

# QUEERING CITIZENSHIP?

## Same-Sex Marriage and the State

Amy L. Brandzel

Without question, civil marriage enhances the “welfare of the community.” It is a “social institution of the highest importance.” . . . Civil marriage anchors an ordered society by encouraging stable relationships over transient ones. It is central to the way the Commonwealth identifies individuals, provides for the orderly distribution of property, ensures that children and adults are cared for and supported whenever possible from private rather than public funds, and tracks important epidemiological and demographic data.  
—*Goodridge v. Department of Public Health* (2003)

From the beginning, same-sex marriage was deemed one of the key “wedge” issues of the 2004 presidential election. One of the questions circulating beneath the issue was, why now? Conservatives, pointing their fingers at gay and lesbian rights activists, claimed that they had forced the issue through legal victories achieved in Massachusetts and Vermont with the assistance of “activist judges,” who had had the audacity to suggest that basing marriage rights on the participants’ gender was discrimination. Liberals, when they had the courage to point back, argued that conservative and right-wing political organizations had made marriage a wedge issue for over a decade, particularly with their emphasis on “family values,” welfare reform, and tax benefits. One could also point toward the proliferation of “gay” cultural productions, from *Queer Eye for the Straight Guy* to *The L Word*; the world of entertainment has turned, according to a recent MTV news special, “totally gay.” But rather than propose that there is something new about the battle over gay rights and belonging in the United States, and that this newness is due to a group’s marketing strategy, I ask that we consider same-sex

marriage in the light of current struggles over citizenship in the United States. At a time when terrorism looms within and beyond the U.S. nation-state's borders, maintaining and policing the racial, gender, and sexual configuration of the U.S. citizenry become central. As a site of citizenship production, the institution of marriage is critical to the formation of a properly gendered, properly racialized, properly heterosexual America. Rather than concern ourselves with whether or not gays should have the right to marry, then, we might consider instead how exactly we want GLBT people and queer others to align themselves with citizenship.

M. Jacqui Alexander argues that citizenship is predicated on the demarcation of homosexual bodies as outside the bounds of citizenship.<sup>1</sup> Through legislation that criminalizes sexualities located outside the purview of the heterosexual, monogamous family, the state has constructed heterosexuality as a prerequisite to citizenship and as the unspoken norm of membership and national belonging. As many queer theorists have shown, numerous regimes, practices, and ideologies not only presume heterosexuality but organize society around this presumption, rendering it the norm and implicitly designating all other sexual and familial practices "deviant."<sup>2</sup> Gays, homosexuals, and queers are certainly not the only "deviants," and gay rights do not take place in a vacuum; they are inextricably linked to negotiations over "terrorism," immigration, welfare reform, and abortion rights, to name a few. A properly angled queer lens, then, analyzes how heteronormativity functions through the production and taxonomy of racialized, gendered, sexualized, and classed behaviors and practices.

In this essay I first argue that the same-sex-marriage debate is one of the primary sites on which anxieties over America's citizenry and sexual, gender, and racial boundaries play out. Thus the proper context for this debate is not only gay rights but the history of marriage law and U.S. citizenship. I then ask that we reconsider the campaign for same-sex marriage and related appeals to the state in a way that takes queer-theoretical critiques more seriously. While it is no surprise that mainstream discussions of same-sex marriage often elide queer theorists' critiques both of same-sex marriage and of appeals to the state, I suggest that most scholarship continues to misconstrue queer theory. Most often the struggle between gay rights advocates and queer theorists is described as a disagreement over the uses (and pitfalls) of identity politics, but on closer examination the battle between these two camps is seen more properly as a debate over citizenship.<sup>3</sup> Whether or not queers can or should be citizens is very much at the center of the debate between queer theorists and those associated with gay and lesbian politics.<sup>4</sup> Finally, placing this debate in the context of citizenship and marriage law forces us to be accountable to the particularly racialized and gendered histories

deployed by various sides on the issue of same-sex marriage. Given these historical contexts, I suggest that citizenship itself is necessarily exclusive, privileged, and normative—and that advocacy for same-sex marriage reifies and reproduces these effects.

In the first part of this essay I present an overview of the burgeoning field of citizenship studies, emphasizing the scholarship coming out of women's history, legal theory, and feminist theory. In the second part I examine the centrality of marriage in citizenship, picking up on the work of Nancy F. Cott and combining it with queer theorists' insights into the state's use of marriage law to produce a gendered, racialized, heterosexualized citizenry. In the third part I turn to marriage law more specifically, discussing recent legal developments in same-sex marriage that have brought on a need to defend and define marriage as unequivocally heterosexual. While this anti-same-sex-marriage legislation has resulted in the legal justification for perpetuating homophobia throughout the United States, it also has signaled the need to reinsert the heterosexual married subject at the center of American legal subjectivity—and therefore has pointed out a crack in the heteronormative regime. In the concluding sections of this essay I discuss the radical—and not-so-radical—potential of same-sex marriage and the possibilities of queering citizenship.

### **The Ever-Elusive Citizen**

citizenship, n. 1. the state of being vested with rights and duties of a citizen; 2. the character of an individual viewed as a member of society.

—*Random House Webster's College Dictionary*, second edition (1997)

Whether or not a person is a U.S. citizen is, for many, an easy question to answer—too easy, in fact. The presumption that citizenship is merely a legal status, signaled by a mark on a birth certificate or on a passport, perhaps, is one of the most critical and common slippages in the United States today. Citizenship is much more than a legal status or a mark on a passport; it encompasses a wide variety of practices, institutions, and ideas. Scholarship on the subject illustrates this “messiness”: citizenship is elusive and difficult to define. As Cott demonstrates, the challenges that citizenship scholars have in grasping and maintaining a definition of citizenship has a historical precedent: judges, legislators, and political theorists have debated the meaning of U.S. citizenship for over two hundred years.<sup>5</sup> In his impressive study of the history of citizenship in the United

States, Rogers M. Smith sums up his findings by stating that “American citizenship . . . has always been an intellectually puzzling, legally confusing, and politically charged and contested status.”<sup>6</sup> Nevertheless, I want to flesh out a few of the meanings of citizenship and to set out my own understanding of it here, asking at the same time that we approach citizenship and aspirations toward “inclusion” with a healthy skepticism.

Most current scholarship on the subject moves back and forth (often inadvertently) between citizenship as a legal status and a political identity, signaling one’s rights and obligations to the state; as a political and/or community practice; or as a kind of national membership, incorporating feelings of belonging to a nation and/or a community. In her overview of the scholarship Linda Bosniak suggests that we consider citizenship as a collection of “strands.”<sup>7</sup> She delineates four of them: citizenship as legal recognition by an organized political community; citizenship as either the enjoyment of or the possession of rights in political and/or social communities; citizenship as the practice of political and social engagement, activity, and/or organization; and citizenship as identity and the collective experience of belonging to a community. Bosniak’s deliberations allow us to make a few important observations. First, while it is useful to differentiate between these strands, it must be stressed that they are always already tangled. The slip-pages inherent in citizenship scholarship, then, simply show that each strand is entwined with the others. For example, practices of civic engagement are affected by (although not limited to) whether or not one is recognized as a member of a political community, and vice versa.

That caveat, however, only makes things messier. If we looked for and examined citizenship in the legal sense, we would find ourselves in the same position as Smith. He and his research assistants tracked fourteen dimensions of the legal articulations of citizenship, including naturalization law, expatriation law, immigration law, and suffrage, as well as the rights and privileges offered by the Fourteenth Amendment. In other words, even if you limit your study to the legal sense of citizenship, you are still immersed in a messy enterprise.

Nevertheless, the legal strand offers the most obvious site for finding the exclusions, if not the omissions, of citizenship. Citizenship law tells us a variety of stories, including that of white racial formation alongside and through the rise of the nation-state. For example, the first federal naturalization law of 1790 limited naturalization to “free white” persons and remained in place until 1952. Importantly, the relationship between whiteness and naturalization was contested. In what Ian F. Haney López refers to as “the racial prerequisite cases,” which took place between 1878 and 1940, the claimants argued that they were in fact

white and so met the prerequisite.<sup>8</sup> Citizenship law also tells us about the particularly racialized and othering discourses used against Asian immigrants. Scholars have demonstrated how whiteness was constructed as “American” in and through the construction of Asianness as “alien” and therefore as noncitizen.<sup>9</sup> This was accomplished through a series of laws, from the first restrictive immigration law in 1875, which targeted Chinese women (the Page Act); to immigration exclusion laws beginning in 1882 (the Chinese Exclusion Act) and ending in the 1960s; to alien land laws, which barred “aliens” from owning property.

Citizenship law also describes how U.S. citizenship has demanded certain types of behavior. The 1887 Dawes Severalty Act, for instance, conferred citizenship on Native American men only when they emerged as property-owning heads of households. Using one of the most significant instruments of assimilationist policy, the federal government divided up tribal lands, dispersed them to Native American men, and granted citizenship to those who “adopted the habits of civilized life.”<sup>10</sup> Native American women could earn citizenship as well, but only through marriage to a male citizen. Citizenship was granted to all Native Americans in 1924 under the Indian Citizenship Act.

