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This research explores and aligns a postmodern method in line with a theoretical lens of "strategic political queer/feminism" to understand the construction and positioning of the issue/ problem of same-sex marriage. The method takes shape through a theoretical framework that leads to a political maneuver opening access to the rights and responsibilities associated with the marriage contract to more families. To determine the political strategy needed to achieve legal inclusion it is necessary to understand the entities at work in shaping the debate regarding same-sex marriage. The formation of this political issue/problem is investigated through Michael Foucault's archeology methods and employs a strategic political plan incorporating a liberal feminist and queer theoretical lens of inquiry. Doing so provides an alternative to the current binary offered by liberal feminist and queer theory of either legalizing same-sex marriage or destroying the institution of marriage. Instead, this thesis (re)constructs an either/and position that abandons dichotomies and opens inclusion through a politics that values difference. This leads directly to the conclusion that the marriage contract needs to be removed from the legal context and alternative contracts need to be offered to a wider array of families such that all are valued.

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Wedding Bells, Binaries and the Heterosexual Menace

by
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I understand that my thesis will become part of the permanent collection of Oregon State University libraries. My signature below authorizes release of my thesis to any reader upon request.

Elizabeth McNeill, Author

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DEDICATION

I dedicate this thesis to my wonderful wife, Megan, and my lifesaving mentor, JJ Hendricks. Without these two fabulous women in my life I would never have had the courage and strength to finish this work. Thank you both for believing in the work I live for.

WEDDING BELLS, BINARIES AND THE HETEROSEXUAL MENACE

INTRODUCTION

THE TOPIC

Prejudice still persists for lesbians, gays, bisexuals, transgendered people, queers, and intersexed people ("LGBTQI") in most of the world (Cruikshank, 64-6; Seager, 26-7; Young, Justice 40). In the United States, supportive evidence can be seen in the context of the law and its refusal to offer equal access to LGBTQI people (Young, Justice 40-44; Appendices A-E). While the law does not end all oppression, it can and does help alleviate some of the oppression that many minority groups face (Young, Justice 159-173). Nonetheless, the lack of legal access afforded LGBTQI people in the United States suggests that homophobia is very much alive and well (Hunter, "Banned" 80). Although I do not believe equality under the law will eliminate all discrimination against the above mentioned groups, I do believe every citizen of the U.S. is entitled to the legal rights and responsibilities afforded every other citizen. Yet, legal equality is not granted to LGBTQI people in the US, especially, when we consider the issue of marriage rights (Young, Justice 173). This lack of access is the focus of my project. Specifically, I focus on a constitutional case for same-sex marriage rights and create a strategic political queer/feminist plan for alleviating the current legal inequity while at the same time offering access to all US citizens.

I begin this journey with an examination of the political climate surrounding same-sex marriage and the federal constitutional rationale that supports granting access to the marriage contract to same-sex couples. To this end, I review the meaning and importance of marriage as a fundamental right and the cases establishing this right.

Through this examination, it is made evident that same-sex marriage has been a heated political debate in the US since a significant 1991 Hawaii lawsuit that challenged the exclusion of same-sex couples from access to the marriage contract at the state level (Strasser, "The Future" 120). This case is seen as pivotal in setting the stage for the battle over same-sex marriage rights, and some twenty years later this legal battle still rages on (Schacter, "Courts" 1154). While we lesbian and gay individuals see small wins with civil unions, domestic partnerships, and, in the rare exception, marriage rights in some states, these contracts lack any federal protection and rights (Appendices A, B & C).

The process of denying federal access is an indication that this sexual minority group lacks equal rights that are guaranteed all citizens (Young, <u>Justice</u> 173). In essence, because of the lack of access, the federal government and most state governments create a second class of citizens who do not have the same legal status as heterosexual people (Brandzel, 186-7; Josephson, 270). This is because marriage confers more than a thousand federal benefits, ranging from the power to make health care decisions to access to benefits to inheritance rights (Appendix A). By denying lesbians and gays access to marriage, the federal government essentially perpetuates a

discriminatory system that has significant and tangible impact on lesbian and gay couples, as we will see later in this thesis. The impact is reflected in a variety of issues, such as the lack of equal access to benefits and the complications of psychological morbidity that this sexual minority faces (Ferguson, 39; Riggle, 66; DiPlacido, 141).

THE QUESTION

As I seek to understand the issues surrounding same-sex marriage in 2010, I begin with the overriding normative question of whether a constitutionally sound argument can be made to legalize same-sex marriage. Without a doubt, to many people this is a moral and religious issue, particularly, for the Religious Right whose members have effectively manipulated the political process in the US to block same-sex marriage (D'Emilio, 59). The Religious Right has had a tremendous influence in shaping this political debate and, as such, cannot be ignored in addressing the possible steps to the legalization of same-sex marriage (Gilreath, 108).

The influence of the Religious Right is seen from the very beginning of this debate in the persistent focus on marriage as framed by religion and morality (Hull, 190). For example, most arguments against same-sex marriage are essentially religious-based and focus on denying access to marriage rights under the contention that marriage is by definition a union between a man and a woman (Gerstmann, 91; Pasfield, 293-99). These definitional arguments can be seen as the real problem with separating religion and legal access for lesbian and gay couples as the vast majority of

people creating legislation, constitutional amendments, and voting on them are deeply religious and base their actions on this characterization (Gilreath, 108; Cahill, 165; Rom, 4-5). Thus, the power of the religious right can largely be attributed to their control of state ballots, which are used to redefine marriage specifically to exclude same-sex couples (Schacter, "Courts" 1154).

These efforts of the Religious Right have led directly to the denial of same-sex marriage rights based upon religious views, which is accomplished through majority votes on constitutional amendments and marriage-related legislation at the state level (Ball, "Forty Years" 2754). This is effectively the tyranny of the majority at work (Gerstmann, 172-3; Marcus 403-8). Margaret Denike extrapolates this religious effect on sexual minority rights as follows:

> While philosophical postmodernity has long celebrated the death of God as a Vestige of the modernist past, those of us who are working to advance rights for groups and individuals who are repudiated or despised by certain religions have had to come to terms with the fact that God has staged an unprecedented revival, and religions that invest in His word on sex and related matters have a tenacious hold on the politics of certain liberal constitutional democracies. This hold has invariably constrained the achievement of basic legal recognition of adult personal relationships between sexual minorities, such as gays and lesbians who wish to marry, and for that matter, any other relationship of care and interdependency that doesn't resemble the conjugal and procreative heterosexual model coddled within Western monotheism (71).

With this as a backdrop, Denike speaks directly to the problem, namely, that state initiatives are being manipulated by the religious right as a tool to write discrimination into state constitutions (Appendix B). For example, Proposition 8 in California that amended the state constitution to define marriage as between one man and one woman

was heavily funded and supported by religious organizations (Galle, 370-1; Shotwell, 671-3).

Not only do same-sex couples contend with the fact that state constitutions are being changed to accommodate discrimination, but also, even in states that offer equal access for same-sex couples, these couples still lack federal rights. Without federal rights and protections, same-sex couples still lack equal access to the privileges and responsibilities provided to heterosexual couples (Appendix A). This is mainly due to the effect the federal Defense of Marriage Act ("DOMA") has had on access to federal rights. At present, DOMA denies federal rights and even negates states rights because it allows states to ignore same-sex couples' state-sanctioned relationship status granted by other states (Graff, 40-1; Marcus, 413). This is an issue when same-sex couples cross state lines because the rights that are granted by their home state do not necessarily have legal standing in another state. In these instances, because of DOMA, same-sex couples no longer have even the rights their state extends. Thus, even same-sex couples who live in states granting some form of marriage rights still lack fundamental federal rights because of DOMA. For these reasons, it is crucial to achieve federal marriage rights for the LGBTQI community in order to access all state and federal rights associated with one's fundamental right to marry guaranteed under the federal constitution. Without federal recognition, same-sex relationships still lack more than a thousand benefits (Appendix A).

With these issues as a backdrop, my normative question evolves into this: if we are going to legalize same-sex marriage, how do we side step the control of the

religious right at the state ballot box and access federal rights as well? The lack of federal rights and the issues faced by the impact of amending state constitutions and legislation leads, in my mind, to just one possible solution: same-sex marriage rights must be addressed at the federal level, especially if we are committed to upholding the U.S. constitution. As such, I believe the political discussion related to same-sex marriage should begin at the federal level where, historically, civil rights issues have been fought and won.

To ensure access to state and federal marriage rights, how do we move away from same-sex marriage being left to the vote of religious majority opinion, or the tyranny of the majority, and put it back into the context of equal access for all citizens? This is a major subject for consideration in this thesis because, I posit, as it stands today the issue of same-sex marriage is not being logically considered in relation to legal and constitutional guarantees. The issue of same-sex marriage needs to be resolved at the federal level to put an end to state legislation and constitutional amendments that effectively ban same-sex marriage and to strike down DOMA which denies access to federal rights.

This question also brings into focus the consideration of race, gender and the heterosexual normative. It cannot be ignored that the debate surrounding same-sex marriage brings up issues regarding the historically oppressive nature of the institution of marriage as it relates to race and gender. This is because the history of the institution of marriage in the US is riddled with racism and sexism (Josephson, 277). For example, bans on interracial marriage were once the law in sixteen states in this

country (*Loving*, 6). It was not until the US Supreme Court took up the case of *Loving v. Virginia* that these laws were overturned (Pull, 26-7).

With these issues in mind, I get to the heart of the tension I seek to resolve in relation to legalizing same-sex marriage, namely, the tension between the liberal feminist theoretical position and the queer theoretical position. The liberal feminist position purports that same-sex marriage upsets the traditional gender division that works to oppress women and, therefore, providing same-sex couples access to marriage is a desirable end (Okin, "Sexual Orientation" 45). The queer theoretical position, on the other hand, asserts that same-sex marriage is not desirable because it truly fails to address the heterosexual normative and is simply an assimilationist measure (Butler, Gender Trouble 182-3; Sullivan, 143; Warner, The Problem 82).

When examining the historically oppressive nature of the contract of marriage and the desirability of legalizing same-sex marriage, a liberal feminist theoretical consideration extends both legal- and gender-based interpretations to the political landscape. It is important to keep in mind the implications of legalization from a feminist point of reference while at the same time considering the very important constitutional component of this political debate. This is because of my commitment to feminism, which implicates the necessity of considering not only the question of how to legalize same-sex marriage but also the impact that this has on women's lives. A commitment to feminism requires questioning the traditional gender roles that are at play in this debate (Eisenstein, Radical Future 6; Walker, Moral Contexts 177). In looking at the constitutionality of same-sex marriage through the lens of liberal

feminism, this is accomplished by addressing legal access issues and issues of gender, as well (Hunter, "Marriage" 121; Okin, "Sexual Orientation" 45). From this perspective, one has to ask: Why does it matter who someone wants to marry? Isn't the real issue the lack of equal access to government-provided legal rights and responsibilities for the LGBTQI community? Shouldn't all citizens regardless of gender have equal access to these legal rights? And because same-sex relationships trouble traditional gender roles, does this not help to negate the historical oppression associated with the marriage contract?

On the other hand, from a queer theoretical perspective it is also important to consider issues surrounding sexuality and the heterosexual normative when considering the issue of same-sex marriage. This is precisely because the debate and the very question I pose center around issues of sexual identity. Queer theorists ask, and I think rightly so, why would members of the LGBTQI community want to get married (Warner, The Problem 86)? Isn't doing so just a form of assimilation and participation in a historically oppressive institution (Ettelbrick, 123; Brandzel, 178; Josephson, 274)? Shouldn't we strive for something different and more inclusive (Markson, 279)?

Finally and perhaps most important, the ultimate evolution of my normative question driving my strategic political and legal response to this issue becomes: how can we grant to all citizens true equal access to the rights and responsibilities associated with the contract of marriage while at the same time challenging the gender norm and troubling the heterosexual normative? Legally speaking, since the Hawaii

case same-sex couples have been fighting for access to this institution. What is not regularly mentioned in this same-sex marriage debate is that even if we open access to same-sex relationships we still exclude a host of "others" who cannot or do not fit in this expanded norm (Butler, Gender Trouble 184-6; "Kinship" 6). For instance, left out of this debate are transgendered people who face a lack of legal access that is not captured by the current framing of the discussion surrounding same-sex marriage (Davidson, 252). Also of importance are considerations of race and class, which are not fully realized in this debate. Issues involving race are implicated in the definition of the family and should be considered given that the definition of a family is central to marriage. For example, the current classification of family is everything that "[a]n African American family is not (Collins, 47; Young, Intersecting Voices 105). Class is also regularly dismissed in this debate but warrants consideration. Particularly, in light of the fact that marriage offers benefits such as health insurance and inheritance rights only in relationships that are privileged to have such access (Brandzel, 181, 190).

