports compulsory heterosexuality should also be entertained.<sup>248</sup>

While seemingly more objective than Biblical or anthropological rationales, the genetic grounding for incest prohibitions is likewise faulty. It is subject to criticism as post-hoc,<sup>249</sup> scientifically unsupportable,<sup>250</sup> and only partial since it is inapplicable to relations by affinity or adoption.<sup>251</sup> Most importantly for same-sex advocates, however, the genetic justification depends upon identity between marriage and procreation—the same logic that is used to resist same-sex marriage.<sup>252</sup>

The final rationale in support of familial marriage prohibitions is a broad argument in favor of family cohesiveness and integrity. Yet such a principle is enervated by its application. For example, in *Rhodes v. McAfee*,<sup>253</sup> the Tennessee Supreme Court decided that a marriage between a former stepfather and stepdaughter was invalid.<sup>254</sup> This fourteen-year marriage that had produced three children was before the courts because the husband had died without a will and the former wife was claiming property rights. In declaring the marriage void and disinheriting the wife, the Tennessee Supreme Court opined:

This case is a good example of why such marriages are prohibited. The stepdaughter lived in the home with the mother and stepfather from the date of the marriage of the mother and stepfather until their divorce, with the exception of two years when she lived with an uncle. The stepdaughter's status in this family would be closely akin to the natural children of a mother and stepfather, who, in fact, were her half brothers and sisters. If there were no statutes prohibiting such marriages, there not only could but very likely would result in discord and disharmony in the family.<sup>255</sup>

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248. Judith Butler tantalizingly notes that the incest taboo raises the question of whether the taboo has been “mobilized to establish certain forms of kinship as the only intelligible and livable ones,” noting that arguments against same-sex marriage and parenting appeal to claims made on the level of the symbolic family, the lack of which will threaten psychosis. JUDITH BUTLER, *ANTIGONE'S CLAIM: KINSHIP BETWEEN LIFE AND DEATH* 70 (2000).

249. See Carmichael, *supra* note 228, at 125-26 (arguing that although ancients prohibited incest, they did not make causal connection between incest and genetics).

250. See Bratt, *supra* note 219, at 267-76 (arguing that dangers are not only “minimal” but are “exceeded by the genetic dangers involved in matings of other social populations”).

251. See Metteer, *supra* note 224, at 274 (concluding that genetic theory of recessive genes is “obviously not an interest at all” applicable to persons related by affinity); see also Mahoney, *supra* note 224, at 28 (stating that biomedical concern regarding recessive genetic abnormalities, premised on “the common genetic makeup of close biologic relatives, obviously has not application to persons” who “are not related by blood”).

252. For example, the “principal purpose the State advances in support of excluding same-sex couples from the legal benefits of marriage is the government's interest in ‘furthering the link between procreation and child rearing.’” *Baker*, 744 A.2d at 881. The Vermont Supreme Court found that the statutory exclusion of same-sex couples was “significantly underinclusive” with regard to this purpose because “many opposite sex couples marry for reasons unrelated to procreation.” *Id.*

253. 457 S.W.2d 522 (Tenn. 1970).

254. *Rhodes*, 457 S.W.2d at 524.

255. *Id.*



Contrary to the court's description of this as a "good example," it seems equally true that the case is a bad example to support familial marriage prohibitions.<sup>256</sup> The court sacrifices a family that existed for fourteen years in favor of the divorced former spouse in order to uphold formalistic notions requiring protection of the family.

The court's emphasis on the fact that the wife had once lived in a household as the husband's child, however, elucidates a central concern in incest prohibitions: the protection of children. Yet this concern is often inadequately served by marital incest prohibitions that function only when the parties are adults with the capacity to marry under the relevant state statutes.<sup>257</sup> Thus, marital incest prohibitions operate as a lifetime bar, despite the fact that the premise of protecting the child is no longer operative because the child has become an adult.<sup>258</sup> Moreover, if the state's interest is to protect the young, then "sexual relationships between the *same household* unit ought to be proscribed regardless of the precise legal nomenclature describing the relationships."<sup>259</sup> In fact, sex abuse of children is criminalized in all states,<sup>260</sup> encompassing a wider range of sexual activity with children,<sup>261</sup> and not dependent upon the formalistic existence of a particular familial relationship.<sup>262</sup> While the term "incest" may be confused with the sexual abuse of children, the terms are not co-extensive and should not be conflated.<sup>263</sup>

256. *Cf.* Mahoney, *supra* note 224, at 34 (noting that opinion did not address countervailing consideration of serious hardship imposed upon wife and children).

257. All states set a minimum age for marriage. *Moe v. Dinkins*, 533 F. Supp. 623, 629 (S.D.N.Y. 1981), *aff'd*, 669 F.2d 67 (2d Cir. 1982) (stating that "age attainment requirement for marriage is established in every American jurisdiction" and rejecting constitutional challenge to New York's parental consent provision for minors). *Cf.* UNIF. MARRIAGE & DIVORCE ACT § 208 (1973) (providing for declaration of invalidity for minors).

258. *Accord* Bratt, *supra* note 219, at 292 (stating that "in reality . . . ban does little to deter family romances between adults").

259. *Id.* at 290 (emphasis in original).

260. *See* Leigh B. Bienen, *Defining Incest*, 92 Nw. U. L. REV. 1501, 1580-1640 (1998) (listing both familial prohibitions and adult sex with children prohibitions for all states).

261. As Bratt points out, the definition of sex abuse encompasses a broader range of activity, while criminal incest statutes typically forbid only sexual intercourse or marriage. Bratt, *supra* note 219, at 294. For example, New York's rape statute provides that rape in the third degree requires the "actor" to be 21 or over and the victim less than 17. N.Y. PENAL CODE § 130.25(2) (McKinney 1998). Rape in the second degree requires the "actor" to be 18 or over and the victim less than 14. *Id.* § 130.30. Rape in the first degree requires the "actor" to be male and the victim less than 11. *Id.* § 130.35(3). Another provision of the New York Penal Code, section 70.07, criminalizes a "sexual assault against a child" as a felony offense. *Id.* § 70.07(2). The essential elements of the offense are that the child be under the age of fifteen, and the commission or attempted commission of "sexual conduct" which is defined in section 130 as "sexual intercourse, deviate sexual intercourse, aggravated sexual contact, or sexual contact," with "sexual contact" being defined in subsection 3 of section 130 as "any touching of the sexual or other intimate parts of a person" including "the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing." *Id.* at § 130.00(10).

262. For example, the step-parent and step-child relation is prohibited in a minority of states. Mahoney, *supra* note 224, at 33.

263. *But cf.* Bienen, *supra* note 260, at 1509 (arguing that although incest is "archaic and

Thus, if we are truly interested in equality, we need to consider whether familial marriage merits our attention. The Vermont scheme, which creates separate but unequal<sup>264</sup> regimes for heterosexuals and for lesbians and gay men, actually creates a tripartite system: marriage for heterosexuals, civil union for lesbians and gay men, and reciprocal beneficiary status for those barred from either marriage or civil union because they are related.<sup>265</sup> Rather than object that the very inclusion of familial relationships is an affront to same-sex relationships,<sup>266</sup> we need to be examining whether this tripartite system conforms to our notions of equality.

### 3. Plural Marriages

While gender exclusions and incest exclusions are well established, their dominion may be wavering with the advent of contemporary marital-like devices, including those established in Vermont and Hawai'i that recognize same-sex and familial relationships. No such amelioration, however, is occurring with regard to another important marriage requirement that likewise implicates equality concerns: the limitation of the marital relation to two persons at a time.<sup>267</sup> Marriage statutes,<sup>268</sup> the Vermont and Hawai'i schemes,<sup>269</sup> and domestic

distorted diction," changing it has "potential to distract").

264. See *supra* notes 155-57 and accompanying text for a discussion of Vermont's reciprocal beneficiary scheme.

265. See *supra* note 155-57 and accompanying text for a full version of the Vermont statute.

266. See *supra* note 239-43 and accompanying text for a discussion on how some same-sex marriage advocates want to distance themselves from incest restrictions.

267. Generally speaking, proscriptions against bigamy or plural marriages only pertain to contemporaneous marriages; one may marry as many times as one wishes during her lifetime assuming that each marriage is legally terminated, as by divorce or death. See, e.g., *infra* note 268 for the text of two typical statutes proscribing plural marriages. However, the contemporaneous requirement for bigamous marriages has sometimes been vitiated in cases of adultery. See, e.g., *Rhodes v. Miller*, 179 So. 430, 431-32 (La. 1938) (construing article 161 of Civil Code which provided "in case of divorce, on account of adultery, the guilty party can never contract matrimony with his or her accomplice in adultery, under the penalty of being considered and prosecuted as guilty of the crime of bigamy, and under the penalty of nullity of the new marriage"); *People v. Faber*, 92 N.Y. 146, 150-51 (1883) (construing section 59 of the New York Divorce Act which prohibited one who has been divorced, on account of his or her adultery, from marrying again until the death of complainant).

268. The statutes of California and New York are typical. The California statute provides:  
Bigamous and polygamous marriages; exceptions; absentees

(a) A subsequent marriage contracted by a person during the life of a former husband or wife of the person, with a person other than the former husband or wife, is illegal and void from the beginning, unless:

(1) The former marriage has been dissolved or adjudged a nullity before the date of the subsequent marriage.

(2) The former husband or wife (i) is absent, and not known to the person to be living for the period of five successive years immediately preceding the subsequent marriage, or (ii) is generally reputed or believed by the person to be dead at the time the subsequent marriage was contracted.

(b) In either of the cases described in paragraph (2) of subdivision (a), the subsequent marriage is valid until its nullity is adjudged pursuant to subdivision (b) of Section 2210.

CAL. FAM. CODE § 2201 (West 1994).

partnership provisions<sup>270</sup> all insist that each person can have a legal marital or quasi-marital relationship with only one other person, whether the person be denominated as spouse, partner, or reciprocal beneficiary. Moreover, being married to more than one person simultaneously continues to be criminalized,<sup>271</sup> in addition to being a bar to immigration.<sup>272</sup>

Although bigamy has a colonial history,<sup>273</sup> for Americans, the notion of plural marriage is inextricably intertwined with the Mormon religion as it appeared in the antebellum nation.<sup>274</sup> The history, influence, and perceived threat of Mormonism explain the prohibitions against polygamy that appear in

The New York statute similarly provides that:

A marriage is absolutely void if contracted by a person whose husband or wife by a former marriage is living, unless either:

1. Such former marriage has been annulled or has been dissolved for a cause other than the adultery of such person; provided, that if such former marriage has been dissolved for the cause of the adultery of such person, he or she may marry again in the cases provided for in section eight of this chapter and such subsequent marriage shall be valid.

N.Y. DOM. REL. LAW § 6 (McKinney 1999).

269. See *supra* notes 135 and 151-57, for a discussion of the reciprocal beneficiary schemes of Hawai'i and Vermont, respectively.

270. For example, the New York City domestic partnership ordinance provides that registration for a domestic partnership requires that "neither of the persons is married" and "[n]either of the persons is a party to another domestic partnership, or has been a party to another domestic partnership within the six months immediately prior to registration." NEW YORK CITY, N.Y. ADMIN. CODE § 3-241(3)-(4) (1998).

271. For example, in California, penal law bigamy is defined as "every person having a husband or wife living, who marries any other person," CAL. PENAL CODE § 281(a) (West 2003). This rule does not extend to "any person by reason of any former marriage whose husband or wife by such marriage has been absent for five successive years without being known to such person within that time to be living," or "any person by reason of any former marriage which has been pronounced void, annulled, or dissolved by the judgment of a competent court." *Id.* § 282. Section 283 of the Penal Law punishes bigamy by a fine not to exceed \$10,000.00 or "by imprisonment in a county jail not exceeding one year or in the state prison." *Id.* § 283. In addition, California criminalizes marrying the husband or wife of someone else when a person "knowingly and willfully marries the husband or wife of another, in any case in which such husband or wife would be punishable under the provisions of this chapter, is punishable by fine not less than five thousand dollars (\$5,000), or by imprisonment in the state prison." *Id.* § 284.

New York provides that "a person is guilty of bigamy when he contracts or purports to contract a marriage with another person at a time when he has a living spouse, or the other person has a living spouse." The same statute defines bigamy as a class E felony. N.Y. PENAL LAW § 255.15 (McKinney 2000).

272. The United States Code provides that "any immigrant who is coming to the United States to practice polygamy is inadmissible." 8 U.S.C. § 1182(a)(10)(A) (2002).

273. In Pennsylvania, a court in 1893, noted that the Commonwealth had proscribed bigamy "as early as 1705," providing punishment by "whipping on the bare back with thirty-nine lashes, and imprisonment for life at hard labor, and declaring the second marriage void" commenting that "the rigid moralists of those days put the act of bigamy on a level with adultery." *Ralston v. Ralston*, 2 Pa. D. 241, 243 (Phila. County Ct. 1893). See *infra* notes 275-294 and accompanying text for further discussions of bigamy in the United States.

274. See generally SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA* (2002), for an excellent and comprehensive treatment of polygamy and the Mormon religion in America.

federal statutes<sup>275</sup> and state constitutions,<sup>276</sup> in addition to their more usual placement in state statutory schemes regulating marriage or crime.

The status of polygamy—or more accurately polygyny<sup>277</sup>—as a religious practice<sup>278</sup> accounts for constitutional arguments that raise the First Amendment.<sup>279</sup> In 1879, the United States Supreme Court decided *Reynolds v. United States*,<sup>280</sup> a “test case” in which Mormon leaders had a “reasonable hope” of vindicating their First Amendment claims.<sup>281</sup> The Court, however, held that the constitutional limitation of congressional power to make laws that would prohibit the free exercise of religion did not encompass laws against the practice of polygamy. The doctrinal distinction, the Court pronounced, was that the free

275. The first federal legislation, The Morrill Anti-Bigamy Act, Act of July 1, 1862, ch.126, §1, made polygamous marriages a crime in the Territories and provided for its punishment. 12 Stat. 501, 501-02 (repealed 1910). It was followed by the Edmunds Act of 1882, Act of Mar. 3, 1887, ch. 397 §§ 1, 13, 17, 24, which sought to remedy the enforcement problems of the Act of July 1, 1862 by disenfranchising Mormons, making “unlawful cohabitation” criminal and, if they did not swear to abide by the laws against bigamy, making them ineligible for public office and jury duty. 24 Stat. 635, 637-38 (repealed 1978). The Edmunds-Tucker Act of 1887, Act of Mar. 3, 1887, ch. 397, §§ 1, 9, 11, 17, 13, 17, made unrecorded marriages felonies, forced wives to testify against husbands, disinherited children of polygamous marriages, and allowed for confiscation of virtually all Mormon church property. 24 Stat. 635, 637-38 (repealed 1978).

276. Utah and states bordering Utah have provisions in their state constitutions. See UTAH CONST. art. III, para. 1 (ensuring that “[p]erfect toleration of religious sentiment is guaranteed . . . [n]o inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited”). See also ARIZ. CONST. art. 20, para. 2 (stating that “[p]olygamous or plural marriages, or polygamous cohabitation, are forever prohibited within this State”); IDAHO CONST. art. I, § 4 (stating that “[b]igamy and polygamy are forever prohibited in the state, and the legislature shall provide by law for the punishment of such crimes”); N.M. CONST. art. XXI, § 1 (stating “[p]erfect toleration of religious sentiment shall be secured, and no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship. Polygamous or plural marriages and polygamous cohabitation are forever prohibited”); OKLA. CONST. art. I, § 2 (stating “[p]olygamous or plural marriages are forever prohibited”).

277. While “polygamy” denotes simultaneous marriages to more than one partner (from the Greek for many marriages), “polygyny” refers to a man having many women partners, derived from the Greek “gune” or “gyn” for women. “Polyandry” refers to a woman having many male partners. NEW WEBSTER’S DICTIONARY OF THE ENGLISH LANGUAGE 737-38 (1981)

278. While not one of the original tenets of the faith as contained in the 1830 text BOOK OF MORMON, the practice of polygamy, modeled on the Biblical character of Abraham, was pronounced by Mormonism’s founder, Joseph Smith, in the 1843 document, “Revelation of Celestial Marriage.” GORDON, *supra* note 274, at 20-23.

279. The so-called religion clauses of the First Amendment provide that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend. I. For contemporary discussions of polygamy prohibitions under the First Amendment, see generally Keith E. Sealing, *Polygamists Out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy are Unconstitutional Under the Free Exercise Clause*, 17 GA. ST. U. L. REV. 691 (2001) (arguing that free exercise clause should protect polygamy); Richard A. Vazquez, Note, *The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting Reynolds in Light of Modern Constitutional Jurisprudence*, 5 N.Y.U. J. LEGIS. & PUB. POL’Y 225 (2001-2002) (arguing that Utah’s commercial bigamy statute continues to be constitutional).

280. 98 U.S. 145 (1879).

281. GORDON, *supra* note 274, at 113-15.

exercise of religion pertains only to religious beliefs, not religious acts.<sup>282</sup> Yet the belief/conduct bifurcation only partially explains the Court's conclusion. Importantly, the Court stated that while "Congress was deprived of all legislative power over mere opinion," Congress was "left free to reach actions which were in violation of social duties or subversive of good order."<sup>283</sup> The post-Civil War Court noted that polygamy had always been "odious" among the "northern and western nations of Europe" and, until the Mormons, "almost exclusively a feature of the life of Asiatic and of African people,"<sup>284</sup> thus implicitly finding that polygamy was no mere difference of opinion.

The Court in *Reynolds* linked the forms of marriage with the forms of government<sup>285</sup> and arguably deemed polygamy inconsistent with democracy itself.<sup>286</sup> This sentiment was echoed a few years later in *Murphy v. Ramsey*,<sup>287</sup> in which the Court upheld the denial of civil rights such as voting to polygamists,<sup>288</sup>

282. *Reynolds*, 98 U.S. at 166. The Court found historical precedent for this distinction in the preamble of a statute drafted by Thomas Jefferson and adopted by the Virginia legislature stating:

[T]hat to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty. . . that is time enough for the rightful purposes of civil government for its officers to interfere when principles break into overt acts against peace and good order.

*Id.* at 163 (quoting 1 Jefferson Works 45 (N.Y. 1853)) (emphasis added). This belief/act principle persists in first amendment free exercise doctrine. See, e.g., *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990) (popularly known as "the peyote case" which upheld criminalization of use of peyote in challenge by members of Native American Church who used peyote as religious practice).

283. *Reynolds*, 98 U.S. at 164.

284. *Id.* As Sarah Gordon observes, the "invocation of race in a polygamy case had special meaning," because after the Civil War "polygamy's racial overtones migrated away from the slaveholders and onto those who had been enslaved." GORDON, *supra* note 274, at 142. The sexual activities of former slaves interested government officials, who urged monogamy, while also prohibiting miscegenation. *Id.* Thus, the analogy between Mormons and peoples from Asia and Africa "carried racial and racist messages as well as religious ones." *Id.*

285. *Reynolds*, 98 U.S. at 165-66 (stating "in fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or lesser extent, rests").

286. The Court referred to Professor Lieber for the proposition that "polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy." *Id.* at 166. Francis Lieber was "widely known as a dedicated antipolygamist." GORDON, *supra* note 274, at 140. As Keith Sealing recently noted:

Because the Court apparently took Professor Lieber's conclusion as a given, the Court made no attempt to explain why Mormon polygamy led to patriarchal system of social organization, why patriarchies are bad (or at least constitutionally infirm) or why polygamy leads to despotism . . . Lieber believed women in polygamous families failed to fully develop their individuality, and that the patriarchal structure of polygamous households led to an acceptance of state tyranny.

Sealing, *supra* note 279, at 713.

287. 114 U.S. 15 (1885).

288. *Murphy*, 114 U.S. at 36-37. The Court observes, in respect to Utah's bid for statehood: For certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, . . . than that which seeks to establish it on the basis

and in *Davis v. Beason*,<sup>289</sup> in which the Court upheld Idaho Territory's "test oath," requiring potential voters to swear they were not advocates of plural marriage.<sup>290</sup> The Court in *Murphy* found the denial of voting an efficacious and "suitable" effort to "withdraw all political influence from those who are practically hostile to its attainment,"<sup>291</sup> while the Court in *Davis* concluded the test oath was necessary to "prevent persons from being enabled by their votes to defeat the criminal laws of the country."<sup>292</sup> Thus, the threat of polygamy to democracy could be constitutionally addressed through anti-democratic means.<sup>293</sup>

Just as the notion of the importance of monogamy to American culture persists,<sup>294</sup> so too do the strategies the government might use to disenfranchise groups with minority sexual practices. The laws targeting Mormons reverberate in the efforts against gays and lesbians that culminated in Colorado's Amendment Two,<sup>295</sup> declared unconstitutional by the Supreme Court in

of the idea of the family, as consisting in and springing from *the union for life of one man and one woman in the holy estate of matrimony*; the sure foundation of all that is stable and noble in our civilization.

*Id.* at 45 (emphasis added).

289. 133 U.S. 333 (1890).

290. *Davis*, 133 U.S. at 346-47. The statute forbade bigamists, polygamists, or members of an organization that advocated such marriages to vote, and required an oath by the voter that he was not a member of an order that teaches the commission of these crimes. *Id.* at 335-36 (quoting IDAHO REV. STATS. 1887, § 501 (now codified at Idaho Code § 34-403 (2002))). In its discussion of polygamy, the Court stated that "few crimes are more pernicious to the best interests of society," *Davis*, 133 U.S. at 341, quoted from *Reynolds* the language that governmental allowance of monogamous or polygamous marriages is related to the "principles on which the government of the people, to a greater or less extent, rests," *id.* at 344 (quoting *Reynolds*, 98 U.S. at 165-66), and quoted from *Murphy v. Ramsey*, the language that monogamous marriage is the "sure foundation of all that is stable and noble in our civilization." *Davis*, 133 U.S. at 345 (quoting *Murphy*, 114 U.S. at 45).

291. *Murphy*, 114 U.S. at 45.

292. *Davis*, 133 U.S. at 348.

293. As Sarah Gordon notes, because the voting franchise was the "epitome of political expression," the Court in *Davis* held that a "propolygamy vote, a form of expression contrary (and dangerous) to legitimate political goals" would "pervert liberty into license by twisting freedom to produce despotism." GORDON, *supra* note 274, at 227. Yet such reasoning displays a "fundamentally antidemocratic logic" because the criminal law is insulated from change by voting. *Id.* at 228. The Court precluded any democratic alteration of the anti-polygamy laws "on the theory that the moral difference of Mormonism was itself evidence of the perversion of democracy." *Id.*

294. For example, in the latter part of this century, a federal appellate court rejected a challenge to Utah's polygamy laws and, relying on *Reynolds*, opined that monogamy is the bedrock upon which our society is built. *Potter v. Murray City*, 760 F.2d 1065, 1070 (10th Cir. 1985) (stating "[m]onogamy is inextricably woven into the fabric of our society. It is the bedrock upon which our culture is built").

295. The state constitutional amendment, entitled "No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation" provides:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all

*Romer*.<sup>296</sup> Justice Scalia noted the similarity in his acrimonious dissenting opinion.<sup>297</sup> For Scalia, polygamy and homosexuality are analogous,<sup>298</sup> and since the Court has found that the perceived social harm is a sufficiently legitimate government concern to render the targeting of polygamists constitutional,<sup>299</sup> the government should have the power to similarly address the perceived social harm of homosexuality by insulating local laws from the concentrated political power of sexual minorities.<sup>300</sup>

Conservative comparisons between polygamy and homosexuality have been vociferous<sup>301</sup> and have troubled same-sex marriage advocates,<sup>302</sup> some of whom have taken pains to distinguish between the two.<sup>303</sup> In one of the most cogent and comprehensive arguments, Maura Strassberg relies upon Hegelian theories of marriage to argue that polygamy is inherently inconsistent with the modern

respects self-executing.

COLO. CONST. art. II, § 30b (enjoined 1993) (2001) (although amendment was declared unconstitutional, it remains in text of Colorado Constitution).

296. *Romer*, 517 U.S. at 635.

297. *Id.* at 636, 648 (Scalia, J., dissenting). Commentators have described Scalia's dissent in *Romer* in similar terms. See, e.g., Steven H. Aden, *A Tale of Two Cities in the Gay Rights Kulturkampf: Are the Federal Courts Presiding Over the Cultural Balkanization of America?*, 35 WAKE FOREST L. REV. 295, 296 (2000) (describing Scalia's dissent as "acerbic"); Michael L. Closen, *The Decade of Supreme Court Avoidance of AIDS: Denial of Certiorari in HIV-AIDS Cases and its Adverse Effects on Human Rights*, 61 ALB. L. REV. 897, n.228 (1998) (describing it to be "inflammatory"); Brannon P. Denning & Glenn Harlan Reynolds, *Comfortably Penumbra*, 77 B.U. L. REV. 1089, 1096 (1997) (describing Scalia's dissent as "caustic"); Robert D. Dodson, *Homosexual Discrimination and Gender: Was Romer v. Evans Really a Victory for Gay Rights?*, 35 CAL. W. L. REV. 271, 303 (1999) (describing Scalia's dissent as "bitter"); Martha M. Ertman, *Sexuality: Contractual Purgatory for Sexual Minorities: Not Heaven, but Not Hell Either*, 73 DENV. U. L. REV. 1107, 1136 (1996) (describing Scalia's dissent as "vitriolic" and "blustery"); H.N. Hirsch, *Levels of Scrutiny, the First Amendment, and Gay Rights*, 7 LAW & SEX. 87, 87 (1997) (describing Scalia's dissent as "blistering"); Darren Lenard Hutchinson, *"Closet Case": Boy Scouts of America v. Dale and the Reinforcement of Gay, Lesbian, Bisexual, and Transgender Invisibility*, 76 TUL. L. REV. 81, 123 (2001) (describing Scalia's dissent as "stinging"); Keith E. Sealing, *Proposition 209 as Proposition 14 (As Amendment 2): The Unremarked Death Of Political Structure Equal Protection*, 27 CAP. U. L. REV. 337, 356 (1999) (describing Scalia's dissent as "scathing"); David M. Skover & Kellye Y. Testy, *LesBiGay Identity as Commodity*, 90 CAL. L. REV. 223, 228 (2002) (describing Scalia's dissent as "stinging").