More important, citizenship law itself undermines the popular rhetoric of evolutionary citizenship in the United States, whereby all members of the American population eventually become part of the national polity through the march of progress. The path of African American citizenship is, of course, convoluted, with its twists and turns following the political and social norms of the times. For example, while the 1857 Dred Scott decision declared descendants of African slaves unworthy of birthright citizenship, case law leading up to this decision had been much more complicated. Although the matter was legally settled by the Fourteenth Amendment, African Americans’ access to citizenship continued to be challenged. In his dissent from the majority opinion in *Plessy v. Ferguson* (1896), Justice John Marshall Harlan condemned the decision to uphold the legality of segregation laws (as “separate but equal”) in part because African Americans were citizens, unlike the Chinese, whom he referred to as “a race so different from our own that we do not permit those belonging to it to become citizens of the United States.”<sup>11</sup> Segregation laws as well as legal infringements on the voting rights of African Americans continued well into the twentieth century. Such stories of citizenship law remind us, as the dictionary suggests, that a person is “vested with rights and duties of citizenship” only to the extent that he or she is “viewed as a member of society.”

It is significant that the remaining three strands identified by Bosniak deploy the concept of “community,” a term with emotional and idealistic overtones. According to Bosniak, one has citizenship status via recognition by a politi-

cal community, or via possession of rights in a community, or via an identity in a community. The state is notably absent from these formulations. This is not a critique of Bosniak as much as it is a suggestion that the scholarship on citizenship tends to follow the beliefs of one of the preeminent political theorists on citizenship, T. H. Marshall, who described citizenship as “a status bestowed on those who are full members of a community.”<sup>12</sup> While I certainly am not suggesting that citizenship is merely state conferred or state sanctioned, I believe that we cannot afford to downplay the role of the state, particularly when statelike interests can masquerade as celebratory calls for community.

Calls for citizenship have often been universalizing claims for inclusion and solidarity in forging a national polity.<sup>13</sup> Citizenship is envisioned as a great equalizer, the problem being how to include more and more people under its umbrella. In this way, citizenship has served as a powerful ideal for disenfranchised groups seeking to make claims for inclusion and rights. Without underestimating the power of this ideal, it is important to be aware of its sentimentalizing uses. As critical race, feminist, postcolonial, and queer scholars are quick to point out, not all citizens are created and/or treated equally, and not all citizens are included in the national polity. Citizenship, then, functions as a double discourse: it serves as a source of political organizing and national belonging and as a claim to equality, on the one hand, while it erases and denies its own exclusionary and differentiating nature, on the other. It is this doubled character of citizenship that most recommends a healthy skepticism toward calls for citizenship, especially those couched in terms of universality and inclusion.

Discriminatory treatment of noncitizens is often justified as a means to safeguard the rights and benefits of citizenship as the exclusive property of recognized citizens. In the United States, where differentiation between citizens and noncitizens is racially loaded, noncitizens become “aliens” and “illegal aliens,” identifications historically associated with Asian and Mexican immigrants.<sup>14</sup> California’s Proposition 187, the 1996 Welfare Reform Act, and, most critically, the events since 9/11 are ample evidence that a war on “aliens” is seen as justified. “Because direct attacks on minorities on account of their race is nowadays taboo,” Kevin R. Johnson points out, “frustration with domestic minorities is displaced to foreign minorities. A war on noncitizens of color focusing on their immigration status, not race, as conscious or unconscious cover, serves to vent social frustration and hatred.”<sup>15</sup> Not only is citizenship exclusionary, but discursive pronouncements to the contrary continue to undermine attempts to expose and critique the presumptions of universal citizenship. Put differently, citizenship is a normative discourse that presupposes universality and therefore exacerbates and negates difference.

### **Straight Nation Seeking Heterosexual Citizen**

Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature.

—*Maynard v. Hill* (1888)

Marriage law is a primary site for the production of normative citizenship and a key mechanism by which the U.S. nation-state produces a properly heterosexual, gendered, and racialized citizenry. Cott reveals that although marriage has been commonly thought of as a “private” affair, it is very much a public institution and “a configuration of state power.” Despite the conservative argument that marriage “is” and “always has been” a timeless formation, Cott shows that marriage has a convoluted history. Giving a historical edge to a long-standing feminist argument, Cott asserts that marriage has been a tool of “cultural regulation” and is not only a “vehicle for public policy” but *the* vehicle by which the state shapes the public order into a “gendered order.”<sup>16</sup> The history of marriage law in the United States demonstrates that this order is not just gendered but racialized and sexualized as well.

While marriage was primarily informal in the colonial era, states began to assume authority over it by instituting laws outlining whom one could marry, which marriages were invalid, how to dissolve marriages, and the repercussions (particularly the financial ones) of these actions. After the Civil War the federal government was increasingly involved in marriage law, which had generally been considered (and which continues to be) the states’ domain; eventually it used marriage law to assert national unity and national identity. The federal government instituted a uniform standard of marriage as heterosexual, monogamous, and intraracial through discourses of morality, righteousness, and the need to control sexuality. This means that the “American family” was constructed through a variety of efforts, including the federal government’s persecution of Mormons, the Freedmen’s Bureau’s efforts to promote heterosexual marriage among emancipated slaves, and the continuous denial of women’s rights (such as the vote), the free exercise of which, it was argued, would cause conflict in the home.

Marriage law, a primary means of controlling women’s access to the public sphere, has been a tool for the construction and enforcement of women’s dependency. Carole Pateman points out that men’s citizenship and participation in the public sphere depended on the assumption that a man would have a wife and children enjoying their nominal citizenship in the private sphere. In this way, the

social contract was founded on “the sexual contract.”<sup>17</sup> The practice of coverture, which transferred a woman’s property to her husband at the time of marriage, also had the effect of transferring a woman’s property in herself to her husband. Since eighteenth- and nineteenth-century perceptions of citizenship relied on notions of independence (perceived as ownership in oneself and one’s labor power), a woman’s (as well as a slave’s) dependency made her the epitome of the anticitizen or noncitizen.<sup>18</sup>

Historically, women’s ability to immigrate, emigrate, and/or naturalize has been linked to their marital status and, importantly, to their partners’ racial identity. Whether or not a woman automatically held the citizenship status of her husband was ambiguous before the mid-nineteenth century, but in 1855 Congress passed legislation declaring that only male citizens could bestow U.S. citizenship on their wives (as long as they were qualified for naturalization under the racial prerequisites) and on their children.<sup>19</sup> With the 1907 Expatriation Act, Congress, by declaring that American women who married foreigners would take the nationality of their husbands, denaturalized thousands of American women who had married noncitizens. Through this act, similar in effect to state antimiscegenation laws, Congress made clear that women who “introduced foreign elements into the body politic” would be punished.<sup>20</sup> As Candice Lewis Bredbenner demonstrates, the 1907 statute sparked a women’s rights campaign directed toward obtaining “nationality rights” for women and abolishing women’s derivative citizenship. This movement achieved some success with the passage of the 1922 Cable Act, which, Bredbenner argues, started to “chip away” at women’s derivative citizenship by abolishing the 1907 declaration that American women who had married foreigners would lose their citizenship. However, the Cable Act retained elements that differentiated between husbands’ and wives’ citizenship rights. Not until the 1934 Equal Nationality Bill was women’s legal citizenship finally dislodged from their marital status.<sup>21</sup>

Given that marriage law has been a vehicle by which the state has gendered the American polity, it is critical to examine how this gendering has gone hand in hand with ensuring a properly intraracial polity. In her study of the Freedmen’s Bureau’s promotion of marriage for newly emancipated slaves, Katherine Franke offers a critical analysis of marriage, race, gender, and citizenship, as well as a stark warning. Franke argues that in the process of claiming access to marriage rights, African Americans found that their familial and intimacy practices fell under the scrutinizing lens of the federal government (particularly the Freedmen’s Bureau). Prior to emancipation, slave familial and intimacy practices had taken various forms, such as unofficial marriage, polygamy, and other “illicit” sexual behaviors.



The Freedmen's Bureau often forced marriage on African Americans; moreover, it prosecuted African American men for not complying with proper marriage laws.<sup>22</sup> Recently we have seen a resurgence in the promotion of marriage as a means of cultivating proper citizenship among people of color. The 1996 Welfare Reform Act describes marriage as the "foundation of a successful society" and figures it as the way to police and control single mothers particularly (who often are rhetorically and visually represented as African American women). More recently, the Bush administration proposed to spend over \$122 million on "experimental marriage and fatherhood programs" for welfare recipients. Rather than economic restructuring policies, the promotion of proper intimacy and familial practices is considered the answer to America's poverty. As Franke persuasively demonstrates, an examination of how marriage law has been used to police its citizenry "reveals the paradox of legal recognition and regulation, and draws into question the fiction of rights discourse that fixes as victory participation in institutions such as marriage."<sup>23</sup>

The work of feminist historians and theorists on the political implications of heterosexual marriage shows that the U.S. citizenry was founded on the intraracial heterosexual family.<sup>24</sup> Yet by adding the insights of queer theorists to this mix, we see that it is not only the male citizen who is given access to the public sphere via the displacement of women, but also the heterosexual married man who is granted the badge of citizenship at the expense of his family and all other forms of families as well. As Alexander points out, the state's demarcation of good citizen bodies (those that are married, heterosexual, reproductive, and white) is drawn in direct opposition to noncitizen bodies (nonheterosexual, nonreproductive, engaging in sex for pleasure, and nonwhite).<sup>25</sup> Thus by promoting and naturalizing heterosexual marriage as the primary institution of American domestic life, the state can not only produce heterosexuality as the norm but also produce heteronormativity as inextricably linked to a properly gendered, racialized, and sexualized citizenry. It is for this reason that marriage matters.

### **The State of the Union**

[Marriage] is rather a social relation like that of parent and child, the obligations of which arise not from the consent of concurring minds—but are the creation of the law itself; a relation the most important as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life, and the true basis of human progress.