In answering this challenging question, I will resolve the tension between liberal feminist theoretical support of same-sex marriage and the queer theoretical opposition to it. Further, in resolving this tension, I reach a conclusion that takes into consideration gender and sexual identity as well as issues involving race and class in an attempt to offer the fundamental rights associated with marriage to all citizens of the State.

THE RESEARCHER

As the researcher in this endeavor, I call attention to the fact that my research is absolutely influenced by the positionalities of time and place. Fittingly, James Scheurich states that postmodern inquiry and methods, which I utilized for this thesis, acknowledge such personal biases and positionalities (Scheurich, 1-3). I assume that there is much in my writing that I do not control, that I contradict myself or that I am contradicted, that that which I oppose is as much inside as outside, and that my commitments and loyalties are more constituted by my time and place than by anything called personal choices or my "static" identity (Scheurich, 1).

The theoretical perspective and belief system to which I subscribe includes the notion that all citizens should have equal opportunity and access both politically and economically. This aligns well with liberal feminist thought, which is one of the leading influences on my position in the debate surrounding same-sex marriage (Tong, 11-47). I also believe, as do queer and postmodern theorists, that change and difference are enviable. This is illustrated by Elizabeth Weed in her introduction to *Feminism Meets Queer Theory*: "The introduction of old arguments into theoretical and political investments of the present serves, rather, to disturb the ground of both the old debates and the new, and this disturbance can only be enriching" (ix). Thus according to Weed, queer theory in relation to feminism is about problematizing and complicating old and new debates in ever changing ways, which is a perspective that further informs my approach to this debate. I align most specifically with a queer politics of difference. Iris Marion Young, in her theoretical work *Justice and the*

Politics of Difference, explains that a politics of difference is committed to taking differences into account when forming policy measures that have a direct influence on minority group rights (163). I come to this issue knowing that my perspective is different in relation to the social norm, and that my access to these rights is positioned by this difference.

I also come to the study of this political problem as a former member of the Religious Right, in a sense. I say this because my upbringing since birth was in a very conservative Christian environment. In my church and home the Bible was the literal word of God. It was not open to further translation, interpretation, or any questioning of prescribed ways of knowing dictated by the church patriarchies. This direct influence and personal understanding of the controlling effects of such a fundamentalist religious way of life has impacted the way I view political problems, especially, problems influenced by religion. Because of my upbringing, I feel I can bring an insider's understanding of the issues surrounding my research on same-sex marriage due to the heavy sway religion and morality has had on my life and currently has in this debate.

Being a lesbian further informs my unique perspective on the topic. From my point of reference and my political context within the United States of America, I lack many fundamental rights as a woman in a same-sex relationship. I confront on a regular basis reminders of the legal rights and benefits I am denied. This debate and its ultimate outcomes directly affect my family in real and very personal ways. Additionally, this is a social justice issue that denies and marks out many others who

cannot access their rights. I have a personal commitment to this debate because I lack my fundamental rights. I am also committed to working to end oppression for all who lack equality, whether that be because of race, class, gender, or sexual identity.

Ultimately, I chose this topic because the personal is political. As a woman in a same-sex relationship, I want access to my rights. This sparked a burning desire to learn more and to understand why my rights, and the rights of members of my community, are vehemently denied in the country where I am a citizen. I believe federal law needs to uphold rights and responsibilities that are granted to all citizens under the US Constitution. In the case of same-sex marriage this has yet to transpire. This lack of rights is merely a form of discrimination, evident in my lack of equal access and protection guaranteed by the ninth and fourteenth amendments of the US constitution. This is troubling to me, personally, because I am denied numerous rights granted to heterosexual couples simply based upon the person with whom I chose to share my life. I feel that gaining the fundamental rights I have been denied requires a critical reexamination of same-sex marriage and related issues and investigation of a more strategic political resolution.

This critical reexamination looks at the normative political questions of whether a constitutional basis exists to support the legalization of same-sex marriage, how to side step the control of the religious right at the state ballot box and access federal rights, and how to grant access to all citizens while also troubling the heterosexual normative. In addressing these questions and arriving at a strategic political resolution, I use a postmodern methodology to shape my inquiry. In

accordance with that methodology, I review the legal, political, social and theoretical landscape related to accessing marriage rights for same-sex couples. I then deconstruct the liberal feminist and queer theoretical perspectives on the issue of same-sex marriage. Finally, in arriving at an answer to my questions, I conclude with the construction of a solution offering a political, legal solution through what I call "strategic political queer/feminism."

METHODOLOGY

THEORETICAL FRAMEWORK

The goal of this thesis is to provide a critical examination of the political issue of same-sex marriage as it relates to the lack of equal access for all US citizens to the fundamental right of marriage granted by the federal constitution. With this goal in mind, as well as a commitment to political theory, my aim in this endeavor is to apply a liberal feminist and queer theoretical framework to the same-sex marriage debate. This may seem like an unlikely combination of theories to apply. However, I believe it is possible and desirable to do so because my application leads to a political strategy, and I believe a solution, providing equal legal access to a wide array of minority groups.

From a liberal feminist perspective, ending oppression against women or minority groups requires equal access to legal rights (Tong, 13). However, liberal feminism also favors the disruption of traditional gender roles that privilege the male gender (Hunter, "Marriage" 121). Within the context of same-sex marriage, arguments set forth by liberal feminists in line with liberal feminist theory support same-sex marriage because everyone merits equal access and rights. Additionally, the majority of same-sex relationships disrupt traditional gender roles (Okin, "Sexual Orientation" 45; Brandzel, 188).

Liberal feminist theory and liberal feminists create solid foundational support for same-sex marriage. Conversely, it might be surprising to learn that queer

theoretical arguments on this issue typically do not support same-sex marriage. The position of queer theorists Judith Butler and Michael Warner typify these arguments and bring into focus the issues of assimilation and its unwanted effects. Assimilation creates "others," folks who cannot or do not fit this new norm, and since assimilation is not realized for these "others" it further marks them out (Butler, Gender Trouble 184-6; Warner, The Problem 92). Queer theory claims that the means by which we access our rights and frame political issues or problems, including from the perspective of liberal feminist theory, further neglects issues of race, class, and the heterosexual normative.

This highlights a tension of considerations within the context of identity politics and legalizing same-sex marriage: how do we get access to our rights, as supported by liberal feminism, while staying true to the disruption of the heterosexual normative, which reflects a queer theoretical commitment? To resolve this issue of access to rights and attention to reducing the effects on "others" requires, if you will, a merging, or a queer feminism. I contend that within the context of identity politics now is the time to begin rethinking fundamental possibilities of inclusion. My rethinking begins with reconciling liberal feminist and queer theories related to same-sex marriage, through which I present a new possibility of legal access in an attempt to further motion towards a radical notion of queer politics or a queer feminism. This, I believe, will lead to the desirable outcome of access to fundamental rights for all citizens.

I achieve this result by first applying a liberal feminist perspective of equal access to the institution of marriage for same-sex couples (Tong, 23). This takes note of the fact that a liberal feminist theoretical framework has a commitment to legal equality for not only women but also lesbians and gays. Liberal feminists are committed to legal equality and believe ending oppression, especially women's oppression, requires that the law grant equality (Tong, 12-13; Lakoff, 300-1). However, they do not view the law as the only means to equality; they also include challenging traditional gender roles in achieving this goal (Eisenstein, Radical Future 4-7). A liberal feminist perspective thus holds that marriage rights should be extended to same-sex couples because doing so lends equal access and also challenges traditional gender norms (Okin, "Sexual Orientation" 43-5).

I agree with the liberal feminist positioning that same-sex marriage is a desirable option. However, this view of access is further problematized by a queer theoretical perspective. A queer theoretical perspective, as Teresa de Lauretis points out, is to challenge ways of knowing and being at every level: "[t]he term Queer Theory was arrived at in the effort to avoid all of these fine distinctions in our discursive protocols, not to adhere to any one of the given terms, not to assume their ideological liabilities, but instead to both transgress and transcend them – or at the very least problematize them" (v). Thus, a queer theoretical perspective not only challenges singular views of equal access to governing institutions, it also turns the focus back on liberal feminists' notion that oppression will end through equal access for all minority groups. In this maneuver, queer theory seeks to deconstruct,

transcend, and problematize liberal feminist notions of equality through legal access to same-sex marriage. To this end, queer theory calls attention to the many "others" who are left out of the debate on same-sex marriage, such as transgender and intersexed people (Davidson, 252; Markson, 280).

In examining this political and legal problem, I apply a politics of difference to the issues surrounding access to marriage rights for same-sex couples. A politics of difference has a commitment to taking into account differences, especially in relation to minority access to legal political rights (Young, Justice 13, 163). According to Young, a politics of difference examines specific issues from the perspective of minority groups in order to effectively draft policy that will accommodate the whole of the group, and that within these groups difference still needs attention. This attention to difference within a minority group helps provide access in a more inclusive way (Young, Justice 184). I use difference to consider the issue of same-sex marriage from a liberal feminist point of view and to then complicate this understanding through contemplating the queer theoretical perspective. In considering political access to same-sex marriage through the lens of difference I pay special attention to the sexual minority group of lesbians and gays. I then further problematize this issue with additional attention to difference as it relates to the minorities within this minority.

METHODS

The conditions necessary for the appearance of a … (political problem), the historical conditions required if one is to 'say anything' about it, the conditions necessary if it (the political problem) is to exist in relation to the other objects.

(Foucault, Archaeology 44)

To apply my combination of theoretical frameworks I start with consideration of a normative philosophical question. This is the basic method used in philosophy, and more importantly for this consideration, in political theory. (Walker, Moral Context 177; Schues, 227). From my position of inquiry, in this case my normative questions related to the legalization of same-sex marriage, a normative subject is invoked that creates a point of reference for the analysis. The normative subject in relation to political theoretical inquiry is the white, heterosexual, middle class male (Walker, "Moral Epistemology" 364). Margaret Walker goes on to suggest that this normative subject conjures up particular problems for those who do not fit this subject position: "[m]ore specifically, this image of normal moral agents and their contexts of choice ignores or distorts a great deal that women in Western societies, even across class and racial groups, have historically been expected and required to do" ("Moral Epistemology" 364). Walker's points highlight that feminist and queer issues with normative questions in political theory are that these questions are conjured in terms of this particular normative subject. Essentially, because the question and the solution are positioned from the perspective of a white, heterosexual, middle class male,

anyone who does not meet the norm is positioned at a disadvantage. Since traditional methods for political theory use this normative subject for inquiry into the political and solutions for such normative questions, this method alone is inadequate for the consideration of the sexual minority group in question.

If this method is, indeed, inadequate a better understanding of the subject is in order; but how do we move past the normative position into a consideration of new possibilities? Walker makes clear that new possibilities are in fact needed and action is required: "[b]etter ethics would mean conceptions of morality descriptively adequate to diverse social positions and the moral understandings they require, and normatively equipped to support social and political critique" ("Moral Epistemology" 365). Thus, it is of utmost importance to begin with the ability to conjure diverse social positions. If this is lacking, we just continue to reinvent exclusions. The basic message to be pulled from Walker is that, "in the manner of naturalized epistemology, to begin where we are, but to pay close attention to how we got there. It shows how we can help ourselves to critical strategies that start from places we no longer wish to be, but that show us where we need to go" ("Moral Epistemology" 368). To reiterate Walker's point, we need to start with the tools that are available for our inquiries, but we need to devise new tools in the process to move beyond the limited positions that are traditionally available.

Therefore, the question I begin with is basic: can a constitutionally sound argument be made to legalize same-sex marriage? From this basic normative question I then deduce from a liberal feminist theoretical perspective what the legal conditions

ought to be for access to the marriage contract by same-sex couples by reflecting the need that feminist philosophers such as Walker, above, assert: that new social positions and subjects need to be included. From a liberal feminist theoretical perspective, same-sex marriage ought to be legal. This theoretical lens of inquiry opens the social positions available but still limits the discussion to only certain social subjects and positionalities. Therefore, I make a final move towards a queer theoretical perspective and, in a relational sense, a postmodern theory.

This move to a queer perspective related to my normative question regarding same-sex marriage is critical. I accomplish this move by problematizing the feminist liberal theoretical lens. I question the framing of the argument by bringing up issues of exclusion within the marriage contract. This lends well to a queer or postmodern theory because, as Chris Weedon outlines, postmodern feminists and queer theorists alike aim to go beyond a strictly liberal feminist view of political problems. This can have the intended effect of taking in account differences. "Attempting to go beyond the liberal feminist goal of extended rights to women, postmodern feminists have sought to theorize those areas of women's experience and oppression that elude liberal theory and politics" (Weedon, Feminist Practice 74). This problematizing is accomplished by going beyond the obvious framing of the debate around same-sex couples. Here, I complicate and problematize the issue by introducing the history of oppression inherent in the contract of marriage, generally, and highlighting the exclusions that would still be present even with the inclusion of same-sex couples. Most importantly, the problematizing of the issue is manifest in the complete

assimilation required by the current political debate surrounding access to the contract of marriage.