298. *Romer*, 517 U.S. at 648.

299. Scalia quotes from both *Murphy v. Ramsey* and *Davis v. Beason*. *Id.* at 649, 651-52.

300. *Id.* at 645-46, 648-51.

301. See David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 56-60 (1997), for a discussion of how the polygamy issue was thrust upon same-sex marriage advocates arguing against DOMA.

302. Carlos Ball argues that the polygamy argument is especially vexing to political liberals because polygamous and same-sex marriages cannot be distinguished with reference to liberal notions such as equality, tolerance, and privacy, but can only be distinguished by reference to normative arguments regarding the value of marriage. Carlos Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871, 1878-79 (1997).

303. For examples of comparisons between polygamy and homosexuality see Corvino, *supra* note 240; Strasser, *supra* note 240.

liberal state while same-sex marriage is consistent.<sup>304</sup> On this view it is monogamy, rather than gender disparity, that is most essential for “the transcendent unity of marriage,” which “in turn grounds the transcendent unity of the state.”<sup>305</sup> Yet as Strassberg candidly notes, Hegelian theorizing regarding the relation between the state and marriage is suspect on two grounds: Hegel’s antidemocratic tendencies and sexism.<sup>306</sup> While Strassberg defends Hegel against claims of totalitarianism, which she refers to as “communitarianism,”<sup>307</sup> she admits Hegel’s anti-feminism,<sup>308</sup> but concludes it is merely attributable to the “realities” of his time.<sup>309</sup> Such a conclusion, however, begs the question of why Hegel’s sexism should be discounted as relative while his views on monogamy should be accorded objective status.

Moreover, Hegel’s opinions on marital forms should be examined with reference to Hegel’s very pronounced views on religion and race. In his penultimate work, *The Phenomenology of Mind*,<sup>310</sup> Hegel describes the evolution of “Mind”<sup>311</sup> as religion through the stages of primitive “natural religions” such as “Oriental religions” to aesthetic religions, culminating in “Revealed Religion,” which is Christianity.<sup>312</sup> As noted Hegel scholar Walter Kaufmann observes, Hegel considered Christianity supreme among religions, and the references to Judaism and Islam are as “patently unjust” as those of other writers of the period.<sup>313</sup> Likewise, Hegel’s racial views are no more enlightened than other European Enlightenment thinkers. Hegel’s *Philosophy of History* relegates Africans to a pre-political and prehistoric state since “universal spiritual laws (for example, that of the morality of the Family)” are not present in Africa.<sup>314</sup> Hegel’s exile of Africa from the “scope of the modern political imaginary”<sup>315</sup> and his elevation of Christianity as the most lofty and

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304. Maura Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy, and Same-Sex Marriage*, 75 N.C. L. REV. 1501 (1997).

305. *Id.* at 1529.

306. *Id.* at 1536-56.

307. *Id.* at 1537-47. See KARL POPPER, *THE OPEN SOCIETY AND ITS ENEMIES*, VOL. II. 27-88 (1966), for the most passionately made argument that Hegel’s theorizing is inextricably linked with totalitarianism, including the rise of German nationalism.

308. Strassberg, *supra* note 304, at 1547 (noting that Hegel posited that difference between women and men was similar to difference between plants and animals).

309. *Id.* at 1553.

310. G.W.F. HEGEL, *THE PHENOMENOLOGY OF MIND* (J.B. Baille trans., Harper Torchbooks 1967) (1807).

311. The German term used by Hegel is “Geist,” which may also be translated as “Spirit,” as it is in Miller’s subsequent translation. G.W.F. HEGEL, *THE PHENOMENOLOGY OF SPIRIT* (A.V. Miller trans., Oxford University Press 1967) (1807).

312. HEGEL, *THE PHENOMENOLOGY OF MIND*, *supra* note 310, at 685-85.

313. WALTER KAUFMANN, *HEGEL: REINTERPRETATION, TEXT, AND COMMENTARY* 273 (Walter Kaufmann trans., 1965). Kaufman further argues, however, that despite Hegel’s elevation of Christianity among religions, religion qua religion is subordinate to philosophy itself. *See id.* at 273-74 (noting that religion compared to philosophy is a “child compared to a man”).

314. PAUL GILROY, *AGAINST RACE: IMAGINING POLITICAL CULTURE BEYOND THE COLOR LINE* 56 (2000) (quoting G.W.F. HEGEL, *THE PHILOSOPHY OF HISTORY* 96 (trans., J. Sibree 1956)).

315. GILROY, *supra* note 314, at 65.



evolved of religions is consistent with his preference for monogamy as a marital form. Polygamy, as the province of Africans and non-Christians,<sup>316</sup> is not surprisingly maligned in favor of monogamy, the predominant form among white European Christians. The cultural bias of such a conclusion is apparent.<sup>317</sup>

Similarly, an argument that polygamy is objectionable as patriarchal is suspect.<sup>318</sup> The condemnation of polygamy as patriarchal by the United States Supreme Court in *Reynolds* in 1879—while the Court was upholding the disenfranchisement of women<sup>319</sup> and the exclusion of women from the practice of law<sup>320</sup>—suggests a startling hypocrisy. Any judicial favoring of a nonpatriarchal society of gender equality seems ludicrous when the Court soon thereafter pronounced it constitutionally permissible to construe the word “person” as being limited to males.<sup>321</sup>

Traditional Mormon polygamy may, in fact, be patriarchal,<sup>322</sup> but traditional monogamous marriage is likewise patriarchal. The unity of monogamous marriage may result in a single entity, but that entity is the man. As William Blackstone phrased it in his influential *Commentaries*, “the very being or legal existence of the woman is suspended during the marriage.”<sup>323</sup> This regime of coverture resulted in the lack of a married woman’s ability to own property, until state legislatures gradually began to implement changes in the antebellum years,<sup>324</sup> often motivated by desires other than gender equality<sup>325</sup> and provoking

316. *Reynolds*, 98 U.S. at 164.

317. See Adrienne Katherine Wing, *Polygamy from Southern Africa to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty-First Century*, 11 J. CONTEMP. LEGAL ISSUES 811 (2001), for some preliminary work attempting to interrogate global polygamy from a critical race feminist perspective.

318. See Strassberg, *supra* note 304, at 1617 (stating “the patriarchal doctrines underlying polygamy and its practice perpetuate inequalities of power between men and women,” although admitting that some “vestiges of patriarchy” persist in contemporary heterosexual marriages); see also Ball, *supra* note 302, at 1900 (stating that normative argument against polygamy is its historical association with subordination of women to interests of men).

319. *Minor v. Happersett*, 88 U.S. 162, 167 n.4 (1875).

320. *Bradwell v. Illinois*, 83 U.S. 130, 139 (1873).

321. *Ex parte Lockwood*, 154 U.S. 116 (1894) (rejecting constitutional challenge to Virginia’s policy of excluding women from practice of law, holding that state courts could construe word “person” in state statute “confined to males”).

322. See RICHARD S. VAN WAGONER, *MORMON POLYGAMY: A HISTORY* 89-102 (2d ed. 1989), for a balanced view of the legal and practical effects of traditional Mormon polygamy on women.

323. 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*442.

324. The gradual nature of these changes is illustrated by Isabel Marcus in her excellent history of marriage and divorce reform in New York. Isabel Marcus, *Locked In and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 BUFF. L. REV. 375, 390-414 (1989). New York’s original 1848 Married Women’s Property Act was limited in its applicability to the “small segment of married women in New York who were the daughters of the landed elite.” *Id.* at 402. Thereafter, “incremental legislative activity” extended the rights of married women to convey and devise real and personal property (1849), individually own savings deposits (1850), and vote as stockholders in elections (1858). *Id.* at 402 (citations omitted). The 1860 amendments greatly expanded married women’s property rights to include the ability of women to sue in their own names, to conduct separate businesses and contract with respect to them, and to keep their own earnings. *Id.* at 403.

anxiety about the consequences of women's financial independence.<sup>326</sup> Even after married women were able to own property, the vestiges of coverture continued for more than a century in legal customs and rules regarding surnames,<sup>327</sup> domicile,<sup>328</sup> and availability of credit.<sup>329</sup> More devastating for this

325. The insulation of property from the husband's creditors could be accomplished by transferring the property into the married woman's name. The 1848 New York Married Women's Property Act, codified as N.Y. DOM. REL. LAW § 50 (McKinney 1999), was introduced "by a conservative judge from St. Lawrence who wanted to safeguard his wife's property from his creditors." Marcus, *supra* note 324, at 401 n.94, (citing Speth, *The Married Women's Property Acts, 1839-1865: Reform, Reaction or Revolution*, 2 WOMEN AND THE LAW: A SOCIAL HISTORICAL PERSPECTIVE 69, 78 (D. Weisberg ed., 1982)). As another commentator states: "It is worth noting that the two major [Married Women's Property] statutes of 1848 and 1860 followed the depressions of 1839-43 and 1857. Married women's property laws, like laws easing bankruptcy, carried the possibility of saving some of the family's assets." NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH CENTURY NEW YORK* 122 (1982).

In his comprehensive work with a national focus, Professor Chused similarly links the first wave of married women's property acts throughout the nation with the harsh economic climate of the 1840s, interestingly noting that acts which concerned women's ownership of real property were passed in agricultural states and women's interest in slaves was included in Southern states, while statutes in urbanized states covered women's property more generally. Richard Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L. J. 1359, 1400-04 (1983).

326. The consequences of the ability of married women to own property included the breakdown of the family, with women leaving their husbands on a "whim." See, e.g., *Schindel v. Schindel*, 12 Md. 294, 307-08 (Md. 1858) (quoted in Marcus, *supra* note 324, at 405-06 n.116) (asking rhetorically "[w]ould not every wife, with property enough to sustain herself independently of her husband, when becoming impatient of his restraint and control, however necessarily exercised over her, take the refuge such a law would give her, and abandon her husband and her home?").

327. The legal requirements of married women adopting their husbands' names continued until the 1970s. Compare *Forbush v. Wallace*, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd*, 405 U.S. 970 (1972) (upholding as reasonable constitutional regulation requiring married female drivers to use their husband's surname as their legal name, because state has significant interest in overseeing its licensees and state has rational basis—administrative convenience—for such regulation), with *Walker v. Jackson*, 391 F. Supp. 1395 (E.D. Ark. 1975) (rejecting as unconstitutional state constitutional provision which required female voters to prefix their names with either "Mrs." or "Miss" and interpretation of that provision as requiring married women to use their husband's surnames as a violation of Equal Protection clause).

The custom among married women continues to dominate. See, e.g., Kif Augustine-Adams, *The Beginning of Wisdom is to Call Things by their Right Names*, 7 S. CAL. REV. L. & WOMEN'S STUD. 1, 11 (1997) (describing her own experiences and noting that eighty to ninety percent of young women expect to take their husband's surnames upon marriage). This is, perhaps, linked to issues pertaining to the naming of the couples' children. See, e.g., Beverly Seng, *Like Father, Like Child: The Rights of Parents in Their Children's Surnames*, 70 VA. L. REV. 1303, 1323-30 (1984) (discussing and criticizing paternal surname presumption).

For an excellent overview of the historical basis for married women adopting their husband's surnames, the feminist litigation against this practice, and the continued legal and social problems regarding paternal naming of children, see Omi [Morgenstern Leissner], *The Name of the Maiden*, 12 WIS. WOMEN'S L.J. 253 (1997); Omi [Morgenstern Leissner], *The Problem That Has No Name*, 4 CARDOZO WOMEN'S L.J. 321 (1998); Esther Suarez, *A Woman's Freedom to Choose her Surname: Is it Really a Matter of Choice?*, 18 WOMEN'S RTS. L. REP. 233 (1997).

328. It was not until 1988 that the American Law Institute revised the common law position that married women's domicile was not dependent upon that of her husband. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 21 (1998). Courts, however, had earlier invalidated restrictions on married

patriarchal argument against polygamy, however, is the fact that current marriage statutes, the Vermont civil union statute, and domestic partnership ordinances and policies are not specifically aimed at polygamy, but likewise prohibit polyandry. Under the current laws, the same consequences flow no matter the gender of the person who claims multiple spouses or partners. There is no room for any notion that links patriarchy to enforced monogamy for women.<sup>330</sup>

Additionally, it is important to consider proscriptions against multiple marriages as separate from the controversial history of polygamy. "Simple bigamy" has its own politics. For one scholar, bigamy is a "crime of mobility" that was fostered by mass immigration to the United States and then migration during the westward expansion.<sup>331</sup> This phenomenon was not merely geographical; it brewed in a cauldron of individualism, class relations, and gender roles,<sup>332</sup> as illustrated by one of the Supreme Court's most quoted cases on the sanctity of marriage, *Maynard v. Hill*.<sup>333</sup> Racism also inflected bigamy. As Katherine Franke has demonstrated, the enforcement of marital monogamy against freed slaves during Reconstruction was a means of domesticating African-Americans and controlling their presumed "primitive" sexuality.<sup>334</sup>

Perhaps due to the political importance of preventing bigamy, technicalities

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women's domiciles. See, e.g., *Samuel v. Univ. of Pittsburgh*, 375 F. Supp. 1119 (W.D. Pa. 1974) (declaring unconstitutional in-state tuition determination that made married woman's domicile dependent on husband's domicile).

329. See *supra* notes 323-26 and accompanying text for a discussion of vestiges of coverture and availability of credit for women.

330. Such a view might rest upon theories regarding the historical interconnections between the rise of monogamous formations, patriarchy, and capitalism. As most famously expressed by Engels: [Monogamy] was the first form of the family based not on natural but on economic conditions, namely, on the victory of private property over original, naturally developed, common ownership. The rule of man in his family, the procreation of children who could only be his, destined to be the heirs of his wealth . . . it appears as the subjection of one sex by the other.

FREDERICK ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY, AND THE STATE* 98-99 (Pathfinder Press 1972) (1884). See GERDA LERNER, *THE CREATION OF PATRIARCHY* (1986), for a more sophisticated and anthropologically sound view, which is nevertheless largely consistent with that of Engels' hypothesis.

331. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 193 (1993).

332. *Id.* at 193-201 (discussing "crimes of mobility" generally and bigamy in particular). Friedman divides Nineteenth Century bigamists into two broad categories: the swindlers, who married women for money, and the "restless or faithless husbands" who left their unsatisfying first marriages and moved on. *Id.* at 198. Friedman notes that although there were a few cases of women as bigamists, for the most part, women were victims of bigamy because of their limited social roles, which valued domesticity and female chastity. *Id.* at 199-201.

333. 125 U.S. 190 (1888). Although not discussed by Friedman in this context, this appeal from the Territory of Washington arises from Maynard's leaving his wife of twenty-two years in Vermont, moving west, claiming land as a married man, and then receiving a territorial divorce decree and marrying another woman. See *infra* notes 416-32 and accompanying text for further discussion of *Maynard*.

334. Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 *YALE J.L. & HUMAN.* 251, 252 (1999).

often prevail over subjective intentions. In the Reconstruction context, a former slave could be unknowingly deemed “ipso facto married” to the person with whom he or she was living on a statute’s effective date; a marriage to another person constituted the crime of bigamy.<sup>335</sup> In addition to the irrelevancy of not knowing one was married, one’s belief that the previous marriage had been terminated might also be irrelevant. For example, in its 1945 decision in *Williams v. North Carolina*,<sup>336</sup> the United States Supreme Court upheld convictions for bigamy regardless of the couple’s belief in the validity of their Nevada divorces.<sup>337</sup> While this imposition of strict liability in the criminal context continues, it remains controversial and unsettled.<sup>338</sup> Civil repercussions for bigamy, which result in a void marriage and thus a disentitlement to financial benefits of marriage, persist unabated.<sup>339</sup>

Finally, it is significant that the prohibitions against bigamy and polygamy do not currently encompass sequential bigamy and polygamy.<sup>340</sup> One may marry as many times during one’s life as one desires—as a substantial proportion of Americans do<sup>341</sup>—as long as each previous marriage has been dissolved through

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335. See *id.* at 287-88 (discussing *State v. Melton*, 26 S.E. 933 (N.C. 1897), and bigamy in the emancipated slave context); *Kirk v. State*, 65 Ga. 159 (1880) (discussing bigamy connections of two former slaves who married women other than those they were living with on “effective date” of state’s marriage law).

336. 325 U.S. 226 (1945).

337. *Williams*, 325 U.S. at 238. As the Court stated, by traveling from North Carolina to Nevada to divorce their respective spouses and then returning to their previous home in North Carolina, the petitioners “assumed the risk that this Court would find that North Carolina justifiably concluded that they had not been domiciled in Nevada.” *Id.* at 238. In his vigorous dissenting opinion, Justice Black, joined by Justice Douglas, criticized the majority’s decision as one which would “cast a cloud over the lives of countless numbers of the multitude of divorced persons in the United States.” *Id.* at 262 (Black, J., dissenting).

338. In addition to the disagreement voiced within the opinions of *State v. Williams*, Justice Traynor’s influential opinion for the California Supreme Court in *People v. Vogel*, 299 P.2d 850 (Cal. 1956), declared a good faith belief that the previous marriage had been terminated to be a defense to the state bigamy statute, a conclusion disputed by the dissenting justice who opined that “specific intent to commit the crime of bigamy is not required by statute expressly nor by reasonable interpretation . . . a person remarries at his peril.” *Id.* at 857 (Shenk, J., dissenting). Compare *Stuart v. Commonwealth*, 397 S.E.2d 533, 533-34 (Va. Ct. App. 1990) (holding that defendant’s reasonable belief that his prior marriage was ended by divorce is not defense to bigamy because statute under which he was convicted does not contain language requiring proof of specific intent to violate prohibitions), with *State v. Seek*, 37 P.3d 339, 342-43 (Wash. Ct. App. 2002) (reversing bigamy conviction after examining legislative intent of statute and finding that statute’s intent provision is ambiguous and thus rule of lenity applies).

339. For example, in *Croskey v. Ford Motor Co.-UAW*, 28 Employee Benefits Cas. 1438, 2002 WL 974827 (S.D.N.Y. May 6, 2002), the district judge denied motions for summary judgment in a dispute regarding the payments of pension benefits to the surviving spouse when two women claimed that status. *Id.* at \*2. What becomes clear from the opinion is that although each of the women seems to have viable claims to the benefits, any sort of equitable distribution or division is unthinkable.

340. But see *supra* notes 267-68 for a description of common law statutes that declare bigamous any remarriage of party guilty of adultery until death of spouse, even in cases of legal divorce.

341. According to government statistics, of the total of 2,443,489 couples who married in the United States in 1990, almost half—forty-six percent—included a person who was not marrying for the first time. In twenty percent of the total number of marriages, both spouses were previously divorced.

death or legal proceedings.

In sum, from an equality perspective, same-sex marriage advocates should not seek distance from plural marriage or bigamy. It may be understandable that same-sex quasi-marital devices would seek to emulate marriage as closely as possible, yet this emulation raises serious equality concerns. Most obviously, the historical confluence of proscriptions against polygamy as practices of Mormons and “Asiatic and African people,”<sup>342</sup> raises religious, racial, and national origin categories that would merit strict scrutiny under traditional equal protection doctrine and to which sexual minorities should be sympathetic. Perhaps more importantly, however, is that a more expansive notion of equality requires that when we advocate for relationship law reform, whether these reforms take the configuration of marriage, civil unions, domestic partnerships, or other forms,<sup>343</sup> we must measure the success of our efforts in terms of who and what we are excluding.

In the realm of intimate relations, the exclusion of heterosexuals, those who may be related to each other, and simultaneous relations engender the same degree of equality problems as does the exclusion of lesbians and other sexual minorities. To reach such a conclusion is not necessarily to accept *Adarand*'s<sup>344</sup> ahistorical and individualistic version of equality or to adopt a stewardship of other disfavored groups. Instead, our reforms should embrace all of us—including the bisexual feminist with a political objection to marriage, the lesbian who wants to marry her aunt, and the three lesbians in a “collective.” Equality amongst all disfavored groups is as important as our equality with heterosexuals.

### C. Compulsory Matrimony

The unequal exclusion from marital and quasi-marital forms might not be relevant if such legal relationships did not bestow a variety of benefits. Indeed, the recitation of the tangible and intangible benefits of marriage is an integral part of the argument for same-sex marriage. The legal benefits of marriage constituted the grounding of the Vermont Supreme Court's rationale that denial of marital advantages to same-sex couples violated the state constitution's common benefits clause.<sup>345</sup> The benefits of marriage support numerous

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Sally Clarke, *Advance Report of Final Marriage Statistics, 1989 and 1990*, 43 U.S. DEP'T OF HEALTH AND HUMAN SERVICES MONTHLY VITAL STATISTICS REPORT No. 12(S) 1-5 (Jul. 14, 1995).

342. *Reynolds*, 98 U.S. at 164.

343. An exemplary model is Martha Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 123-31 (2001). Suggesting corporate models for intimate relationships, Martha Ertman analogizes limited liability companies to polyamorous relationships, importantly seeking to denaturalize heterosexual marriage and provide morally neutral rules for forming and dissolving relationships. *Id.*

344. *Adarand*, 515 U.S. at 200. See *supra* notes 46-49 and accompanying text for discussions of *Adarand*.

345. See *supra* notes 168-81 and accompanying text for a discussion of *Baker v. State*. See also *Tanner v. Oregon Health Scis. Univ.*, 971 P.2d 435, 437 (Or. App. 1998) (holding that denial of benefits to domestic partners of employees violated Article 1, section 20, of Oregon Constitution, which forbids inequality of privileges or immunities not made available upon same terms to any citizen

arguments for same-sex marriage and quasi-marital remedies,<sup>346</sup> including conservative ones.<sup>347</sup> In addition to tangible benefits, the social value of marriage sustains the arguments by some same-sex marriage theorists that anything other than marriage is less than marriage and thus unacceptable.<sup>348</sup> Obviously, legally sanctioned benefits and social approval for marriage entails corresponding legal disadvantages and social disapproval for the unmarried. In this way, marriage is coercive.

Like compulsory heterosexuality, compulsory matrimony “needs to be recognized and studied as a *political institution*.”<sup>349</sup> While advocates of same-sex

or class of citizens).

346. See, e.g., WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* (The Free Press 1996) 66-70 [hereinafter ESKRIDGE, *THE CASE*] (listing benefits of marriage and arguing that “when the state denies lesbian and gay couples a marriage license” it is “denying those couples dozens of ongoing rights and privileges that are by law associated with marriage”); *Report, Same-Sex Marriage in New York*, 52 *THE RECORD* (Committees on Lesbians and Gay Men in the Profession, Civil Rights, and Sex and Law, of the Bar of the City of New York), 1997, at 343, 345, 358-64 (arguing in favor of same-sex marriage and noting that benefits and burdens of marriage are of great significance and including “catalogue” of rights and responsibilities of marriage); David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 *MICH. L. REV.* 447, 485-91 (1996) (discussing benefits and regulations of marriage and concluding that they should apply to long term gay and lesbian couples); Debbie Zielinski, *Domestic Partnership Benefits: Why Not Offer Them to Same-Sex Partners and Unmarried Opposite Sex Partners*, 13 *J.L. & HEALTH* 281, 296-98 (1999) (setting forth list of rights and tangible benefits available automatically to married couples and contrasting this list with schemes of benefits currently offered through many domestic partnership benefits programs); Carey Goldberg, *Gay Couples are Welcoming Vermont Measure on Civil Union*, *N.Y. TIMES*, March 18, 2000, at A1 (quoting one gay man as saying there has been shift towards marriages because “people realize there are real legal tangible benefits”).

347. See, e.g., Darren Bush, *Moving to the Left by Moving to the Right: A Law & Economics Defense of Same-Sex Marriage* 22 *WOMEN’S RTS. L. REP.* 115, 117 (2001) (arguing that marriage is economic relation “like other market transactions upon which [law and economic] scholars—and conservatives generally”—prefer to leave as unregulated as possible).

348. See Cox, *Return Home*, *supra* note 126 and accompanying text; Wolfson, *supra* note 162 and accompanying text for discussion of same-sex marriages and their Constitutional implications. See also Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 *GEO. L.J.* 1871, 1930 (1997) (stating “[g]ays and lesbians seek not only the tangible benefits that would accompany a recognition of same-sex marriage, but also the societal acknowledgment of the humanity and normative goodness that they believe inheres in many of their relationships”); Sheila Rose Foster, *The Symbolism of Rights and the Costs of Symbolism: Some Thoughts on the Campaign for Same-Sex Marriage*, 7 *TEMP. POL. & CIV. RTS. L. REV.* 319, 320 (1998) (arguing that although material benefits are compelling reason for gays and lesbians to seek marriage rights, material benefits not primary reason this right being sought).