—*Adams v. Palmer* (1863)

It was not too long ago that Congress passed and President Clinton signed into law the 1996 Defense of Marriage Act (DOMA).<sup>26</sup> DOMA has two provisions: first, it defines marriage for federal purposes as “only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife”; and second, it permits states not to recognize same-sex marriages performed in or legitimized by other states.<sup>27</sup> Throughout the DOMA debates, senators and representatives claimed that heterosexual marriage needed to be defended. The “homosexual lobby,” according to Senator Jesse Helms, had “chipped away at the moral stamina of some of America’s courts and some legislators, in order to create the shaky ground that exists today that prompts this legislation.” Helms and the bill’s other sponsors argued that while marriage had always been unequivocally, irrevocably heterosexual, recent case law had challenged this presumption. What troubled Helms and other conservatives was that, according to the law, marriage and heterosexuality were no longer synonymous.

Wary that DOMA had not sufficed, President George W. Bush proclaimed October 12–18, 2003, Marriage Protection Week. Interestingly, the week of heterosexual festivities immediately followed National Coming Out Day, October 11. According to a White House press release, “Marriage Protection Week provides an opportunity to focus our efforts on preserving the sanctity of marriage and on building strong and healthy marriages in America.” While this maneuver was a clear sign of the administration’s bowing to fundamentalist and right-wing pressure to oppose same-sex marriage more vigorously—marriage, the proclamation insisted, was “a union between a man and a woman”—Bush wanted to assure the public that “we must continue our work to create a compassionate, welcoming society, where all people are treated with dignity and respect.”<sup>28</sup>

But apparently the federal Defense of Marriage Act and the slew of state versions of it, often referred to as mini-DOMAs, along with Marriage Protection Week, have not soothed conservatives’ anxieties over the sanctity of (heterosexual) marriage, as revealed by the proposed Federal Marriage Amendment.<sup>29</sup> The self-styled “multicultural” Alliance for Marriage had originally proposed the amendment back in 2001, to little avail.<sup>30</sup> Only a handful of conservative politicians had seemed open to it then. Its reintroduction and warm reception in May 2003, then, suggested that something dramatic had happened in the homophobic landscape during the intervening two years. What could have arisen to threaten the citadel of marriage in spite of DOMA, the mini-DOMAs, and marriage’s grounding in the natural and eternal heterosexual couple?

Despite the conservative rhetoric to the contrary, there is a widespread

suspicion that marriage is not, and has never been, as straightforward as it is frequently represented. Marriage law in particular is convoluted and involves not only the gendered and racialized histories discussed above but also transformations in divorce law, property law (especially regarding married women's property), estate law, and tax law. While each of these areas demonstrates that marriage law is gendered, racialized, classed, and sexualized in terms of who is and is not included in its benefits and burdens, for the purposes of this essay I will focus on the case law on marriage rights that has been referenced by advocates both for and against same-sex marriage. Commonly, the story begins in 1967 with the case of *Loving v. Virginia*, when the U.S. Supreme Court struck down Virginia's antimiscegenation law and recognized marriage as one of the "basic civil rights of man" and a "fundamental freedom."<sup>31</sup> Virginia had attempted to defend the law by arguing that it furthered a "rational" state interest in protecting the sanctity of marriage; moreover, because the statute impacted both people of color and whites "equally," it did not violate the equal protection clause of the Fourteenth Amendment. The Court was not convinced, noting that the law was nonetheless used to maintain white supremacy.

The fact that *Loving* is both an antidiscrimination case and an explicit example of the use of marriage law to police the racial bounds of the U.S. polity is central to my concerns here. The Court struck down antimiscegenation laws because they depended on racial classifications and were obvious mechanisms for promoting white purity and white supremacy. In regard to racial classifications and equal protection law, the Court has recognized that distinctions based on race require a compelling state interest. Sex discrimination law has followed suit, though the courts have been unwilling to apply as "strict" a level of scrutiny to sex as they have applied to race. A central reason for this is the belief that sex distinctions are based on factual or real differences between the sexes, while race distinctions are generally recognized as based on prejudicial beliefs and/or "imagined" differences. Thus the courts apply "intermediate" scrutiny to sex discrimination claims, meaning that the state only needs to justify sex distinctions according to reasonable rationales. Most legal arguments in favor of same-sex marriage have followed the antidiscrimination route, arguing that heterosexual marriage discriminates on the basis of gender (or "sex," as the law more commonly refers to it) and/or sexual orientation.

In the early 1970s, in response to gains made through feminist legal opposition to sex discrimination, same-sex couples began to challenge marriage laws. In the 1971 Minnesota case *Baker v. Nelson*, two men argued that they should be granted a marriage license because no statute explicitly denied them access to

marriage. Moreover, they argued, denial of their “fundamental right” to marriage was tantamount to sex discrimination. The court deployed all-too-common tropes of “common understanding” and history to reject their claims. “A sensible reading,” the court held, suggested that Minnesota legislators had used *marriage* in the common sense of the term, meaning a bond between a man and a woman.<sup>32</sup> The existing statutes used words such as *husband and wife* and *bride and groom*, which were, according to the court, “words of heterosexual import.” Turning to history, the court continued:

The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis. . . . This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend. The due process clause of the Fourteenth Amendment is not a charter for restructuring it [marriage] by judicial legislation.<sup>33</sup>

Thus semantics and history precluded rights claims, particularly one to a “contemporary” formation such as the petitioners, Richard John Baker and his partner, James Michael McConnell, apparently constituted.<sup>34</sup>

A few years later, in the 1974 Washington case *Singer v. Hara*, the petitioners offered a more sophisticated and thorough case for same-sex marriage. They claimed that denial of their application for a marriage license violated the state’s Equal Rights Amendment (ERA; approved by the voters in 1972), as well as various parts of the U.S. Constitution. Moreover, they contended that the trial court’s conclusion was based on “the erroneous and fallacious conclusion that same-sex marriages are destructive to society.”<sup>35</sup> To prove their point, they dedicated over forty pages of their brief to the social science literature attesting to the benefits of same-sex marriage, as well as to information on homosexuality. The court responded that this information provided a strong context for their claim but did not provide a legal argument. Importantly, then, appeals to nonlegal sources, such as dictionaries or history, appear to be acceptable only when these sources are aligned with common knowledge.<sup>36</sup>

In regard to the case’s legal merits, the court first considered whether or not Washington’s ERA was applicable. The petitioners argued that they had been denied the right to marry because of a sexual classification. The state responded that there was no violation as long as men and women were equally denied and therefore were not treated differently. The court sidestepped both arguments by

stating that the petitioners' claim had been denied not because of their sex but because of their type of relationship. Moreover, the court reprimanded them for trying to subvert the purposes of the ERA and the historical achievement it represented for women.

Following these cases, state legislatures began to pass laws designating marriage as opposite sex only. Maryland led the way in articulating what many had previously considered obvious—"A marriage must be between a man and a woman in order to be valid"—and seventeen states followed suit between 1973 and 1993.<sup>37</sup> Clearly, there was trouble in heterosexual paradise before the well-known 1993 Hawaii case *Baehr v. Lewin*, but it was this case particularly that agitated the U.S. Congress.<sup>38</sup> In *Baehr* the court claimed that although gays and lesbians were not a suspect class, this was a sex discrimination case. *Suspect class* is the terminology the courts employ to refer to classification- or identity-based claims. A class (or group) is designated "suspect" when it is seen as historically discriminated against. Race is a suspect class, but gender is only "semisuspect." A generous reading would suggest that the terminology refers to a suspicion that at least some identity-based distinctions arise from prejudice and are instituted to further subordination, although the courts do not appear to have admitted this connection.

Under the Hawaii constitution, sex is a suspect class, and any desire to distinguish rights or obligations on the basis of sex must pass strict scrutiny analysis. On remand to the circuit court, the Hawaii Supreme Court found that the state had not demonstrated that restricting marriage to heterosexual couples constituted a compelling state interest. The state had argued that the heterosexual requirement furthered the interest in procreation within marriage and that Hawaiian same-sex marriages would not be recognized in other states. But since procreation was not required of heterosexual married couples, and since a perceived need to comply with the laws of other states did not justify discrimination in a given state, the court found in favor of the same-sex couples.

What makes this case especially interesting is that it demonstrates the conflation of sex, gender, and sexuality. In fact, members of the Hawaiian legislature claimed that the Hawaii Supreme Court was engaging in "judicial activism" by misconstruing the meanings of "sex" in this case.<sup>39</sup> By suggesting that the denial of same-sex marriage rights was predicated on sex classifications, the court deliberately confused sex-as-in-gender with sex-as-in-sexual orientation. According to the court, "It is the state's regulation of access to the status of married persons, on the basis of the applicants' sex, that gives rise to the question whether the applicant couples have been denied the equal protection of the laws in violation of

article I, section 5 of the Hawaii Constitution.”<sup>40</sup> According to conservative legislators, however, the court was overriding legislative intent to regulate the gender of its married citizenry. But the central point here is that a questioning of the presumption of heterosexuality in marriage results, albeit fleetingly, in a disruption of the gender/sexuality binary system.

The *Baehr* case ended on a disappointing note, because the Hawaiian legislature made two moves in 1997 that have become the quintessential liberal compromise on same-sex marriage. State lawmakers did approve a “reciprocal beneficiaries” plan that granted same-sex couples some of the benefits associated with marriage. But they also proposed a constitutional referendum on the nature of marriage, and in 1998 this referendum, “preserving” marriage for “opposite-sex couples,” passed with 69 percent of the vote, halting (at least temporarily) the struggle of same-sex marriage in Hawaii. The Hawaiian case set off a firestorm of mini-DOMAs throughout the United States. But since DOMA and the mini-DOMAs defined marriage as a union “between a man and a woman,” the question remains: what exactly is a man or a woman?