The final issue that must be addressed is the use of postmodern methods that are clearly present in my work. The overreaching method I use in this thesis is a queer adaptation of postmodern methodology. I say this because most of my methods are a mixture of a queer theoretical perspective and Michel Foucault's methods gleaned from *The Archaeology of Knowledge*. Foucault, in this philosophical text, outlines what can be said to be a method for research and study from a postmodern referent. While I may at times apply the use of Foucault's postmodern methods loosely, I have a commitment and focus that directly derive from queer theory's charge to deconstruct and problematize the discourse. Essentially, I endeavor to shine a light of inquiry onto the problem at hand by applying Foucault's methods outlined in his *The Archaeology of Knowledge* while staying true to my feminist and queer theoretical lenses of analysis.

To understand the methods I utilize within this body of work it is of utmost importance to outline Foucault's "Archaeology" methods. These methods begin with the notion quoted at the onset of this discussion that implies objects, or in this case political problems, cannot exist or be constructed except in relation to other "preexisting" objects, concepts, or political legal discourses. Thus, because lesbians and gays cannot get married this problem exists or is constructed in the refraction of this fact. The problem is created, first, by the object, or the marriage contract, and second, by the political problem of lesbians and gays lacking entrance into the already

constructed heterosexual institution of marriage. In other words, same-sex marriage is a problem constructed through the structure and existence of the marriage contract in its current form. If lesbians and gays were not excluded from the contract there would be no political problem to construct because of their exclusion. Accordingly, the existence of the marriage contract as presently defined is the reason the political problem comes into existence or becomes "constructed."

The preliminary step in this method requires that we must "[f]irst map out the first surfaces of their emergence: show where these individual differences, which, according to the degrees of rationalization, conceptual codes, and types of theory" exist (Foucault, <u>Archaeology</u> 41). In this first step, I examine the legal issue of same-sex marriage by outlining the emergence of this political problem. This is the beginning of the map of the archaeology on the issue (the literature review).

Foucault's method is also utilized by postmodern researcher James Scheurich in *Research Method in the Postmodern*. In this text, Scheurich adapts the use of Foucault's archaeology methods. Here, he defines this method as Policy Archaeology and outlines the first step in line with Foucault. "Area I. The education/social problem arena: the study of the social construction of specific education and social problems" (Scheurich, 97). Thus, Scheurich's first move also begins with a study of the construction of a specific problem or, in this case, the construction of the political problem of same-sex marriage. Scheurich outlines this first step by stating:

> Examine closely the emergence of the particular problem…By what process does a social problem gain the 'gaze' of the state…Policy archaeology posits that social problems are social constructions, and

> critically examines the social construction process – how the social problem was made 'manifest, nameable, and describable… Consequently, the territory of policy archaeology begins prior to the emergence and social identification of a problem as a problem…It examines the naming process by which problems enter the gaze of the state (97).

Here, Scheurich explains and utilizes Foucault's "Archaeology" methods, which he adapted to his postmodern research methods.

I apply this first step by examining the emergence of the problem (same-sex marriage) and the recognition of the "state gaze" beginning with my literature review or "archaeology map." In this section of my thesis, I outline the beginnings of the political issue of same-sex marriage by calling attention to the appearance of the "state gaze" upon this problem. Specifically, I highlight the emergence of this political problem through legal cases related to the fundamental right to marriage. The archaeology begins to take shape by highlighting the origins of the political focus on same-sex marriage, specifically with the Hawaii case, *Baehr v. Lewin*. However, I take this mapping of the archeology a step further and complicate this examination with the emergence of this problem in relation to liberal feminist and queer theory. By doing so, I highlight and take account of the specific issues associated with the emergence of same-sex marriage in relation to these two perspectives.

The next step in my methods is to identify the networks involved in this political problem. To do this I utilize the postmodern move of identifying the networks that create social regularities that have positioned the political problem (same-sex marriage) as such. Scheurich introduces this step as follows, "Area II. The

social regularities arena: the identification of the network of social regularities across education and social problems" (Scheurich, 97). Foucault gives further clarification to this step by stating, "We must also describe the authorities of delimitation" (Foucault, Archaeology 41). Thus, the essential move here is to identify the networks or grids of power at play in this political problem.

Scheurich highlights the powers of influence as follows: "This arena of policy archaeology suggests that there are powerful 'grids' or networks of regularities that are constitutive of the emergence or social construction of a particular problem, regularities that constitute what is labeled as a problem and what is not labeled as a problem. These grids, also, constitute the range of acceptable policy choices" (Scheurich, 99). This not only suggests what and how things are labeled as a political problem but also the range of possible solutions to any problem. The way policy archaeology and the archaeology of knowledge are positioned as a reflection of objects that are already in existence influences this second step of labeling problems and solutions. This is because of the effect and position of having to work within already existing networks of social regularities.

These social regularities are what make permissible and visible all that may be said in relation to the object positionalities. "Policy archaeology suggests that there is a grid of social regularities that constitutes what becomes socially visible as a social problem and what becomes socially visible as a range of credible policy solutions" (Scheurich, 99). The question brought to bear here is, what are social regularities? Scheurich, borrowing from Foucault, defines social regularities as follows: "[s]ocial

regularities, then, constitutes both categories of thought and ways of thinking" (Scheurich, 100). The main point is that these social regularities are established through the grids of networks prior to the emergence of the social problem at hand. Foucault emphasizes this point as follows:

> These relations are established between institutions… They do not define its internal constitution, but what enables it to appear, to juxtapose itself with other objects, to situate itself in relation to them, to define its difference, its irreducibility, and even perhaps its heterogeneity, in short, to be placed in a field of exteriority (Foucault, Archaeology 45).

The important pretext to social regularities is that, "they do not determine social problems or solutions as if from an outside force; instead 'they constitute rather the set of conditions in accordance with which a practice is exercised'" (Scheurich, 100). In other words, "[s]ocial regularities are constitutive of social problems and solutions" (Scheurich, 100). Therefore, social regularities give us a preexisting framework within which to work, though they do not specifically outline the political problem or a specific solution. They, instead, give us a range of possibilities.

Specifically, how do I utilize this second step in my thesis? What are the social regularities that frame the political problem I address? I rely upon the examination of the heteronormative, religious right, legislation, and ballot measures, which establish the authorities of delimitation of this problem. These social regularities are demonstrated in the political problem and solutions made available from the preexisting conditions already established. Thus, in this second step I point to the social regularities or networks and grids of power that shape this political

problem. By identifying these networks or social regularities, I can then examine the discourse and formulate what is, essentially, a political problem. This same process of identification is used to arrive at a solution in the third step of this method.

The third area of consideration in this method is "The policy solution arena: the study of the construction of the range of acceptable policy solutions" (Scheurich, 97). These solutions or formations are in line with the previous step because the possible solutions are made in juxtaposition to the objects which are already established or in "existence." The steps used above to identify and define the social regularities in formation of a political problem are virtually the same process used in formulating solutions.

I adapt this method to fit neatly into my thesis work in the discussion portion. In this section, I consider possible solutions to the political problem of same-sex marriage. I examine a possible solution to lend access to same-sex marriage and the possible effects of doing so in relation to already established objects of inquiry. These established social regularities are the legal and religious discourses in which the political solution is juxtaposed in its formation.

The final step in Scheurich's application of policy archaeology is, "Area IV. The policy studies arena: the study of the social functions of policy studies" (Scheurich, 97). This is a step that is arguably incomplete in studying contemporary problems within the state. This is the case because it is of utmost difficulty to study the outcome of possible solutions when they have not yet moved to fruition. Related to this line of reasoning, Foucault writes, "We can now complete the analysis and see

to what extent it fulfills, and to what extent it modifies, the initial project" (Archaeology 46). Thus, ideally these postmodern methods would pick up here and study in the same sequence the outcome of the solution applied to the political problem. For this reason, this section in my work is necessarily incomplete. It would be impossible to consider the effects of my proposed solution when it is not yet adopted as a solution to this particular political problem. What I have done in this space, instead, is offer a solution to the problem of same-sex marriage that I hope will be implemented and, eventually, will open up legal rights and responsibilities to all. I approach this task through a combination of methods in what I call a "strategic political queer/feminist" perspective.

LITERATURE REVIEW

INTRODUCTION

This literature review focuses on the issue of same-sex marriage and whether it should be legalized. To begin this project, I map the emergence of same-sex marriage as political problem. This is my "archeology map" outlined in my methodology (Foucault, Archaeology 41; Scheurich, 97). Included in this archeology is a recognition of the social regularities, essential to which is identification of the networks or girds of power at play in this political problem. Identifying the networks of power makes permissible and visible all that may be said in relation to the political problem (Foucault, Archaeology 41; Scheurich, 99). This accounts for steps one of two of my methodology.

In order to align this methodology, I first examine the legal landscape of federal constitutional law and whether a case can be made in support of same-sex marriage. After a consideration of the legal validity, I turn attention to the legal arguments against and religious rights' efforts to ban same-sex marriage. Next I investigate from a social and psychological perspective the implications of being excluded from the legal contract of marriage and the associated minority stress that interfere with the pursuit of life, liberty, and happiness. (Meyer, 66) Further, the legal and social considerations of same-sex marriage lend well to a liberal feminist point of reference that includes a commitment to equal legal access. This reference provides convincing arguments in support of mitigating the legal disparities and reducing social

harms by providing access to marriage. While liberal feminism and a few liberal feminists make persuasive arguments in favor of marriage equality, I end this review with a consideration of queer theorists' counterpoints related to this political question. In particular, I note their contention that the current discussion surrounding same-sex marriage leaves others out of the debate. Further, queer theorists bring to this discussion the issue of assimilation, which highlights how same-sex marriage works to reinforce the heteronormative within dominant society (Warner, The Problem 82).

THE US CONSTITUTION AND MARRIAGE RIGHTS

First, it is important to review the legal discourse on the constitutional validity of arguments in favor of same-sex marriage. This requires an examination of marriage as a fundamental right under the US Constitution. To date, the constitutional provisions argued in marriage cases at the federal level include the Ninth Amendment and the due process and equal protection clauses of the Fourteenth Amendment. Thus, I examine the text of these amendments and how they are used by the US Supreme Court to define marriage as a fundamental right. These, in turn, are applied to the arguments in the case law and literature on how the Ninth and Fourteenth Amendments of the US Constitution can be used to support same-sex marriage.

Marriage as a Fundamental Right

What exactly is a fundamental right? Fundamental Rights are rights guaranteed by the US Constitution that cannot be limited by the State unless there is a

compelling state interest at issue, like state security, and no less restrictive means of achieving the purpose. Black's Law Dictionary defines a fundamental right as follows:

> 1. A right derived from natural or fundamental law. 2. Constitutional law. A specific component of liberty, encroachments of which are rigorously tested by courts to ascertain the soundness of purported governmental justifications. A fundamental right triggers strict scrutiny to determine whether the law violates the Due Process Clause or the Equal Protection Clause of the 14th Amendment. As enumerated by the Supreme Court, fundamental rights include voting, interstate travel, and various aspects of privacy (such as marriage and contraception rights) (683).

This definition reflects the case law related to fundamental rights, and authors on the topic like Joseph Pull make clear that marriage is a fundamental right guaranteed by the US Constitution. He also makes a point of explaining that fundamental rights can only be denied under the most limited of circumstances (23-32).

The confusion with fundamental rights guaranteed by the US Constitution stems from the fact that they are not necessarily enumerated in the document itself. This is the case with marriage. Nowhere in the US Constitution is marriage specifically named as a fundamental right. However, certain rights retained by the people are nonetheless fundamental to the pursuit of life, liberty and happiness and are interpreted by the Court as such. In his constitutional review of marriage as a fundamental right, Pull outlines that over the past 150 years the Court has established marriage as a protected fundamental right. He pinpoints that in 1877 Justice William Strong first established marriage as a fundamental right and that this right was then held as such by the Court in1923 in *Meyer v. Nebraska* (25-6). This case set precedence that established marriage as a fundamental right that, while not

enumerated in the US Constitution, is nevertheless protected as such under the Fourteenth Amendment (Purvis, "Right to Contract" 157).

The trajectory of establishing marriage as a fundamental right is further highlighted through *Loving v. Virginia*. This 1967 litigation is an essential precedential case defining marriage rights. In *Loving*, interracial marriage and the constitutionality of laws that criminalized interracial couples were under review. This case challenged anti-miscegenation laws as purely a form of racial discrimination and, as such, alleged the laws were a denial of fundamental rights (Graff, 45). At the time 16 states, including Virginia, had anti-miscegenation laws (*Loving*, 6). The facts of this case reveal that the Lovings had previously married in another state and shortly after returned to Virginia. Upon their return they were indicted, found guilty of violating Virginia anti-miscegenation laws, and sentenced to one year in jail. However, their sentences were suspended for 25 years on the contingency that they leave the state and not return together for 25 years (*Loving*, 3). The Lovings left the state and soon challenged the constitutionality of their sentences in the State Courts. The case eventually made its way to the US Supreme Court.