349. See ADRIENNE RICH, *Compulsory Heterosexuality and Lesbian Existence*, in *BLOOD, BREAD, AND POETRY: SELECTED PROSE 1979-1985*, 23, 51, 57 (1986) (defining “compulsory heterosexuality” as heterosexuality that “has been both forcibly and subliminally imposed on women” and that women’s resistance to it can be described along “lesbian continuum”). The term “compulsory heterosexuality” has been adopted by legal scholars working on a wide array of sexuality issues. See, e.g., Mary Becker, *Strength in Diversity: Feminist Theoretical Approaches to Child Custody and Same-Sex Relationships*, 23 *STETSON L. REV.* 701, 730-31 (1994) (arguing “biases against same-sex relationship are part of system of compulsory heterosexuality” because homosexual relations do not have traditional female subordinate roles); Patricia A. Cain, *Lesbian Perspective, Lesbian Experience, and the Risk of Essentialism*, 2 *VA. J. SOC. POL’Y & L.* 43, 71 (1994) (arguing that ‘compulsory heterosexuality’ is certainly part of sexist oppression of women so long as women are constructed as

marriage may “feel they are, in their personal experience, the precursor of a new social relations,” Adrienne Rich’s call to heterosexual feminists regarding compulsory heterosexuality is apposite.<sup>350</sup> It is important to acknowledge that

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sexual objects (or breeders) for men, “and [c]ompulsory heterosexuality is simply one of tools used to construct house of patriarchy”); Cheshire Calhoun, *Denaturalizing and Desexualizing Lesbian and Gay Identity*, 79 VA. L. REV. 1859, 1873-75 (1993) (discussing lesbian continuum and resistance to compulsory heterosexuality in context of same-sex romantic love); Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467, 1493 n.109 (2000) (stating that exclusion of gay men and lesbians from military is part of “a disciplinary regime of compulsory heterosexuality”); Ruth Colker, *Feminism, Sexuality, and Self: a Preliminary Inquiry into the Politics of Authenticity*, 68 B.U. L. REV. 217, 257-59 (1988) (book review) (discussing compulsory heterosexuality and authenticity and concluding that heterosexual relations can be authentic choice for women); William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1380-81 (2000) (arguing that compulsory heterosexuality undermines women’s sexuality); Paula L. Ettelbrick, *Domestic Partnership, Civil Unions, or Marriage: One Size Does Not Fit All*, 64 ALB. L. REV. 905, 908 (2001) (discussing resistance of lesbians in 1970s to compulsory heterosexuality); Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 183 (2001) (stating “degree to which social preferences and prohibitions—otherwise known as compulsory heterosexuality—contribute to the ‘fact’ stated by the first proposition has become relatively accepted within feminist, and certainly queer, theory circles”); Kris Franklin & Sarah E. Chinn, *Lesbians, Legal Theory and Other Super Heroes*, 25 N.Y.U. REV. L. & SOC. CHANGE 301, 310 n.42 (1999) (book review) (discussing Rich’s argument that women resisted compulsory heterosexuality by creating primary relationships with women along lesbian continuum); Christopher N. Kendall, *Gay Male Pornography after Little Sisters Book and Art Emporium: A Call for Gay Male Cooperation in the Struggle for Sex Equality*, 12 WIS. WOMEN’S L.J. 21, 49 (1997) (questioning gay male pornography’s abilities and inabilities to combat “compulsory heterosexuality”); Tamara Packard & Melissa Schraibman, *Lesbian Pornography: Escaping the Bonds of Sexual Stereotypes and Strengthening Our Ties to One Another*, 4 UCLA WOMEN’S L.J. 299, 315-16 (1994) (arguing “[f]rom birth, dominant culture indoctrinates women into compulsory heterosexuality through fairy tales, television, movies, and mainstream pornography” and that lesbians have struggled and continue to struggle regarding sexuality, but criticizing lesbian continuum notion for denying lesbian sexuality); Darren Rosenblum, *“Trapped” in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 512 (2000) (noting relationship between compulsory heterosexuality and gender identity); Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1467 (1992) (stating “[h]omophobic violence aims to regulate the erotic economy of contemporary American society, or more specifically, to enforce the institutional and ideological imperatives of what Adrienne Rich has termed ‘compulsory heterosexuality’”); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CAL. L. REV. 1, 234 (1995) (comparing Native American “pan-sexuality” with Euro-American “compulsory heterosexuality”). See also Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 247 (1994) who states:

A lesbian fails to provide the emotional nurturance and solace from the difficult world of maleness that, many men feel, women exist in order to provide; she signifies that there is no way back from that world. The prohibition of lesbianism has an unmediated, direct relation to gender inequality. Adrienne Rich argues that this prohibition is best understood as one item in an arsenal of male-created institutions that enforce “compulsory heterosexuality,” institutions that have the purpose and effect of guaranteeing that men will continue to have physical, economic, and emotional access to and control over women.

350. See Rich, *supra* note 349, at 35 (discussing importance of examining heterosexuality as “political institution”). Rich seeks to “encourage heterosexual feminists to examine heterosexuality as a political institution that disempowers women—and to change it.” *Id.* at 23. She argues that “when we look hard and clearly at the extent and elaboration of measures designed to keep women within a

matrimony, like heterosexuality, may not be a “preference at all but something that has had to be imposed, managed, organized, propagandized, and maintained by force.”<sup>351</sup> While some same-sex marriage advocates have theorized same-sex marriage as an antidote to compulsory heterosexuality,<sup>352</sup> the compulsory nature of matrimony itself remains disputed<sup>353</sup> or unacknowledged.<sup>354</sup> Yet the failure to examine matrimony, like the failure to examine heterosexuality “as an institution is like failing to admit that the economic system called capitalism or the caste system of racism is maintained by a variety of forces.”<sup>355</sup>

The most obvious of these forces cohere into a legal regime that provides benefits to marital partners. While the Vermont Supreme Court listed numerous tangible benefits,<sup>356</sup> one of the most pronounced benefits occurs because of the perverse system of health insurance in the United States that links medical benefits with employment.<sup>357</sup> Given the importance of health care, same-sex

male sexual purlieu, it becomes an inescapable question whether the issues feminists have to address is not simple ‘gender inequality’ nor . . . mere ‘taboos against homosexuality,’ but the enforcement of heterosexuality for women as a means of assuring male right of physical, economic, and emotional access.” *Id.* at 49-50.

351. *Id.* at 50. Rich argues that for women, heterosexuality must be “imposed, managed, organized, propagandized and maintained by force.” *Id.*

352. See, e.g., ESKRIDGE, *THE CASE*, *supra* note 346, at 65 (stating that “[m]arriage, in short, is the last legal bastion of compulsory heterosexuality”) (emphasis in original); Barbara J. Cox, *The Lesbian Wife: Same-Sex Marriage as an Expression of Radical and Plural Democracy*, 33 CAL. W. L. REV. 155, 162-65 (1997) (arguing that “equal marriage” displaces compulsory heterosexuality and that “[e]very time I assert that I am married, I am claiming that the norm of heterosexuality cannot control me”).

353. See, e.g., TESS AYERS & PAUL BROWN, *THE ESSENTIAL GUIDE TO LESBIAN AND GAY WEDDINGS* 5 (1994) (stating “[n]obody’s saying that if you’re *allowed* to get married, you *have* to get married”); E.J. GRAFF, *WHAT IS MARRIAGE FOR?* 189 (Beacon Press 1999) (arguing that “opening marriage to same-sex couples would scarcely force marriage on *all* lesbians and gay men”); Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15, 58 (2000) (noting that within confines of institution like marriage, “the lesbian and gay community can chart its own course”).

354. See, e.g., ESKRIDGE, *THE CASE*, *supra* note 346, at 66 (noting that state “encourages” marriage, but not considering whether this encouragement might amount to compulsion); Cruz, *infra* note 453 and accompanying text for a discussion of marriage as expressive conduct.

355. See Rich, *supra* note 349, at 51 (noting that questioning heterosexuality would be rewarding).

356. See *Baker*, 744 A.2d at 883-84 (listing benefits of marriage).

357. The vast majority of Americans, roughly two-thirds of the population, pay for health care with the assistance of some private third party financing scheme, generally purchased through their employment under the incentives of federal tax exemption for those benefits. Kenneth R. Wing, *Health Care Reform In The Year 2000: The View From The Front Of The Classroom*, 26 AM. J.L. & MED. 277, 286 (2000) (citing Health Care Fin. Admin., National Health Care Expenditures Projections: Table 3b, National Health Care Expenditures, Percent Distribution and Per Capita Amounts by Source of Funds available at <http://www.hcfa.gov/stats/NHE-Proj/proj1998/tables/table3b.htm> (last modified July 12, 1999)). Although Professor Wing does not use the term perverse, he characterizes the United States health care system thusly:

We are Americans and we have a uniquely American way of delivering and financing health care, both in the sense that our way is unlike that in any other country, and in the sense that it reflects some very basic American characteristics. We are Americans and not Canadians



marriage and domestic partnership advocacy has understandably focused on the injustice of not allowing a same-sex partner of an employee to have the same access to health benefits as would a legal spouse of the employee.<sup>358</sup> Yet the larger injustice—the lack of universal health care—remains largely imperceptible.<sup>359</sup> Instead, the imposition of matrimonial devices becomes the proposed—and very partial—“solution” for the travesty of the health care system.<sup>360</sup> Marriage is the “cover,” which is itself an assimilationist demand that obscures the realities of deeper inequalities.<sup>361</sup> Although the remedy of marriage

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or Swedes or inhabitants of any of the multitude of countries that accept socialized health care more readily. We are Americans and not free marketeers or libertarians, at least not to the extent that we could ever buy and sell health care in the same way we are told we would buy and sell widgets. No one set out to create American health care delivery and financing the way that it is today. It can not be justified in terms of any one person's theoretical model or any organized set of principles.

*Id.* at 292.

358. *See, e.g., Univ. of Alaska v. Tumeo*, 933 P.2d 1147, 1152 (Alaska, 1997) (holding that University's health benefits program unlawfully discriminated on basis of marital status because, by providing added health care coverage for married employees but not for unmarried employees, University compensates married employees to greater extent than it compensates unmarried employees); *ESKRIDGE, THE CASE*, *supra* note 346, at 67 (noting that “especially employer spousal benefits” are tangible economic advantages associated with same-sex marriage); Paula L. Ettelbrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J.L. & POL'Y 107, 142-43 (1996) (stating “[domestic partnership] establishes a civil rights remedy to the pervasive practice of disproportionately providing married employees with health insurance, paid bereavement, family sick leave and other ‘family’ based benefits that are denied to unmarried employees and their families”); Jonathan Andrew Hein, *Caring For the Evolving American Family: Cohabiting Partners and Employer Sponsored Health Care*, 30 N.M. L. REV. 19, 39 (2000) (asserting that equitable considerations mandate extension of benefits to domestic partners and pointing out that failure to extend health care benefits to committed, unmarried partners violates the principle of equal compensation for equal work).

359. *Cf. Wolfson, supra* note 162, at 605 (stating that “we can, and should, advocate for universal health care alongside marriage, as well as alongside domestic partnership”).

360. For example, although “up to 70 million Americans may lack health insurance,” and without insurance health care is largely unavailable, “*domestic partner benefits, although applicable to a proportionately small segment of society, provide a significant means of reducing the economic burden presented by the uninsured.*” Hein, *supra* note 358, at 25-26 (emphasis added).

361. As Kenji Yoshino explains it, the assimilationist strategy of “covering” is different from “passing” or “converting” because in “covering” a “group is permitted both to retain and articulate its identity as long as it mutes the difference between itself and the mainstream.” Yoshino, *Don't Ask, supra* note 6, at 500. For example, “covering” occurs when “a black woman is told that she is ‘too black’ or ‘too feminine.’” *Id.* at 501. This demand to cover has a subtle and pervasive presence in equal protection doctrine. *Id.* at 502. Further:

It is not captured in any discrete factor, but rather in a classification-based—as opposed to class-based—view of equal protection. A classification-based view of equal protection seeks to treat all classes created by a classification the same, while a class-based view privileges the disadvantaged class(es) created by a classification. Because it tends to ignore differences between the classes created by a classification, the classification-based view often results in the demand to cover. The ideal of ‘color blindness’ is perhaps the best example of such a classification-based view. In attempting to be color-blind, the judiciary often garners results that not only ignore the real disparities between whites and blacks but evaluate blacks by implicitly white standards. In order to succeed, blacks are forced to meet those standards, and thereby must mute any cultural and historical differences between whites and blacks. In

is individualized, that does not mean marriage is not “imposed, managed, organized” with reference to political institutions such as matrimony, capitalism, and the liberal state.<sup>362</sup>

The tangible benefits of matrimony<sup>363</sup> accrue not only when there is a medical problem,<sup>364</sup> but also when the relationship is terminated, either by death<sup>365</sup> or separation.<sup>366</sup> Although not all matrimonial benefits are economic,<sup>367</sup> for the most part, legal benefits arose from the premise of marriage as a relationship of economic dependency and on society as one of capitalist inequality.<sup>368</sup> The idea of matrimony as an “economic partnership,” if not always

such a scenario, blacks are not being asked to convert or to pass, but they are being asked to cover.

*Id.* at 502-03 (footnotes omitted).

362. For a critique of health care reform and the liberal state, see Kevin P. Quinn, S.J., *Viewing Health Care as a Common Good: Looking Beyond Political Liberalism*, 73 S. CAL. L. REV. 277, 285 (2000), arguing that “true reform will require looking beyond individual choices made by bargain-hunters in the medical marketplace and beginning to think in the ‘first person plural,’” rejecting among other things, the concept of the neutral liberal state which allows market forces to regulate access to goods.

363. This is not to imply that the “benefits” of matrimony are always subjectively experienced as positive. If one party is economically advantaged in divorce or other termination of the relationship proceedings, this occurs in relation to the other party, who is necessarily economically disadvantaged. Moreover, third parties, such as creditors, may seek to become akin to third party beneficiaries to the marital contract. *See, e.g.*, *Queen’s Med. Ctr. v. Kagawa*, 967 P.2d 686, 700-01 (Haw. Ct. App. 1998) (holding that woman who filed for divorce was nevertheless liable to hospital for medical treatment costs incurred by her husband before his death based on theory that marriage is economic partnership); Stephen A. Zorn, *Innocent Spouses, Reasonable Women and Divorce: the Gap Between Reality and the Internal Revenue Code*, 3 MICH. J. GENDER & L. 421, 429-33 (1996) (discussing difficulty of proving one is “innocent spouse” and thus not liable for tax consequences on joint return).

364. In addition to health care costs, other health care issues include access and decision-making. The court in *Baker* specifically included the right to hospital visitation and other rights incident to the medical treatment of a family member. *Baker*, 744 A.2d at 884.

365. These benefits include the right to receive a portion of the estate of a spouse who dies intestate and protection against disinheritance through elective share provisions; preference in being appointed as the personal representative of a spouse who dies intestate; the right to bring a lawsuit for the wrongful death of a spouse; the right to bring an action for loss of consortium; the right to workers’ compensation survivor benefits; and the right to spousal benefits statutorily guaranteed to public employees, including health, life, disability, and accident insurance. *Id.* at 883-84.

366. For the court in *Baker*, these benefits are phrased as “the right to receive, and the obligation to provide, spousal support, maintenance, and property division in the event of separation or divorce.” *Id.* at 884.

367. One of the most interesting arguably non-economic benefits is the spousal testimonial privilege, which protects and can even prohibit one spouse testifying against the other. *See id.* at 884 (listing as benefit “the right to claim an evidentiary privilege for marital communications”). *See also* MILTON C. REGAN, JR., *ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE* 89-135 (1999), for a doctrinal and theoretical discussion of the testimonial privilege in the context of the marital relationship.

368. Indeed, Martha Ertman has argued that there should be a debtor/creditor relationship between the spouses that would value homemaker contributions to family wealth governed by Article 9 of the Uniform Commercial Code. Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women’s Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17, 19-20 (1998). *See also* Martha M. Ertman, *Reconstructing Marriage: An InterSEXional Approach*, 75 DEN. U. L.

an equal one, is the prevalent modern view.<sup>369</sup>

One of the consequences of this view is that those who do not participate in the “economic partnership” of matrimony may suffer financially. This financial disadvantage may occur through the workings of capitalism or it may be more directly influenced by the state. For those who are employed, the substantial portion of wages paid in “fringe” benefits—up to forty percent of total compensation<sup>370</sup>—is considerably lessened if one does not have a partner or dependents eligible for these benefits. On this view, those who are unmarried do not receive equal pay for equal work.<sup>371</sup> Rather than prohibit this inequality, the

REV. 1215, 1226-50 (1998) (discussing proposal for premarital security agreements from perspectives of queer theory).

369. *Accord In re Marriage of Heupel*, 936 P.2d 561, 570 n.11 (Colo. 1997) (noting that marriage is “an economic partnership” and “deferred compensation, such as retired pay, by its nature requires that former spouses extend their economic partnership beyond the date of dissolution”); *Queen’s Med. Ctr.*, 967 P.2d at 699-700 (stating marriage is “economic partnership” and duties and obligations of parties terminate only when partnership legally terminates and not upon filing of divorce); *Dejesus v. Dejesus*, 687 N.E.2d 1319, 1322 (N.Y. 1997) (acknowledging “the contemporary view of marriage as an economic partnership, crediting each party’s contributions, whether monetary or not, to the growth and value of the marriage”); *Roane v. Roane*, 407 S.E.2d 698, 701 (Va. Ct. App. 1991) (stating that equitable distribution of property upon divorce “is predicated on the philosophy that marriage represents an economic partnership requiring that upon dissolution each partner should receive a fair proportion of the property accumulated during marriage”); S. REP. NO. 98-575, 1 (1984), *reprinted in*, 1984 U.S.C.C.A.N. 2547 (noting that the Retirement Equity Act is intended to amend ERISA to account for “the status of marriage as an economic partnership, and the substantial contribution to that partnership of spouses who work both in and outside the home”); UNIF. MARITAL PROPERTY ACT, Prefatory Note, 9A U.L.A. 104 (1998) (stating “it has become increasingly recognized in the realities of American family living . . . [that] [m]arriage is partnership to which each spouse makes a different but equally important contribution”); UNIF. PROBATE CODE art. II, pt. 2 general cmt., 8 U.L.A. 93 (1998) (stating “main purpose of the revisions is to bring elective-share law into line with the contemporary view of marriage as an economic partnership”); Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83, 148-63 (1994) (discussing view of marriage as economic partnership); Marsha Garrison, *Good Intentions Gone Awry: the Impact of New York’s Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 624 (1991) (noting that divorce reform was based upon the “the modern view of marriage as an economic partnership of equals”); Marjorie E. Kornhauser, *Love, Money, and the IRS: Family Income-Sharing and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 73 (1993) (noting modern tax law assumes “an economic partnership” model); Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2356-60 (1994) (discussing and criticizing “influential metaphor” of marriage as economic partnership); Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689, 695-96 (1990) (discussing and critiquing economic partnership theory of marriage and its relation to divorce reforms); Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 236, 236 n.38 (1991) (discussing marriage as “economic partnership” and noting that “[o]ne of the earliest American expressions of the partnership theory of marriage appears in the 1963 Report of the Committee on Civil and Political Rights to the President’s Commission on the Status of Women”).

370. See Heidi Eischen, *Survey, For Better or Worse: An Analysis of Recent Challenges to Domestic Partner Benefits Legislation*, 31 U. TOL. L. REV. 527, 531 (2000) (pointing out that fringe benefits can comprise up to 40% of employee’s compensation); Nancy J. Knauer, *Domestic Partnership and Same-Sex Relationships: A Marketplace Innovation and a Less Than Perfect Institutional Choice*, 7 TEMP. POL. & CIV. RTS. L. REV. 337, 342 (1998) (discussing studies indicating fringe benefits are between thirty and forty percent of total compensation).

371. See Thomas F. Coleman, *The High Cost of Being Single*, American Association for Single  
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government encourages it through tax policies applicable to both employer and employee.<sup>372</sup> This government subsidy of the marital relation is most obvious when employers provide compensation in the form of domestic partnership benefits that do not receive this favorable tax treatment and are taxable as income to the employee.<sup>373</sup> Importantly, however, employees without dependents and without a partner, whether a legal spouse or domestic partner, do not receive this compensation at all.

Tax subsidies of the marital relation are not limited to employee benefits. The federal income tax system is weighted in favor of the married, especially those whose income patterns follow the traditional model of dependency and disparate income.<sup>374</sup> Despite the much discussed “marriage penalty”<sup>375</sup> addressed by the recent Economic Growth and Tax Relief Reconciliation Act,<sup>376</sup>

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People, available at <http://www.singlesrights.com/cost-discrimination.htm> (last visited Feb. 15, 2003). Coleman also discusses discrimination against unmarried persons in the form of higher taxes, higher insurance rates, especially automobile insurance, credit discrimination, housing discrimination, disparity in consumer discounts (such as “family” discounts in auto clubs, airport, health, and country clubs), and disadvantages in child custody, will challenges, and survivor’s rights. *Id.*

372. As Nancy Knauer explains, these benefits are deductions to the employer as salaries or other compensation, but excludable from the gross income of the employee. Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129, 169 (1998) (citing I.R.C. §132 (1994) and I.R.C. §162(a) (1994)).

373. *See id.* at 169-70 (discussing tax consequences and citing applicable IRS private letter rulings).

374. *See* Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, 65 U. CIN. L. REV. 787, 788-90 (1997) (demonstrating that marriage penalty is greatest when total household income is split equally between spouses and marriage bonus is greatest when total household income is earned by only one wage earner, but noting that these bonuses or penalties are not distributed evenly and marriage penalty does not begin until one spouse earns twenty percent of what other spouse earns); Amy C. Christian, *Legislative Approaches to Marriage Penalty Relief: The Unintended Effects of Change on the Married Couple’s Choice of Filing Status*, 16 N.Y.L. SCH. J. HUM. RTS. 303, 321-26 (1999) (demonstrating that because of tax code’s combination of income aggregation and income splitting, the greater the difference in incomes of spouses, the less the tax liability). As Patricia Cain notes, the “marriage penalty denies married couples the benefit of using the lower single-taxpayer rates because the entire joint return rate system is based on an archaic view of married couples as couples in which one spouse works and the other stays home.” Patricia A. Cain, *Heterosexual Privilege and the Internal Revenue Code*, 34 U.S.F. L. REV. 465, 487-88 (2000).

Nancy Knauer provides an enlightening brief history of the income tax code’s treatment of marriage, from the original mandate of separate tax returns for spouses which, resulted in disparities in tax liability depending upon whether the couple resided in a community property state or a separate property state, to the Congressional enactment of joint filing provisions in 1948, to the subsequent protest against the “singles penalty” waged by War Widows of America who successfully argued that they were being saddled with additional tax penalties despite the patriotic loss of their husbands resulting in the 1969 adoption of the rate schedules, which led to the possibility of a “marriage penalty.” Knauer, *supra* note 372, at 147-52.

375. The marriage penalty is the increase in tax liability if a couple files jointly or as married persons filing individually compared with the tax liability if the two persons could file individual tax returns, and it is attributable to the graduated tax scheme. For discussions of the controversies regarding the marriage penalty. *See id.* at 185-208 (demonstrating prevalence of moral dimensions of arguments as they began in 1992 Republican “Contract with America” until publication of her article in 1998).

376. Economic Growth and Tax Relief Reconciliation Act of 2001, 107 Pub. L. No. 16, 115 Stat. HeinOnline -- 75 Temp. L. Rev 784 2002

even before the Act more married couples benefited from a “marriage bonus” rather than a “marriage penalty” in the income tax scheme.<sup>377</sup> Additionally, the transfer of assets between unmarried parties is subject to more stringent tax requirements,<sup>378</sup> pronounced in cases in which great wealth is involved.<sup>379</sup> Especially important for the less wealthy, the social security tax and benefit scheme<sup>380</sup> likewise privileges the married over the unmarried, again with increased advantages for married couples whose income distribution follows the breadwinner/dependent model.<sup>381</sup>

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38 (2001). Title III of the Act, entitled Marriage Penalty Relief, provides that beginning in 2005, those couples in the fifteen percent tax bracket shall have the marriage penalty “phased out.” In assessing this portion of the Act, the New York Times reported:

Millions of two-income couples who are in the higher brackets [than the 15% bracket], however, will continue to be penalized. The maximum marriage penalty is almost \$18,000 . . . but the maximum relief . . . would [be a savings of] \$1,531 . . . . The changes also mean that more couples will collect a marriage bonus, paying less in taxes than they would as singles because one spouse earns the bulk of the family income . . . . And in many cases, that bonus will be larger.

David Cay Johnston, *The Tax Bill Close Up: Some Facts, Some Tips*, N.Y. TIMES, June 3, 2001, at 3-1.