If anti-same-sex-marriage law depends on the presumption that “man” and “woman” are discrete, natural, or even identifiable categories, then surely transgender and transsexual rights advocacy has sounded and will continue to sound an alarm over the protection of (heterosexual) marriage. In fact, transgender case law has been particularly successful in challenging the relationship among marriage, sex, and gender. Paisley Currah argues that “while the . . . freedom-to-marry challenge engineered by mainstream lesbian and gay rights advocates is apparently articulated in terms of essentialist notions of sex and gender, it is important to recognize that legal advocates of transsexuals [have] already been defending ‘same-sex’ marriages for some time.”<sup>41</sup> For example, in the 1999 Texas case *Littleton v. Prange*, a woman who had sued for malpractice following her husband’s wrongful death appealed the trial court’s judgment favoring the physician, who had countered that she was ineligible for insurance benefits because Texas law defined marriage as a union between a woman and a man, and the appellant, according to the physician, was in fact not a woman.<sup>42</sup> Christie Lee Littleton, a male-to-female transsexual, had changed her sex designation as well as her name on her birth certificate by court order before the marriage ceremony. Yet her status still plagued the appellate court:

This case involves the most basic of questions. When is a man a man, and when is a woman a woman? Every schoolchild, even of tender years, is confident he or she can tell the difference, especially if the person is wearing no

clothes. These are observations that each of us makes early in life and . . . [are among] the more pleasant mysteries.

The deeper philosophical (and now legal) question is: 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? The answer to that question has definite legal implications that present themselves in this case.<sup>43</sup>

Reminiscent of the drive to declare the nature of marriage obvious and known by all, the court's desire to declare gender unquestionable, even as the court admitted gender's questionability, demonstrates the court's (as well as society's) general refusal to acknowledge the social construction of gender.

Interestingly, the question is not, what is a man or woman? but "*when* is a man a man, and *when* is a woman a woman?" The reference to time suggests that gender may be, after all, historically contextual and constructed. While the court 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," it concluded that Littleton was not entitled to sue because the original birth certificate designated her "real" sex.<sup>44</sup> In the end, the legal-juridical document trumped both science and nature: "Christie was created and born a male. Her original birth certificate, an official document of Texas, clearly so states" (231). While the court acknowledged that Christie had changed the sex on her birth certificate, this change was a "ministerial one." As the court stated: "The facts contained in the original birth certificate were true and accurate. . . . There are some things we cannot will into being. They just are." Therefore, "we hold, as a matter of law, that Christie Littleton is a male. As a male, Christie cannot be married to another male" (231). The U.S. Supreme Court affirmed this decision by denying certiorari on October 2, 2000.<sup>45</sup>

While the question of what makes a man a man and a woman a woman will undoubtedly return to the courts in the near future, lesbian and gay rights activists have also attempted to assert marriage rights by claiming that homosexual orientation should be considered a suspect class.<sup>46</sup> Most courts have rejected this claim by reasoning that homosexuality is a "practice," not a natural and irrevocable identity. Gay rights advocates desperately held out hope until 1996, when the Supreme Court, in *Romer v. Evans*, struck down Colorado's Amendment 2, which would have repealed all of that state's antidiscrimination laws that protected gays and lesbians.<sup>47</sup> Colorado argued that it was trying to treat everyone equally by

disallowing “different” treatment for gays and lesbians. It was an attempt to apply a color-blind approach to sexuality, the logic being that since sexual difference is not seen, the law should act as if it did not exist. Antidiscrimination law therefore granted gays and lesbians “special rights.”<sup>48</sup> The Court rejected this argument, insisting that any attempt by the state to classify people by group identity must be predicated on “rational” reasons. The state’s interest in defining gays and lesbians as people who could not assert equal protection claims was, the Court found, far from rational. Nevertheless, gays and lesbians were not a “suspect class,” a decision that dealt a heavy blow to the gay rights legal movement.

Although the U.S. Supreme Court was unwilling to designate homosexual orientation a suspect classification, the Vermont Supreme Court came close to doing so in 1999. In *Baker v. State of Vermont* the court, applying the “common benefits clause” of the state constitution, found that same-sex couples should receive the same benefits as opposite-sex couples and ordered the state legislature to ensure that they did.<sup>49</sup> While the *Baker* decision has been seen as a breakthrough for gays and lesbians, the court both avoided the question of whether homosexuals were a suspect class under the Fourteenth Amendment, thereby limiting the impact of the case to the state of Vermont, and designated marriage a benefit, not a right. The court delicately suggested that the state legislature should adopt some form of benefit for same-sex partners, in the form of either marriage or civil union. In April 2000 the legislature passed a compromise bill, which gave same-sex partners access to civil unions while defining marriage as a union “between a man and a woman.”

At this point, the potential of civil unions is unknown. While many gays and lesbians have packed their bags for Vermont, it is still unclear whether or not civil unions must be recognized by other states. Just in case, a few months after *Baker* Nebraska and Nevada passed anti-civil-union laws, and many states have followed suit. Importantly, civil unions serve as an interesting compromise, giving gays and lesbians the right to benefits associated with marriage without the acceptance and legitimacy of marriage itself. In this way, marriage is reinstitutionalized as the foundation of intimate life, while civil unions are merely practical, economic, and contractual. Heterosexual couples, however, have not obtained the legal right to civil unions, which reminds us that marriage law both polices those in the category and keeps outsiders at bay. Many legal scholars have argued that this turn of events follows the pattern of race discrimination law, whereby civil unions constitute a “separate but equal” approach to gay rights.

Civil unions are contradictory in that they signal at least a partial recognition of same-sex relationships while they label gay and lesbian couples second-



class citizens. Perhaps the most fascinating and complex case on same-sex marriage, as well as the most successful in terms of gay rights advocacy, is the 2003 Massachusetts case *Goodridge v. Department of Public Health*, in which the court directly addressed the questions of second-class citizenship and the history and meaning of marriage. This case, however, is more properly understood in the terms of gay rights and queer critique, to which I would like to turn before delving into the particulars of the case.

### **Gay Rights and Queer Critique: A Debate on Citizenship**

marriage, 1 a (1) : the state of being united to a person of the opposite sex as husband or wife in a consensual and contractual relationship recognized by law (2) : the state of being united to a person of the same sex in a relationship like that of a traditional marriage.

—*Merriam-Webster's Collegiate Dictionary*, eleventh edition (2003)

At the beginning of this essay I suggested that there is a fundamental disagreement between gay and lesbian rights advocates and queer theorists over the issue of same-sex marriage and that this disagreement is best described as a debate regarding citizenship. It is, of course, problematic to presume that “gay and lesbian rights advocates” and “queer theorists” are identifiable groups with distinct politics and theoretical frameworks. This is not just another admission that groups, politics, or ideas are complex and multifaceted. Moreover, I do not want to discount the fact that these classifications are already loaded with meaning and that these identifications, as well as rumors of their supposed “divide,” have circulated throughout the academy for quite some time. I am not the first, nor will I be the last, to attempt to capture, name, and therefore reproduce this notion of a division between gay and lesbian rights advocates and queer theorists. Rather, I aim to emphasize that scholarship is always political; whatever we are looking for necessarily defines and limits what we find. My argument here is served by my system of classification and by the suggestion that there is a distinction manifested in and represented by these groups. When I refer to gay and lesbian rights advocates, I am identifying those who call for same-sex marriage rights particularly through legal means, and when I refer to queer theorists, I am identifying those who critique efforts to promote same-sex marriage and who do so particularly by arguing that such efforts reify identity categories and are assimilationist in tone and/or outcome. With this in mind, I want to walk through the debates surrounding same-sex marriage and tease out where each side stands not only on issues of same-sex

marriage but on questions about how, when, and whether to appeal to the state, about rights-based claims in the name of groups, and about strategies for critiquing and exposing the institutionalization of heteronormativity.

According to gay rights advocates, marriage rights will allow GLBT people to be recognized as viable members of the nation and will signal one of the final moves toward full equality. Picking up on the rhetoric of equal citizenship, gay rights organizations argue that, eventually, discrimination against gays and lesbians will be seen as part of an America that did not know any better. All will receive civil rights in time, and obtaining marriage rights is one of the most important hurdles on this trajectory. Same-sex marriage rights will also validate same-sex relationships in the eyes not just of family and friends but of the nation as a whole. Moreover, these rights will provide important practical benefits, such as tax benefits, immigration benefits, inheritance rights, and health insurance. While marriage rights may be more central to those who are middle and upper class and therefore economically privileged, allowing poor gays and lesbians to marry will provide them with some access to these economic protections.

One of the most important arguments for same-sex marriage is that it may transform the institution of marriage altogether by ending its history as a form of gender discrimination. Nan D. Hunter suggests that same-sex marriage may “dismantle the structure of gender in every marriage,” and Thomas Stoddard believes that it may divest the institution of “the sexist trappings of the past.”<sup>50</sup> If marriage has supported and reified a hierarchical relationship between man and woman as husband and wife and as breadwinner and homemaker, then same-sex marriages will trouble these equivalences. If marriage has been a central vehicle by which the state has gendered, racialized, and sexualized its citizenry, then same-sex marriage will certainly disrupt this process.