In *Loving*, the Court held that marriage was a fundamental right. The US Supreme Court further described marriage as one of the "basic civil rights of man, fundamental to our very existence and survival" (*Loving,* 12). Because of the decision in *Loving*, marriage is in fact held as a fundamental right (Parshall, 267). Thus, *Loving* made clear that the right to marry is fundamental and protected by our US Constitution (Pull, 46-8).

Marriage as a fundamental right was further firmly established by *Zablocki v. Redhail* (1978). This is because, as Pull points out, *Zablocki* specifically picked up the language in *Loving* and relied solely on marriage as a fundamental right to argue the case (30-1). At this juncture, no other case had relied so narrowly on this principle (Pull, 31). The *Zablocki* case was again dealing with the issue of marriage and the State's rights to limit this freedom. Here, Roger Redhail was denied a marriage license by the state on the grounds that he owed a substantial amount of back child support. The lower Courts ruled in favor of the state and upheld the restrictions on marriage. However, upon review, the US Supreme Court ruled it was unconstitutional to deny access to the marriage contract because it is a fundamental right guaranteed to the citizenry (*Zablock*i, 386-7). The real significance of this case is the fact that when arguing for access to marriage it relied solely on marriage as a fundamental right as established in *Loving*. Thus, *Zablocki* can be seen as firmly establishing that marriage is a fundamental right (Strasser, <u>On Same-Sex Marriage</u> 6).

Commentary by various scholars in the study of constitutional law, and by David O'Brien in his Constitutional review, aptly stresses marriage as a fundamental right as well. "The entire fabric of the Constitution and the purposes that clearly underline its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected" (O'Brien, 339). Thus, one would be hard pressed to dissent that marriage is not a fundamental right guaranteed by the US Constitution. Since marriage has been firmly established as a fundamental right it can only be limited in

rare circumstances (Pull, 23-32). These authors indicate, and US history through Supreme Court precedence firmly upholds, that marriage is a fundamental and basic right of all the citizenry. With this understanding of the right to marry as a fundamental, I now turn to the Ninth Amendment to outline the relevance of the Constitution in upholding fundamental rights.

The Ninth Amendment and Privacy

The Ninth Amendment of the US Constitution states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people" (U.S. CONST. amend. IX). By its plain language, this amendment supports the contention that marriage, as an unenumerated fundamental right, cannot be denied to citizens. However, the problem with the Ninth Amendment, as is made clear by Evan Gerstmann, is that it does not expressly state that marriage is a fundamental right and unenumerated rights are often disputed (76). Nevertheless, the US Supreme Court has firmly established through precedence that marriage is in fact a fundamental right, as set forth above.

O'Brien also makes evident the connection between the Ninth Amendment and marriage as a fundamental right when he states that; "The Ninth Amendment expressly recognizes, there are fundamental rights such as this one (the right to marry and the right to marital privacy), which are protected from abridgement by the Government though not specifically mentioned in the Constitution" (339). O'Brien is

clear that the Ninth Amendment is important in upholding marriage as a fundamental right and, further, that it provides support for the right to privacy within marriage.

What is most important about the Ninth Amendment and its linkage to marriage as a fundamental right is that the US Supreme Court used this Amendment to establish privacy rights within the marriage contract (La Valle, 961-2). The right to privacy in marriage is significant for same-sex marriage because, in 1965, the case of *Griswold v. Connecticut* used the right to marital privacy to sever procreation from the marriage contract (Pull, 25). In *Griswold*, the US Supreme Court held that married couples have the right to access and use birth control. They based this on the right to privacy within marriage as protected by the Ninth Amendment. This is significant for same-sex marriage because an argument commonly used against it is that same-sex couples cannot procreate.

Since the Court has held marriage is a fundamental right, it seems plausible based on the reasoning above that this amendment requires the right to be extended to all US citizens. The Ninth Amendment also established the right to privacy within marriage and through *Griswold* severed an essential link between marriage and procreation. Essentially then, through the Ninth Amendment, *Griswold v. Connecticut* establishes that a fundamental right to marriage is not dependent upon a couple's ability or desire to procreate.

The Fourteenth Amendment

The Fourteenth Amendment to the US Constitution contains the Equal Protection and Due Process Clauses, which state:

> Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws (U.S. CONST. amend. XIV).

According to the language of the Fourteenth Amendment, no state shall make or enforce any law denying any person the rights which are extended to the citizens of the US. Thus, pursuant to the Fourteenth Amendment, if a state enacts laws denying rights to certain groups of citizens, that state is likely in violation of the Constitution by denying equal access to rights which are guaranteed to all citizens.

The Fourteenth Amendment is the birth of the US Government's explicitly outlining the power it has to regulate the states on issues of fundamental rights that are essential to life, liberty, and the pursuit of happiness. O'Brien appertains this when he outlines this very point. "Ratification of the Fourteenth Amendment in 1868, changed the constitutional landscape and laid a new basis for applying the Bill of Rights to the states" (306). Namely, this change gave the federal government the legal authority to enforce matters involving individual civil rights. An example of this is set forth by the US Supreme Court when it outlawed miscegenation laws that unfairly discriminated against interracial marriages (Emond, 448). Thus, this amendment ushered in a new

area of mitigating legal discrimination that, at the time, was largely felt by African Americans in the US.

From the review of the literature on the Fourteenth Amendment, it is clear the purpose of this amendment was not only to ensure individual rights but to also ensure that minority groups did not face undue discrimination by the state or suffer from the tyranny of the majority (Marcus, 403-408). This is made pointedly clear by Gerstmann when he states the intent of the Fourteenth Amendment:

> The rights that individuals and minorities have against the majority are not just the abstract concern of elite academics. They were a vital concern of the framers of the Fourteenth Amendment…the Bill of Rights had to protect minorities and dissenting individuals against the majority just as it had to protect the 'the people' against the central government. The framers of the Fourteenth Amendment therefore needed to create a new Bill of Rights, one against the periphery, and one that would balance the initial Bill of Rights against the center. Protecting minorities and individuals is a core command of the Fourteenth Amendment (172-173).

It is apparent from reading the text of the Fourteenth Amendment and reviewing the commentary on the purposed effect that this amendment was to ensure fundamental rights for all US citizens and to mitigate the tyranny of the majority. This balancing act was initially to inform race relations in the US so that racial minority groups did not suffer mistreatment by the State, or by the majority. This point will be further outlined in the case *Loving v. Virginia* that follows. With the essential sections of the US Constitution guaranteeing marriage as a fundamental right outlined, namely the Ninth and Fourteenth Amendments, I now turn attention to the cases in the literature that have demonstrated this principle by setting precedent on the matter.

Cases in the Legal Discourse

Loving v. Virginia, 1967

In this case, the US Supreme Court set precedence on marriage in general and ruled that marriage was a fundamental right guaranteed in the US Constitution. *Loving* is the historic US case that struck down anti-miscegenation laws at the federal level and declared marriage a "basic civil right of man and a fundamental freedom" (Brandzel, 181). This is one of the most persuasive cases in the history of the US Supreme Court demonstrating that marriage is a fundamental right protected under the equal protection and due process clauses of the Fourteenth Amendment. Establishing marriage as such was a two step process that first established race as a "suspect class," and, second, clearly established marriage as a fundamental right.

The Court uses "suspect class" to refer to identity based claims and establishes that historically this particular group faces discrimination solely on group membership (Brandzel, 183). When a group is established as a suspect class then the strict scrutiny standard of review is applied by the US Supreme Court in determining if a law runs afoul of the Constitution in denying that group's fundamental rights (Fallon, 1273). Adam Winkler defines strict scrutiny as a, "standard of review that asks if a challenged law is the least restrictive means of achieving compelling government objectives" (227). The law in question also needs to be independent of discrimination.

In order to apply strict scrutiny in the *Loving* case, which was essential to finding the anti-miscegenation laws unconstitutional, it was necessary to first establish that African Americans are in fact a suspect class. This is because the laws against

interracial marriage applied to all races not just African Americans and, absent the law being based on their suspect class status, their rights were not being withheld (Graff, 45-6). Meaning, under the law African Americans still had the fundamental right to marry, just not outside of their race. Thus, in order to apply strict scrutiny and reason that African Americans' fundamental rights were being withheld, the Court first had to find that they were a suspect class.

In *Loving*, the Court established race as a suspect class and set the tone that the US Supreme Court would not tolerate discrimination based on race, especially when fundamental rights are involved. Justice Earl Warren explicitly stated this in the Court's ruling: "There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the equal protection clause" (*Loving*, 12). It seems clear in reviewing this case that the Court believed states could not limit access to the institution of marriage based upon arbitrary reasoning, because this violated couples' basic civil liberties.

The question that seems to loom is how the Court decided that this type of discrimination was arbitrary. In cases dealing with fundamental rights the Court uses a strict scrutiny test. When restrictions on fundamental rights are compounded by suspect class they are under even more scrutiny. With this test, the Court determines if the State has a compelling state interest in limiting the freedoms that are the subject of the law.

> At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subject to the 'most rigid scrutiny,' *Korematsu v. United States* (1944), and, if they

> are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which was the object of the Fourteenth Amendment to eliminate (*Loving*, 11).

According to the Court, any limit on fundamental rights must be independent of discrimination and demonstrative of a compelling state objective. This means the reasoning for the restriction of a fundamental right can not rely on discrimination, but needs to demonstrate a real state interest outside of discrimination.

The case of race as a suspect class is established through the Court's repeated insistence that banning interracial marriage is a violation of the Fourteenth amendment because it is based upon racial discrimination.

> Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a bias as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry a person of another race resides with the individual and cannot be infringed by the State (*Loving*, 12).

Clearly, the Court takes offense at discrimination based upon race and thus established race as a suspect class, which requires strict scrutiny when the suspect class is denied equal access to fundamental rights (Oh, 597). The case for same-sex marriage seems to be somewhat implicated by the treatment of anti-miscegenation laws by the US Supreme Court, especially, when one considers the bans on same-sex marriage in many states (Emond, 448). Currently in the US a total of 41 states have legal restrictions barring same-sex couples from being legally wed (Appendix B). This

seems to indicate that sexual identity might also be worthy of suspect class status given that historically sexual minorities have been discriminated against and that today they still are (Strasser, On Same-Sex Marriage 118).

Mark Strasser, professor of Law at Capital University, has written extensively on the legal aspects of same-sex marriage and purports that minority sexual identities need to be established as a suspect class. If this is done, the analogy between same-sex couples and race as a suspect class could logically grant fundamental marriage rights to this group, as was evidenced in *Loving*.

> What is manifestly clear is that many opponents of same-sex marriage want to assure that same-sex relationships are not viewed as 'equal' to different-sex marriages and that lesbians, gays, bisexuals, and transgendered people are not viewed as the equals of others. These commentators seem to have forgotten that part of the rational in *Loving v. Virginia* for striking down Virginia's anti-miscegenation statute was that Virginia had been attempting via its marriage statute to promote the view that one group was superior to another (Strasser, On Same-Sex Marriage 35).

If same-sex couples were established as a suspect class then it seems possible that a similar ruling would transpire (Strasser, "The Future" 143). In US society, lesbians and gays have been historically discriminated against and the reasons given for the bans on same-sex marriage rest upon the assumption that heterosexuals are somehow superior. This superiority is based largely on the heteronormative, which will be extensively discussed below. Establishing homosexuals as a suspect class would lend well to granting access to their fundamental right to marry and ending this discrimination.

<u>Turner v Safely</u>, 1987

Turner v. Safely (1987) also establishes marriage as a fundamental right. The Court ruled in 1987 that prisoners cannot be denied the right to marry (Rom, 6). *Turner* examined restrictions on inmate marriages and, based on marriage as a fundamental right, found that the right to marry should not be withheld without a compelling state interest. Under *Turner*, the only way a state can deny inmates the freedom to marry is if it is for security reasons independent of arbitrary discrimination. The opinion of the Court, explained by Justice Sandra Day O'Connor, stressed four main points regarding marriage and inmates.

> First, inmate marriages, like others, are expressions of emotional support and public commitment…Second, many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an expression of religious faith as well as an expression of personal dedication. Third, most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated. Finally, marital status often is a precondition to the receipt of government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by entirety, inheritance rights), and other, less tangible benefits (*Turner*, 95-96).