377. See Cain, *supra* note 374, at 467 n.9 (citing Congressional Budget Office, 105th Cong., *For Better or for Worse: Marriage and the Federal Income Tax* 31, tbl.5 (1997)) (concluding “that forty-two percent of all couples experience a penalty, fifty-one percent experience a bonus, and six percent experience neither”). The distribution of penalties and bonuses implicates class and racial disparities. For example, low-income women may be more likely to be employed and have economic parity with their spouses. Additionally, the aggregation of incomes will reduce any earned income tax credit designed to benefit those in poverty. Brown, *supra* note 374, at 789. Brown also concludes that “[b]lack families are more likely to pay a marriage penalty; white families are more likely to receive a marriage bonus,” *id.* at 791, because black women are more likely to contribute a larger share of the marital income, in part due to wage discrimination, *id.* at 795-96.

378. As Patricia Cain notes, a simple sharing of income can give rise to “unexpected tax consequences.” Patricia Cain, *Taxing Lesbians*, 6 S. CAL. REV. L. & WOMEN’S STUD. 471, 476-77 (1997) (citing I.R.C. §1041(a) which exempts transfers of property between spouses from being considered as gain or loss).

379. See Knauer, *supra* note 372, at 171-77 (discussing estate and gift taxation and “unlimited marital deduction” allowing non-taxable transfer of 1.25 million dollars).

380. Initiated in 1935, social security is “perhaps the most popular social welfare policy in the United States” and operates as a tax and transfer system that provides cash benefits and health insurance to retired or disabled, collecting almost as much in taxes as the federal income tax system (\$558 billion for social security in 1998 in comparison to \$692 billion for federal income tax that same year). Goodwin Liu, *Social Security and the Treatment of Marriage: Spousal Benefits, Earnings Sharing, and the Challenge of Reform*, 1999 WIS. L. REV. 1, 5 (1999). It is a crucial form of income maintenance for the less wealthy who do not have other forms of income such as private pension plans, disability insurance, or substantial assets. *Id.*

381. This inequity occurs because the spouse of a wage earner can choose to collect benefits based upon her own earnings or collect fifty percent of the benefits which would be paid to the spouse based upon his earnings. Additionally, a spouse is entitled to survivor’s benefits in the event of death. See Karen C. Burke & Grayson M. P. McCouch, *Women, Fairness, and Social Security*, 82 IOWA L. REV. 1209, 1230-31 (1997) (pointing out that “[t]he spousal benefit provisions introduce disparities in the replacement rates of married couples relative to unmarried individuals . . . . [t]he existing benefit formula, however, produces a significantly higher replacement rate for married couples than for unmarried individuals with equivalent preretirement standards of living”); Jonathan Barry Forman, *Making Social Security Work for Women and Men*, 16 N.Y.L. SCH. J. HUM. RTS. 359, 369 (1999) (noting that for the social security system to get money for spousal benefits, “the benefits provided to

Overall, the entire federal tax scheme fosters and subsidizes the economics of marriage. “Being first a product of politics, taxation’s most conspicuous characteristics are those of the political power represented in its provisions.”<sup>382</sup> The political power exercised in taxation maintains the political institution of compulsory matrimony. When lesbian and other sexual minority advocates argue that the tax systems should accommodate same-sex couples on the same terms as married couples, the issue of compulsory matrimony is elided.<sup>383</sup>

In addition to income tax laws, other federal laws affecting people’s economic lives privilege the marital relation and provide adverse consequences to the unmarried. For example, the federal bankruptcy laws specify various privileges for the married,<sup>384</sup> although the “biggest benefit” may be indirect, as the laws allow one person to purchase goods for use by the other and then discharge those debts.<sup>385</sup>

Additionally, for persons subsisting on public benefits, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)<sup>386</sup> stresses marriage as a means to remedy poverty<sup>387</sup> and

individual workers must be less than actuarially fair. In essence, workers subsidize the Social Security benefits provided to spouses and surviving spouses . . . . These ‘extra’ benefits for spouses are paid for by reducing the benefits available to workers, including unmarried workers”); Jonathan Barry Forman, *Social Security: What Can Be Done about Marriage Penalties?*, 6 S. CAL. REV. L. & WOMEN’S STUD. 553, 555 (1997) (contending “spousal benefits are heavily subsidized by unmarried workers. In short, married couples make out like bandits, but unmarried workers pay the bill. Worse still, not all married couples are winners. The only real winners are traditional, one-earner married couples, right out of the 1930s.”).

382. Nancy E. Shurtz, *Critical Tax Theory: Still Not Taken Seriously*, 76 N.C. L. REV. 1837, 1854 (1998).

383. See, e.g., Knauer, *supra* note 372, at 157 (arguing that same-sex couples and lesbian and gay scholars seek inclusion within marital realm, while other progressive scholars are working to dismantle marriage based tax system).

384. See A. Mechele Dickerson, *Family Values and the Bankruptcy Code: A Proposal to Eliminate Bankruptcy Benefits Awarded on the Basis of Marital Status*, 67 FORDHAM. L. REV. 69, 71, 103-112 (1998) (arguing that Congress should reconsider whether debtors should be entitled to extra benefits based “simply on their choice or ability to marry” and listing those benefits as including option of joint filing to minimize expenses, shielding of property held as tenants by entirety, and option to treat non-debtor spouse as dependent regardless of actual dependency); A. Mechele Dickerson, *To Love, Honor, and (Oh!) Pay: Should Spouses be Forced to Pay Each Other’s Debts*, 78 B.U. L. REV. 961, 966 (1998) [hereinafter Dickerson, *To Love, Honor*] (arguing that law should deny federal bankruptcy benefits to any married debtor whose spouse refuses to accept certain burdens to avoid current situation of subsidizing married debtor by creditors and society at large, rather than solvent spouse).

385. Dickerson, *To Love, Honor*, *supra* note 384, at 964.

386. Personal Responsibility and Work Opportunity Reclamation Act (PRWORA) of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 42 U.S.C.).

387. Accord NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 222 (2000) (noting that proponents of Personal Responsibility and Work Opportunity Act “spoke as though the marriage ceremony itself magically solved the problem of poverty” and “said ‘get a job!’ and ‘get married!’”); GWENDOLYN MINK, WELFARE’S END 78 (1998) (stating “Personal Responsibility Act codifies the claim that marriage is the best antipoverty policy”); SANFORD F. SCHRAM, AFTER WELFARE: THE CULTURE OF POSTINDUSTRIAL SOCIAL POLICY 40 (2000) (noting “[w]elfare reform may initially be largely about getting single mothers to work, but as those jobs fail to produce a livable

concomitantly seeks to penalize the unmarried without directly challenging established constitutional doctrine.<sup>388</sup> The first statement that Congress makes in its findings is that “marriage is the foundation for a successful society,”<sup>389</sup> emphasizing the rise in out-of-wedlock pregnancies by teenaged and other women<sup>390</sup> and the harm to children born out of wedlock, including their reduced chance of “growing up to have an intact marriage.”<sup>391</sup> These findings are the support for a system with the stated purpose of “promoting job preparation, work, and marriage.”<sup>392</sup> This purpose becomes actualized in the funding incentives to states to reduce the number of out-of-wedlock births,<sup>393</sup>

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wage, the policy’s focus logically shifts to getting women to marry men”); Martha Albertson Fineman, *The Inevitability of Dependency and the Politics of Subsidy*, 9 STAN. L. & POL’Y REV. 89, *passim* (1998) (arguing that independence as an ideal and dependency as a stigma prevent true welfare reform, and that marriage is not a solution to dependency, instead, we should recognize that all families are dependent and receive subsidies, and caretakers should be compensated); Nicole Huberfeld, *Three Generations of Welfare Mothers Are Enough: A Disturbing Return to Eugenics in the Recent “Workfare” Law*, 9 UCLA WOMEN’S L.J. 97, 127-8 (1998) (criticizing Act’s assumption that “marriage is the solution” that “will solve all of welfare mothers’ problems”); Megan Weinstein, *The Teenage Pregnancy “Problem”: Welfare Reform and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 13 BERKELEY WOMEN’S L.J. 117, 126 (1998) (arguing that Act assumes that when teenagers marry, family will be less poor and welfare costs will be reduced).

388. In *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973), the Court held that a statute limiting welfare assistance to families which consisted of “two adults of the opposite sex ceremonially married to each other” unconstitutionally deprived illegitimate children equal protection. *Id.* at 619-20. The brief per curiam opinion, however, provoked a dissent by Justice Rehnquist, who reasoned that the state was not acting irrationally in conditioning benefits on “the sort of ceremonial marriage that could quite reasonably be found to be an essential ingredient of the family unit” that the state legislature is attempting to protect, especially as compared to “communes.” *Id.* at 622 (Rehnquist, J., dissenting).

389. Personal Responsibility and Work Opportunity Reclamation Act (PRWORA) of 1996, Pub. L. No. 104-193, tit. I, §101 (1), 110 Stat. 2105, 2110 (1996) (codified at 42 U.S.C. §601 (notes) (1996 & Supp. V. 2000)).

390. While the findings state the “increase in the number of children receiving public assistance is closely related to the increase in births to unmarried women,” *id.* §101 (5) (C), the statistics for “out-of-wedlock” births are not limited to women receiving public benefits. PRWORA Pub. L. No. 104-193, tit. I §101 (6)(B), 110 Stat. 2105, 2110-2111 (1996) (appearing at 42 U.S.C. §601 (notes) (1996 & Supp. V. 2000)) (reporting that “out of wedlock” births in 1991 comprised 29.5% of births). One wonders what percentage of these births are attributable to the “lesbian baby boom.” Moreover, a percentage of these births in several states could be due to married but feminist mothers. See Wendy Chavkin et. al., *Sex, Reproduction, and Welfare Reform*, 7 GEO. J. ON POVERTY L. & POL’Y 379, 385 n.32 (citing Jane Lawler Dye & Harriet B. Presser, *The State Bonus to Reward a Decrease in “Illegitimacy”: Flawed Methods and Questionable Effects*, FAM. PLAN. PERSP., May-June 1999, at 144 (reporting that Connecticut, Michigan, Nevada, and New York over estimate number of actual out-of-wedlock births since “new mother is considered unmarried if the mother’s last name is different from the father’s”)).

391. PRWORA Pub. L. No. 104-193 tit. I §101 (8)(E), 110 Stat. 2105, 2111 (1996) (appearing at 42 U.S.C. §601 (notes) (1996 & Supp. V. 2000)).

392. PRWORA Pub. L. No. 104-193 tit. I §401 (a)(2), 110 Stat. 2105, 2113 (1996) (appearing at 42 U.S.C. §601 (notes) (1996 Supp. V. 2000)).

393. PRWORA Pub. L. No. 104-193 tit. I §402(a)(1)(v), 110 Stat. 2105, 2113 (1996) (codified as amended at 42 U.S.C. §602(a)(1)(A)(v) (1996 & Supp. V. 2000)) (providing that state funding plans “[e]stablish goals and take action to prevent and reduce the incidence of out-of-wedlock

prohibitions against providing assistance to certain unmarried teenage mothers while allowing assistance to married teenage mothers,<sup>394</sup> and requiring only unmarried women to comply with the work-fare requirements.<sup>395</sup> For unmarried women who nevertheless do give birth, the welfare system imposes a regime of quasi-marriage through its mandated co-operation with paternity determinations.<sup>396</sup> This imposition of marriage can be more direct when the federal government decides to deem two people married for welfare purposes, despite the fact that they are not legally married.<sup>397</sup>

In the non-federal context, state laws regulating inheritance also privilege marriage. One of the goals of intestate succession is the maintenance of the

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pregnancies"); PRWORA Pub. L. No. 104-193 tit. I § 403 (a)(2)(A), 110 Stat. 2105, 2118 (1996) (codified as amended at 42 U.S.C. § 603(a)(2)(A) (1996 & Supp. V. 2000)) (providing "bonus" to states to reduce illegitimacy and providing additional grant for "each bonus year for which the State demonstrates a net decrease in out-of-wedlock births").

394. PRWORA Pub. L. No. 104-193 tit. I § 408 (a) (4), 110 Stat. 2105, 2135-36 (1996) (codified as amended at 42 U.S.C. § 608 (a)(4) (1996 & Supp. V. 2000)) (prohibiting assistance to unmarried mothers under age of 18 who have not completed high school and are not engaged in educational activity); PRWORA Pub. L. No. 104-193 tit. I § 408 (a)(5), 110 Stat. 2105, 2136 (1996) (codified as amended at 42 U.S.C. § 608 (a) (5) (1996 & Supp. V. 2000)) (prohibiting assistance to unmarried mothers under the age of 18 who do not live with a parent or guardian).

395. *Compare* Pub. L. No. 104-193 tit. I § 407(c)(2)(B), 110 Stat. 2105, 2132 (1996) (codified as amended at 42 U.S.C. § 607(c)(2)(B) (1996 & Supp. V. 2000)) (requiring unmarried mother to work unless she is exempted under disability); *with* Pub. L. No. 104-193 § 407(c)(1)(B)(ii), 110 Stat. 2105, 2131 (1996) (codified as amended at 42 U.S.C. § 607 (c)(1)(B)(ii) (1996 & Supp. V. 2000)) (not requiring married woman to work if her spouse is working or otherwise qualifying). Congress amended the latter statutory provision to now provide that "the individual and the other parent" in the house be working "for a total of at least 55 hours per week," thus reducing the benefit to married women. *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, § 55504(d), 111 Stat. 251, 609 (codified at 42 U.S.C. § 607 (c)(1)(B)(ii) (1997 & Supp. V. 2000)).

396. While welfare policy since 1968 has required maternal compliance in paternity proceedings, the PRWORA intensifies this policy by requiring states to reduce the grant of unmarried women who fail to co-operate by at least twenty-five percent and providing that the grant may be entirely denied. Pub. L. No. 104-193 tit. § 408(a)(2), 110 Stat. 2105, 2135 (1996) (codified as amended at 42 U.S.C. § 608 (a)(2) (1996 & Supp. V. 2000)). Gwendolyn Mink points out that it is not only conservatives who champion enforced paternal child support as a solution to poverty, but liberals and feminists as well. Mink, *supra* note 387, at 78-86. Mink, however, argues that it is important to make a distinction between "child support that is sought and child support that is imposed," *id.* at 83, and to remember that "some mothers do not have support orders because they do not want them;" some unmarried women do not want to identify the biological father or have him involved with the child or with her, *id.* at 85. She argues that the Act seeks to "foster marriage-like heterosexual relations." *Id.* at 71.

397. 42 U.S.C. § 1382c(d) allows the government to deem two people receiving SSI, supplemental security income for disability based upon indigence, married if they "hold themselves out as husband and wife," regardless of their actual legal status. In *Smith v. Shalala*, 5 F.3d 235 (7th Cir. 1993), the court upheld this provision and its implementing regulations in a constitutional challenge, concluding that there was no infringement on any fundamental decisional freedom to marry, the rational basis test therefore applied, and the state's legitimate interests in efficiency, prevention of fraud, and administrative convenience were being served in a rational manner. *Id.* at 239-40. *See United States v. Seay*, 718 F.2d 1279, 1285, 1285 n.9 (4th Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984) (discussed *infra* notes 426-27, 432), for a case deeming two persons as being married under the state's common law marriage doctrine over their objections for purposes of the Federal Employees Compensation Act.



dominance of the marital relation and the nuclear family.<sup>398</sup> Similarly, elective share statutes prevent a spouse from being disinherited, despite the intent of the testator as expressed in a will.<sup>399</sup> Recent attempts to broaden intestate succession include Hawai'i's Reciprocal Beneficiary Act<sup>400</sup> and a proposal to amend the Uniform Probate Code to include surviving committed partners<sup>401</sup> as determined by incorporating some functional definitions that replicate the marital relation.<sup>402</sup> Yet again, these reforms do not fundamentally challenge compulsory matrimony or question the benefits provided for married persons over single persons, but merely attempt to make marital privileges somewhat

398. See Fellows et al., *supra* note 243, at 13-16 (tracing purpose of intestacy laws to promoting historically-valued institution of marriage).

399. For example, New York provides that regarding wills executed after 1966, a personal right of election is given to the surviving spouse to take a share of the decedent's estate. N.Y. EST. POWERS & TRUSTS LAW § 5-1.1 (McKinney 2003). The share is one third of the estate if the decedent has children and one-half of the estate if not. *Id.* This provision was invoked by a same-sex partner who was a specific and residuary legatee of the will with the exception of certain real estate, allegedly constituting over eighty percent of the value of the estate, which was left to a lover of the decedent. *In re Matter of Cooper*, 592 N.Y.S.2d 797, 797-98 (N.Y. App. Div. 1993). The court held that the statutory term "surviving spouse" "cannot be interpreted to include homosexual life partners," *id.* at 799, and rejected the constitutional challenge to such a construction, *id.* at 800-01.

400. The laws affected by the Reciprocal Beneficiaries Act, HAW. REV. STAT. § 572C-7 (2000), see *supra* notes 200, 242 and accompanying text, include both the intestate succession laws and the elective share provisions. The intestate succession statutes now provide that like the spouse, the intestate share of a surviving reciprocal beneficiary is the entire estate if there are no surviving parents or descendants or if all of the surviving descendants are also descendants of the surviving spouse or reciprocal beneficiary. HAW. REV. STAT. ANN. § 560:2-102 (Michie 2001). The statute also contains three other variations depending upon the existence and relation of other survivors. *Id.* The elective share provisions, *id.* §§ 560:2-201-560:2214 (2001), were amended to allow a person designated as a reciprocal beneficiary to be entitled to an elective share, the amount of which, like the amount for spouses, is graduated depending upon the length of time the parties were in the applicable relationship, with between one and two years being three percent and fifteen years or more being fifty percent. *Id.* § 560:2-202 (2001). See Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 36-37 (2000) (arguing these statutes will not reach child of couple who have registered as reciprocal beneficiaries if the decedent is not legally related to the child).

401. See Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 78-87 (1994) (proposing amendments which provide for less than spousal intestate share for committed life partners); see also Fellows et al., *supra* note 243, at 92-94 (containing as appendix, Waggoner Working Draft: Intestate Share of Committed Partner). As Professor Fellows points out, Lawrence Waggoner is a "preeminent scholar of wills and trusts who is a national leader in probate reform" and who has been involved with draftings of the applicable Restatement and Uniform Probate Code. *Id.* at 6 & n.15.

402. Waggoner's proposal requires a "marriage-like relationship" to be assessed in accordance with factors such as "the purpose, duration, constancy, and degree of exclusivity" of the relationship, the intermingling of finances, the existence of a co-parented child, any commitment ceremonies, and the holding of themselves out as a "emotionally and financially committed to each other on a permanent basis." *Id.* at 92-93. The proposal also includes that there be a presumption of a committed relationship if they shared a common household for five of the past six years, registered as domestic partners, engaged in a commitment ceremony "conducted and contemporaneously certified by an organization," or was a "parent" to the child or had a written co-parenting agreement. *Id.* Thus, Waggoner's departure from the solely formal approach of legal marriage is not strictly functional, but combines elements of the formal and functional. For a critique of functionalism in the context of couples, see SAPHO, *supra* note 5, at 158-67.

more inclusive.

Specific advantages for married persons persist because there is “no firm national policy” to eradicate marital status discrimination.<sup>403</sup> Constitutionally, classifications based upon marital status are accorded only minimal scrutiny.<sup>404</sup> Statutorily, neither Title VII<sup>405</sup> nor the Fair Housing Act<sup>406</sup> prohibit marital status discrimination. Indeed, the only federal prohibition of marital status discrimination appears in the Equal Credit Opportunity Act, which was passed in 1974 largely to protect married women who were unable to obtain credit in their own names,<sup>407</sup> although it also applies to unmarried persons.<sup>408</sup>

Most often, to the extent marital status discrimination is protected, it is because various state anti-discrimination statutes include “marital status” as a protected category.<sup>409</sup> The prospect of protecting unmarried cohabitants under

403. While made in the context of housing discrimination, Justice Thomas’ remark that unlike race discrimination, there “is surely no ‘firm national policy’ against marital status discrimination,” describes the general federal landscape. See *Swanner v. Anchorage Equal Rights Cmm’n*, 513 U.S. 979, 981 (1994) (Thomas, J., dissenting from denial of cert.) (arguing marital status discrimination is not protected, and in many ways is codified in law through, for example, intestacy law, surviving spouse death benefits, and marital privilege); see also *Thomas v. Anchorage Equal Rights Cmm’n*, 165 F.3d 692, 715 (9th Cir. 1999), *opinion withdrawn* 192 F.3d 1208 (en banc), *rev’d on other grounds*, 220 F.3d 1134 (9th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 1143 (2001) (arguing “[i]t is beyond cavil that there is no similar [to race] ‘firm national policy’ against marital-status discrimination”).

404. See, e.g., *Smith*, 5 F.3d at 239 (applying rational basis scrutiny to constitutional challenge of marital status classification in supplemental security income welfare statute).

405. 42 U.S.C. § 2000e (1976). See Nicole Buonocore Porter, *Marital Status Discrimination: A Proposal for Title VII Protection*, 46 WAYNE L. REV. 1 (2000), for an argument that Title VII should be amended to include marital status and a discussion of the ways in which marital status discrimination has been litigated as sex discrimination. Employment discrimination against unwed pregnant women or unwed mothers may violate the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1976).

406. Although the Civil Rights Act (Fair Housing Act) of 1968, 42 U.S.C. § 3601, 3604 (1976 & Supp. V 2000), includes the prohibition of discrimination based upon “familial status,” 42 U.S.C. § 3602(k) defines “familial status” as meaning the domicile of children with adults.

407. 15 U.S.C. § 1691 (1976) (prohibiting creditors from discriminating against any applicant, with respect to any aspect of credit transaction—“on the basis of race, color, religion, national origin, sex or marital status, or age”). The Act, as originally passed in 1974, included only sex and marital status. Pub. L. No. 93-495, Title V, 58 Stat. 1521 (1974) (codified as amended at 15 U.S.C. §§ 1691-1691f (1988 & Supp. V 2000)). Its purpose was “to eradicate credit discrimination waged against women, especially married women whom creditors traditionally refused to consider for individual credit.” *Anderson v. United Fin. Co.*, 666 F.2d 1274, 1277 (9th Cir. 1982). In addition, the legislative history includes much discussion of discrimination against divorced and separated women, as well as married women. See Susan Smith Blakely, *Credit Opportunity for Women: The ECOA and its Effects*, 1981 WIS. L. REV. 655, 656-57 (discussing Act and its amendments and arguing for “effects test” similar to that of Title VII because the ECOA was passed to address discrimination against women); Elwin Griffith, *The Quest for Fair Credit Reporting and Equal Credit Opportunity in Consumer Transactions*, 25 U. MEM. L. REV. 37, 41 (1994) (discussing Report of National Commission on Consumer Finance and Congressional hearings).

408. See, e.g., *Markham v. Colonial Mortgage Serv. Co.*, 605 F.2d 566, 569 (D.C. Cir. 1979) (stating that although primary purpose of Act was to prevent credit discrimination against married women, it also extends to prevent *any* discrimination based on marital status).

409. For example, California prohibits marital status discrimination in employment in California Fair Housing and Employment Act. CAL. GOV’T. CODE §§ 12900-12906 (West 1992), and in certain

such statutes has provoked claims by landlords asserting a violation of their religious freedom rights by being forced to rent to people “living in sin.”<sup>410</sup>

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welfare benefits, CAL. WELF. & INST. CODE § 18907 (West 2001) (prohibiting discrimination on basis of marital status in provision of food stamps), although California’s comprehensive Civil Rights Statute, CAL. CIV. CODE §§ 51-51.12 (West 1982 & Supp. 2001), does not prohibit discrimination on the basis of marital status. In New York, marital status discrimination is prohibited in employment, public accommodations, private and public housing, and public education, New York Human Rights Law, N.Y. EXEC. LAW § 296 (McKinney 2001), credit, New York Human Rights Law, N.Y. EXEC. LAW § 296-a (McKinney 2001), insurance, N.Y. INS. LAW § 2607 (McKinney 2000), and educational opportunities, N.Y. EDUC. LAWS § 313 (McKinney 2000). New Jersey’s prohibition of marital status discrimination is similarly comprehensive, encompassing employment, public accommodations, housing, credit and market transactions, Law Against Discrimination, N.J. STAT. ANN. §§ 10:5-1–10:5-49 (West 1993), as well as specific provisions for public and quasi-public employment, see New Jersey Civil Rights Act, N.J. STAT. ANN. § 10:1-1 (West 1993) (prohibiting discrimination on basis of marital status in right of citizens to hold elected office or employment); New Jersey Civil Rights Act, N.J. STAT. ANN. § 10:1-10 (West 1993) (prohibiting discrimination on basis of marital status by industries engaged in defense work); New Jersey Civil Rights Act, N.J. STAT. ANN. § 10:2-1 (West 1993) (prohibiting discrimination on basis of marital status in employment on public works). On the other hand, Texas limits marital status discrimination prohibitions to credit and insurance matters. See e.g., TEX. FIN. CODE ANN. § 341.401 (Vernon 1999) (prohibiting discrimination on basis of marital status in the extension of credit); TEX. INS. CODE ANN. art. 21.21-6 (Vernon 1999) (prohibiting discrimination on basis of marital status in provision of insurance); TEX. INS. CODE ANN. art. 21.50 (Vernon’s 1981) (prohibiting discrimination on basis of marital status in provision of mortgage guaranty insurance), although a relatively new statute prohibiting discrimination in utilities also includes marital status discrimination, TEX. UTIL. CODE ANN. § 17.004 (Vernon 1999 & Supp. 2003) (prohibiting discrimination on the basis of marital status in the provision of telecommunications and retail electric services).