Many gay and lesbian advocacy groups have named same-sex marriage their top priority. The Lambda Legal Defense and Education Fund and the Gay and Lesbian Advocates and Defenders (GLAD) have initiated lawsuits and promoted same-sex-marriage legislation throughout the United States. Lambda declared February 12 National Freedom to Marry Day, adopting the emblem of a rainbow-colored heart with the words “love + equality” across it. It also initiated the Marriage Project, which joins gay and lesbian organizations throughout the country in advocacy for same-sex-marriage rights. As part of this project, Lambda has published a guide titled “Roadmap to Equality,” which offers step-by-step instructions on how to educate communities about the need to eliminate marriage discrimination.<sup>51</sup>

Importantly, advocacy for same-sex marriage extends far beyond the court-

room. In fact, Lambda proposes that same-sex couples take their activism to the streets. Its “Strolling Wedding Party Guide” encourages same-sex couples to celebrate National Freedom to Marry Day by forming a strolling wedding party:

Same-sex couples, arm-in-arm in bridal gowns or tuxedos, accompanied by their wedding party or entourage—especially in winter—will turn heads. Take it from those of us who have donned the dresses, the suits, the gowns, the winter gloves and scarves, carried the signs, rung the bells, blown the celebratory wedding bubbles, and tossed handfuls of birdseed at our brides and grooms: Street theater is effective in capturing attention and opening dialogue about lesbian, gay, bisexual, and transgender lives and relationships.<sup>52</sup>

Lambda suggests that this is a great opportunity to educate one’s neighbors about same-sex marriage, because the sight of gay couples strolling down the street is likely to prompt dialogue.

Critics of the same-sex-marriage movement have argued that advocating for marriage rights is assimilationist and simply affirms that some families are better than others. Paula Ettelbrick, for example, asserts that seeking validation for some types of relationships will renew distinctions between good and bad, moral and immoral.<sup>53</sup> Moreover, she suggests, the desire to seek validation is antithetical to the gay and lesbian movement. Others have argued that committing such a vast array of resources to same-sex marriage is problematic, since only a few stand to benefit from it. In effect, advocating for same-sex marriage has distracted the GLBT movement from more important and immediate issues, such as organizing for antidiscrimination laws and economic restructuring.

Many critics of same-sex marriage also pick up on feminist critiques of marriage, arguing that marriage is inherently patriarchal and oppressive. Rather than attempt to obtain marriage rights, gays and lesbians should try to abolish the institution of marriage altogether.<sup>54</sup> These critics claim that while same-sex marriage might be a more egalitarian form of union than opposite-sex couples enjoy, it will not radically transform marriage’s exclusionary nature.<sup>55</sup> Importantly, mainstream gay rights organizations have not critiqued the institution of marriage, and by suggesting that gays and lesbians are “like heterosexuals,” they certainly have not forced society to contemplate gender subordination in marriage.<sup>56</sup> In seeking same-sex-marriage rights, gay rights advocates have ended up revering marriage, and suggesting that it is the final step on the “road to equality” only bolsters without critiquing the institution of marriage in U.S. society.

Queer theorists in particular have argued that the goal of achieving same-

sex-marriage rights is problematic.<sup>57</sup> First, it appeals to the state in the name of a minority status, which, they claim, has the potential to solidify and essentialize gay identity. Moreover, appealing to a state that has had a long, horrible history of policing and harming gays and lesbians is troubling. Second, in attempting to obtain same-sex-marriage rights, gays and lesbians are forced to ask for equal rights on the basis of their similarity to heterosexuals, which is tantamount to conceding that they deserve what heterosexuals have only as long as they look and behave like them. A quick glance at GLAD's and Lambda's marriage Web sites, promotional materials, and press releases demonstrates as much. On the Web sites, for example, GLAD and Lambda provide detailed descriptions of same-sex couples who have had long, committed, and happy relationships. GLAD issued a press release on April 11, 2001, in which the pictures of seven happy couples and the evidence of their happy lives (suburban homes, dogs, children) cover the page. Lambda's "Freedom to Marry Educational Guide" repeats over and over that gay people are normal, average, and like everyone else: "Gay people are very much like everyone else. They grow up, fall in love, form families and have children. They mow their lawns, shop for groceries and worry about making ends meet. They want good schools for their children, and security for their families as a whole."<sup>58</sup> Third and most critically, by attempting to obtain marriage rights, gays and lesbians help further heteronormativity.

Michael Warner states the goal of queer theory in his introduction to *Fear of a Queer Planet* as follows: "'Queer' gets its critical edge by defining itself against the normal rather than the heterosexual. . . . If queers, incessantly told to alter their 'behavior,' can be understood as protesting not just the normal behavior of the social, but the idea of normal behavior, they will bring skepticism to the methodologies founded on that idea."<sup>59</sup> Heteronormativity, then, is not simply the silent presumption of heterosexuality, although this is a large part of it. Heteronormativity promotes the norm of social life as not only heterosexual but also married, monogamous, white, and upper middle class. In other words, heteronormativity promotes the idea that middle-class, white heterosexuals are synonymous with "Americans." Racial and class norms are central to heteronormativity. Consumption is as well. Good, normal Americans participate in the consumerist American ethos whereby home ownership and purchasing power are equivalent to the American dream. As Lambda rightly points out, normative Americans "mow their lawns, shop for groceries and worry about making ends meet. They want good schools for their children, and security for their families as a whole."

Similarly, Cathy J. Cohen argues in "Punks, Bulldaggers, and Welfare Queens" that the radical potential of queer theory is its ability to demonstrate how

normalization displaces large groups of people. In promoting a queer theory that attempts to advocate “against the normal” (as Warner puts it), queer theory brings together many people who share a common displacement from the social norm.<sup>60</sup> This approach to queer theory is also taken by David L. Eng, who argues that the term *queer* signals “a stake in nonnormative, oppositional politics.”<sup>61</sup> According to Eng, queers are not just gays and lesbians, or nonheterosexuals, for that matter. Queerness includes all who are displaced from normative regimes and practices, for example, nonwhite or racialized others. If we take the queer project to be, at the very least, a critique of heteronormativity, then we can see that it must be critical of and attuned to how norms of heterosexuality are produced by and uphold norms of race, class, and nation as well.

So if queer theorists have a stake in critiquing the institutionalization of gendered, sexualized, racialized, and classed norms, then they must understand that appeals to normalcy, to class privileges, and to consumption through same-sex marriage advocacy are a problem. It is this problem that arises in *Goodridge v. Department of Public Health*.<sup>62</sup> Initiated by GLAD on behalf of seven couples, this case argued that the Massachusetts marriage licensing law did not explicitly deny same-sex couples the right to a marriage license and that not recognizing same-sex marriage violated the equal protection and due process clauses. The court dismissed the first claim quickly, suggesting that there was plenty of evidence that legislators intended to define marriage rights for opposite-sex couples only. Taking the second claim more seriously, the court found that even if it applied only a “rational basis” test, the marriage laws of Massachusetts violated both due process and equal protection.

Interestingly, the court structured its argument by walking through the state’s three rationales for excluding same-sex couples from marriage: maintaining marriage for opposite-sex couples only provided a “favorable setting for procreation,” ensured “the optimal setting for child rearing,” and “preserv[ed] scarce State and private financial resources.” The court disagreed with the state and concluded: “Barred access to the protections, benefits, and obligations of civil marriage, a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community’s most rewarding and cherished institutions. That exclusion is incompatible with the constitutional principles of respect for individual autonomy and equality under law.”<sup>63</sup>

While it has no doubt been one of the most progressive decisions in terms of its implications for same-sex marriage, *Goodridge* demonstrates through its language (penned by Justice C. J. Marshall) that the anxieties of queer theorists

are well founded. While the Massachusetts State Supreme Court deems opposite-sex-only marriage discriminatory, it reaffirms the state's role in regulating intimacy and citizenship through the stability and exclusivity of marriage law. The court decision begins by describing the seven couples, emphasizing their long-term monogamous relationships and their familial responsibilities. Moreover, the plaintiffs are vital members of the community, for they are "business executives, lawyers, an investment banker, educators, therapists, and a computer engineer" and "are active in church, community, and school groups."<sup>64</sup> The court uses these very identifications and qualifications of the good citizen to undermine the state's argument.

In addressing the state's first rationale, the court points out that marriage law is clearly not dependent on procreation, since opposite-sex license applicants are not required to "attest to their ability or intention to conceive children by coitus."<sup>65</sup> The court refutes the state's second rationale by pointing directly to the plaintiffs and their families. The exclusion of same-sex couples from marriage rights demonstrates that the state does not value all families, only certain ones. Rather than protect children, the exclusivity of marriage law harms them:

No one disputes that the plaintiff couples are families, that many are parents, and that the children they are raising, like all children, need and should have the fullest opportunity to grow up in a secure, protected family unit. . . .

. . . It cannot be rational under our laws, and indeed it is not permitted, to penalize children by depriving them of State benefits because the State disapproves of their parents' sexual orientation.<sup>66</sup>

Thus the court cleverly deploys the state's logic against itself and, along the way, suggests that discrimination against gays and lesbians targets families, parents, and children.

In addressing the state's third rationale, the court addresses the related issue of "preserving" not only state resources but the idea of marriage itself. The court quickly throws aside the financial question, since discrimination based on scarcity is far from convincing. But the argument that marriage itself must be preserved exclusively for heterosexuals is more worthy of negotiation. The court suggests that while many people are concerned that extending marriage rights to same-sex couples "will trivialize or destroy the institution of marriage," it must be understood that this decision in fact strengthens the institution of marriage. It is important to trace the trajectory of the court's argument:

Here, the plaintiffs seek only to be married, not to undermine the institution of civil marriage. They do not want marriage abolished. They do not attack the binary nature of marriage, the consanguinity provisions, or any of the other gate-keeping provisions of the marriage licensing law. Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race. If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities. That same-sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.<sup>67</sup>

The argument contains many of the elements that queer theorists have critiqued, particularly the suggestion that same-sex-marriage rights will not change or transform the institution of marriage but will fortify its "gate-keeping provisions." For example, the court references here the ways in which same-sex-marriage advocacy has not attacked the "binary nature[s]" of marriage. While it is true that same-sex-marriage advocates have critiqued the male/female and homosexual/heterosexual binaries latent in marriage, they have not attempted to undermine the sanctity of the domestic couple. There are a variety of intimacies and familial practices that fall out of this narrow construction.