The importance of this case is that the Court again upheld that marriage is a fundamental right (Strasser, "The Future" 134-5). Although the *Turner* ruling specifically relates to inmate rights, it highlights the Court's commitment to upholding marriage as a fundamental right. Namely, that marriage should not be denied without a compelling state interest; even to inmates (Pull, 31).

What is interesting to note about this case is that inmates' fundamental right of marriage is of greater importance than even their fundamental right to vote. This is evidenced by laws and Court precedence that govern disenfranchisement for inmates. *Richardson v. Ramirez* is testament that the US Supreme Court, while they acknowledge that voting is a fundamental right, has upheld state's rights to deny felons and incarcerated persons from exercising this right (Handelsman, 1895). Alec Ewald highlights the fact there are 13 states in the US that practice some form of disenfranchisement regarding inmates and felons (1046).

Another feature of this case brought to light by Ariel Graff is that like *Griswold*, above, *Turner* implicates the severance of procreation from the marriage contract (44-5). Though there is not much commentary on this topic, it is interesting to note that because prisoners are incarcerated and not able to consummate their relationships it presumes that the couple, at least at the present time, is not going to procreate. Graff points out that in *Turner* the Court supported marriage as a fundamental right for reasons completely independent of procreation (Graff, 52-3). These reasons, Graff suggests, further implicate that the legal, state-sanctioned right to marry is not dependent on having children or the ability to have children.

<u>The Hawaii Case</u>, B<u>aehr v Lewin</u>, 1993

The case *Baehr v Lewin* (1993) was one of the first in a series of legal cases specifically dealing with same-sex marriage (Schacter, "Courts" 1154). The case was brought before the Hawaiian courts after three same-sex couples were denied marriage

licenses by the State of Hawaii. As explained by Kathleen Hull, “The battle over same-sex marriage in Hawaii began in late 1990 when three same-sex couples filed applications for marriage licenses and the state health department denied the applications on the grounds that the couples were same-sex” (Hull, 153). When the state health department denied their applications, they filed suit. Because the couples were denied marriage licenses based upon their sex, it opened up questions of sex discrimination that the Supreme Court of Hawaii would soon consider in *Baehr v. Lewin* (Strasser, “The Future” 119).

The literature surrounding *Baehr* makes evident that the Supreme Court of Hawaii takes sex discrimination seriously (Coolidge, 26). The Court ruled that “strictest scrutiny” must be applied when denying same-sex couples the right to marry and that, in its estimation, this was a clear case of sex discrimination. The Court reached its conclusion based on the fact that sex is a “suspect class” for purposes of equal protection under the Hawaiian Constitution. For this reason, the Court ruled the State would have to show a compelling state interest to be allowed to deny equal protection and, more specifically marriage, to same-sex couples (Strasser, <u>On Same-Sex Marriage</u> 196).

The Hawaiian court was facing what they claimed was, “the precise question as to whether we will extend the present boundaries of the fundamental right of marriage to include same-sex couples” (56). Therefore, the Court was faced with examining the question of whether same-sex couples are protected under the Hawaii constitution. The Court found that, indeed, it was unconstitutional to deny same-sex

couples the fundamental right to marry based upon article 1, section 5 of the Hawaii Constitution, which states, "[n]o person shall… be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry" (60). The Court interpreted this to mean same-sex couples are protected under the state constitution from being discriminated against based on their sex. Further, not allowing them to marry was discrimination based on their sex, and, hence, same-sex couples had the right to marry (Lavely, 258). "Thus, by its plain language, the Hawaii Constitution prohibits state sanctioned discrimination against any person in the exercise of his or her civil rights on the basis of sex" (*Baehr*, 60).

Not only does the Court base its decision on the Hawaii Constitution, it also invokes the *Loving v. Virginia* case stating:

> "[t]he Virginia courts declared that interracial marriage simply could not exist because the Deity had deemed such a union intrinsically unnatural, … in effect, because it had therefore never been the 'custom' …. With all due respect to the Virginia courts of bygone era, we do not believe that trial judges are the ultimate authorities on the subject of Divine Will, and, as Loving amply demonstrates, constitutional law may mandate, like it or not, that customs change with an evolving social order" (63).

Thus, the court invokes the Virginia case as precedence for the intolerance that can exist based upon arbitrary discrimination and the rationale for applying a tougher constitutional test in such instances.

As previously outlined in the analysis of *Loving*, if arbitrary discrimination is established as the basis for a law, the rules of strict scrutiny must be applied. This is the standard applied in the Hawaii case, where the Court stated, "[w]henever a denial

of equal protection of the laws is alleged, as a rule our initial inquiry has been whether the legislation in question should be subjected to 'strict scrutiny' or to a 'rational basis' test" (63). The Court goes on to say, "[t]his court has applied 'strict scrutiny' analysis to laws classifying on the basis of suspect categories or impinging upon fundamental rights expressly or impliedly granted by the constitution" (63). Further, "[a]s we have indicated, HRS § 572-1, on its face and as applied, regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex" (64). Therefore, the Hawaii court ruled in favor of same-sex marriage largely due to marriage being a fundamental constitutional right. The fact that this fundamental right was withheld due to the applicants' sex, which they equated to discrimination based upon sex, meant the law could not withstand the strict scrutiny test (Strasser, "The Future" 125).

What is worth noting in the *Baehr* case is that the Court was willing to label this a form of discrimination based on the "suspect class" of sex (Gerstmann, 52). Up to this point, lesbians and gays had not been granted any kind of protected status under the law. Though sex discrimination related to same-sex marriage has been contested in subsequent years, it is interesting to note that standing as a "suspect class" has not in any way been invoked (Gerstmann, 66-7). Establishing lesbians and gays as a "suspect class" opens the legal door to a minority group status, which makes discriminatory laws much more difficult to impose because they are then subject to strict scrutiny when reviewed for constitutionality.

Finally, it is evident in the literature that the Hawaii case spurred a backlash of sorts (Schacter, "Courts" 1154; Collidge 35; D'Emilio, 59; O'Brien, 439; Walters, 179). This backlash took the form of state constitutional amendments and state legislation, referendums, and ballot measures used to ban same-sex marriage—including a ban on same-sex marriage enacted in Hawaii after the *Baehr* decision. Historian John D'Emilio has noted this in his work on lesbian and gay history and pointedly states that, "The most significant outcome of litigation has been the negative legislative and voter response that the Hawaii case and its successors have elicited" (D'Emilio, 59). Thus, according to the body of literature surrounding this particular case, it is unmistakable that the Hawaii case was the beginning of the debate in the Courts, as well as the catalyst for state measures used to place the issue of same-sex marriage on the ballot. Additionally, the negative legislation enacted as a result has complicated same-sex marriage to such a degree that, barring an act of congress or a federal Supreme Court ruling, true equality for same-sex couples is a dismal prospect (Gerstmann, 7).

Baehr v. Lewin has also fueled federal-level legislation resulting in the Defense of Marriage Act ("DOMA"). Suzanna Walters calls attention to this link and states that an effect of the Hawaii case was to spur Congress to pass DOMA, the federal legislation that overrules state laws (179). Thus, the Hawaii case can be translated as not only eliciting a backlash at the state level, but also at the federal level as well (Cahill, 169; Schacter, "Courts" 1187; Emond 449). The purpose of DOMA

was to limit federal recognition of any same-sex marriage that might be granted by the states, the implications of which are further examined below.

DOMA

The Defense of Marriage Act or DOMA is federally enacted legislation denying same-sex couples federal rights, which was signed into law by President Bill Clinton on September 21, 1996 (Gilreath, 108). One part of the Act reads:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means 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 (DOMA, 1 U.S.C. §7).

In 2004, the U.S Government Accountability Office issued a report outlining the 1,138 federal rights, benefits, and responsibilities made unavailable to same-sex couples pursuant to DOMA (Appendix A). These rights include things like access to social security benefits, health care benefits and federally-funded housing.

DOMA can be considered a defensive move related to the near legalization of same-sex marriage in the state of Hawaii. Kathleen Hull states that in reaction to *Baehr v. Lewin,* the US Congress passed DOMA to ensure that only heterosexual marriages are federally-recognized and that states are not required to recognize any same-sex marriages granted by other states (Hull, 154). As noted in the literature, the political climate at the time of the Hawaii case was such that simply out of fear of the possibility of same-sex couples being able to marry a backlash ensued.

Pursuant to DOMA, there is no federal recognition of same-sex marriages, partnerships, unions, or whatever else a state deems to call it (Graff, 40-1). Effectively, this means the federal government does not recognize or grant rights to same-sex relationships in any form. Further, same-sex couples who are granted state-based rights by individual states do not necessarily enjoy those same state level rights once they cross the border to another state (Marcus, 413). DOMA is clearly a piece of legislation that blocks full access to rights for lesbian and gay citizens. What is also troubling about this legislation is the involvement of President Clinton, because he positioned himself as an advocate for gay rights (Rimmerman, 277).

To reiterate, the political implications of—indeed the very purpose of—DOMA is to block all access to federal rights and limit access to state rights for same-sex couples (Emond, 449-50). This single piece of legislation has made overcoming the barriers to access to legal rights for same-sex couples very difficult. In fact, unless DOMA is repealed by Congress, only the federal courts have the authority to change the legal status of same-sex relationships at the federal level (Gerstmann, 7). As is made evident, with the enactment of DOMA marriage rights granted by the states to same-sex couples will always be limited unless this piece of legislation is either repealed or found to be unconstitutional by the US Supreme Court. However, it is unlikely the US Congress will repeal this piece of legislation given the current political climate highlighted by the voting electorate, which I will now consider (Strasser, On Same-Sex Marriage 31-3; 40-1).

Legislation, Referenda, and Ballot Measures

Throughout the US, legislation and ballot measures at the state level have created a situation that has essentially left equal rights to a majority vote. This is the very essence of the "tyranny of the majority." It leaves equal rights for lesbians and gays up to the majority vote. Kathleen Hull and Mark Strasser specifically emphasize this point and note the backlash to the Hawaii decision in their respective writings on the subject. "At both the state and national level, opponents of same-sex marriage are now focusing on constitutional amendments to block legal same-sex marriage" (Hull, 11). More particularly, Strasser states that in Hawaii "[i]n response to two court decisions suggesting that the state constitution might protect the right to marry a same-sex partner, the Hawaii electorate voted to amend their state constitution to empower the state legislature to reserve marriage for different-sex couples" (Strasser, <u>On Same-Sex Marriage</u> 76). Shannon Gilreath further makes evident in her text on the subject that the "tyranny of the majority" has taken hold of equal rights in the US in response to the possibility of same-sex marriage (107-8).

The Hawaii court's ruling that it is unconstitutional to deny same-sex couples entrance to the marriage contract set the stage for what many see as a backlash from the electorate and legislators. This is extensively noted in the literature on the topic (Ball, "Legal Rights" 1524; Cahill, 169; D'Emilio, 59; Kristen, 113; Lavely, 258; Purvis, "Evaluating" 50; Rimmerman, 276; Schacter, "Courts" 1154; Strasser, <u>On Same-Sex Marriage</u> 76). Response to the Hawaii Supreme Court's decision was a nationwide panic regarding the possibility of including same-sex couples in the

marriage contract. This has resulted in 41 states either amending their state constitutions to explicitly define marriage as an institution between one man and one woman, or state legislation that explicitly makes marriage illegal for same-sex couples (Appendix B). Not only are voter initiatives and ballot measures responsible for the banning of same-sex marriage, but the state legislatures also play a role by enacting laws that facilitate this result (Purvis, "Right to Contract" 145). Gay and lesbian historian John D'Emilio highlights the involvement of the state legislatures in this backlash. "Beginning with Utah in 1995, at least thirty-eight states have passed 'little DOMAs.' That is, these legislatures have declared that marriage is a union of a man and a woman and that their states will not recognize same-sex marriages performed else where" (D'Emilio, 60). Fundamentally, the US Congress through the enactment of DOMA has created an environment ripe for this type of legislation and has led the way for states to follow.

However, the literature notes that state "DOMAs" are not enough for opponents. Campaigns throughout the country have elicited the electorate to amend the constitutions of their individual states. These amendments specifically deny same-sex couples access to the contract of marriage. D'Emilio illustrates this point when he states, "[n]ot only have these states declared that they will not recognize same-sex marriages from other states but, either through legislation or voter initiative, they have also amended their constitutions to include prohibitions against same-sex marriage" (60). D'Emelio paints a grim picture of equality for LGBTQ people in the United

States, where we have opted for supposed direct democracy to dole out fundamental rights for this minority group.