410. See, e.g., *Thomas*, 165 F.3d at 718 (holding anti-discrimination statute may not be enforced against landlord who, for religious reasons refuses to rent to unmarried couples), *withdrawn and reh’g granted*, 192 F.3d 1208, 1208 (9th Cir. 1999), *and rev’d on other grounds*, 220 F.3d 1134, 1142 (9th Cir. 2000) (en banc) (rejecting landlord’s claim for lack of ripeness); *Swanner v. Equal Rights Comm’n*, 874 P.2d 274, 277 (Alaska 1994) (holding that claimed defense of religious freedom failed because governmental interest in abolishing improper discrimination in housing outweighed landlord’s interest in acting based on his religious beliefs and landlord could not claim exemption from fair housing law because engaging in voluntary commercial activity did not entitle him to burden private right of unmarried couples to nondiscrimination in housing), *cert denied*, 513 U.S. 979 (1994) (Thomas, J., dissenting from denial of cert); *Smith v. Fair Employment & Housing Comm’n*, 913 P.2d 909, 914 (Cal. 1996) (holding Religious Freedom Restoration Act (42 U.S.C. § 2000bb (1993)) would not exempt landlord from state anti-discrimination provisions because landlord could choose to engage in economic activities that were not subject to statute; prohibition did not substantially burden landlord’s free exercise of religion); *Attorney Gen. v. Desilets*, 636 N.E.2d 233, 243 (Mass. 1994) (vacating and remanding case for question of whether state has compelling interest to prevent discrimination based on marital status to justify burden on landlord’s exercise of religion); *McCready v. Hoffus*, 586 N.W.2d 723, 726 (Mich. 1998) (holding that state Civil Rights Act’s prohibition against marital status discrimination encompassed unmarried cohabitants and was sufficiently compelling to override any religious freedom interests asserted by landlords who chose to participate in real estate market); *State v. French*, 460 N.W.2d 2, 11 (Minn. 1990) (plurality opinion) (holding that state’s prohibition of marital status discrimination did not apply to unmarried cohabitants and considering “state’s paramount need under our constitution to protect religious freedom”).

See Maureen E. Markey, *The Price of the Landlord’s “Free” Exercise of Religion: Tenant’s Right to Discrimination-Free Housing and Privacy*, 22 FORDHAM URB. L.J. 699 (1995), for an excellent scholarly discussion of the conflict between religious freedom and marital status discrimination in housing. See also David Kushner, Note, *Free Exercise, Fair Housing, and Marital Status—Alaska Style*,

Another area of contentious litigation has been employer anti-nepotism rules that prohibit spouses from being employed in the same company.<sup>411</sup> The very existence of the scattered statutes prohibiting marital status discrimination can conflict with—and often seem subordinate to—the “nationwide policy in favor of marriage.”<sup>412</sup> The coercive nature of matrimony is often apparent: married persons asserting marital status discrimination may be successful because the failure of their claims would imply a policy favoring non-marriage,<sup>413</sup> while unmarried persons, especially couples, claiming marital status discrimination can avoid the discrimination “simply by marrying.”<sup>414</sup> Under this regime of compulsory matrimony, the inability of same-sex couples to marry can mean that sexual orientation discrimination is afforded more relief than marital status discrimination.<sup>415</sup>

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12 ALASKA L. REV. 335 (1995) (discussing marital discrimination in housing and exemptions for landlord's freedom of religion); Jack S. Vaitaynonta, Note, *In State Legislatures We Trust: The “Compelling Interest” Presumption and Religious Free Exercise Challenges to State Civil Rights Laws*, 101 COLUM. L. REV. 886 (2001) (discussing importance of enforcing civil rights laws, including laws protecting against marital discrimination).

411. Jurisdictions have been divided on the question of whether statutes prohibiting marital status discrimination forbid the common employment prohibition against relatives in general (anti-nepotism policies), and spouses (no-spouse rules), in particular, working together. Under the broader construction of the statutes, marital status refers to the identity, occupation or situation of a spouse, as well as to whether an individual is married, single, divorced, widowed, and thus anti-nepotism and anti-spouse rules are disallowed. Under a more narrow construction of “marital status,” the protection is afforded to a person's status of being married or unmarried. *Compare, e.g., Kraft, Inc. v. State* 284 N.W.2d 386, 388 (Minn. 1979) (holding that absent compelling, bona fide occupational qualification, anti-nepotism rule that denied full time employment to individuals whose spouses were already full time employees violated marital status anti-discrimination statute because otherwise employees could be discouraged from marrying); *Thompson v. Bd. of Trustees*, 627 P.2d 1229, 1231 (Mont. 1981) (holding that school district policy that administrators could not have spouse employed in any capacity by the school system was violative of state statute prohibiting discrimination on basis of marital status because this could lead to absurd result that dissolution of marriage could mean that individuals could keep their jobs), *with Thomson v. Sanborn's Motor Express, Inc.*, 382 A.2d 53, 56 (N.J. Super. Ct. App. Div. 1977) (holding that employer's rule that spouses cannot work in same freight terminal fell outside statutory prohibition on discrimination based on marital status because marital status refers to state of being married and not “relationship” with a particular person); *Manhattan Pizza Hut, Inc. v. New York State Human Rights Appeal Bd.*, 415 N.E.2d 950, 953 (N.Y. 1980) (holding that anti-nepotism rules did not violate state's ban on marital status discrimination because term “marital status” does not encompass identity or occupation of spouse, but merely state of being married or single).

412. *Irizarry v. Bd. of Educ.*, 251 F.3d 604, 606 (7th Cir. 2001). Judge Posner discounts the claim made pursuant to a Chicago ordinance prohibiting marital status discrimination by stating that “the purpose, at least the primary purpose, of such a prohibition is surely not to dethrone marriage; it is to prevent discrimination against married women, whose employers might think have divided loyalties. *Id.* at 609. Such laws are pro-marriage, not anti- as the plaintiff suggests.” *Irizarry*, 251 F.3d at 609-10.

413. *See supra* note 411 (discussing *Kraft*, 284 N.W.2d at 386; *Thompson*, 627 P.2d at 1229).

414. *Irizarry*, 251 F.3d at 606 (discussing domestic partnership benefits which can be obtained by heterosexual couples “simply by marrying”).

415. In *Levin v. Yeshiva University*, 754 N.E.2d 1099 (N.Y. 2001), New York's highest court considered a challenge to a university's housing policy, which limited housing to students, their spouses and children. The court concluded the policy did not result in marital discrimination because housing did not depend on marital status, but instead merely restricted housing to those in “legally

While specific legislative acts and judicial constructions provide the framework for the edifice of compulsory matrimony, legal and political rhetoric constitutes the foundation. Indeed, it is marriage that is often likened to a foundation itself. The United States Supreme Court's pronouncement in *Maynard*, decided in 1888, that marriage is "the most important relation in life," and "the foundation of the family and of society, without which there would be neither civilization nor progress" was perhaps ironically rendered in the context of upholding a legislatively declared divorce.<sup>416</sup> In this century, the Court's hyperbole in *Griswold v. Connecticut*,<sup>417</sup> that marriage "is a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred," supported the establishment of the right to contraception as an aspect of constitutional privacy.<sup>418</sup> These paeans to marriage are echoed not only by the United States Supreme Court in other decisions,<sup>419</sup> but by courts considering issues such as lesbian and gay relationships and challenges to the marriage laws,<sup>420</sup> grounds for separation or divorce,<sup>421</sup> equitable distribution of marital

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recognized, family relationships with a student." *Id.* at 1102. The court, however, remanded the case for determination of whether the policy disproportionately burdens lesbians and gay men, and if so, whether the university could justify its policies as bearing a "significant relationship to a significant business objective." *Id.* at 1106. Only Judge Judith Kay dissented in part, finding that the plaintiffs stated a claim of marital status discrimination. *Id.* at 1109-10 (Kaye, J. dissenting in part and concurring in part).

416. *Maynard*, 125 U.S. at 205, 211. Maynard had left his wife and children in Ohio, traveled to Oregon, claimed land in the Oregon Territory as a married man, then later received a divorce by the legislative assembly of the territory, and married another woman. *Id.* at 190. Maynard died intestate and the subject of the dispute is ownership of the land. *Id.* at 190-195. For a discussion of *Maynard* in historical perspective, see HENDRICK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 261-62 (2000) (describing case as "paradigm of western remarriage" and noting that it marked understanding that divorce was not "near criminal process," but was part of state's marital powers).

417. 381 U.S. 479 (1965).

418. *Griswold*, 381 U.S. at 486.

419. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (declaring unconstitutional state statute which barred marriage for persons delinquent in child support payments) (quoting, respectively, *Maynard*, 125 U.S. at 205; *Griswold*, 381 U.S. at 486); *Smith v. OFFER*, 431 U.S. 816, 843-44 (1977) (quoting *Griswold* and recognizing that marital relations are protected although not biologically based in context of discussion of rights of foster parents); *Andrews v. Andrews*, 188 U.S. 14, 30 (1902) (quoting *Maynard* in upholding Massachusetts Supreme Court's refusal to give effect to a divorce decree rendered in South Dakota).

420. *See, e.g., Shahr v. Bowers*, 114 F.3d 1097, 1114 (11th Cir. 1997) (en banc) (Tjoflat, J., concurring) (citing *Maynard v. Hill* and distinguishing lesbian ceremonial marriage which caused plaintiff to be terminated from employment from marriage recognized as important and foundational); *Dean v. District of Columbia*, 653 A.2d 307, 333, 361 (D.C. 1995) (Ferren, J., concurring in part and dissenting in part) (citing *Zablocki*, 434 U.S. at 386) (proposing that marriage is fundamental to our very existence and survival (citing and quoting *Griswold*, 381 U.S. at 486)); *Baehr*, 852 P.2d at 55-57 (quoting *Maynard* as quoted in *Zablocki* to conclude that there is no right to same-sex marriage under Hawaii's constitutional provision protecting right to privacy); *Baker*, 191 N.W.2d at 186-87 (citing both *Griswold* and *Maynard*, but concluding that there is "commonsense" basis for marital restrictions "based upon the fundamental difference in sex").

421. *See, e.g., Rachel v. Rachel*, 33 S.W.2d 735, 736 (Ark. Ct. App. 1987) (en banc) (upholding requirement of corroboration by non-party of grounds for divorce) (citing *Maynard*, 125 U.S. 190); *Rabinowitz v. Rabinowitz*, 321 N.Y.S.2d 934, 940 (N.Y. Sup. Ct. 1971) (holding that incompatibility

property,<sup>422</sup> child custody,<sup>423</sup> disputes surrounding estates<sup>424</sup> the constitutionality of “heart balm” statutes that abolish actions for breach of promise to marry,<sup>425</sup> conviction for false statements,<sup>426</sup> qualifications for federal benefits,<sup>427</sup> insurance,<sup>428</sup> termination of employment,<sup>429</sup> immigration,<sup>430</sup> and issues regarding marriage licenses.<sup>431</sup> Whenever the subject involves marriage, the judiciary hastens to stress its importance by invoking human civilization and the sacred.

Congress has likewise engaged in this valorization of marriage, despite the fact that our federalist system entrusts domestic relations, including marriage, to

and “infrequent violence” do not justify the granting of a legal separation in case of long term marriage) (citing *Maynard*).

422. See, e.g., *Sheridan v. Sheridan*, 589 A.2d 1067, 1070 (N.J. Super. Ct. Ch. Div. 1990) (holding that marital property obtained from illicit sources is not subject to equitable distribution).

423. See, e.g., *Waites v. Waites*, 67 S.W.2d 326, 330 (Mo. 1978) (citing *Griswold*, 381 U.S. at 486, about sanctity of marriage and adding that in child custody cases “children, faultless in the parental dispute, are objects of sad residual conflict”).

424. See, e.g., *Adams v. Boan*, 559 So. 2d 1084, 1087-88, 1088 n.1 (Ala. 1990) (affirming estate’s administrator to be decedent’s common law wife, woman who lived with decedent from age of 16 until his death little more than two years later, although parties “may not have achieved that idyllic relationship” as described in *Griswold* and quoting language); *In re Estate of De Laveaga*, 75 P. 790, 795 (Cal. 1904) (citing *Maynard*, 125 U.S. 190, and holding that illegitimate child cannot inherit).

425. See, e.g., *Fearon v. Treanor*, 5 N.E.2d 815, 816 (N.Y. 1936) (citing *Maynard*, 125 U.S. at 205 and upholding constitutionality of “heart balm” statute which abolished actions for breach of promise to marry); *Vrabel v. Vrabel*, 459 N.E.2d 1298, 1303 (Ohio Ct. App. 1983) (upholding same statute).

426. See, e.g., *Seay*, 718 F.2d at 1285, 1285 n.9 (quoting *Maynard*, 125 U.S. at 205 and holding that a woman could be deemed married under state common law marriage doctrine over her objections and affirming her conviction for making false statements that she was not married).

427. See, e.g., *id.* at 1285 (quoting *Maynard*, 125 U.S. at 205 in determining whether there was remarriage terminating federal benefits under Federal Employees Compensation Act); *Mincey v. Celebrezze*, 246 F. Supp. 447, 451 (W.D.S.C. 1965) (quoting *Griswold*, and remanding case to Secretary for determination of identity of proper widow of deceased in social security benefits claim).

428. See, e.g., *Allstate Ins. Co. v. Flaumenbaum*, 308 N.Y.S.2d 447, 465-66 (N.Y. Sup. Ct. 1970) (quoting *Griswold*, 381 U.S. at 486 as support for presumption that husband and wife are members of same household under terms of insurance contract).

429. See, e.g., *Fugate v. Phoenix Civil Serv. Bd.*, 791 F.2d 736, 738-39 (9th Cir. 1986) (citing and quoting *Griswold*, 381 U.S. at 486, for language regarding sanctity of marriage in rejecting police officers’ constitutional challenge to regulation requiring their dismissal based upon their sexual relationships with prostitutes); *Tylo v. Superior Court*, 64 Cal. Rptr. 2d 731, 734 (Cal. Ct. App. 1997) (citing and quoting *Griswold*, 381 U.S. at 486 for language regarding sanctity of marriage in discovery dispute concerning queries about plaintiffs’ relationship with her husband in pregnancy discrimination suit brought by actress against television series producers).

430. See, e.g., *Perez-Oropeza v. INS*, 56 F.3d 43, 45 (9th Cir. 1995) (citing *Maynard*, 125 U.S. at 205; *Zablocki*, 434 U.S. at 384; *Griswold*, 381 U.S. at 486, regarding importance of marriage in declining to extend the sibling provision permitting discretionary waiver of deportation where alien aided illegal entry of his spouse, parent, or child).

431. See, e.g., *Moran v. Moran*, 933 P.2d 1207, 1212 (Ariz. Ct. App. 1996) (citing *Maynard*, 125 U.S. at 211 and holding parties’ marriage based on private marriage contract invalid and rejecting freedom of religion challenge to state licensing requirement); *In re Application of H. and W.*, 5 Pa. D. & C.2d 791, 794 (Phila. County Orphans Ct. 1956) (citing *Maynard*, 125 U.S. at 205 and directing clerk to issue marriage license to parties, despite fact that parties had previously been ceremoniously married while one was underage).

the states rather than to the federal government.<sup>432</sup> While the United States Supreme Court expressed little doubt the previous year that family law was within the exclusive province of the states,<sup>433</sup> the proceedings of the 104th Congressional session attest to Congressional fervor on the subject of marriage. The PRWORA, passed in that session, is replete with hortatory claims for marriage, including its finding that “marriage is the foundation of a successful society.”<sup>434</sup> DOMA<sup>435</sup> seeks to “defend” marriage from those who would degrade it, including, but not limited to, same-sex-couples.<sup>436</sup> As Nancy Knauer notes, the rhetoric surrounding Congressional consideration of DOMA was “replete with the image of marriage as the elemental building block of society, whether that be a rock, a foundation, a pillar, or a keystone.”<sup>437</sup> Taken together, the rhetoric surrounding DOMA and PRWORA establishes the zeal of elected federal officials to exalt marriage.<sup>438</sup>

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432. *Maynard's* celebration of marriage is rendered in service to state power: it implies that *because* marriage creates the most important relation in life and essential to morals and civilization, it “has always been subject to the [state] legislature,” 125 U.S. at 205, and *because* it is the “foundation of the family and society, without which there would be neither civilization nor progress,” it rests upon the “the general law of the State, statutory or common,” *id.* at 211. While the precise issue in *Maynard* involved a question of the power of the territorial legislature rather than the judiciary to grant a divorce, it is often cited for the proposition that it is the states that have power to determine marital status. For example, in *Seay*, 718 F.2d at 1285, the court cited and quoted *Maynard* for the precept that it “is a well-established rule that a state has the power to determine how its residents enter into a marital relationship.” *Id.* The court, therefore, concluded that there was no requirement of uniformity for determining marriage under the Federal Employees Compensation Act, a program under which the defendant was receiving widow’s benefits that would terminate upon remarriage and upheld her conviction for making false statements regarding her present marital status based upon South Carolina doctrine, which recognized that “a common law marriage may exist despite denials by the husband and wife.” *Id.* at 1282-3. *See also* Vincent v. LeDoux, 83 So. 439, 440 (La. 1919) (quoting *Maynard* and stating that it “is undisputed and undisputable that each of states is vested with power to determine the marital status of its own citizens”).

433. In *United States v. Lopez*, 514 U.S. 549 (1995), the Court’s rhetorical use of family law places it unquestionably within the province of state rather than federal power. In holding that the federal Gun-Free Schools Act exceeded Congressional power under the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, Justice Rehnquist, writing for the Court, rejects the government’s arguments that possession of a firearm in a school zone could affect the national economy by retorting that under the government’s rationale “Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example.” *Id.* at 564. Rehnquist’s opinion for the Court likewise criticizes dissenting Justice Breyer’s argument that education serves commercial purposes because under such a rationale “Congress could just as easily look at child-rearing” as commercial. *Id.* at 565 (quoting *Lopez*, 514 U.S. at 629 (Breyer, J., dissenting)).

434. Pub. L. No. 104-193, Title I § 101 (1), 110 Stat. 2105, 2110 (appearing at 42 U.S.C. § 601 (notes) (Supp. V. 2000)). For discussion of PRWORA, see *supra* notes 386-97 and accompanying text.

435. Pub. L. No. 104-199, 110 Stat. 2419 (codified at 28 U.S.C. § 1738C (1996 & Supp. 2002)). See *supra* note 127 for list of journals containing scholarly discussion of DOMA.

436. The purpose of DOMA is to “defend the institution of traditional heterosexual marriage,” H.R. REP. NO. 104-664, at 2, reprinted in 1996 U.S.C.C.A.N. 2905, 2906, a defense which is especially necessary given that the “institution of marriage is already reeling because of the effects of the sexual revolution, no-fault divorce and out-of-wedlock births,” 1996 U.S.C.C.A.N. at 2919.

437. Knauer, *supra* note 370, at 190 (footnotes and citations to Congressional Record omitted).

438. This is not to say that this exaltation is not without its anxieties. See, e.g., SCHRAM, *supra*

More consistent with federalist concerns, a few state legislatures have also seen fit to make explicit state policy in favor of marriage. For example, Wisconsin's Family Code specifically states that its intent is "to promote the stability and best interests of marriage and the family," that "marriage is the institution that is the foundation of family and of society," and that marital "stability is basic to morality and civilization, and of vital interest to society and the state."<sup>439</sup> Other states have enunciated their praises of traditional matrimony in their enactments of so-called little DOMAs, which articulate their state public policy as limiting marriage to opposite-sex couples.<sup>440</sup>

In a brilliant example of not only the override of federalism through funding,<sup>441</sup> but also of the leverage provided by "welfare reform," the PRWORA not only promotes marriage for poor persons, but provides incentives for states to educate poor and non-poor alike<sup>442</sup> that marriage is "the expected standard of human sexual activity" and that "sexual activity outside the context of marriage is likely to have harmful psychological and physical effects."<sup>443</sup> The federal government's sex-education program—which one commentator has described as "no-sex education"<sup>444</sup>—demands abstinence-only sex-education. This funding, accepted by every state except California,<sup>445</sup> requires states that accept funding

note 387, at 112 (discussing DOMA and noting that welfare is not only social policy that reflects "anxiety" about marriage and family).

439. WIS. STAT. § 765.001(2) (2001). Subsection (3) of § 765.001 provides that The Family Code shall be "liberally construed" to give effect to these objectives.

440. ALA. CODE. § 30-1-19 (b) & (c) (1998) (noting that state has "special interest in encouraging, supporting, and protecting the unique relationship" of marriage "in order to promote, among other goals, the stability and welfare of society and "marriage is a sacred covenant"); LA CIV. CODE ANN. art. 86 (West 1999) (providing legislative history stating "the state of Louisiana has manifested through its laws and in civilian theory, that the institution of marriage is one that sustains order and morality in our communities and preserves the posterity and well-being of our larger society"); ME. REV. STAT. ANN. tit. 19-A, § 650 (2)(A) (West 1998) (stating purpose of Act "to encourage traditional monogamous family unit as basic building block of our society, and foundation of harmonious and enriching family life"); MICH. COMP. LAWS § 551.1 (2002) (noting that state has "special interest in encouraging, supporting, and protecting that unique relationship [of marriage] in order to promote, among other goals, the stability and welfare of society").

441. See *South Dakota v. Dole*, 483 U.S. 203, 212 (1987) (upholding Congressional scheme of conditioning funding for highway construction upon state's adoption of minimum drinking age of 21). For scholarly discussions of Congressional power pursuant to the spending clause, see generally John C. Eastman, *Restoring the "General" to the General Welfare Clause*, 4 CHAP. L. REV. 63 (2001); David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1 (1994); Rebecca E. Zietlow, *Federalism's Paradox: The Spending Power and Waiver of Sovereign Immunity*, 37 WAKE FOREST L. REV. 141 (2002).

442. As Anna Marie Smith observes, PRWORA "reaches far beyond the relatively small numbers of teen parents on welfare." Anna Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 MICH. J. GENDER & L. 121, 195 (2002). Moreover, she notes that "[s]ome of the federal funds earmarked for poverty assistance are being directed towards state education departments to support abstinence education courses that are delivered to all public school students, poor and non-poor alike." *Id.* at 197.

443. PRWORA, 42 U.S.C. § 710(b)(2)(D)-(E) (2000).

444. JUDITH LEVINE, HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX 90 (2002).

445. See Smith, *supra* note 442, at 197 n.284, 206 (2002) (dividing other states into four categories



to use the monies for teaching a sex-education program limited in content to teaching abstinence from sex outside of marriage.<sup>446</sup>

The government is spending a substantial sum of money<sup>447</sup> to convince teenagers not merely to abstain from premature sex, but to abstain from *premarital* sex. This abstinence-only sex-education provision within welfare reform is buoyed by arguments regarding the economic consequences of unwed motherhood.<sup>448</sup> The government, however, is not content with such arguments; if it were, government policy could address the issue by fostering premarital birth control, including abortion, or perhaps even more radically, economic support for single parents. Instead, the sex-education message uses sex itself to promote marriage. People who accede to the sex-education abstinence message are channeled into marriage as a condition for sexual expression. For those who disregard the abstinence-only sex-education message,<sup>449</sup> the coercive pressures may occur as negative reinforcement: the funding scheme has precluded education about ways in which they could protect themselves from HIV/AIDS, sexually transmitted diseases, or pregnancy and has instead insisted that marriage is the only defense.<sup>450</sup> At the very least, according to the government

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on other education information provided in addition to abstinence: severely conservative, strongly conservative, conservative, and moderate based). Although Oregon received the only moderate classification because it concurrently taught about contraception, it was not characterized as liberal due to failure to require tolerance for homosexuality or gender equality. *Id.* at 205-06.

446. The present Secretary of Health and Human Services, apparently does not view the program as limiting, even though it is confined to marital sex:

Abstinence education is more than saying no to nonmarital sexual activity. These programs help teens formulate positive, achievable goals for their lives, provide them with skills to foster communication with their family and friends on sensitive matters such as sex, and teach them how to resist pressure to engage in risk-taking activities.

Press Release, Tommy Thomson, HHS Secretary, Regarding Committee Action of Abstinence Program Provisions, *available at* <http://www.hhs.gov/news/press/2002pres/20020424a.html> (last modified April 24, 2002).

447. The President's budget for 2003 pledged to spend \$135 million for abstinence-only education. Press Release, HHS, President's Budget Increases Abstinence Program Funding, *available at* <http://www.hhs.gov/news/press/2002pres/20020131a.html> (last modified January 31, 2002). In 2000, one commentator noted that in the last five years, Congress had increased federal funding for abstinence only sex-education by *three thousand* percent. Elizabeth Arndorfer, *Absent Abstinence Accountability*, 27 HASTINGS CONST. L.Q. 585, 586 (2000).

448. *See supra* note 389-91 (noting Congressional findings in PRWORA include statement that "increase in the number of children receiving public assistance is closely related to the increase in births to unmarried women." Pub. L. No. 104-193, Title I § 101 (5) (C), 110 Stat. 2105, 2110 (appearing at 42 U.S.C. § 601 (notes) (Supp. V. 2000)).

449. Arndorfer, *supra* note 447, at 590 (recognizing recent research fails to show effectiveness of abstinence-only programs); Smith, *supra* note 442, at 196 (arguing abstinence education programs have had no effect on students' sexual behavior).