The strategic analogy to race in the court's argument must be interrogated. One of the most common elements of the same-sex-marriage debate has been the deployment of the history of antimiscegenation laws. Most case law on same-sex marriage includes a debate about how applicable and similar *Loving v. Virginia* and antimiscegenation laws are to same-sex marriage. Proponents of same-sex marriage have often argued that sex orientation now is like race then. Opponents counter that discrimination based on race was "false" (i.e., based on prejudice), whereas discrimination based on sexual orientation concerns a real difference that matters. Either way, the operative narrative holds that "we" all know that racial discrimination is wrong, and "we" will either learn a similar lesson in regard to sexuality or not. Without denying that the *Loving* decision has had an impact on race and marriage rights, or that racial discrimination has changed over time, I am wary of the ways in which a legal decision can be mobilized to suggest that racial discrimination in marriage, employment, education, and so on is a thing of the past. The analogy is loaded and works to obscure the fact that such discrimi-

nation remains very much a part of citizenship in the United States. Moreover, understanding the history of marriage law and citizenship highlights the fact that marriage law has been a primary site for the production and maintenance of a white normative citizenry. The deployment of the racial analogy, then, simultaneously recalls this white normative history and denies its political and contemporary import.

The Massachusetts State Supreme Court's argument next suggests that there is nothing new about anxiety over extending marriage rights. Acknowledging the work of historians like Cott, the court observes that marriage laws have changed over time and that while previous extensions of marriage rights contested the gender and racial norms of marriage, the institution of marriage has survived: "Alarms about the imminent erosion of the 'natural' order of marriage were sounded over the demise of antimiscegenation laws, the expansion of the rights of married women, and the introduction of 'no-fault' divorce. Marriage has survived all of these transformations, and we have no doubt that marriage will continue to be a vibrant and revered institution."<sup>68</sup>

If it were merely a matter of critiquing the ways in which this decision attempts to soothe the anxieties of homophobic America, then one might be willing to suggest that in this case we have paid a small price for a large gain. This case goes much farther, however, for ultimately the court's decision rests on the premise that extending marriage rights to gays and lesbians will make them good citizens. The court recognizes and reaffirms that marriage law is one of the best mechanisms for maintaining and tracking conformity:

Without question, civil marriage enhances the "welfare of the community." It is a "social institution of the highest importance." . . . Civil marriage anchors an ordered society by encouraging stable relationships over transient ones. It is central to the way the Commonwealth identifies individuals, provides for the orderly distribution of property, ensures that children and adults are cared for and supported whenever possible from private rather than public funds, and tracks important epidemiological and demographic data.<sup>69</sup>

The court suggests that extending same-sex-marriage rights is a way to incorporate and assimilate gays and lesbians into the norms of the national polity. Such rights will provide order, stability, and a means of identifying and recognizing individuals. That is, they will make gays and lesbians intelligible and acceptable to the state as citizens. Moreover, marriage rights privatize responsibilities,



in accordance with the conservative rhetoric that promotes marriage among single welfare recipients (read: single, racialized mothers) as a solution to social ills and financial scarcity.

The court's decision is refreshingly clear and blunt. Throughout the decision the court asserts the legitimacy of the state's intrusion into the marital bed, stating that "in a real sense, there are three partners to every civil marriage: two willing spouses and an approving State."<sup>70</sup> In this way, same-sex-marriage rights merely expand the number of beds that can be "approved" by the state and raise the question of whom gays and lesbians are in bed with. This decision provides excellent material for a queer analysis of same-sex marriage: marriage is a mechanism by which the state ensures and reproduces heteronormativity, and absorbing certain types of gay and lesbian relationships will only further this process.

### **To Queer or Not to Queer: That Is the Question**

The struggle for same-sex marriage has had some positive effects consistent with a queer analysis. In particular, by forcing the reinsertion of heterosexuality as the norm, it has pointed to a crack in the facade of heteronormativity. If heterosexuality's naturalness and normalcy need to be written into laws and constitutional amendments, then apparently heterosexuality is not natural enough to go without reinforcement. That marriage laws need to be buttressed with the phrase *opposite-sex only* demonstrates, at the very least, the questioning of heterosexuality as synonymous with marriage. Moreover, same-sex marriage has had the fortunate effect of placing the sex/gender system itself under a spotlight. Twenty years ago, who could have foreseen courts pondering what makes a man a man? By questioning the presumption of heterosexuality in marriage, same-sex-marriage advocates have exposed the presumption of the naturalness of gender that is inherent in the cultural production of heterosexuality.

More important, the same-sex-marriage debate has exposed the state's interest in using marriage law to maintain, police, and regulate citizenship. V. Spike Peterson points out that "heterosexism as sex/affect invokes the normalization of exclusively heterosexual desire, intimacy, and family life. Historically, this normalization is inextricable from the state's interest in regulating sexual reproduction, undertaken primarily through controlling women's bodies, policing sexual activities, and instituting the heteropatriarchal family/household as the basic socio-economic unit."<sup>71</sup> Suggesting, then, that two men or two women can be in a marriage not only calls into question the sex/gender system but also exposes the

state's interest in promoting the reproduction of certain kinds of citizens. Again, to draw on Alexander's insight, the state does not want just anybody to be a citizen, and marriage is central to this position.

So despite numerous queer theorists' disdain of advocating same-sex-marriage rights, the struggle has had some positive effects. But at what cost? While it may seem that advocating for same-sex marriage could hardly cause any direct harm to disenfranchised peoples, gay rights organizations' practice of basing their claim to marriage on its normalcy has gradually reduced the space for "deviant" sexual practices and intimacies. That advocacy of same-sex-marriage rights is coincident with the forceful promotion of marriage to welfare mothers serves as a useful reminder that gay rights organizations have advocated for the right of some to marry while neglecting the right of others to reject marriage and participate in alternative family structures. Racial analogies to antimiscegenation laws have only worsened this problematic. Same-sex-marriage claims are not made in a vacuum, and assertions of proper relationships and proper citizenship practices draw attention to those people who are considered improper. While the fight for same-sex-marriage rights has dented some elements of heteronormativity, it has reified and bolstered it on the whole by asserting, over and over, that marriage is good, gays are normal, and "we" are like "you." For heteronormativity is the presumption and promotion not simply of heterosexuality but of a particular type of heterosexual couple: white, middle class, child rearing, and materialistic. Moreover, advocacy for same-sex-marriage rights has not critiqued citizenship and its tendency to exclude or differentiate, but it has reproduced the myth of universal citizenship as a great equalizer.

With these critiques in mind, I want to point toward some radical potential in gay and lesbian citizenship. In doing so, I am taking up Lauren Berlant and Elizabeth Freeman's discussion of queer nationality as a model.<sup>72</sup> Berlant and Freeman argue that the activist group Queer Nation was only partly successful in promoting a queer nation. They contend that Queer Nation did not demonstrate a disjunction between queers and the nation, a disjunction that they see as necessary for queer nationality. Applying a similar logic to gay and lesbian citizenship, we can see that a disjunction between gay and lesbian citizenship, on the one hand, and heterosexual citizenship, on the other, is emergent in U.S. national culture and, further, is needed to expose and critique the myth of universal, equal citizenship. Consider the recognition of civil unions in Vermont and of other forms of domestic partnership policies, as in Hawaii. These were trade-offs, offers made by a heterosexual majority to render gay and lesbian relationships valid, but not as valid as heterosexual ones. Civil unions work simultaneously to include gay and

lesbian relationships in the national body and to exclude them from it. In this way, civil unions expose the paradox of citizenship itself, as both a universalizing and an exclusionary device.

Consider also the scandalous campaigns undertaken by various U.S. cities and counties to grant marriage licenses to same-sex couples. Beginning on February 12, 2004, with San Francisco, followed by cities in New York, New Mexico, and Oregon, local governments mounted challenges to discriminatory anti-same-sex-marriage laws and policies. These actions not only put same-sex marriage in the spotlight as an important political issue but provided ample opportunity to examine the nation's anxieties over it. Image after image, late-night joke after late-night joke, one could not escape the concern aroused by the sight of hundreds of gay and lesbian couples lined up outside San Francisco's city hall. It brought to mind a Queer Nation kiss-in, and, as commentators often pointed out, these couples did not all live in San Francisco—some might even be returning to your home state. Moreover, this picture did not promise a future of happy, nice, normal gay and lesbian couples; there were far too many types of couples for that. The sheer numbers and varieties suggested that gay and lesbian relationships—and potentially marriage-as-citizenship itself—could not be contained or controlled.