The literature is rife with the impending possibility of same-sex marriage turning into an explicit affront to lesbian and gay rights by way of voter initiatives, referendums, ballot measures, and legislation (Cook, 1167; Flagg, 632; Schacter, "Role of Courts" 869). Political scientist Mark Rom brings focus to this issue by stating, "[a]fter the ruling in *Baehr v. Lewin* was handed down … [b]y 2004 thirty-eight other states had enacted their own DOMA or constitutional amendments barring same-sex marriage or the recognition of such marriages performed in other states, with most of the bills adopted between 1996-2000" (27). Rom points out that the political situation for same-sex marriage in the US at this juncture is ripe with legislation and constitutional amendments that effectively ban same-sex marriage. At this time, the status of same-sex marriage is dictated by the electorate and legislators. These campaigns are directly hosted and funded by the religious right in the U.S, whose involvement in this debate is highlighted in the following section (Gilreath, 108).

THE RELIGIOUS RIGHT AND LEGAL ARGUMENTS AGAINST SAME-SEX MARRIAGE

Religion and government are supposed to be separate in the United States. However, if religion and government were truly separate it would be of no use to review the religious literature when discussing legal rights. The problem with disconnecting religion from the discussion of legal rights is that many people who are

making legal arguments, decisions, and voting on this issue are deeply religious. For this reason, religion cannot always be separated out of governing institutions and the Religious Right's arguments against same-sex marriage cannot be ignored in the discussion of this fundamental legal right. When voters and politicians make decisions or cast their votes many feel that they are doing their religious duty by voting against same-sex marriage.

The arguments highlighted in the literature on the right revolve around religious and moral arguments. "Opponents of same-sex marriage freely draw on moral arguments and make assertions about God's will or intensions as they critique legal recognition for same-sex couples" (Hull, 190). The problem here is not that the Courts are unwilling to uphold their state constitutions, because this clearly is not the case. When state courts review these cases they typically rule in favor of same-sex marriage, like courts have done in Hawaii, California, Massachusetts, and Iowa. This is because there are not any compelling arguments made legally to withhold same-sex couples' their fundamental rights. Legally, the case for same-sex marriage is backed by a strong constitutional argument that most courts rule in favor of (Pasfield, 281-3; Schacter, "Courts" 1174). This is highlighted above with the *Baehr* case, in which the court ruled in favor of same-sex marriage by finding it unconstitutional to deny same-sex couples their fundamental rights (Schacter, "Role of Courts" 869). However, *Baehr* also highlights the real legal issue regarding same-sex marriage rights, namely that a new plan of attack was stepped up by the opposition, in particular the Religious Right. This new plan of attack was the co-option of legislation, referendums, and

ballot measures across the states because it was clear that same-sex marriage was typically winning within the court system.

The success of the fight for same-sex marriage in the courts is clearly a result of the fact that the arguments against same-sex marriage were typically seen as being constitutionally weak. The legal arguments proffered for the exclusion of same-sex couples from the right to marry are:

1. The right to marry is a predicate of the right to procreate and raise children in a traditional family setting.
2. The ability to have children is at the core of marriage.
3. Marriage is by definition dual gendered (Gerstmann, 91).

These are the standard reasons routinely offered in the US for denying to same-sex couples the fundamental right to marry, all of which are tied to religion and morality in some way (Pasfield, 293-99; Schuman, 2123).

The first argument against same-sex marriage can be dismissed as false fairly easily. If what is purported to be the traditional family is what determines one's eligibility to enter into this contract, it seems that more than half of the heterosexual population would be barred from entrance. Considering the high divorce rates, which result in single parent and mixed families, the heterosexual population hardly supports the model of a traditional family (Culhane, "Uprooting" 1190; Eisenstein, Sexual Decoys 109).

The second point offered is that marriage is for procreation. "Another theme in the opposition testimony that relates to both the morality theme and the definition theme is the argument from nature" (Hull, 185). This argument seems to be flimsy

since heterosexual couples that cannot and do not want to procreate freely enter into the marriage contract (Coombs, 229). There are no laws that deny heterosexuals their fundamental right to marry because of their ability or willingness to have children. This was clearly established by the US Supreme Court in its ruling in *Griswold v. Connecticut* when they effectively removed procreation from marriage (Pull, 25). This was again the case in *Turner v. Safely* (Graff, 44-5). The Court, in its rulings, relied on the Ninth and Fourteenth Amendments to establish that marriage and procreation are not necessarily one and the same (Pull, 31). Furthermore, it would seem odd to try to bar heterosexuals from their fundamental rights because they were unable or unwilling to procreate. If this argument is not true all of the time, that the institution is for procreating couples, then it would be constitutionally inconsistent to bar same-sex couples from their fundamental right to marry (Eskridge, "Constructing Family" 312).

The third argument, that marriage is by definition dual gendered, seems to be the real issue hindering same-sex couples from entering into the contract of marriage because of the current legal climate (Schacter, "Courts" 1154). Many state constitutions now define marriage as an institution for one man and one woman (Ball, "Forty Years" 2754). This is directly related to religion because the majority of people voting for these definitional changes within their state constitutions do so according to their religious beliefs (Cahill, 165). This is a clear instance of writing discrimination into a guiding document that is supposed to protect minority groups and keep religion separate from government (Schacter, "Courts" 1191). Herein lies

the problem, if a state's constitution defines marriage as between one man and one woman then it is per se not unconstitutional to deny same-sex couples entrance into the contract of marriage (Schacter, "Courts" 1186-7).

The co-option of state constitutions is a testament to the degree of influence that the Religious Right has over the US political system (Gilreath, 108). There have been more than a hundred anti-gay ballot referenda and initiatives in the US and the majority of these have been approved (Cahill, 165).

With this degree of influence, one has to ask who or what is the Religious Right that exercises such control over the issue of same-sex marriage? The Religious Right refers to all of the religious factions within the US that have formed an alliance to work together to ban same-sex marriage, which alliance is comprised of religions with by far the largest memberships (Rom, 4). Included in this list are the Catholic Church, various evangelical churches, mainline Protestant Churches including the Methodist Church and the Presbyterian Church, the Church of Jesus Christ of Latter Day Saints (or Mormons), and Orthodox Judaism (Rom, 4-5; Campbell, 137-145; Cahill, 155-165). The interesting thing to note here is that these religious groups are in allegiance only because they have the common interest of banning same-sex marriage. This is evident in the fact that many of these factions would hardly agree on anything other than their opposition to same-sex marriage. While their other fundamental religious beliefs are often at odds, they are willing to build a coalition to defeat same-sex marriage (Cahill, 155-6; Campbell, 133). However, this being said,

not all religious faiths disapprove of same-sex marriage. Some, although a minority, do approve (Rom, 5).

It seems clear from the literature that same-sex couples' main opponents are the Religious Right. This is not to say that all gays and lesbians are not religious, or to assert that all religions would be in favor of a ban on same-sex marriage. What this says is the above-defined Religious Right and their organizations that work against same-sex marriage are the main obstacles, effectively blocking access to same-sex marriage in the states by way of legislation, referendums, and ballot measures. They base their opposition on a traditional values or family values rhetoric, claiming that same-sex marriage harms the family and, particularly, children (Cahill, 170-1). The social science literature, mainly in psychology and sociology, is considered next because it has considerable implications for claims that same-sex marriage harms children or families.

SOCIAL SCIENCE

Why consider the social science literature on same-sex marriage when looking at an obvious legal problem? While the particular research examined here does not directly offer legal arguments or constitutional support for same-sex marriage, it does provide context for the need for equal access to legal rights and bring attention to the psychological issues associated with lack of access to marriage. This lack of access is implicated in increased rates of psychological morbidity in same-sex couples. If this lack of access does, in fact, cause psychological morbidity, then the lack of equal

access to marriage rights can be seen as interfering with the pursuit of liberty, life and happiness that are at the heart of the US constitution (Grob,6; Wolfe, 7). To begin, I highlight the negative effects that gays and lesbians experience because of their exclusion from the state-sanctioned institution of marriage and explicate what these psychological harms are. Then, I examine and make visible the positive effects that are associated with allowing gays and lesbians access to these legal rights.

Gays' and lesbians' exclusion from marriage implicates psychological issues and difficulties with everyday functioning in society. This point is made clear by researchers Ellen Riggle and Sharon Rostosky in their work on the exclusionary effects the lack of access has on same-sex couples. They state that, "[t]he culture of devaluation, including overt and subtle prejudice and discrimination, creates and reinforces the chronic, everyday stress that interferes with optimal human development and well-being" (Riggle, 66). The psychological effects of exclusion from the marriage contract results specifically in what is called minority stress (Meyer, 675). This stress is produced when members of a minority group, in this case lesbians and gays, experience social and legal discrimination due to their minority status.

Minority stress has effects that are made evident by the increased rates of psychological morbidity. (DiPlacido,141). What researchers on this topic illustrate is that lesbians and gays have to negotiate certain societal perceptions and pressures because their relationships are not seen as legitimate (Kertzner, 34). This morbidity manifests in gay and lesbian individuals as internalized hatred, depression, anxiety, and even suicide (DiPlacido, 142). These are serious psychological outcomes

produced by the lack of access that lesbian and gay families must face. The internalized psychological effects are the mental health results of being excluded from marriage (Myers, 167). Because of this, gays and lesbians face increased psychological morbidity brought on by this minority stress from the undue societal burdens and discrimination resulting from the fact that they lack legal access.

Children of lesbian and gay couples also experience negative outcomes due to the lack of legal recognition for their families. Mark Blechner points out that protecting children is often used as justification for banning same-sex marriage, but that ban actually has the opposite effect on children of same-sex couples (149). What is interesting to note, is that children of same-sex couples can also suffer from minority stress. This is due to the fact that children of gays and lesbians face similar forms of societal stress as their parents because they have to negotiate stereotypes and discrimination (Pawelski, 353). Children, similar to their adult parents, experience discrimination from family, friends, and social institutions. Also important is that children are often less equipped to negotiate these social situations where they experience discrimination. The conclusions about the harms children of same-sex couples suffer are made evident in that these children experience stress resulting in increased rates of psychological morbidity (Stacey, 182). This research has implications for the commonly-used argument that children are harmed when same-sex couples are allowed to marry. In fact, research done on children of same-sex couples indicates that the harm to children occurs when their parents are not allowed to marry.

The last points to emphasize in the consideration of the social implications of legal access to the marriage contract for same-sex couples are the positive outcomes. Research indicates that access has a positive influence on the stability of relationships (Schecter, 413). Not only are relationships more stable, but access also helps to alleviate psychological morbidity in this population (Rothblum, 28). As noted above, the main concern with lack of access to marriage is psychological morbidity due to the minority stress that affects couples as well as their children. A study of 50 married and unmarried same-sex couples done in Massachusetts by the Wellesley Centers for Women indicates the elimination of minority stress when same-sex couples are provided access to marriage rights (Schecter, 400). This study outlines that same-sex couples report less psychological morbidity and higher rates of happiness when they are in committed relationships that are sanctioned by the legal recognition of their marriages.

Another study with similar findings to those above is one conducted by Pamela Lannutti on 288 individuals in same-sex marriages. Lannutti's study indicates that lesbians and gays report higher levels of satisfaction with their relationships because of the positive impact of legal marriage recognition. This is evident in the fact that these couples face less ambiguity from society as a result. They report that the discomfort they felt previously at having to explain their relationship to friends, family, and societal institutions is lessened if not completely eliminated. This is due to the inclusion provided by the state's recognizing that their relationships are legitimate and valid (Lannutti, 137). Clearly, this research indicates that

discrimination against same-sex relationships should be a consideration in the legal debate on access. This is because exclusion from the marriage contract indicates interference with the right to the pursuit of life liberty and happiness.

THE POLITICS FROM THE LEFT

Now, I turn attention to the arguments on the left and consider the perspectives from liberal feminism and queer theory in relation to the question of legalizing same-sex marriage. When examining the issue of same-sex marriage, important arguments are made from the left in opposition to the question of legalization. The liberal feminist argument, however, lends well to a legal push for equal access because a liberal feminist perspective focuses on equality in relation to the law and government (Wendell, 66). In contrast, the queer theorists' standpoint is in opposition to same-sex marriage and is bound with the fear of assimilation (Warner, The Problem 82). Of interest is that both of these perspectives come from groups wishing to disrupt the heterosexual normative and deeply concerned with the welfare of sexual minorities. However, their conclusions are opposing, advocating for and against. For this reason it is important to examine why this is the case when both are advocates for sexual minorities.

Liberal Feminist Arguments for Same-Sex Marriage

Liberal feminist tenets lend well to the debate for equal access to the institution of marriage because of the commitment to an equal rights rhetoric (Tong, 12-13).

This is made evident by liberal feminists, who can be positioned as supportive of same-sex marriage because they advocate for equality through government reform, which reflects equality through legal access (Tong, 12-13). From a liberal perspective, government and law have been guilty of excluding women and minority groups from full legal protections and liberal feminism can be seen as supporting a move towards inclusion (Kensinger, 183-4).