450. *See* 42 U.S.C. § 710(b)(2)(C) (2000) (requiring abstinence be taught as only method of contraception certain to prevent "out-of-wedlock pregnancy, sexually transmitted diseases, and other associated health problems"). A bill is currently before the House of Representatives that provides reauthorization of the abstinence only funding. *See* HR 4585, 107th Cong. § 2 (2002) (extending funding until 2007 for abstinence only education). In addition, the Family Life Education Act which also includes contraception and safer sex-education, has been introduced. HR 3469, 107th Cong. § 1 (2001).

funded sex-education curriculum, engaging in sexual activity before marriage will likely have harmful psychological effects.<sup>451</sup> Thus, the government is attempting to compel marriage through sex-education by teaching teenagers that marriage is the only acceptable condition for sexual expression.

Legal rhetoric, rules, pronouncements, and perhaps even propaganda in the guise of sex-education are not the only strategies for maintaining a system of compulsory matrimony. What may be broadly termed “the social” operates to “organize and propagandize”<sup>452</sup> marriage. Arguments for same-sex marriage recognition adopt these social themes. For example, David Cruz draws upon an array of sources to support his conclusion that marriage is expressive conduct.<sup>453</sup> With seeming approval, he notes:

- a married woman has an acceptability and legitimacy that a single woman lacks;<sup>454</sup>
- to “make an honest woman” of someone means to lawfully marry her;<sup>455</sup>
- marriage is a sign of maturity;<sup>456</sup> marriage epitomizes maturity;<sup>457</sup>
- to be married is to be an adult, to accept commitment, to pledge one’s self to fidelity, loyalty, and devotion;<sup>458</sup>
- marriage means that one’s sexuality is not one’s predominant interest;<sup>459</sup>
- the desire to marry to constitute one’s identity is a human desire.<sup>460</sup>

Such statements illustrate not only that marriage may be an “expressive activity,” but also coercively ensure that such expressive activity occurs. The universalization of matrimony as a human desire, like the universalization of heterosexuality as human, functions as a “theoretical and political stumbling block.”<sup>461</sup> It does not allow for the questioning of matrimony as a choice or

451. 42 U.S.C § 710 (b)(2)(E) (2000).

452. See Rich, *supra* note 349, at 50.

453. David B. Cruz, “Just Don’t Call it Marriage”: *The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925 (2001).

454. *Id.* at 937 (citing Jeanne M. Eck, *The Shun Factor*, WASH. POST, Oct. 21, 1997, at D5).

455. *Id.* at 939. Cruz does not provide a specific source for this statement, but it appears to be an interpretation of a general perception.

456. *Id.* at 942 (citing Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 672 (1980)).

457. *Id.* (citing CHRIS INGRAHAM, WHITE WEDDINGS: ROMANCING HETEROSEXUALITY IN POPULAR CULTURE 3 (1999)).

458. Cruz, *supra* note 453, at 942 (citing Samuel A. Marcossion, *Romer and the Limits of Legitimacy: Stripping Opponents of Gay and Lesbian Rights of Their “First Line of Defense” in the Same-Sex Marriage Fight*, 24 J. CONTEMP. LEGAL ISSUES 217, 246 (1998)).

459. *Id.* at 942-43 (citing Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 546 (1992)). This proposition does earn a skeptical comment regarding its validity: “Marriage . . . communicates to the world (*however accurately or not*) that one’s sex life is simply one facet of one’s life.” *Id.* at 942 (emphasis added).

460. *Id.* at 940 (citing ESKRIDGE, *THE CASE*, *supra* note 346, at 45).

461. Rich, *supra* note 349, at 50.

preference and leaves little space for dissenters. Moreover, any dissenters that exist are implicitly pathologized as immature, uncommitted, unfaithful, disloyal, undevoted, and overly sexual. For women, this pathology is expressed as more pronounced, given the implicit view that unmarried women are unacceptable and illegitimate, and if sexually active, somehow dishonest and disreputable.

To be “single” is to be defined “through absence,” by a “lack of,” and “to conjure up images of a lone fragmentary existence,” for which women have been especially stigmatized.<sup>462</sup> This stigma attaches despite purported celebrations of the sexy single woman, because such a woman is still “hoping for the big white wedding that will signal her social completion.”<sup>463</sup> The enactments necessary for this social completion, from the engagement ring, the invitations, the pre-wedding showers, parties, and dinners, to the wedding clothes, rings, ceremony, reception, and gifts, and on to the honeymoon, are all supported by a huge industry<sup>464</sup> and are predominant in popular culture.<sup>465</sup> That the ceremonies, etiquette, and commercialism of the wedding industry are translatable to gay and lesbian couples is unsurprising.<sup>466</sup> Lesbians and gay men are included in the statement that “most of us have been brought up with expectations that we will marry,”<sup>467</sup> yet our personal “choice,” no less than the choice of heterosexuals, is overdetermined by external social forces.<sup>468</sup> Thus, the desire or choice to marry should be as open to question as the desire or choice to be heterosexual.<sup>469</sup>

462. JACLYN GELLER, *HERE COMES THE BRIDE: WOMEN, WEDDINGS, AND THE MARRIAGE MYSTIQUE* 64 (2001).

463. *Id.* at 54. Geller supports her thesis with an analysis of popular cultural representations, including Helen Gurley Brown and recent television programs such as *Sex and the City*, *id.* at 54-63, and *Ally McBeal*, *id.* at 238-44.

464. *See id.* at 309, 314 (recognizing that American weddings represent 70 billion dollar industry and that this money could be better spent on woman’s health and education instead of diamonds and parties).

465. GELLER, *supra* note 462, at 295-314 (examining television shows, movies, magazines, and self-help books focused on finding mates and planning weddings).

466. For example, in *THE ESSENTIAL GUIDE TO LESBIAN AND GAY WEDDINGS*, the authors provide a range of advice from dealing with vendors, invitations, ceremony and reception locations, wedding rings, food and beverages, to the wedding cake, wedding clothes, flowers, entertainment, parties and gifts, photography and video, and again onto the honeymoon—in short, the same areas of concern dealt with in traditional wedding guides. *See generally* AYERS & BROWN, *supra* note 353 (providing advice for dealing with details of lesbian and gay weddings—the same areas of concern dealt with in traditional wedding guides). Ayers and Brown also advise that “a business that is gay-owned or operated won’t necessarily give you . . . a better price.” *Id.* at 34.

467. PAULA MARTINAC, *THE LESBIAN AND GAY BOOK OF LOVE AND MARRIAGE* 76 (1998).

468. *See* GELLER, *supra* note 462, at 70-71 (opining that a woman’s decision to marry is rarely individualistic given influence of “family pressure, legal sanction, and the deluge of consumer images linking wedlock to female happiness and self-worth”).

469. Interestingly, despite the failure to consider the possibility of compulsory matrimony in his work of marriage, David Cruz provides an excellent analysis of compulsory heterosexuality as related to the “choice” to undergo sexual orientation conversion therapy. David B. Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. CAL. L. REV. 1297, 1340-45 (1999). Cruz argues that “given historical and present social circumstances” he gravely doubts whether a person’s choice to “submit to sexual reorientation can be voluntary” in a society in which sexual minorities are “subject to legal and other social sanctions” and the pressures of

Social, political, and legal forces combine to produce a system of compulsory matrimony. Thus far, this system has excluded same-sex couples. Nevertheless, any quest for lesbian and gay marriage occurs within this coercive construct.

#### *D. Marital Identity and the State*

One need not perceive marriage as a “repressive” institution to take seriously Foucault’s suggestion that we question how the processes of becoming individuals are linked to the state.<sup>470</sup> This linkage between our individualization and the state is inherent in much of same-sex marriage advocacy. For example, as one same-sex marriage advocate phrases it, marriage has a necessary “civilizing” effect,<sup>471</sup> but such rhetoric depends upon the oppositional and degraded state of nature. Moreover, the celebration of civilization rejects any critique of the ways in which civilization depends upon capitalist exploitation and inequalities. That this civilizing effect is important, “especially for gay men” who “have been known for their promiscuous subcultures,”<sup>472</sup> is not merely an argument regarding personal happiness. The individual satisfaction with marriage (as opposed to promiscuity) is inextricably connected to the state.

Although this connection is often articulated by metaphors rather than with

compulsory heterosexuality are difficult to quantify. *Id.* at 1344-45. Cruz uses the exclusion of same-sex couples from state sanctioned marriage as a prime example of the valorization of heterosexuality. *Id.* at 1345.

The issue of sexual conversion therapy is important. See MARTIN DUBERMAN, CURES: A GAY MAN’S ODYSSEY 32-202 (1991) (detailing struggle to accept homosexuality despite therapeutic attempts to “cure” it); Laura Gans, *Inverts, Perverts, and Converts: Sexual Orientation Conversion Therapy & Liability*, 8 B.U. PUB. INT. L.J. 219, 220 (1999) (seeking to develop theory to hold therapists who seek to alter person’s sexuality liable for damages). Even so, the number of people who submit to therapy to alter their sexual orientation is far surpassed by the number of people who submit to therapy to achieve marital or quasi-marital relationship “success.” See American Association for Marriage and Family Therapy, *A Consumer’s Guide to Marriage and Family Therapy* (1997) available at <http://www.aamft.org> (last visited June 27, 2001) (estimating that at any given time, marriage and family therapists are treating over 1.8 million people). Given compulsory matrimony, one wonders whether a person’s choice to submit to “marriage counseling,” seek “couples therapy,” or individual therapy to “find a mate” can truly be voluntary.

470. See DREYFUS & RABINOW, *supra* note 106 at 208-16 (arguing individuals should be liberated from both “the state and from the type of individualization that is linked to the state”).

471. ESKRIDGE, *THE CASE*, *supra* note 346, at 9.

472. *Id.* at 9-10. Eskridge contends that same-sex marriage could be particularly useful for gay men, to the extent that males have been more “sexually venturesome (more in need of civilizing in our culture than women),” and further that “sexual variety has not been liberating to gay men.” *Id.* Sounding very Posnerian, he opines:

In addition to the disease costs, promiscuity has encouraged a cult of youth worship and has contributed to the stereotype of homosexuals as people who lack a serious approach to life. (Indeed, a culture centered around nightclubs and bars is not one that can fundamentally satisfy the needs for connection and commitment that become more important as one grows older.) A self-reflective gay community ought to embrace marriage for its potentially civilizing effect on young and old alike.

*Id.* at 10.

precision,<sup>473</sup> arguments that married persons are wealthier and healthier<sup>474</sup> necessarily implicate the state in several ways. First, while such persons may be happier, they are also better citizens, able to contribute to the financial health of the state by paying taxes and not receiving benefits. Indeed, marriage serves to privatize the risks of poverty and illness and to remove governmental responsibility.<sup>475</sup> The state's promotion of marriage in its welfare and bankruptcy laws inures to the benefit of the state fisc. It also allows the state to be efficient; marriage serves as a "bright line" category for state administrative regulation.<sup>476</sup>

Second, the capitalist state's conceptualization of the married couple as a "unit of consumption" and a "unit of production" is related to the state's interest in promoting both consumption and production.<sup>477</sup> That this "unit" could be redefined as a household,<sup>478</sup> does not detract from the central premise that what is at stake is capitalism. The notion that marriage is an "economic partnership" is consistent with the state's interest in economic prosperity.<sup>479</sup>

473. John Witte, Jr., *The Goods and Goals of Marriage*, 76 NOTRE DAME L. REV. 1019, 1070 (2001) (noting "careful demonstration and documentation" that marriage is beneficial to civil society is lacking from social science arguments on benefits of marriage).

474. See generally LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* (2000).

475. For example, Waite and Gallagher argue that a married partner will help in times of a health crisis in the way that a "friend or lover" cannot, *id.* at 69, seemingly discounting any notion that the state should be required to provide assistance. Additionally, they conclude that "most of the health benefits of marriage for women" are attributable to having more money, access to better housing and importantly, private health insurance, "an increasingly precious commodity." *Id.* at 60. Again, the possibility of a state solution, such as universal health care, remains unmentioned.

476. Patricia A. Cain, *Imagine There's No Marriage*, 16 QUINNIPIAC L. REV. 27, 57-58 (1996). Cain nevertheless argues that the tax code should recognize same-sex couples because lack of such recognition "can actually result in losses to the treasury," and that "failure to conform tax law to the realities of life will produce unnecessary inefficiencies." *Id.* at 59.

477. WAITE & GALLAGHER, *supra* note 474, at 17 (stating "[m]arriage creates not just a new unit of consumption, but a new unit of production: Getting and staying married produces goods for the partners, their children, and for the rest of society").

478. Cain, *supra* note 476, at 57 (describing how "functioning households create value to the state").

479. See *supra* notes 363-401 and accompanying text for a discussion of the economic benefits that accompany marriage. As Martha Fineman has consistently and eloquently argued, the burden of this view falls predominantly on women, who are disproportionately caretakers. See generally Martha Albertson Fineman, *Fatherhood, Feminism and Family Law*, 32 MCGEORGE L. REV. 1031 (2001) (arguing that the gender neutral language and idealized equality reform in the area of custody decisions disregards or minimizes the role of caretaker in favor of the wage earner and is therefore often disadvantageous to women, who are usually the family's primary caretakers, and who, as a result of this role, are forced to decrease their market activity and self-investment and instead a new set of norms for fatherhood should be created that involve nurturing); Martha L. A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181 (1995) (discussing that marriage is seen as a way to implement social policy and achieve independence, and any alternative to traditional notions of marriage threatens society and therefore punishes women who do not conform to that model, and suggesting that society look at the function of families, instead of their form); Martha Fineman, *Roundtable: Opportunities for and Limitations of Private Ordering in Family Law*, 73 IND. L.J. 535 (1998) (calling for the abolition of marriage as a legal concept and for the

Lastly, it is important to always recall that the state itself creates the conditions that allow the married to be wealthier and healthier, through a legal regime that benefits and promotes marriage.<sup>480</sup> As Brian Bix argues, separating the institution of marriage from “the incentives and disincentives to participate in it would be a mistake.”<sup>481</sup> While the state’s expression of its interests may not always be consistent or coherent,<sup>482</sup> this does not mean that there is not a predominant orientation.

This predominant marital orientation makes it difficult to disentangle our personal interests and the state’s interests. Just as the regime of compulsory matrimony makes it difficult to discern whether our “choices” are truly voluntary, the linkage between state and personal concerns regarding marriage renders the Foucauldian interrogation demanding. Similarly, when we incompletely adopt the liberal state’s preoccupation with equality—focusing on whether we as sexual minorities are equal to heterosexuals, but excluding the inquiries concerning whether other minorities, such as cohabiting but unmarried heterosexuals, persons in intimate relationships with relatives, and persons who are simultaneously married to more than one person—we may be serving the interests of the state more than our own interests. Thus, the previous discussions regarding problems with equality doctrine and theory as exemplified in legal problems surrounding unmarried heterosexuals, familial marriage, and bigamy and polygamy re-emerge when one considers the relationship between the individual and the state. Similarly, the state’s efforts to channel its inhabitants into marriage likewise demonstrates the need to interrogate the linkage between our identity as individuals, who seem to possess free choice, and the state’s management of our choices.

Perhaps our individual desires and the state’s interests coincidentally merge; yet questions of causation do not seem to me to be the real issue. Instead, correlation is sufficient. Given such correlation, I believe it is imperative to incessantly examine the techniques by which our own personal lives are “married” to the state.

One area of greatest concern for the state, previously only implicitly discussed, is the production of its future citizens. For same-sex marriage advocates, the question of children has become crucial. As Nancy Polikoff has noted, this “intertwining of marriage and parenting” became obvious during the post-Hawai’i Supreme Court litigation in *Baehr*, in which the state chose child-rearing as a compelling state interest to justify the restriction of marriage to

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implementation of private ordering, which would eliminate marital privacy and thus publicize dependency and better protect women, who traditionally bear the burden of dependency as caretakers).

480. See *supra* notes 416-85 and accompanying text for a discussion of the coercive promotion of compulsory matrimony through the legal machine.

481. Brian Bix, *State of the Union: The States’ Interest in the Martial Status of Their Citizens*, 55 U. MIAMI L. REV. 1, 8 (2000).

482. See *id.* at 26-29 (emphasizing incoherence of state policies on marriage and tension between symbolic and actual support for marriage).

opposite-sex couples.<sup>483</sup> As Polikoff also observes, the state of Vermont similarly raised an argument linking marriage and child-rearing in *Baker v. State*, but this contention seemingly backfired because the Vermont Supreme Court used its previous decision allowing joint adoption by a same-sex couples to bolster its finding that excluding same-sex couples from the benefits of marriage violated the state constitution.<sup>484</sup> Subsequently, those eager to forestall same-sex marriage arguments have focused on denying parental rights to lesbians and gay men.<sup>485</sup> Thus, the struggle for same-sex marriage and lesbian/gay parenting rights have become intertwined.

These two struggles, however, are also intertwined in their implication of assimilationist concerns. In the next section, this Article turns to a particular aspect of lesbian parenting litigation, the equality considerations it evokes, a discussion of the coercive aspects of motherhood, and the ways in which our identities as mothers are linked to state interests.

#### V. LESBIAN MOTHERS

At an earlier point in the history of lesbian advocacy, lesbian custody litigation could quite correctly be considered a civil rights battle for lesbians.<sup>486</sup> The purpose of such litigation was to prevent lesbians previously involved in heterosexual relationships from being denied custody based upon their status as lesbians. Unfortunately, this situation is not merely historical; (former) husbands and other relatives continue to deprive lesbians of the custody and company of our children.<sup>487</sup> The energy of our advocacy is now devoted to

483. See Nancy D. Polikoff, *Recognizing Partners but not Parents/ Recognizing Parents but not Partners: Gay and Lesbian Family Law in Europe and the United States*, 17 N.Y.L. SCH. J. HUM. RTS. 711, 738 (2000) (discussing how *Baehr v. Lewin* marked seminal retreat from positive developments in law of lesbian and gay parenting, illustrating that state still equated same-sex couples with negative parenting); see also *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at \*16-20 (Haw. Cir. Ct. Dec. 3, 1996) (discussing and rejecting state's arguments).

484. See Polikoff, *infra* note 486, at 746 (noting that Vermont Supreme Court used its past treatment of child-raising to reject state's explanation for its marriage restriction); see also *Baker*, 744 A.2d at 882 (reasoning that exclusion of same-sex couples from legal protections of marriage exposes their children to precise risks that state argues marriage laws are designed to guard against).

485. Polikoff, *supra* note 486, at 749-50.

486. Unfortunately, I am unable to attribute this insight to particular lesbians on particular occasions. I believe I have heard it voiced by Nancy Polikoff, Mary Dunlap, and Liz Hendrickson.

This does not mean, however, that "civil rights" were a prominent part of the litigation. In fact, a conferring of lesbian civil rights in custody cases has been explicitly advised against. See Nan D. Hunter & Nancy D. Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFF. L. REV. 691, 721 (1976) (suggesting that equal protection arguments in lesbian custody litigation should be replaced by factual particularization and by decentering of mother's lesbianism during trial phase).

487. The case of *Bottoms v. Bottoms*, in which a grandmother was granted custody of her lesbian daughter's child has become the commonplace illustration. 457 S.E.2d 102 (Va. 1995). The trial court decision and subsequent appeals attracted national media attention. See, e.g., B. Drummond Ayres, *Judge's Decision in Custody Case Raises Concerns*, THE NEW YORK TIMES Sept. 9, 1993, at A16 (documenting collective shock and dismay within homosexual communities over the *Bottoms* decision); Debbie Howlett, *Judge Rules Lesbian Is "Unfit" Mother*, USA TODAY, Sept. 8, 1993, at A1

another type of custody contest: one between lesbians. While the issue of assimilation and lesbian motherhood is certainly broader than these quarrels,<sup>488</sup> they often entail arguments that poignantly problematize the anti-assimilationist stance with regard to our notions of equality, coercion, and our identities.

### A. Disputes Between Lesbian Mothers

Intra-lesbian disputes may be conceptualized as a situation in which one of the lesbians is precluded from having a relationship with her child based upon her status as a lesbian. In the typical scenario, two lesbians agree to have a child, although the litigation often highlights very differing perspectives on the existence, extent, and specifics of any agreement. Only one of the lesbians is the legal mother, most typically because she is the birth mother. The other lesbian is

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(detailing facts of *Bottoms* decision); Elizabeth Kastor, *The Battle is for the Boy in the Middle; Little Tyler's Mom is a Lesbian, So Grandma Got to Take Him Away*, THE WASHINGTON POST, Oct. 1, 1993, at C1 (detailing facts and impact of *Bottoms* decision). For legal scholarship on the trial court decision, see generally Joseph Price, Comment, *Bottoms III: Visitation Restrictions and Sexual Orientation*, 5 WM. & MARY BILL RTS. J. 643 (1997); Amy D. Ronner, *Bottoms v. Bottoms: The Lesbian Mother and the Judicial Perpetuation of Damaging Stereotypes*, 7 YALE J. L. & FEMINISM 341 (1995); Peter Nash Swifter & Nancy Douglas Cook, *Bottoms v. Bottoms: In Whose Best Interest?*, 34 U. LOUISVILLE J. FAM. L. 843 (1995). In *Bottoms*, the lesbian mother's custody was challenged by her mother—the child's grandmother—and the Virginia Supreme Court sustained the trial court's grant of custody to the grandmother. 457 S.E.2d at 109. This occurred despite the more stringent standards when a nonparent, such as a grandparent, seeks custody. See Ruthann Robson, *Third Parties and the Third Sex: Child Custody and Lesbian Legal Theory*, 26 CONN. L. REV. 1377, 1408-10 (1994) (exposing inapplicability of third-party doctrine to protect legal mothers in effort to preserve heterosexual matrix of identity).

As between parents, a child custody dispute is resolved on the basis of the "best interest of the child" standard, under which several different approaches to a parent's lesbianism have evolved. Most extremely, a court may decide that lesbianism is a per se disqualification. Once popular, this approach has been widely rejected. See, e.g., Heidi Doerhoff, Note, *Assessing the Best Interests of the Child: Missouri Declares that a Homosexual Parent is Not Ipso Facto Unfit for Custody*, 64 MO. L. REV. 949, 959-60 (1999) (jurisdictions that find homosexual parents per se unfit for custody as matter of law are rare). More moderate is the nexus approach which requires the court to find a relationship between parental sexuality and harm to the child. Under the "true" nexus approach, the burden of persuasion is allocated so that there must be proof that parental sexuality will have an adverse impact on the child. Yet some courts presume adverse impact, demanding that the sexuality minority parent prove an absence of harm, an approach that Professor Julie Shapiro calls a standard of "permissible determinative inference." Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 624, 639-41 (1996). Scholars argue that while the nexus approach may seem neutral, it is applied operatively to deprive sexual minorities of child custody because of differing standards of conduct for sexual minorities than for heterosexuals. See Kathryn Kendall, 35-AUG Trial 42, 43-46 (1999) (documenting inequitable application of nexus test); Shapiro, *supra* note 487, at 641-46 evaluating misapplication and distortion of nexus test); Mark Strasser, *Fit to Be Tied: On Custody, Discretion, and Sexual Orientation*, 46 AM. U.L. REV. 841, 862 (1997) (concluding that courts often espouse nexus test, and yet deny custody without evidence of harm).

The most liberal approach, and to my mind the only correct one, deems a parent's sexuality irrelevant.

488. I have discussed such questions in terms of "domestication," elsewhere. See (OUT)LAW, *supra* note 5, at 129-41 (explicating necessity of choice within lesbian issues and fragmentation within lesbian community over these issues).



a nonlegal parent who has not adopted the child, either because so-called second parent adoption is not legally available or because the parties have not availed themselves of that process.<sup>489</sup> The relationship between the adults deteriorates, and, usually after a period of accommodation, the lesbian who is the legal mother decides to deprive her former lover of all access to the child. The nonlegal mother consults an attorney, receives support from lesbian advocacy groups, and institutes litigation.

The situation in *V.C. v. M.J.B.*,<sup>490</sup> decided by the New Jersey Supreme Court, follows these broad outlines.<sup>491</sup> The court rejected the idea that a non-legal "parent" is no "parent" with any claim to visitation, a rationale advanced by New York's highest court in *Alison D. v. Virginia M.*<sup>492</sup> Instead, the court favored the functional, psychological or de facto definitions of parenthood, articulated by the Wisconsin Supreme Court in *In re Custody of H.S.H.-H. (Holtzman v. Knott)*.<sup>493</sup> Under the Wisconsin test, adopted by the New Jersey Supreme Court,<sup>494</sup> among others,<sup>495</sup> visitation will be allowed if there is a

489. See *Making Mothers*, *supra* note 5, at 17-35, for a discussion of the concept and availability of second parent adoptions, both as a legal and factual matter.

490. 748 A.2d 539 (N.J. 2000), *aff'g*, 725 A.2d 13 (N.J. Super. Ct. App. Div. 1999).