I describe such events as conferring gay and lesbian rather than queer citizenship because I believe that “queer” and “citizen” are antithetical concepts. I am proposing that queers, especially those who are privileged and well off enough to do so, should refuse citizenship and actively subvert the normalization, legitimization, and regulation that it requires. In claiming that queer is anticitizen, I am referencing a more nuanced understanding of what it means to be a citizen. To be a citizen is not simply a matter of enjoying a specific legal status; it includes the wide variety of practices and imaginings required by citizenship. That is, one must imagine oneself as a citizen as well as be imagined by the American citizenry as a member of it. “Citizenship for Asian Americans in the form of legal status or rights,” Leti Volpp notes, advancing a similar claim, “has not guaranteed that Asian Americans will be understood as citizen-subjects or will be considered to subjectively stand in for American citizenry. . . . While in the contemporary moment Asian Americans may be perceived as legitimate recipients of formal rights, there is discomfort associated with their being conceptualized as political subjects whose activity constitutes the American nation.”<sup>73</sup> Historically, Asian Americans have been deemed, in legal and popular discourses, as always already aliens and outsiders to U.S. community practices and political rights. Throughout U.S. history they have been figured as abjected citizens and, as such, have withstood egregious discriminations and harms that continue to this day. I want to

apply Volpp's insight to queers, but by no means to diminish the substantial harms suffered by Asian Americans through U.S. orientalism or to equate Asian American with queer experience. While an intersectional queer critique aims to make connections among practices, experiences, and identifications, it must not equalize these experiences or treat them as if they were the same. In fact, a central argument of this essay has been that citizenship displaces nonwhite, nonheterosexual, nonmale peoples via intersections of normativities, but it does so in very different and meaningful ways.

A radical queer critique of citizenship has a stake not in saving it or in redefining it but in undermining its production and promotion of normativity. Queers are seen as oppositional and/or antagonistic to U.S. community-building practices and institutions. In the American imaginary, they often epitomize indulgence and selfishness, traits seen as extensions of their excessive sexual identifications. While queers do not choose to be positioned outside or in opposition to U.S. citizenship, their positioning can and should be used to critique normative citizenship practices and institutions. Queerness as an identification and a politics allows for a reflective stance that can represent the paradox of citizenship: that the great umbrella of American ideals does not shelter everyone. It allows for a position from which we, as deviants, can work to undermine and expose—that is, queer—the normativities of citizenship.

Queer citizenship requires a critique of citizenship, of the nation-state, of normalization and heteronormativity. To queer citizenship, then, we need to work to conceive a citizenship that does not require universalization, false imaginaries, or immersion in and acceptance of the progress narratives of U.S. citizenship. At a time when immigrants are terrorized, when hate crimes are on the rise, when wars are waged to extend the U.S. empire and are excused through racialized and gendered imagery as well as through the supposedly benevolent desire to spread American ways of life (such as “citizenship” and “democracy”), we cannot afford to participate in any colonial rhetorics or orthodox appeals. Queer citizenship requires a constant critique not only of the break between queer and normative citizens but of the boundary maintenance inherent in citizenship. If the history of citizenship is in fact the history of normalization, of legitimization, of differentiation, then to queer citizenship would transform these practices radically. A queer citizenry would refuse to participate in the prioritizing of one group or form of intimacy over another; it would refuse to participate in the differentiation of peoples, groups, or individuals; it would refuse citizenship altogether.

## Notes

1. M. Jacqui Alexander, "Not Just (Any) Body Can Be a Citizen: The Politics of Law, Sexuality, and Postcoloniality in Trinidad and Tobago and the Bahamas," *Feminist Review*, no. 48 (1994): 5–23.
2. See M. Jacqui Alexander, "Erotic Autonomy as a Politics of Decolonialization: An Anatomy of Feminist and State Practice in the Bahamas Tourist Economy," in *Feminist Genealogies, Colonial Legacies, Democratic Futures*, ed. M. Jacqui Alexander and Chandra Talpade Mohanty (New York: Routledge, 1997), 63–100; Lauren Berlant, *The Queen of America Goes to Washington City: Essays on Sex and Citizenship* (Durham: Duke University Press, 1997); Cathy J. Cohen, "Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?" *GLQ* 3 (1997): 437–65; Jigna Desai, *Beyond Bollywood: The Cultural Politics of South Asian Diasporic Film* (New York: Routledge, 2004); Lisa Duggan, "Making It Perfectly Queer," in *Sex Wars: Sexual Dissent and Political Culture*, ed. Lisa Duggan and Nan D. Hunter (New York: Routledge, 1995), 155–72; Duggan, "Queering the State," *Social Text*, no. 39 (1994): 1–14; David L. Eng, "Out Here and Over There: Queerness and Diaspora in Asian American Studies," *Social Text*, nos. 52–53 (1997): 31–52; and Michael Warner, introduction to *Fear of a Queer Planet: Queer Politics and Social Theory*, ed. Michael Warner (Minneapolis: University of Minnesota Press, 1993), vii–xxxii.
3. These two camps are not mutually exclusive, however, and I address the problematics of classifying and distinguishing them as distinct later in the essay. By *gay and lesbian politics* I refer to the positions of both scholars and activists who attempt to assert gay and lesbian rights by legal mechanisms. By *queer theorists* I mean those scholars who assert an antinormative sexual politics.
4. I do not use the term *queer* here as an umbrella term for gay, lesbian, bisexual, and transgender people. I use it in the spirit of queer theorists who argue that to be queer is to be outside and/or in opposition to the normative regimes of sexuality, which might include people who identify as gay, lesbian, bisexual, and transgender, but not necessarily or exclusively.
5. See Nancy F. Cott, "Giving Character to Our Whole Civil Polity: Marriage and the Public Order in the Late Nineteenth Century," in *U.S. History as Women's History: New Feminist Essays*, ed. Linda K. Kerber, Alice Kessler-Harris, and Kathryn Kish Sklar (Chapel Hill: University of North Carolina Press, 1995), 107–21; Cott, "Marriage and Women's Citizenship in the United States, 1830–1934," *American Historical Review* 103 (1998): 1440–74; and Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, MA: Harvard University Press, 2000).
6. Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven: Yale University Press, 1997), 14.
7. Linda Bosniak, "Universal Citizenship and the Problem of Alienage," *Northwestern University Law Review* 94 (2000): 963.

8. Ian F. Haney López, *White by Law: The Legal Constructions of Race* (New York: New York University Press, 1996). Of the sixty-two reported prerequisite cases, not one of the claimants was from Europe. Rather, the claimants were identified as “immigrants” and/or “aliens” from China, Burma, Japan, Syria, India, the Philippines, Afghanistan, Yemen, Saudi Arabia, Mexico, and South America.
9. See Neil Gotanda, “‘Other Non-Whites’ in American Legal History: A Review of Justice at War,” *Columbia Law Review* 85 (1985): 1186–92; Gotanda, “Race, Citizenship, and the Search for Political Community among ‘We the People’: A Review Essay on Citizenship without Consent,” *Oregon Law Review* 76 (1997): 233–60; Lisa Lowe, *Immigrant Acts: On Asian American Cultural Politics* (Durham: Duke University Press, 1996); Natsu Taylor Saito, “Model Minority, Yellow Peril: Functions of ‘Foreignness’ in the Construction of Asian American Legal Identity,” *Asian Law Journal* 4 (1997): 71–96; and Leti Volpp, “‘Obnoxious to Their Very Nature’: Asian Americans and Constitutional Citizenship,” *Asian Law Journal* 8 (2001): 71–88.
10. Indian General Allotment Act of 1887 (Dawes Severalty Act), chap. 119, 24 Stat. 388 (1887), amended by 25 U.S.C. § 331.
11. *Plessy v. Ferguson*, 163 U.S. 537, 561 (1896).
12. Quoted in Nira Yuval-Davis, “Women, Citizenship, and Difference,” *Feminist Review*, no. 57 (1997): 69. See also Will Kymlicka and Wayne Norman, “Return of the Citizen: A Survey of Recent Work on Citizenship Theory,” in *Theorizing Citizenship*, ed. Ronald Beiner (Albany: State University of New York Press, 1995), 283–322.
13. See Gotanda, “Race, Citizenship, and the Search for Political Community”; Kenneth L. Karst, *Belonging to America: Equal Citizenship and the Constitution* (New Haven: Yale University Press, 1989); Karst, “Citizenship, Law, and the American Nation,” *Indiana Journal of Global Legal Studies* 7 (2000): 595–601; Smith, *Civic Ideals*; Peter J. Spiro, “The Citizenship Dilemma,” *Stanford Law Review* 51 (1999): 597–640; and Nira Yuval-Davis and Prina Werbner, eds., *Women, Citizenship, and Difference* (New York: Zed, 1999).
14. See Richard Delgado, ed., *Critical Race Theory: The Cutting Edge* (Philadelphia: Temple University Press, 1995); Gotanda, “Race, Citizenship, and the Search for Political Community”; Kevin R. Johnson, “Race, the Immigration Laws, and Domestic Race Relations: A ‘Magic Mirror’ into the Heart of Darkness,” *Indiana Law Journal* 73 (1998): 1111–60; Saito, “Model Minority, Yellow Peril”; and Enid Trucios-Haynes, “The Legacy of Racially Restrictive Immigration Laws and Policies and the Construction of the American National Identity,” *Oregon Law Review* 76 (1997): 369–424.
15. Johnson, “Race, the Immigration Laws, and Domestic Race Relations,” 1116.
16. Cott, “Giving Character to Our Whole Civil Polity,” 108, 121, 107, 121.
17. Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988).