This being the case, what is liberal feminism? Liberal feminism can be seen as a combination of classical liberalism and welfare liberalism. Liberal feminism is eloquently outlined by George Lakoff as follows:

> Most of the forms of feminism that have developed over the past thirty years have been set within the liberal context, and for good reason. Liberalism allows for social causes, and gender stereotypes are social and seen as having causal powers. Since male roles in gender stereotypes are more highly valued in society, gender stereotypes are seen as giving power to men. Feminism in a liberal context sees this as unfair and believes that such unfairness should be eliminated. Within liberalism, there is a general form of feminism. Feminism (1) assumes that the above-mentioned gender stereotypes exist; (2) assumes that higher values are placed on the male role; (3) assumes that these values given to social stereotypes have causal powers that give men a dominant position in society; (4) sees male dominance as unfair and to be remedied…On this view, it is the role of government to eliminate political and economic unfairness to women (300-301).

Lakoff's definition supports the case that liberal feminism would endorse same-sex marriage based upon a commitment to equal access to governmental rights. However, as has been made clear by liberal feminists such as Nan Hunter and Susan Okin, equal access to marriage should not only be about accessing these rights, it should also trouble traditional gender roles (Okin, "Sexual Orientation" 45; Hunter, "Marriage"

122). Liberal feminists endorse the idea that US citizens need full protections and access to the laws that govern them (Ferguson, 51). Therefore, since marriage is a fundamental right under the Constitution that provides certain legal rights and protections, lesbian and gay citizens need access to this institution. The lack of access is seen by liberal feminists as being unfair discrimination based upon the traditional gender system that favors male heterosexuals (MacKinnon, 117). Thus, the challenge is also posed to unsettle the traditional gender roles that work to oppress women.

The literature supports the contention that liberal feminism would be supportive of same-sex marriage because they are in support of equality. Indeed, in the past liberal feminists have made convincing arguments in support of same-sex marriage. However, interestingly, there has been a shift in feminist work from arguing for same-sex marriage to seemingly ignoring this issue, as is made evident by Erik Fassin.

> In the United States, feminist arguments were originally presented both for and against same-sex marriage: this was the debate formulated by Nan Hunter or Susan Moller Okin (pro), and by Paula Ettelbrick or Nancy Polikoff (con), as to whether or not same-sex marriage will dismantle the legal structure of gender in every marriage. Not surprisingly, as Sullivan's 'conservative case' gained prominence, the feminist argument in favor of same-sex marriage vanished from the public stage—but its initial presence should not be forgotten (Fassin, 228).

Fassin outlines that, initially, liberal feminists such as Susan Okin and Nan Hunter made significant contributions to the arguments for same-sex marriage, but that the debate from a liberal feminist perspective begins and ends here. It is unclear in the literature why liberal feminists' discourse on same-sex marriage has gone into

remission, though Fassin claims that it is largely due to the conservative debate on same-sex marriage (221-2). In particular, according to Fassin, the real issue was the conservative argument for same-sex marriage and the way it was being positioned politically. This was because the conservative arguments being made for same-sex marriage undermined the feminist notion that marriage needed to be transformed to end its oppressive nature. Instead, intellectuals such as Andrew Sullivan, made conservative arguments presenting the rationale that marriage needed to be extended to gays so as to normalize and civilize them (Sullivan, 155).

Thus, we see a very short lived and unengaged liberal feminist debate on this issue. Although liberal feminists have stopped doing any significant theorizing on the topic, it is clear that liberal feminist tenets support same-sex marriage by way of equal access and the potential of same-sex marriage to transform the meaning of the institution.

Why liberal feminists would ignore the issue even under the circumstances described above is not explicitly outlined in the literature. What is evident is that in the early 1990s two feminists with liberal leanings made arguments in favor of same-sex marriage. However, soon after that they seemingly ceased discussion of the topic. As Fassin points out, it is speculated that the disappearance of the subject is due to the cooption of the same-sex marriage debate by conservatives in favor normalizing and civilizing gays (222-3).

This highlights an important issue raised in the literature regarding whether same-sex marriage should be something that feminists or lesbians and gays should

even advocate for. The issue is defined by the concept of cooption, and this necessitates asking serious questions about same-sex marriage, as is deftly outlined by Michael Warner.

> Where does the politics of gay marriage lead? What kind of marriage are we talking about, and how might its place in the larger context of state regulations about sexuality be changed? Behind the question of gay marriage as it is posed in the United States, these fundamental questions are not being aired. But they are the questions that count. We can not wait until American courts have settled the marriage issue before addressing them, not l
> east because the way they are answered will play a large part in determining the meaning and consequences of marriage (Warner, The Problem 86).

Warner here emphasizes the importance of considering cooption because of the historical link between marriage and oppression. Are things going to change by granting access to same-sex couples? Will access contribute to breaking down the heteronormative, or is it merely going to reinforce it? Thus, what needs consideration are the effects same-sex marriage will have on the oppressive history of marriage. Will it continue to be constructed and defined within the traditional terms that it now exists, or is there a way to co-opt the institution so as to produce inclusive change that challenges its oppressive history?

What seems to be the overriding question here is whether supporting same-sex marriage will foster continued oppression of women and other minority groups through the reinforcement of traditional gender roles. This is nicely illustrated by Steven Seidman as he examines the heteronormative in relation to the gender system. Seidman claims that "[t]he gender system is said to posit heterosexuality as a primary

sign of gender normality…Heterosexuality has meaning only in relation to homosexuality; the coherence of the former is built on the exclusion, repression, and repudiation of the later…Gay liberation is a struggle against heterosexism and sexism, as we would say today" (114-130). Thus, what Seidman brings to our attention is that feminists, lesbians, and gays need to question the institution of heterosexuality. Since marriage can be understood as an institution that fosters gender divisions, we need to trouble this powerful institution not adopt it. This means if the goal is to disrupt the traditional gender system then liberal feminists are going to have to trouble marriage, not replicate it.

Liberal feminists offer an alternative understanding on the issue of marriage in general, which seems to subvert issues surrounding cooption and actively trouble the traditional gender system. This is the case because the presence of non-traditional relationships will trouble traditional gender roles by their very existence (Ferguson, 51). This was also illustrated by liberal feminist Susan Okin in her essay on same-sex marriage. She concludes that in lesbian and gay relationships there are rarely gender roles associated with the division of labor. The lack of gender roles is seen as challenging the natural biological base upon which the sex/gender system is built. Okin believes that even heterosexual relationships can be transformed into egalitarian ones if they take notice of the examples same-sex couples provide, particularly the fact that same-sex couples are less likely to practice a gendered division of labor ("Sexual Orientation" 44). According to Okin, based on her findings evidence exists that same-sex relationships are far more equal and have the potential to transform traditional

gender roles and trouble the heteronormative. She concludes that "[t]here is considerable evidence, then, that gay and lesbian relationships involve far more equal divisions of labor than do heterosexual ones, especially marriages" ("Sexual Orientation" 45). It seems possible, then, that same-sex relationships have the potential to transform marriages into more egalitarian relationships. Thus, if heterosexuals looked to the examples same-sex couples set regarding the practice of equality in intimate relationships, there is potential for heterosexuals to transform the heteronormative within their own marriages.

Liberal feminist Nan Hunter also makes a similar case for the disruption of traditional gender roles as she outlines in her essay "Marriage, Law, and Gender: A Feminist Inquiry." Hunter claims the existence of same-sex relationships shifts traditional understandings of the gender division that is often associated with traditional marriage if we incorporate gender into the legal frame ("Marriage" 121). Because of this effect and the legal tenets associated with liberal feminism, it can be reasoned that same-sex marriage is a tenable and desirable challenge to the historical tradition of gender oppression that is associated with marriage (Eisenstein, Radical Future 6). Hunter reinforces that same-sex marriage can and does trouble the gender division and places same-sex marriage as a desirable challenge to ending gendered oppression ("Marriage" 122). For these reasons, liberal feminism can be seen as supporting the legal recognition of such unions.

Jyl Josephson also calls attention to traditional gender roles and the possibility that exists for same-sex relationships to disrupt this. She claims that perhaps

legalizing same-sex relationships will foster the questioning of gender roles in society at large, and that this could change negative attitudes about same-sex couples (276). Josephson further outlines that historically traditional forms of marriage are what actually harm women and sexual minorities and that granting legal recognition to sexual minorities actually helps to end this oppression (277). Thus, Josephson upholds the notion that liberal feminists support same-sex marriage as an institution that grants needed rights, but further argues that we need to problematize and disrupt the traditional gender divisions associated with it.

Again, this issue of disrupting gender norms is brought to light by Amy Brandzel. Brandzel calls attention to the transformative potential of same-sex marriage by stating that "[i]f 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" (188). Brandzel makes a case here for same-sex marriage by claiming that the institution of marriage will be troubled by the mere fact that same-sex relationships are not based on traditional gender roles. Clearly, same-sex marriage will challenge the traditional meanings of gender. But will this upset the firmly held tradition of marriage altogether, or will it just subsume lesbians and gays into the already established institution? Will it change tradition or will it just normalize gays and lesbians in the process? These are serious questions that need to be addressed and highlights the tensions that are evident on the topic of same-sex marriage.

These questions are also at the root of liberal feminists arguments in favor of same-sex marriage. As highlighted above, many liberal feminists see same-sex couples as setting an example for and a challenge to traditional gender roles. Because of this challenge to traditional gender roles in marriage coupled with the issue of legal equality, liberal feminism can be purported to support same-sex marriage. It makes sense that in order to access practical rights same-sex couples need entrance into the marriage contract. However, this is contingent on our also needing to question and re-create our relationships according to egalitarian rules that dismantle the traditional gender division. With the liberal feminist case made in support of equal access to the marriage contract, I now turn attention to queer theoretical arguments against same-sex marriage to examine this quandary further.

Queer Theorist Arguments Against Same- Sex Marriage

If same-sex marriage can be seen as disrupting traditional gender roles, why is it queer theory would be at odds with the legalizing of same-sex marriage? In this section, I focus on the literature outlining a queer theoretical perspective on same-sex marriage. The main reason offered by queer theorists for their resistance is that same-sex marriage is a form of assimilation or normalization (Brandzel, 189). They claim that if lesbians and gays enter into the contract of marriage it will surely normalize homosexual visibility by incorporating these bodies into the heterosexual model of family and marriage, while at the same time marking out others who do not fit this

model (Butler, Gender Trouble 182-3; Davidson, 253; Warner, The Problem 82, 90; Sullivan, 143).

I begin this consideration of queer theoretical arguments with the debut of queer theory as outlined by Teresa de Lauretis. The term queer theory was coined by de Lauretis in the 1991 issue of *Differences* titled "Queer Theory: Lesbian and Gay Issues." Here, de Lauretis aligned queer theory with anti-essentialism and a responsibility to deconstruct our own feminist work "[o]n the conceptual and speculative work involved in discourse production, and on the necessary critical work of deconstructing our own discourses and their constructed silences" (de Lauretis, iv). Thus, the efforts toward deconstructing dominant ways of knowing and the silences they create lead us to also deconstruct heterosexist society, or the heteronormative (Duggan, 168). The heteronormative came into focus within this emerging theoretical discourse in the early 1990s and became much of the focus of queer theory. This is because this notion of the heteronormative was associated with the silences that were not being voiced or articulated. Interestingly, the definitional foundations of the heteronormative used in queer theory are borrowed from a critique of heterosexuality from feminist theorists.

To understand this connection it is essential to first define the heteronormative, a concept which is central to queer arguments on same – sex marriage. The heteronormative lends voice to the constructed silences that are assumed to be created with the question of same-sex marriage. Michael Warner coined the term the heteronormative, largely through the use of feminist work that had already been done

on the pervasive nature of heterosexuality. Warner draws upon theorists such as Audre Lorde, Adrienne Rich, and Monique Wittig to establish the definition of the heteronormative. Rich concludes that heterosexuality is not really a choice but rather an institution that is imposed, resulting in compulsory heterosexuality. "[A] pervasive cluster of forces, ranging from physical brutality to control of consciousness…Yet each one I have listed adds to the cluster of forces within which women have been convinced that marriage and sexual orientation toward men are inevitable" (Rich, 39). In this work, Rich identifies heterosexuality as a cluster of forces that are imposed upon the female body. To this, Warner adds Audre Lorde's theory that heterosexuality is setup as a hierarchy that privileges the dominant perspective or way of being. She claims that, "Heterosexism – a belief in the inherent superiority of one form of loving over all others and thereby the right to dominance" (Lorde, 20). Thus, Warner takes Lorde's idea of a hierarchy of heterosexuality and melds that with Rich's concept of compulsory heterosexuality. The last step in Warner's construction of the heteronormative is the addition of Monique Wittig's work on the pervasive nature of the heterosexual conscious.