491. *V.C.*, 748 A.2d at 542-44. *V.C.* and *M.J.B.* are described by the New Jersey Supreme Court as "lesbians," who began "dating" and then having a "relationship," which an expert "likened" to "a heterosexual marriage." *Id.* at 544. During their relationship, *M.J.B.* was inseminated and there was some controversy about whether *V.C.* and *M.J.B.* "jointly" decided that *M.J.B.* be inseminated. *Id.* at 542. According to the court, *V.C.* claimed that the parties jointly decided to have children and "jointly researched and decided which sperm donor to use," while *M.J.B.* "acknowledged that she consulted *V.C.*" but that "she individually made the final choice about which sperm donor to use" and that *V.C.* was initially unaware of *M.J.B.*'s visits to a doctor regarding the insemination. *Id.* *M.J.B.* became pregnant with twins and according to the court, both women attended prenatal and Lamaze classes, and "*V.C.* took *M.J.B.* to the hospital and she was present in the delivery room at the birth of the children. *Id.* At the hospital, the nurses and staff treated *V.C.* as if she were a mother. *V.C.*, 748 A.2d at 542. Immediately following the birth, the nurses gave one child to *M.J.B.* to hold and the other to *V.C.* and took pictures of the four of them together." *Id.*

*M.J.B.* and *V.C.* remained together until the twins were almost two years old, with both women participating in the care of the children. *Id.* at 543-44. At trial, the decision-making regarding the twins' day care and medical care became subject to intense debate because *M.J.B.* characterized *V.C.*'s role as "mere helper and not co-parent." *Id.* at 543. The New Jersey Supreme Court noted that it was "clear that *M.J.B.* brought *V.C.* to the [child care] center she selected prior to making a final decision" and that "*M.J.B.* listed *V.C.* as the 'other mother' on the children's pediatrician and day care registration forms" and gave *V.C.* "medical power of attorney over the children." *Id.* When *M.J.B.* terminated the relationship with *V.C.*, at first the women pursued arrangements that involved *V.C.* as a parent in the twins' lives. *V.C.*, at 544. Soon these arrangements disintegrated and as the appellate court related, *M.J.B.* decided that she wanted her new lover - and not *V.C.* - to be the children's other mother, testifying that "she, the children and her new partner were a family now." *V.C.*, 725 A.2d at 16.

492. *Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991). The court stated that the term parent does not include categories of non-parents who have developed a relationship with the child. *Id.*

493. 533 N.W.2d 419 (Wis. 1995). The court listed requirements necessary to establish a parent-like relationship with the child. *Id.* at 434-36.

494. The court in *V.C.* stated that the "most thoughtful and inclusive definition of de facto parenthood is in the test enunciated" by the Wisconsin Supreme Court and adopted the test because it

“parent-like” relationship between any petitioner and the child, which is proved by meeting four elements:

- 1) the legal parent fostered and consented to development of a parent-like relationship between the petitioner and the child;
- 2) the petitioner and child lived together in the same household;
- 3) the petitioner assumed the obligations of parenthood by taking responsibility for the child’s care, education, and development, including but not limited to financial contribution, and did not expect financial compensation;
- 4) the petitioner has been in a parent-like relationship a sufficient amount of time to have a bonded relationship.<sup>496</sup>

In addition to these elements, state interference requires a “triggering event” such that the parent must have interfered with the relationship between the petitioner and the child, and further that the petitioner must bring the action within a reasonable time.<sup>497</sup> The Wisconsin Supreme Court’s functionalist approach in *Holtzman* and its careful articulation of standards is the opposite of the formalist approach employed by New York’s highest court in *Alison D.*

I have recently elsewhere analyzed some of the problems with the functionalist approach as articulated in *Holtzman* and adopted by the New Jersey Supreme Court in *V.C.*<sup>498</sup> Borrowing from Professor Julie Shapiro’s critique of second-parent adoptions,<sup>499</sup> I have argued that despite some of the advantages of the functionalist approach, it ultimately enshrines a very conservative and stereotyped view of parenting<sup>500</sup> and places the authority for enforcing that view in the legal system.<sup>501</sup>

For purposes of evaluating intra-lesbian custody disputes from the anti-assimilationist perspective, the inquiries are somewhat different. The first question is whether our advocacy of functionalist definitions of lesbian parenting fetishizes constitutional concepts rather than striving for a broader approach such as liberation. While substantive due process rights are implicated in our functional parent theorizing, usually as belonging to the legal parent and thus an obstacle to overcome,<sup>502</sup> the constitutional principle most at issue is equality.

“provided a good framework for determining psychological parenthood.” *V.C.*, 748 A.2d at 551-52.

495. The Massachusetts Supreme Court in *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 891-94 (Mass. 1999), did not explicitly adopt the *Holtzman* criteria, but used much of its reasoning in its development of functional definitions of parenthood.

496. *Holtzman*, 533 N.W. at 435-36.

497. *Id.* at 421, 435.

498. See *Making Mothers*, *supra* note 5, at 30-35 (arguing that functionalist approach leads to conservative definitions of parenting and to inequality in levels of proof for person to be deemed a parent).

499. See Julie Shapiro, *A Lesbian-Centered Critique of Second-Parent Adoptions*, 14 BERKELEY WOMEN’S L.J. 17 (1999) (using lesbian legal theory to critically examine second-parent adoptions).

500. *Making Mothers*, *supra* note 5, at 31.

501. *Id.* at 15-16.

502. In *Troxel v. Granville*, 530 U.S. 57 (2000), the Court considered a challenge to a Washington state statute which allowed “any person” to petition for visitation “at any time” and directed the court

### B. Equality and Motherhood

One of the most compelling arguments for judicial adoptions of lesbian functional parenting arises from comparisons of the legal status of lesbian parents as compared with that of heterosexual parents, specifically fathers. A man can become a father simply because of his status as married to the child's mother.<sup>503</sup> For the most part, a biological father is deemed a parent with or without any other connection to a child or to the child's other parent,<sup>504</sup> one notable exception being the conferring of United States citizenship to the children of unwed parents.<sup>505</sup> Given the general trend of deeming fathers as

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to grant visitation if it was within the "best interests of the child." The Court found that the application of the statute violated the due process rights of the parent because the trial judge gave no weight to the mother's determination of her child's best interests. *Id.* at 69-70. The Court grounded this conclusion in almost a century of recognition for parental due process rights. *Id.* at 65-66 (citing *Parham v. J.R.*, 442 U.S. 584 (1979); *Quillon v. Walcott*, 434 U.S. 246 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

In the functional parenthood test enunciated by the Wisconsin Supreme Court in *Holtzman* and adopted by the New Jersey Supreme Court in *V.C.*, the first requirement, that of "fostering" and "consenting," addresses the substantive due process rights of the legal parent. As the court in *V.C.* stated, the legal mother can choose to maintain her "zone of autonomous privacy," but once she abandons it and a "profound bond" between the nonlegal parent and child develops, that bond may not then be "unilaterally terminated" by the legal parent. 748 A.2d at 552.

503. *See, e.g.*, N.J. STAT. 9:17-43 (providing that man is presumed to be father of child if he is married to mother and child is born during marriage or 300 days thereafter). The presumption of fatherhood, through marriage to the mother, was held constitutional by the United States Supreme Court in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

504. This is not to imply that biological fathers necessarily experience this as a privilege, as many men paying court-ordered child support could attest. *See* David Chambers, *Fathers, The Welfare System, and the Virtues and Perils of Child Support Enforcement*, 81 VA. L. REV. 2575, 2589-93 (1995) (discussing effects of collecting child support from fathers); Kindra Gromelski, *You Made Your Bed . . . Now You Are Going to Pay for it: An Analysis of the Effects of Virginia's Mandatory Parental Identification in AFDC Cases Will Have on the Rights of Unwed Fathers*, 5 WM. & MARY J. WOMEN & L. 383, 397-407 (1999) (discussing disproportionate burden placed on fathers as compared to benefits and rights they receive); Tonya Plank, *Human Rights, Women's Rights and Welfare Reform: An Analysis of H.R.4 from an International Human Rights Perspective*, 17 WOMEN'S RTS. L. REP. 345, 347-50 (1996) (discussing Work Opportunity Act of 1995 and its effect on mothers and fathers).

505. In *Nguyen v. INS*, 533 U.S. 53 (2001), the Court rejected a challenge to 8 U.S.C. § 1409 that imposes different requirements for a child born outside the United States regarding the child's acquisition of citizenship, depending upon whether the citizen parent is the mother or the father. Specifically, § 1409(c) provides that a child born out of wedlock acquires at birth the nationality status of a citizen mother who meets specified residency requirements, while § 1409(a) requires where the father is the citizen parent that the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and that while the person is under the age of 18 the child is legitimated under the laws of person's domicile, or the father acknowledges paternity of the person in writing under oath, or the paternity of the person is established by adjudication of a competent court.

In considering the statutory distinction, which requires the father—but not the mother—of a child born to unwed parents to take one of three affirmative steps before the child reaches the age of 18, the Court found that two important governmental interests support the gender distinction. *Id.* at 62. The first government interest is the importance of assuring that a biological parent-child relationship exists. *Id.* at 62-64. The second interest is the determination to ensure that the child and

parents on the basis of biology alone, however, it seems a blatant inequality to deny parenting status to a nonbiological lesbian parent.

The functionalist standard, however, does not achieve equal treatment. Unlike most fathers, every nonlegal lesbian parent must prove through her actions that she deserves the status of parent. While the functionalist standard allows the lesbian nonlegal parent some relief from absolute exclusion, it is more separate than equal.

Furthermore, the equality is illusory even between the lesbian parents. The intra-lesbian disputes frequently concern visitation and not custody. With regard to custody disputes, the judicial preference remains for the biological parent. As the New Jersey Supreme Court in *V.C.* opined, a child's "search for self-knowledge" and "roots" is biologically based, requiring preference to the biological parent.<sup>506</sup>

The fissure between equality and biology is apparent both when the nonlegal lesbian mother is compared to her partner and when she is compared to the biological father. Constitutional equal protection doctrine has often foundered on the shoals of biological reasoning. The basis for egregiously unequal treatment to various racial and ethnic minorities can be biologically grounded,<sup>507</sup> using the "facts" of skin,<sup>508</sup> blood,<sup>509</sup> and genes.<sup>510</sup> Issues of gender

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the citizen parent have some demonstrated opportunity or potential to develop the real, everyday ties that provide a connection between child and citizen parent, and in turn, the United States. *Id.* at 64-68. The classification made by the statute between mothers and fathers is substantially related to these interests because the mother's identity is self-evident by the birth that she is indeed the mother, while the father's identity is not. Thus, there is no equal protection violation. Previously, in *Miller v. Albright*, 523 U.S. 420 (1998), a plurality upheld the statute, 42 U.S.C. § 1409, which provided that to confer citizenship the citizen mother must only "give birth to the child," *Miller*, 523 U.S. at 433, while in order for the unmarried citizen father to transmit citizenship, he must acknowledge paternity or be subject to adjudicated paternity before the child reaches the age of eighteen, *id.* at 434. The plurality opinion implied that if any parent's equality interests were implicated, it was the mother who gives birth, rather than the father who need only be the subject of a legal proceeding. *See id.* (reasoning that burdens imposed on female citizen are more severe than those imposed on male). For a critique of *Miller*, see Linda Kelly, *Republican Mothers, Bastards' Fathers and Good Victims: Discarding Citizens and Equal Protection Through the Failures of Legal Images*, 51 HASTINGS L.J. 557, 571-72 (2000) (arguing that majority failed to distinguish biological realities from societal ones). *See also* Kristin Collins, Note, *When Fathers' Rights are Mothers' Duties: The Failure of Equal Protection in Miller v. Albright*, 109 YALE L.J. 1669 (2000) (arguing that focusing on nexus between biological sex differences and parental rights is problematic). *See generally* Laurence Nolan, "Unwed Children" and Their Parents Before the United States Supreme Court From Levy to Michael H.: *Unlikely Participants in Constitutional Jurisprudence*, 28 CAP. U. L. REV. 1 (1999), for an analysis of cases involving the children of unwed parents.

506. "The legal parent's status is a significant weight in the best interests balance because eventually, in the search for self-knowledge, the child's interest in his or her roots will emerge. Thus, under ordinary circumstances when the evidence concerning the child's best interests (as between a legal parent and psychological parent) is in equipoise, custody will be awarded to the legal parent." *V.C.*, 748 A.2d at 554.

507. For an enlightening discussion of the biological basis for racial categories from a cultural studies perspective, see SARAH CHINN, *TECHNOLOGY AND THE LOGIC OF AMERICAN RACISM* (2000) (using categories of skin, blood, and DNA).

The "biological" discourse can also be conflated with the religious. Perhaps the most notorious

example is from the trial court's conviction of the Lovings for miscegenation, quoted by the United States Supreme Court, "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix." *Loving v. Virginia*, 388 U.S. 1, 3 (1967).

508. As the Court stated in *Plessy v. Ferguson*, 163 U.S. 537, 543 (1896), a statute requiring segregation in railway transportation did not violate the Thirteenth Amendment because it implicated "merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist as long as white men are distinguished from the other race by color." For an excellent analysis of the relationships between skin color and race see Trina Jones, *Shades of Brown*, 49 DUKE L.J. 1487 (2000) (arguing that "colorism" is basis for discrimination).

509. The use of "blood" to determine race is exemplified by the miscegenation statute declared unconstitutional by the United States Supreme Court in *Loving* which provided:

It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term 'white person' shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter.'

*Loving*, 388 U.S. at 5 n.4 (quoting VA. CODE ANN. § 20-54 (1960 Repl. Vol.)).

The Court in *Plessy*, in addition to the skin marker (see *supra* note 508 for a discussion of the skin marker), also confronted the metaphor of blood, concluding that it was not properly an issue that the varying states had decided that "any visible admixture of black blood stamps the person as belonging to the colored race; others, that it depends upon the preponderance of blood; and still others that the predominance of white blood must only be in the proportion of three-fourths." *Plessy*, 163 U.S. at 552.

However, while blood may be the "best-known narrative of racial taxonomy," one author argues that "the one-drop rule does not have the transhistorical, universal legal tradition in the United States that some contemporary race theorists presume." Michael A. Elliott, *Telling the Difference: Nineteenth-Century Legal Narratives of Racial Taxonomy*, 24 LAW & SOC. INQUIRY 611, 616-17 (1999). Instead, "judges (and others) have had more than one story available to them that they could tell to explain why a person belonged to a certain race . . . judges often deployed several such stories in a confusing and self-contradicting manner." *Id.* at 614.

510. For example, the linking of race, genetics, and intelligence occurs in the controversial bestseller RICHARD J. HERNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994). As the scientist Stephen J. Gould noted:

THE BELL CURVE, with its claims and supposed documentation that race and class differences are largely caused by genetic factors and are therefore essentially immutable, contains no new arguments and presents no compelling data to support its anachronistic social Darwinism, so I can only conclude its success in winning attention must reflect the depressing temper of our time—a historical moment of unprecedented ungenerosity, when a mood for slashing social programs can be powerfully abetted by an argument that beneficiaries cannot be helped, owing to inborn cognitive limits expressed as low I.Q. scores.

Derrick A. Bell, *Who's Afraid of Critical Race Theory?* 1995 U. ILL. L. REV. 893, 894 (citing Stephen J. Gould, *Curveball*, NEW YORKER, Nov. 28, 1994, at 139).

See *THE BELL CURVE WARS: RACE, INTELLIGENCE, AND THE FUTURE OF AMERICA* (Steven Fraser ed., 1995), for additional critiques of *THE BELL CURVE*. See also Jana Leslie-Miller, *From Bell to Bell: Responsible Reproduction in the Twentieth Century*, 8 MD. J. CONTEMP. LEGAL ISSUES 123, 135-50 (1997) (linking *Buck v. Bell* to *THE BELL CURVE* and arguing that propositions regarding race and genetics in *THE BELL CURVE* embody biological deterministic perspective similar to eugenics movement).

equality have also been plagued by uncertainties about coping with sexual and physical differences.<sup>511</sup> Likewise, inequality regarding disability is predicated on medical distinctions.<sup>512</sup>

We must not fetishize present equality jurisprudence in our theorizing or advocacy in the realm of lesbians and motherhood. Through the tiers of scrutiny, present equal protection doctrine imbues some physical differences with more constitutional meaning than others: racial classifications merit strict scrutiny,<sup>513</sup> sex classifications earn intermediate scrutiny,<sup>514</sup> disability classifications can be judged by serious rational basis scrutiny,<sup>515</sup> and age classifications deserve mere rational basis examination.<sup>516</sup> Yet race, sex,

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511. The VMI litigation, *see supra* note 29-33 and accompanying text, concerned three issues regarding women's ability to attend the Virginia Military Institute, physical training, the absence of privacy, and the adversative approach, *VMI*, 518 U.S. at 525; *id.* at 588 (Scalia, J., dissenting). At least two of these three issues are rooted in the physical: physical training is obviously based upon physical characteristics and abilities, while privacy concerns stem from bodily differences between the sexes.

512. Common understandings of disability, as well as the so-called bio-medical model of disability are bodily in nature. While this may be an improvement from earlier models of disability that ascribed disability to sin or moral failures, the medicalization of disability remains problematic. *See Berg, supra* note 19, at 5-8 (discussing regressive definitions of disability in ADA doctrine). Moreover, as Berg brilliantly demonstrates through her examination of numerous cases, antidiscrimination efforts under the ADA reify the body: "To establish disability under antidiscrimination law, the plaintiff's physical or mental differences from the 'normal' body must be constructed as defects, inadequacies, oddities, or failures." *Id.* at 38. A person's subjective experiences are discounted, in favor of the understandings of medical experts. *Id.* at 39. These understandings, in turn, are reductive:

[P]laintiffs who wish to persuade a judge that they are disabled have no choice but to portray their impairment—in all its corporeal detail—as the central and defining feature of their daily lives. Plaintiffs who make the mistake of revealing a self-perception that is not so defined, or who characterize their impairment as anything less than crippling, are summarily dismissed, along with their story of unequal treatment at the hands of the defendant.

*Id.* at 41 (footnotes omitted).

513. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223 (1995) (stating all racial classifications merit strict scrutiny); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (noting racial classification deemed "suspect" and subject to "the most rigid scrutiny" but upholding exclusion of Japanese and Japanese ancestors from certain areas).

514. *See Craig v. Boren*, 429 U.S. 190, 197 (1976) (stating classifications by gender "must serve important governmental objectives and must be substantially related to achievement of those objectives"). The Court in *VMI* added a gloss to the intermediate scrutiny standard, noting that the justification for the gender classification must be "exceedingly persuasive," genuine, and not relying on "overbroad generalizations" about differences between men and women. *VMI*, 518 U.S. at 533. Dissenting in *VMI*, Scalia argued that the Court was silently replacing the intermediate scrutiny standard previously applied in sex classification cases with a standard more akin to the strict scrutiny standard for racial classifications. *Id.* at 572-73 (Scalia, J., dissenting).

515. *See Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446 (1985) (holding that although legislation distinguishing between mentally retarded and others must be rationally related to legitimate government interest, desire to harm politically unpopular group cannot be legitimate interest, and classification's relationship to claimed goal cannot be so attenuated as to render distinction arbitrary).

516. *See Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991) (noting that state judge petitioners challenging mandatory retirement age of 70 were "correct to assert their challenge at the level of rational basis"); *Vance v. Bradley*, 440 U.S. 93, 110-12 (1979) (applying rational basis test to uphold

disability, and age are all considered biological. The language of immutability is initially attractive as a logical justification, but it ultimately lacks explanatory power.<sup>517</sup> We understand that people can and do alter their racial and sexual identities: the courts have been confronted with deciding the legal consequences of changes relating to race<sup>518</sup> and to sex.<sup>519</sup> On the other hand, judicial discourse

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equal protection challenge to mandatory retirement age of 60 for foreign service employees); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 317 (1976) (per curiam) (upholding mandatory retirement for police officers of age 50 based upon physical capabilities despite possibility that individual officers attaining age might not be physically unfit); *see also* *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 80-87 (2000) (holding that Congressional passage of ADEA under section 5 of Fourteenth Amendment is unconstitutional as not being congruent and proportional to Court's equal protection principle that age classifications are presumptively valid under rational basis review).

517. *See generally* Yoshino, "Don't Ask" *supra* note 6, for a critique of the relationship between immutability and assimilation in the sexual orientation context.

518. In the racial context, one scholar notes that trials at which the "central issue became the determination of a person's racial identity were a regular occurrence in the Southern county courts in the nineteenth century." Ariela Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 111 (1998). In her exhaustive study, Professor Gross explores how juries considered evidence of physical markers (including inspection of skin color, hair color and texture, and feet), documented ancestry, and social interactions. *Id.* at 137-50.

Additionally, while *Plessy v. Ferguson* is infamous for the Court's rejection of Plessy's argument against the Louisiana statute mandating segregated railway passenger cars, Homer Plessy was also raising an issue about racial identity. The Court described Plessy's factual allegations that he was a person "of mixed descent, in the proportion of seven-eighths Caucasian and one-eighth African blood" in whom the "mixture of colored blood was not discernible in him." 163 U.S. 537, 538 (1896). The relevance of this factual allegation is suggested at the end of the Court's opinion in its remark tacitly approving of the varying standards used by the states to determine whether a "colored person, as distinguished from a white person." *Id.* at 552. Plessy's argument on this issue as described by the Louisiana Supreme Court, however, was not directed to the varying judicial standards, but to the statute's apparent grant of judicial authority allowing railroad employees to make racial determinations without any associated legal responsibility for those decisions. *Ex Parte Plessy*, 11 So. 948, 951 (La. 1892).

In rejecting Plessy's argument, the court stated that a "reading of the statute utterly repels these charges" because the "discretion vested in the officer to decide primarily the coach to which each passenger, by race, belongs, is only that necessary discretion attending every imposition of a duty, to determine whether the occasion exists which calls for its exercise." *Id.* If the railroad employee made an incorrect determination, the person refused to go into the assigned coach, and the employee thus excluded the person from the railroad, the person would have an action for damages in light of any "defenses which might lie open" to the employee and the railroad "based on good faith and probable cause." *Id.*

Racial identity as the subject of litigation is not limited to an earlier century. Litigation can concern racial designations on official documents in which the object of the litigation is a decree of "whiteness." *See, e.g.,* *Doe v. Dep't of Health and Human Res.*, 479 So. 2d 369, 371-73 (La. Ct. App. 1985) (ruling on family's claim to change parent's racial designation on their birth certificates); *Rodi v. City of New Orleans*, 94 So. 2d 108, 117 (La. Ct. App. 1975) (ruling on daughter's claim to change racial designation on her father's death certificate). With the advent of laws protecting against racial discrimination, litigation might also center upon persons seeking to be adjudicated as within a protected racial minority class. *See* *Malone v. Haley*, No. 88-339 (Sup. Jd. Ct. Suffolk County, Mass. July 25, 1989) (*cited in* Christopher Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231, 1232-34 (1994) (finding twin brothers who asserted they were black in their applications to Boston Fire Department to be white)).

519. Courts confronted with transgender issues have various strategies to determine the litigant's

“true” gender. For example, in *Richards v. United States Tennis Ass’n*, 400 N.Y.S.2d 267 (N.Y. Sup. Ct. 1977), a court considered the effects of what was then called “sex-reassignment surgery” on the tennis career of the former Richard Raskin, a nationally ranked tennis player, who was now Renee Richards. *Id.* at 267. Before allowing Richards to compete in the women’s section of the United States Open, the association required her to take the sex-chromatin test, also known as the Barr body test, before allowing her to compete in the tournament. *Id.* at 268. The Barr body test, which the International Olympic Committee started using in 1968, sought to determine whether a person had the second X chromosome, and thus, was classified as a “normal female,” or whether a person had an XY chromosome pattern and was thus classified as a male. *Id.* at 269. When Richards eventually took the test, the results were “ambiguous.” *Id.* at 270. The court ruled that Richards must be allowed to compete as a woman. *Richards*, 400 N.Y.S.2d at 273. While not completely rejecting the Barr body test, the court found its usage “grossly unfair, discriminatory, and inequitable,” noting that the Tennis Association had instituted the test for the sole purpose of preventing Richards from playing in the tournament. *Richards*, 400 N.Y.S.2d at 272-73. The court decided that the only rationale for a sex determination test was to prevent fraud, such as in a case in which a man would masquerade as a woman. *Id.* at 272. The court rejected any claim of fraud in Richards case, implicitly valuing Richards’ identity as an open transsexual. *Id.*

In stark contrast to *Richards* is *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984) in which the court rejected a claim for discrimination. Kenneth Ulane was hired in 1968 as a pilot for Eastern Airlines, but after a brief absence in 1980 for sex reassignment surgery, returned to work with a new flight license in the name of Karen Ulane. *Id.* at 1082-83. Eastern Airlines terminated Ulane, citing various reasons including a belief that the sex change operation had changed Ulane from the person Eastern Airlines had hired into a different person. *Ulane v. E. Airlines, Inc.*, 581 F. Supp. 821, 832 (N.D. Ill. 1983). This seemed to substantiate a basic claim for sex discrimination and the trial court agreed. *Id.* at 839. The Seventh Circuit, however, held that Ulane was not discriminated against because of sex, but because of transexuality. *Ulane*, 742 F.2d at 1087. The court described a transexual as a “biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female.” *Id.* Thus, since Ulane only “appeared” to be female, there was no claim for sex discrimination. *Id.*

Sexual function, rather than chromosomes as in *Richards*, or a previous “reality” as opposed to a mere “appearance” as in *Ulane*, was the determinant in *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976), in which a New Jersey appellate court was faced with the issue of the validity of a marriage. M.T., a male to female transsexual, and J.T., a male, were married in 1972, apparently without legal difficulties. *Id.* at 205. J.T. eventually left M.T. and stopped supporting her. *Id.* When M.T. sued for support, J.T. interposed the defense that the marriage was void because M.T. was a male. *Id.* In analyzing the validity of the marriage, the court started with the presumption that only persons of opposite-sex could lawfully marry each other. *Id.* at 207. In finding the marriage valid, both the trial court and the appellate court relied upon experts to reject the argument that sex is limited to biological sex at birth. *M.T.*, 355 A.2d at 207. The judicial reasoning focused heavily on M.T.’s possession of female anatomy and her ability to engage in sexual intercourse as a female. *Id.* at 211.