18. See Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* (Cambridge: Cambridge University Press, 1998); Linda K. Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (New York: Hill and Wang, 1998); Cott, "Marriage and Women's Citizenship"; and Cott, *Public Vows*.
19. On whether or not a woman automatically held the citizenship status of her husband see the debate between Kerber, *No Constitutional Right to Be Ladies*, and Cott, "Marriage and Women's Citizenship." The racial prerequisites referred to here included "free white" status and "African descent." For more information on the racial prerequisites see López, *White by Law*.
20. Cott, "Marriage and Women's Citizenship," 1461.
21. See Candice Lewis Bredbenner, *A Nationality of Her Own: Women, Marriage, and the Law of Citizenship* (Berkeley: University of California Press, 1998); and Cott, "Marriage and Women's Citizenship."
22. African American women were also prosecuted, but much less often. The legal charges ranged from bigamy, adultery, and fornication to less egregious infractions of marital and intimacy practices. See Katherine Franke, "Becoming a Citizen: Reconstruction Era Regulation of African American Marriages," *Yale Journal of Law and the Humanities* 11 (1999): 251–309.
23. *Ibid.*, 253.
24. An appeal to history and foundations is part of many civil rights issues. In regard to the debate on same-sex marriage, opponents often describe the "traditional" (read: opposite-sex, gender-hierarchical) family as the "foundation of society." In an interesting response to this argument, William Eskridge Jr. contends that same-sex marriage has a long history and has been prevalent in many cultures ("The History of Same-Sex Marriage," *Virginia Law Review* 79 [1993]: 1419–1514). Appeals to historical foundations are discussed in more detail below.
25. Alexander, "Not Just (Any) Body," 6.
26. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996). It is not a coincidence that the same Congress that passed DOMA also passed the 1996 Welfare Reform Act, thereby promoting and policing the proper marriages of some while disallowing the possibility of marriage for others.
27. Often referred to as the "choice of law" provision, this second part has been hotly debated by legal theorists attempting to decide whether or not it is necessary (since states can already refuse to recognize other states' laws) or a violation of the full faith and credit clause of the U.S. Constitution (since the intent of this clause is to ensure that an individual's rights do not end at the state border). See Brian Bix, "State of the Union: The States' Interest in the Marital Status of Their Citizens," *University of Miami Law Review* 55 (2000): 1–30; Nancy J. Feather, "Defense of Marriage Acts:

- An Analysis under State Constitutional Law,” *Temple Law Review* 70 (1997): 1017–36; Andrew Koppelman, “Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional,” *Iowa Law Review* 83 (1997): 1–34; and Jeffrey L. Resenberger, “Sex Marriages and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit,” *Creighton Law Review* 32 (1998): 409–56.
28. White House, Office of the Press Secretary, “Marriage Protection Week, 2003,” October 3, 2003, [www.whitehouse.gov/news/releases/2003/10/20031003-12.html](http://www.whitehouse.gov/news/releases/2003/10/20031003-12.html) (accessed July 20, 2004).
  29. H. J. Res. 56, 108th Cong., 1st sess. (2003); see also S. J. Res. 26, 108th Cong., 1st sess. (2003).
  30. See Alliance for Marriage, “Senate Vote Is First Step in Democratic Debate AFM Intended to Create by Drafting Marriage Amendment,” July 12, 2004, [www.allianceformarriage.org](http://www.allianceformarriage.org) (accessed July 20, 2004).
  31. *Loving v. Virginia*, 388 U.S. 1, 12 (1967). For an excellent discussion of the historical context of same-sex-marriage case law see Peggy Pascoe, “Sex, Gender, and Same-Sex Marriage,” in *Is Academic Feminism Dead? Theory in Practice*, ed. Social Justice Group at the Center for Advanced Feminist Studies, University of Minnesota (New York: New York University Press, 2000), 86–129. At the time of the *Loving* decision, sixteen states had laws banning interracial marriage.
  32. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971). The U.S. Supreme Court dismissed the appeal (*Baker v. Nelson*, 409 U.S. 810 [1972]).
  33. *Baker*, 191 N.W.2d at 186.
  34. In the 1973 Kentucky case *Jones v. Hallahan* (501 S.W.2d 588 [Ky. 1973]), two female petitioners argued that the denial of same-sex marriage violated their freedom to associate and their freedom of religion. The court did not directly address these concerns but instead denied the petitioners’ claim by deploying the trope of language. Since the challenged statute did not specifically define marriage, the court concluded from a variety of dictionaries that a union between one man and one woman was implied.
  35. *Singer v. Hara*, 522 P.2d 1187, 1188 (Wash. Ct. App. 1974).
  36. For an excellent discussion of how and when courts deploy social science literature see Peggy Pascoe, “Miscegenation Law, Court Cases, and Ideologies of ‘Race’ in Twentieth-Century America,” in *Sex, Love, Race: Crossing Boundaries in North American History*, ed. Martha Hodes (New York: New York University Press, 1999), 464–90.
  37. *Maryland Laws*, 1973, chap. 213, quoted in Pascoe, “Sex, Gender, and Same-Sex Marriage,” 86.
  38. *Baehr v. Lewin*, 852 P.2d 44 (Hawaii 1993).
  39. Philip L. Bartlett II, “Recent Legislation: Same-Sex Marriage,” *Harvard Journal on Legislation* 36 (1999): 581, 582.



40. *Baehr*, 852 P.2d at 55.
41. Paisley Currah, "Queer Theory, Lesbian and Gay Rights, and Transsexual Marriages," in *Sexual Identities, Queer Politics*, ed. Mark Blasius (Princeton: Princeton University Press, 2001), 185.
42. *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999).
43. *Littleton*, 9 S.W.3d at 224.
44. *Littleton*, 9 S.W.3d at 231.
45. *Littleton v. Prange*, 531 U.S. 872 (2000).
46. The term *orientation* is intentional here, since part of the basis of the claim is that a person is born gay, lesbian, or bisexual. If homosexuality were a preference, this claim would be much more difficult to make.
47. *Romer v. Evans*, 517 U.S. 620 (1996).
48. Importantly, other states as well as numerous cities have antidiscrimination laws for gays, lesbians, and sometimes bisexuals and transgenders. For more information see Lambda Legal Defense and Education Fund, "Anti-Discrimination," [www.lambdalegal.org/cgi-bin/iowa/issues/record?record=18](http://www.lambdalegal.org/cgi-bin/iowa/issues/record?record=18) (accessed July 20, 2004).
49. *Baker v. State of Vermont*, 744 A.2d 864 (Vt. 1999).
50. Nan D. Hunter, "Marriage, Law, and Gender: A Feminist Inquiry," in Duggan and Hunter, *Sex Wars*, 109; Thomas Stoddard, "Why Gay People Should Seek the Right to Marry," in *Lesbians, Gay Men, and the Law*, ed. William B. Rubenstein (New York: New, 1993), 401. Pascoe, echoing Hunter's argument, stresses the potential of same-sex marriage to promote radical feminist politics of gender difference ("Sex, Gender, and Same-Sex Marriage").
51. Lambda Legal Defense and Education Fund, "Roadmap to Equality: A Freedom to Marry Educational Guide," March 12, 2002, [www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1022](http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1022) (accessed July 20, 2004).
52. Lambda Legal Defense and Education Fund, "Strolling Wedding Party Guide: Street Theater for Your Community," [www.lambdalegal.org/binary-data/LAMBDA\\_PDF/pdf/255.pdf](http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/255.pdf) (accessed July 20, 2004).
53. Paula Ettelbrick, "Since When Is Marriage a Path to Liberation?" in Rubenstein, *Lesbians, Gay Men, and the Law*, 401–6.
54. For elaborations of this argument see Nancy 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,'" *Virginia Law Review* 79 (1993): 1535–50; Polikoff, "Why Lesbians and Gay Men Should Read Martha Fineman," *American University Journal of Gender, Social Policy, and the Law* 8 (2000): 167–76; and Pascoe, "Sex, Gender, and Same-Sex Marriage."
55. Polikoff, "We Will Get What We Ask For"; Polikoff, "Why Lesbians and Gay Men"; Ettelbrick, "Since When Is Marriage?"; Pascoe, "Sex, Gender, and Same-Sex Marriage."

56. Polikoff, "We Will Get What We Ask For."
57. Interestingly, some queer theorists have positioned themselves in opposition not only to gay and lesbian political strategies but to gay and lesbian studies. They argue that they have different political and theoretical motives than those scholars they consider part of gay and lesbian studies. Simplistically, one could describe the differences between the objects of queer theory and gay and lesbian studies as between, for example, the construction of the normative and that of the deviant, between the construction of heterosexuality and that of homosexuality, and between the study of sexual practices and that of sexual identities. See, e.g., Warner, introduction; and Duggan, "Queering the State." This narrative is from a particular queer theory perspective, however, and it is certain that those in gay and lesbian studies could tell a different story.
58. Lambda Legal Defense and Education Fund, "Roadmap to Equality."
59. Warner, introduction, xxvi–xxvii.
60. Cohen, "Punks, Bulldaggers, and Welfare Queens."
61. Eng, "Out Here and Over There," 50.
62. *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).
63. *Goodridge*, 798 N.E.2d at 949.
64. *Goodridge*, 798 N.E.2d at 949.
65. *Goodridge*, 798 N.E.2d at 961.
66. *Goodridge*, 798 N.E.2d at 964.
67. *Goodridge*, 798 N.E.2d at 965.
68. *Goodridge*, 798 N.E.2d at 967.
69. *Goodridge*, 798 N.E.2d at 954.
70. *Goodridge*, 798 N.E.2d at 954.
71. V. Spike Peterson, "Sexing Political Identities/Nationalism as Heterosexism," in *Women, States, and Nationalism: At Home in the Nation?* ed. Sita Ranchod-Nilsson and Mary Ann Tétreault (London: Routledge, 2000), 60.
72. Lauren Berlant and Elizabeth Freeman, "Queer Nationality," in Warner, *Fear of a Queer Planet*, 193–229.
73. Volpp, "'Obnoxious to Their Very Nature,'" 73.