Yet in a more recent marriage case, the court held that the original birth certificate was sufficient to defeat a claim of marriage. In *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999), the marriage was collaterally attacked by the defendant physician in a malpractice case brought by Littleton as the spouse of her deceased husband. In considering whether Littleton was a spouse who could bring the action, the court phrased the issue as “can a physician change the gender of a person with a scalpel, drugs and counseling, or is a person’s gender immutably fixed by our Creator at birth?” *Id.* at 224. Given this initial invocation of “our Creator,” the court not surprisingly held that the sexual designation on Littleton’s original birth certificate, despite the fact that it had been amended under Texas law, was determinative. *Id.* at 231. In reasoning similar to that utilized by the court in *Ulane*, the Texas appellate court stated that although it recognized “that there are many fine metaphysical arguments lurking about here involving desire and being, the essence of life and the power of mind over physics,” courts “are wise not to wander too far into the misty fields of sociological philosophy,” and concluded its opinion with the pronouncement: “There are some things we cannot will into being.



has also not always privileged immutability: the Court in *Cleburne v. Cleburne Living Center, Inc.*, found the “mentally retarded” to be “different, immutably so,” but nevertheless declined to elevate their equal protection status because such an elevation would also lift “a variety of other groups who have perhaps immutable disabilities” such as “the aging, the disabled, the mentally ill, and the infirm.”<sup>520</sup> Even without entering into the fray of biological models of sexual orientation and their effect on equal protection,<sup>521</sup> equality and biology have a hopelessly convoluted relationship.

Thus, in the context of lesbian parenting, appeals to equality should not be based on appeals to biological models, including the biology of parenting or motherhood. Moreover, if we are serious about liberation, the interconnectedness of biology and equality deserves our “most exacting scrutiny.” Biology is destiny—or the shibboleth of equality—only in an unliberated society.

Furthermore, even if equality were to be achieved, the materialities of that equality merit scrutiny. Custody disputes are referred to by many as “battles,” with justification. At its most crude, what is at stake is our ability to participate in this combat and assault on our former lovers. The critiques of custody litigation are legion.<sup>522</sup> Yet our goal is entry into this destructive and flawed system.<sup>523</sup>

### C. The Coercive Nature of Mothering

The second inquiry of an anti-assimilationist perspective regarding the

They just are.” *Id.*

520. *Cleburne*, 473 U.S. at 445-46. In addition to this slippery slope argument, however, Justice White, writing for the Court, recognized that current equal protection doctrine favoring classifications rather than classes, made a higher level of scrutiny problematic from the perspective of those who would seek state interventions on behalf of the disabled. *Id.* at 444 (discussing Texas and other federal legislation intended to assist developmentally disabled).

521. See SAPHO, *supra* note 5, at 11-12 (discussing competing theories of lesbian identification and their interaction with equal protection issues); EDWARD STEIN, *THE MISMEASURE OF DESIRE: THE SCIENCE, THEORY, AND ETHICS OF SEXUAL ORIENTATION* 23-116 (1999) (analyzing various theories regarding etiology of sexual orientation).

522. See DEBORAH RHODE, *JUSTICE AND GENDER* 154-60 (1989), for an outline of the history of child custody and the various critiques. See also PHYLLIS CHESLER, *MOTHERS ON TRIAL: THE BATTLE FOR CHILDREN AND CUSTODY* 80-83 (1986) (arguing that custody litigation disproportionately disadvantages mothers); Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 728 (1988) (arguing that move away from legal adversarial process has resulted in troubling substitution of rhetoric of social workers and mediators); Janet Weinstein, *And the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 80-86 (1997) (arguing that adversarial process in child custody disputes is inappropriate).

523. There are some suggestions for other models. See William B. Rubenstein, *Divided We Propagate: An Introduction to Protecting Families: Standards for Child Custody in Same-Sex Relationships*, 10 UCLA WOMEN'S L.J. 143, 147 (1999) (wondering if gay couples can “opt out of the traditional legal system” and use mediation assuming mediators were educated about our lives). See also (OUT)LAW, *supra* note 5, at 171-75 (discussing and critiquing mediation); Fineman, *supra* note 522, at 727-31 (arguing against mediation in child custody).

coercive aspects of the assimilation has special resonance in the context of lesbian parenting. The success of functional definitions of parenting very clearly rewards those lesbians who comply with prevailing norms of parenting—and relationships—and very clearly excludes those who do not.<sup>524</sup> The facts used in the cases to prove psychological parenthood are those that mimic the most traditional of traditional families, even including the names by which children refer to their parents.<sup>525</sup>

The coercive lessons of assimilation are also conveyed through exclusion. Building on Julie Shapiro's insights about second parent adoptions,<sup>526</sup> the message of the legal discourse on functional parents relegates some lesbians who are functioning as parents as incognizable. These excluded lesbians are lesbians whose income, histories of substance abuse or criminal convictions, or lifestyles make them unattractive as candidates for litigation.<sup>527</sup> The exclusion also operates against lesbians whose only "fault" was becoming involved in a situation in which there was a biological father.<sup>528</sup> No matter how much psychological or functional parenting such lesbians perform, the present discourse does not allow their recognition as legal mothers.

The coerciveness of motherhood occurs not only in the particular details, but is linked to the achievement of womanhood. While feminists have fomented a "highly voluntaristic rhetoric" surrounding motherhood, women's empowerment is limited to a choice to "delay or space out childbearing" because the option to totally abstain from motherhood is implicitly denied.<sup>529</sup> The mythic, the social, and the psychological realms construct women as mothers—women who are not mothers are depicted as pitiful, evil, lacking, selfish, deficient, and unfeminine.<sup>530</sup> What one commentator names "matrigynoidolatry"—evident in Freud, diverse religious traditions, the doctrine of true womanhood, and contemporary popular media—is buttressed by the negative stereotypes of the childless woman as a mythic witch or contemporary corporate bitch.<sup>531</sup> Feminist attempts to resuscitate "childfree" women serve to reaffirm motherhood.<sup>532</sup>

524. See *Making Mothers*, *supra* note 5, at 32, for an elaboration of this argument, including how the courts stress the spouse-like relationship among the women, even prior to the appearance of the child.

525. As I have argued in *Making Mothers*, *id.* at 31, the courts have often found it significant to discuss what the child called the adults in her life, and I wonder whether this leaves any room for adult-child relations in which titles, however innovative, are eschewed in favor of less hierarchal use of first names.

526. Shapiro, *supra* note 98, at 30-32.

527. See *Making Mothers*, *supra* note 5, at 31 (discussing Shapiro's contention that second parent adoption divides lesbian community between politically attractive lesbians and those without power).

528. *Id.*

529. Diana Tietjens Meyers, *The Rush to Motherhood-Pronatalist Discourse and Women's Autonomy*, 26 *SIGNS* 735, 736 (2001).

530. See MARDY S. IRELAND, *RECONCEIVING WOMEN: SEPARATING MOTHERHOOD FROM FEMALE IDENTITY* 6-7 (1993) (discussing traditional views of women in myth and folklore).

531. Meyers, *supra* note 529, at 758-60.

532. Meyers notes that the term "childfree" itself "testifies to the intransigence of the cultural

Such cultural messages are not lost on lesbians.<sup>533</sup> Anthropologist Ellen Lewin, in her groundbreaking study of lesbian mothers, notes that lesbians are motivated to become mothers by desires to achieve adulthood, responsibility, authenticity, naturalness, and “an identity as a ‘good’ woman.”<sup>534</sup> More concretely, lesbians becoming mothers are often seeking acceptance from their own families of origin by creating new families.<sup>535</sup> Lewin concludes that motherhood allows lesbians to “claim membership in the group known as ‘women’ on the same basis as single heterosexual mothers.”<sup>536</sup> By becoming mothers, lesbians can refute the accusations that we are unwomanly, unfeminine, unnatural—denunciations perhaps made by our own families and certainly by society at large. Because mothering may thus be a “choice” constructed from the avoidance of pain and stigma, the coercive potential of lesbian motherhood should not be underestimated.

#### *D. The State Interest in Women as Mothers*

Until nonbiological reproduction becomes the norm, the state interest in women, including lesbians, as mothers, should be obvious. The state relies upon the continued reproduction of citizens to ensure its continued existence. This interest can take a eugenic twist when the state possesses a particular vision of its future, causing it to promote childbearing amongst some women and suppress it among others. For example, the American history of birth control is fraught with governmental efforts to outlaw abortion and birth control among middle-class white women and simultaneously limit the population of the poor, the darker races, and immigrants.<sup>537</sup> Perhaps most notoriously, the United States

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refusal to acknowledge that not having children is a legitimate, and for some individuals, a positive option.” *Id.* at 760 n.28. More interestingly, Meyers discusses the work of one feminist psychologist who studied childless women and divided them into two categories: the life-negating rejectors and the life-affirming aficionados. *Id.* at 760 (referencing J. E. VEEVERS, *CHILDLESS BY CHOICE* (1980)). The former group may fit the stereotype of selfish women, but those in the latter group are “similar to parents.” As Meyers comments:

I suppose Veevers thinks she is doing the childfree population a service by dispelling the myth that they are all sour, maladjusted misanthropes. But inasmuch as she legitimates voluntary childlessness by assimilating it to the psychology of parenthood, she contributes to a retrograde current of normalizing matrigynist sentiment. Motherhood is the sine qua non of womanhood, and even childfree women (the healthy ones, at any rate) are mothers at heart.

*Id.*

533. Although Meyers seems to posit lesbians—who “cannot avoid making a conscious choice” about motherhood—as an exception to her argument that autonomy is elusive in women’s decisions about motherhood, she admits that “sober, in-depth reflection” about mothering choices is neither universal in the lesbian community, nor confined to lesbians. *Id.* at 751.

534. ELLEN LEWIN, *LESBIAN MOTHERS: ACCOUNTS OF GENDER IN AMERICAN CULTURE* 54-57 (Roger Sanjek ed., 1993).

535. *Id.* at 52, 57, 78-94.

536. *Id.* at 192.

537. See generally Rosalind Pollack Petchesky, *ABORTION AND WOMAN’S CHOICE: THE STATE, SEXUALITY, & REPRODUCTIVE FREEDOM* (rev. ed. 1990) (discussing history of birth control in United States).

Supreme Court upheld the compulsory sterilization of an institutionalized woman upon Justice Holmes's reasoning that society should prevent those who are "manifestly unfit from continuing their kind," rather than wait to "execute degenerate offspring for crime" or "let them starve for their imbecility," concluding that "three generations of imbeciles are enough."<sup>538</sup>

Nevertheless, the United States Supreme Court has rejected the notion that children should be unparented except by the state,<sup>539</sup> and has pronounced that the state does not have any general power to "standardize its children" because the "child is not the mere creature of the state."<sup>540</sup> The underlying premise, however, is that the parent will act for the state in controlling and civilizing the child.<sup>541</sup> The Court has thus made clear that when the parent fails, the state has the power to intervene, not merely to protect the child, but to protect its own interests: "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."<sup>542</sup> It is not merely mothering, but proper mothering, that is necessary to ensure the survival of the state.

The fascist state's "kinder, kirche, kuche" has its reverberations in the capitalist state's conceptualization of women as (re)producers. Women's value as workers is eclipsed by their value as mothers, as the Court's upholding of a labor law limiting the hours women could work demonstrates: "the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race."<sup>543</sup> As feminist theorist Nancy Chodorow explains, women's mothering is "pivotal to the reproduction of the capitalist mode of production and the ideology supports it" because mothers reproduce the workers and consumers necessary for capitalism at both the material and emotional level.<sup>544</sup> The not surprising facts that the work of

538. *Buck v. Bell*, 274 U.S. 200, 207 (1927). As it turned out, Ms. Buck was a woman of normal intelligence, a foster child who had become pregnant probably through rape while in the custody of her foster parents, and court records presented her as one of the people who belong to that "shiftless, ignorant, and worthless class of anti-social whites of the South." Stephen Jay Gould, *Carrie Buck's Daughter*, 2 CONST. COMMENT. 331, 336-37 (1985).

539. *Meyer*, 262 U.S. at 401-02. Without citation, the Court quotes from Plato's Republic and makes a reference to ancient Sparta regarding practices of segregating children from their parents, concluding that this would violate "both letter and spirit of the Constitution." *Id.*

540. *Pierce*, 268 U.S. at 535-36 (holding unconstitutional Oregon statute that required children to attend public schools).

541. See Barbara Bennett Woodhouse, *Who Owns the Child?: Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992), for an excellent exploration of the connections between the parental and state rights in this era.

542. *Prince*, 321 U.S. at 168 (affirming enforcement of child labor laws against Jehovah's Witness church members using of children to distribute church newsletters on public highway).

543. *Muller v. Oregon*, 208 U.S. 412, 421 (1908).

544. Nancy Chodorow, *Mothering, Male Dominance, and Capitalism, in CAPITALIST PATRIARCHY AND THE CASE FOR SOCIALIST FEMINISM* 83, 95, 100 (Zillah Eisenstein ed., 1979). As Chodorow makes clear, this is not a unique insight, and she discusses the work of Talcott Parsons, the esteemed sociologist, Max Horkheimer, critical theorist of the Frankfurt School, as well as other social theorists which view mothering in a similar vein. *Id.* at 96-100. Portions of this essay appear in NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF*

mothering is devalued as work<sup>545</sup> and that women's reproduction is devalued in accordance with racial and class stratifications,<sup>546</sup> does not detract from the centrality of capitalistic conceptions of women as mothers.

Furthermore, the state's conceptualizing of lesbians as lesbian mothers may also be linked to the state's interest in preserving the dominance of heterosexuality. Mothers are assigned responsibility for their children's sexual identity.<sup>547</sup> If, as the recent empirical studies suggest, the children of "homosexual" parents are most likely heterosexual,<sup>548</sup> then lesbian mothers are

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GENDER (1978), although in her book, Chodorow is much more concerned with the psychoanalytic aspects of theories of motherhood, emphasizing the sexual dynamics between mothers and sons which produce male workers in capitalism. *Id.* at 186-90. The impact of reproductive technologies has sharpened the idea of children as products and women as their producers. Donna L. Dickenson, *Property and Women's Alienation from Their Own Reproductive Labour*, 15:3 BIOETHICS 205, 209-10 (2001). For example, Professor Dickenson argues that the effect of the paid surrogacy debate is the realization of the commodity value of women's labor in pregnancy and childbirth. *Id.*

545. For analysis of the underevaluation of women's caretaking and household work, see, e.g., ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED* 45-64 (2001) (contemporary and popular account arguing that mother's work is consistently undervalued in variety of contexts); CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 60-80 (1989) (seeking to integrate Marxist and feminist perspectives on domestic labor including discussion of "wages for housework" movement); Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J.L. & FEMINISM 81 (1997) (arguing that women's domestic labor should be subject to a commodification analysis); Katherine Silbaugh, *Turning Labor into Love*, 91 NW. U. L. REV. 1 (1996) (comprehensive analysis of women's unpaid labor which she values at substantial portion of gross domestic product).

The issue of women's unpaid labor is part of the platform of the Fourth World Conference on Women, Beijing, 1995, which emphasizes that women's contributions to development include both remunerated and unenumerated work. Although acknowledging that, to a limited extent, international standards for labor statistics include unenumerated domestic and community work, the platform states that the economic contributions of this work are often undervalued and under-recorded. It continues by urging a full accounting of women's unenumerated domestic and agricultural work so that women's economic contributions can be fully appreciated. UNITED NATIONS REPORT OF FOURTH WORLD CONFERENCE ON WOMEN: DECLARATION AND PLATFORM FOR ACTION, at art. 156, U.N. DOC. A/CONF.177/20 (1995); 35 I.L.M. 401 (1996) available at <http://www1.umn.edu/humanrts/instree/beijing4.htm> (last visited Feb. 13, 2003)

546. See *supra* notes 441-60 and accompanying text for a discussion of contemporary welfare reform. See also ROSALIND POLLACK PETCHESKY, *ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY, & REPRODUCTIVE FREEDOM* 34-57 (1990), discussing the rise of Malthusian "moral economy" in bourgeois culture which blames the poor and working classes for a poverty attributable to having too many children and advocates the middle and upper classes have fewer children of "better" quality.

547. While fathers could be "occasionally implicated in the making of properly gendered citizens, again and again throughout the twentieth century, mothers have been held primarily responsible" for producing "healthy, adjusted heterosexuals," and making "boys into sufficiently masculine men and girls into feminine women." Jennifer Terry, *"Momism" and the Making of Treasonous Homosexuals*, in *"BAD" MOTHERS: THE POLITICS OF BLAME IN TWENTIETH-CENTURY AMERICA* 169-70 (Molly Ladd-Taylor & Lauri Umansky eds., 1998).

548. For an excellent review of the social science research from a legal perspective, see Carlos Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, 280-85. For Wardle's response, see *Fighting with Phantoms: A Reply to Warring with Wardle*, 1998 U. ILL. L. REV. 629. Other treatments of the same topic include Susan Golombok & Fiona Tasker, *Do Parents Influence the Sexual Orientation of Their Children?*

indeed reproducing heterosexual society.<sup>549</sup> As the present judicial discourse illustrates, our mothering is contingent on our ability—and agreement—to mother heterosexuals.<sup>550</sup>

Our self-conceptualization as mothers also ensures the reproduction of heterosexuality in another important way. As mothers, we become privatized and insular. When we use the phrase “our children,” we mean only the children for whom we claim biological, legal, or defacto parenthood.<sup>551</sup> Excluded in this narrow vision of “our children” are those who will truly inherit the culture we have ourselves inherited. Many of us who are now middle-aged lesbians can recall our first experiences when older dykes in bars welcomed “baby dykes” or older women made room for us in various communities.<sup>552</sup> This is not to say that

*Findings from a Longitudinal Study of Lesbian Families*, 32 DEVELOPMENTAL PSYCHOL. 3 (1996); Charlotte J. Patterson & Richard E. Redding, *Lesbian and Gay Families with Children: Implications of Social Science Research for Policy*, 52 J. SOC. ISSUES 29 (1996).

549. I realize that this argument contrasts to sentiments that the children of lesbian and gay parents will be more liberal and tolerant. *See, e.g.*, M.P. v. S.P., 404 A.2d 1256, 1263 (N.J. Super. App. Div. 1979) (rejecting modification of custody based upon lesbianism and stating that it is “reasonable to expect” that children might “emerge better equipped to search out their own standards of right and wrong, better able to perceive that the majority is not always correct in its moral judgments, and better able to understand the importance of conforming their beliefs to the requirements of reason and tested knowledge, not the constraints of currently popular sentiment or prejudice”); LAURA BENKOV, *REINVENTING THE FAMILY: THE EMERGING STORY OF LESBIAN AND GAY PARENTS* 96 (Jane Cavolina ed., 1994) (discussing presentation to then-Governor of Massachusetts Michael Dukakis by Dean of School of Social Work concerning “review of the clinical literature showing that the only way children reared in gay and lesbian households differed from those in heterosexual homes was that they tended to be more tolerant of homosexuality”); SUZANNE JOHNSON & ELIZABETH O’CONNOR, *FOR LESBIAN PARENTS* 179-80 (2001) (stating that grown and nearly grown children of lesbians seem to be more tolerant and can be future leaders against homophobia); Judith Stacey & Timothy Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 168-70 (April 2001) (noting some limited evidence implies that lesbian parenting may free daughters and sons from “broad but uneven range of traditional gender prescriptions”).

My point is simply that however liberal and tolerant our heterosexual children might be, they still have the privileges accorded to the heterosexuals in dominantly-heterosexual society.

550. Such an agreement would, to my mind, also imply agreeing to mother badly. For example, I cannot imagine any good mothering practices which could take the parenting advice of such pundits as Richard Posner who opined that parents can prevent the “formation of homosexual preference” by “discouraging gender-nonconforming behavior *at its outset* (later is too late),” including not “condoning ‘sissyish’ behavior in infancy.” RICHARD A. POSNER, *SEX AND REASON* 308-09 (1992) (emphasis in original).

551. My attempt to use the phrase more broadly occurs in Ruthann Robson, *Our Children: Kids of Queer Parents and Kids Who Are Queer—Looking at Sexual Minority Rights From a Different Perspective*, 64 ALB. L. REV. 915 (2001). In a somewhat similar vein, Valerie Lehr poses the question “Who Are “Our” Children?” as a chapter title, answering it with her discussion of sexual minority youth. VALERIE LEHR, *QUEER FAMILY VALUES: DEBUNKING THE MYTH OF THE NUCLEAR FAMILY* 139-67 (Shane Phelan ed., 1999). Lehr only implicitly compares her previous discussion of children growing up in gay and lesbian households with gay and lesbian youth, but she argues quite explicitly for the agency of children and youth. *Id.* at 140.

552. For discussions of the importance of various public spaces for the formation of lesbian identities, see generally LILLIAN FADERMAN, *ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH-CENTURY AMERICA* (1991) (discussing importance of communities in 1920s, bars in 1950s, and political visibility in 1970s); ELIZABETH LAPOVSKY KENNEDY & MADELINE

this transmission of various and fluctuating cultures was always simple or carefree, only that it had the opportunity to occur. Now, many of us who are middle-aged lesbians are ensconced at home with our toddlers, inaccessible to a younger generation.

Thus, the assimilative aspects of mothering not only fetishize equal protection doctrine and possess coercive aspects, but also construct lesbians as mothers in a manner linked to the state and its interests. Yet in all of these aspects, lesbian mother litigation and legal theorizing is deeply connected to questions of coupledness, the legal apotheosis of which has become marriage.

## VI. CONCLUSION

Neither an assimilationist nor a strict anti-assimilationist stance regarding the question of marriage for lesbians will ensure liberation. Nevertheless, an anti-assimilationist perspective that considers issues of equality, coercion, and the interests of the state is vital.

I remain deeply concerned that advocates of same-sex marriage and other quasi-marital devices for same-sex couples have capitulated to equal protection doctrine, rather than pursuing a more generous and global version of equality. The exclusion of different-sex couples from quasi-marital devices available to same-sex couples is misguided and petty. More controversially, I have maintained that attempts to differentiate same-sex couples from others who seek to avail themselves of the marital relation—others who may be related to each other or married to someone else—serves to undermine the claims to equality of same-sex couples. In the quest to be included in the institution of marriage, it is important to consider who we would continue to exclude. As I have argued, marital incest prohibitions and polygamy prohibitions are as problematic as same-sex marriage prohibitions.

Additionally, even if legal marriage were available on a more inclusive basis, I am profoundly troubled by our failure to interrogate adequately our quest, individually and collectively, to enter into the institution of legal marriage. By naturalizing and universalizing marriage rather than heterosexuality, I fear we are simply in danger of replacing compulsory heterosexuality with a regime

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D. DAVIS, *BOOTS OF LEATHER, SLIPPERS OF GOLD: THE HISTORY OF A LESBIAN COMMUNITY* (1993) (discussing history of Buffalo, New York lesbianism with emphasis on working class bar culture); Esther Newton, *The "Fun Gay Ladies": Lesbians in Cherry Grove, 1936-1960*, in *CREATING A PLACE FOR OURSELVES: LESBIAN, GAY, AND BISEXUAL COMMUNITY HISTORIES* 145 (Brett Beemyn ed., 1997) (discussing historical development of Cherry Grove lesbian community on Fire Island, New York); Rochella Thorpe, *"A House Where Queers Go": African-American Lesbian Nightlife in Detroit, 1940-1975*, in *INVENTING LESBIAN CULTURES IN AMERICA* 40 (Ellen Lewin ed., 1996) (reconceptualizing "public" lesbian space from perspective of segregation and discussing rent parties and house parties as well as bars).

For a more personal example, see Leslie Feinberg, *Butch to Butch: A Love Song*, in *THE PERSISTENT DESIRE: A FEMME-BUTCH READER*, 83-85 (Joan Nestle, ed., 1992) (describing how she was called "kid," taken under "wing" by older women who taught her all important things to know such as fearing cops and to "toughen up," and describing relationship with "mentor" including "butch 'father-son' talk").

of compulsory matrimony.

Finally, we need to consider more rigorously the confluence of our individual and collective interests with the nation-state's interests. As a productive unit in the capitalist state, the marital couple performs certain functions, including the production of future citizens, which we should further consider rather than simply adopt.

Again, it is important not to underestimate the pain of being excluded. The legal system has denied our intimate relationships and our relationships with children for too long. Yet like other legal reform movements, the lesbian and queer movement cannot simply assume that assimilation is the answer for all of us. Unproblematized, the quest for assimilation leaves those who cannot—or will not—be assimilated outside of our community of interests. We need to envision liberation beyond the boundaries of state-sanctioned marriage; beyond the bounds of the state. To do this, we need to recognize the limits of marriage and assimilation.