> For to live in society is to live in heterosexuality…The social contract I am talking about is heterosexuality…Because even if they, if we, do not consent, we cannot think outside of the mental categories of heterosexuality. Heterosexuality is always already there within all mental categories. It has sneaked into dialectical thought (or thought of differences) as its main category (Wittig, 40-43).

Here, Wittig explains heterosexuality as a dominant way of knowing and being, and emphasizes that there are no alternatives. Thus, with the work of Rich, Lorde, and

Wittig as a base, Warner coins the term heteronormative to account for the system of heterosexuality.

> [S]o much privilege lies in heterosexual culture's exclusive ability to interpret itself as society. Het culture thinks of itself as the elemental form of human association, as the very model of inter-gender relations, as the indivisible basis of all community, and as the means of reproduction without which society wouldn't exist (Warner, Fear xxi).

This definition of the heteronormative is a clear combination of feminist theory on heterosexuality. Since the heteronormative is a central focus of queer theory and feminist theory on heterosexuality is a guiding principle of the heteronormative, it can be assumed that queer theory's main tenets are rightly built upon feminist theories of heterosexuality and its assumed pervasive nature.

With queer theory's basic doctrine summarized, I now turn my focus to queer theorists' main argument against same-sex marriage. Namely, that same-sex marriage is a form of assimilation into the heteronormative (Walters, 20). Queer theorists see assimilation as the real problem with same-sex marriage because gaining access to the institution does not open up alternative ways of being, but rather confirms the heteronormative (Walters, 189). The main goal from a queer theoretical point of reference is to challenge the heteronormative and give voice to the constructed silences. Thus, if it is true that same-sex marriage is the assimilation of same-sex couples into the heteronormative, then same-sex marriage does not necessarily challenge this dominant way of being (Conway, 167).

Queer theory further brings into focus the suggestion that assimilation not only fails to challenge the heteronormative, it actually confirms it (Davidson, 253). This is

touched upon by Judith Butler when she claims that assimilation essentially defines the parameters of the political debate. "The normalizing powers of the state are made especially clear, however, when we consider how continuing quandaries about kinship both condition and limit the marriage debates" (Butler, "Kinship" 16). Here, Butler highlights the idea that assimilation is the end result for same-sex marriage because the arguments in the debate are framed and limited by heterosexist terms.

Butler further explains the political consequences of framing debates through assimilationist methods, whereby the body is shaped by political forces with strategic interests in keeping the body bounded and constituted by the sex/gender system (Butler, Gender Trouble 176). She says here that assimilation is political and these politics are what informs, or shapes, our bodies. History through politics is the creation of values and meanings by a signifying practice that requires the subjugation of the body (Butler, Gender Trouble 177). Through this process, homosexuality is politically produced in a binary that is conceived within a homophobic signifying economy as both uncivilized and civilized (Butler, Gender Trouble 179-81). In the context of same-sex marriage, this assimilation process positions the homosexuals who marry and assimilate as civilized and the other homosexuals who do not marry as the uncivilized.

These new categories of homosexuals are then reinforced.

> And this stability, this coherence, is determined in large part by cultural or political orders that sanction the subject and compel its differentiation from the other. Hence, inner and outer constitute a binary distinction that stabilizes and consolidates the coherent subject (Butler, Gender Trouble 182).

This illustrates how the heteronormative, through assimilation, subsumes the same-sex couples who fit the expanded norm, while it politically constructs those who cannot or do not want to fit this norm as the "other." Thus, as highlighted by the political framing of the same-sex marriage debate, the disciplining of bodies through assimilation is the heteronormative at work (Butler, Gender Trouble 183). Those who cannot assimilate are signified as the uncivilized homosexual body that needs to be disciplined to fit the heteronormative (Butler, Gender Trouble 184-6). This, Butler says, is the real issue of assimilation. It continues to reinforce or reify the produced categories of sex/gender that are at the core of the heteronormative.

Accordingly, many queer theorists claim that, same-sex marriage should not be our goal. They reason that if lesbians and gays are allowed to access the institution of marriage it will only serves to mark as "others" those who cannot or do not assimilate into marriage. "First, marriage will not liberate us as lesbians and gay men. In fact, it will constrain us, make us more invisible, force our assimilation into the mainstream, and undermine the goals of gay liberation" (Ettelbrick, 123). The goals that are undermined are the very foundation of the gay and lesbian movement: the idea of being counter and resistant to dominant culture (Sullivan, 29). The gay and lesbian liberation movement was built upon the notion that lesbians and gays are not the same as heterosexual couples, and that homosexuals do not want to assimilate into dominate culture (Ettelbrick, 120-3). "This approach (of assimilation) may succeed as an additive method, opening up citizenship to gay – identified people, but it

simultaneously reinforces the strict boundaries of such a citizenship" (Markson, 285). Ziysah Markson makes clear that including lesbians and gays in the institution of marriage is counter productive and, as a movement, we need instead to be concerned with refuting the heteronormative. Meaning, access to marriage benefits by additive measures should not be our goal.

Queer theorists critical of the inclusion of same-sex couples in the marriage contract point out the exclusion of transgendered individuals as an additional issue not easily addressed by the current debate. Essentially, trans folks are left out of the debate entirely when the issue is framed by same-sex rhetoric. "In making gay marriage more palatable, gay and lesbian activists did not frame this issue in ways that necessarily include the marriage rights of transgender people, who are increasingly finding their marriages under attack" (Davidson, 252). Currently, the debate centers on the sexual identities of lesbians and gays. However, language is important because it plays a crucial role in the political framing and outcome of this debate.

This outcome for many trans folks is the reality that in some instances they are unable to access their marriage rights or even the rights that are made available to same-sex couples. This is often the case related to marriage and domestic partnerships, because of the documentation that is needed to gain access (Denike, 80). In some cases, trans folks are unable to access the marriage contract because of issues with birth certificates and state laws that restrict the changing of one's birth sex on this document (Robson, 61). This document is needed to access the marriage contract. If one's gender is not changed on this document trans folks are unable to access the

marriage contract because their birth sex is the same as the person they seek to marry (Brandzel, 189). Further, a driver's license is the required form of identification for entering into a domestic partnership. Many trans folks will have their driver's license changed to reflect the gender by which they choose to be identified. As such, when they try to enter into a same-sex domestic partnership, these trans folks are again restricted if their driver's license does not indicate they will be entering into a same-sex partnership. This is a good example of queer theorist's point that a narrow framing of the marriage debate fails to include transgender issues, which highlights assimilationist politics at work (Brandzel, 187-9).

The political framing of the debate can also be seen as ignoring issues related to class and race because the assimilationist model is based upon everyone being the same. This sameness blinds us to issues associated with different class and race positions. According to critics, this excludes others who cannot assimilate (Young, Justice 157; Butler, Gender Trouble 184-6). Josephson makes this point when she calls attention to the issue that same-sex marriage can provide access to benefits only for those that have benefits to access. This means only the more privileged members of the community will be able to benefit from the marriage contract, while others will be disenfranchised (Josephson, 237). If, as is claimed, the marriage debate seeks to assimilate those who are most like the norm, how can we account for differences associated with race and class in relation to same-sex marriage? Nikki Sullivan makes clear that if the aim is assimilation we will not be able to account for race or class because it makes our differences invisible. This is because the aim of assimilation is

to be accepted into the mainstream (Sullivan, 23). Further, he says that, "the assumption was/is that tolerance can be achieved by making differences invisible, or at least secondary, in and through an essentializing, normalizing emphasis on sameness" (Sullivan, 23). This brings into focus that the assimilationist framing of the debate on same-sex marriage, as is often manifested by proponents of same-sex marriage, only serves to normalize same-sex couples. By doing this, race and class are let out of the debate entirely.

As queer theorist point out, issues with race and class privilege those that most fit the norm. Assimilationist measures that frame the marriage debate "[p]aint our communities as mostly white, middle class, and able bodied" (Markson, 279). When this happens "[m]ainstream gay rights campaigns fail to challenge racism and classism alongside homophobia. Rather than expose assumptions about love, monogamy, procreation, family, sex, and gender, the movement tends to focus on individual rights, ironically working to make queers normal" (Markson, 279). Markson's points are important to consider because they expose those who are left out of the current debate because of the political framing of the issue and also highlight how this reinforces the heteronormative. Thus, it seems likely that from a queer theoretical perspective the debate on same-sex marriage as it stands today is implicated in excluding a host of "others."

Iris Young offers an alternative to the contract of marriage, which she feels will mitigate the oppression felt by sexual minorities. What she brings to the debate are universal domestic partnerships open to a host of people (Young, Intersecting

Voices 110). "If we are not to privilege particular relationships or ways of life, then what it means to be a family must be redefined and pluralized" (Young, Intersecting Voices 105). Thus, as Young points out, if we want to build a fully inclusive political movement centered on rights associated with the family, we have to redefine the family so it does not continue to reproduce exclusion. Essentially, we are going to have to account for the differences and give voice to all of the silences.

CONCLUSION

The literature highlighted above sheds light on current debates on same-sex marriage. First, it is important to acknowledge that the law is in contradiction when it denies same-sex couples legal access to the fundamental right of marriage that is squarely supported by the ninth and fourteenth amendments of the US Constitution. The same can be said for religion's influence on the law excluding same-sex couples from the marriage contract. Religion is supposed to be separate from governing institutions. Nevertheless, the arguments currently insuring that same-sex couples cannot access their fundamental rights are directly based upon religious argumentation.

Additionally, queer and liberal feminists' argumentation for and against same-sex marriage are a challenge to negotiate. This is because both are concerned with ending oppression of minority groups and, yet, their arguments appear to be in opposition. Liberal feminists see same-sex marriage as a possible solution. At the same time, queer theorists do not want same-sex marriage. Iris Young, picking up on

queer logic, offers an alternative to the marriage contract that promotes the destruction of marriage and its replacement with universal domestic partnerships. These contracts suggested by Young appear to be a logical alternative to the institution of marriage, and a real challenge to the heteronormative.

The political agenda today is such that a strategic plan of action is needed. If the LGBTQI community does not come to a strategic plan of action we surly will not gain any legal rights. Same-sex couples need the protections that are only available, at present, through the institution of marriage. Thus, a strategic line of attack is necessary to end the legal oppressions that sexual minorities face in our society. The question that remains is how do we resolve the tension between feminists and queer theorists to achieve legal protections while at the same time destroying the heteronormative? This is the tension I hope to resolve with a new strategic political queer/feminist approach to the issue.

DISCUSSION

INTRODUCTION

Examining my overriding question of how to legalize same-sex marriage while at the same time undermining and disrupting the heterosexual normative requires deconstructing the pertinent literature and (re)constructing a new political strategy. I do this through what I call a "strategic political queer/feminism," which is grounded in liberal feminist and queer theory. Utilizing this new approach, I scrutinize the political landmarks and social regularities that emerged from my literature review, which leads directly to step three of my methods whereby I deconstruct the social regularities and (re)construct a solution (Scheurich, 97). This (re)construction leads to a solution that has the possibility of granting to all US citizens access to the rights and responsibilities associated with the marriage contract. A strategy I hope will weaken and end the historically oppressive nature of marriage. Ultimately, I propose offering "marriage" through religious institutions and legal rights and responsibilities through states and the federal government through "contracts of care."

This discussion begins with the assumption that all citizens deserve access to the fundamental rights associated with the marriage contract. As established in the literature review, marriage is a fundamental right and as such should not be limited or denied to any citizen (Pull, 23-32). First on the political agenda is the need to shift this debate to the federal level. This is directly related to the issue outlined in the literature review, which highlights that the biggest obstacle to same-sex marriage is

the Religious Right and its takeover of state constitutions to redefine marriage as between one man and one woman (Gilreath, 108; Cahill, 165; Hull, 11, Strasser, On Same-Sex Marriage 76). Making this a federal rights issue will bring an end to the control the Religious Right maintains at the state level. Doing so would also alleviate the burdens associated with the lack of access to federal rights currently faced by same-sex couples. Essentially, this current political climate necessitates a federal approach to this problem.

Additionally, because I have a commitment to feminism, it is also of vital importance to pay attention to the underlying issues at stake in answering my question. After examining the literature, I find the most relevant arguments from a feminist political perspective are liberal feminist and queer theoretical positions. These two perspectives both work to understand the feminist issues in this debate, namely traditional gender roles and heterosexism (Brandzel, 188; Hunter, "Marriage" 121; Seidman, 114-130). I feel I must consider these issues to reach my goal of offering a solution that will lend access to the rights and responsibilities of the marriage contract to all citizens while upsetting the heteronormative. Thus, I employ liberal feminist and queer theories to come to a better understanding of these concerns.

With this aim in mind I first consider a liberal feminist position on the topic, which asserts convincing arguments in favor of same sex-marriage. Liberal feminist theory offers support to claims that all couples need access to fundamental rights (Tong,12-13; Kensinger, 183-4; Lakoff, 300-301; Ferguson, 51). It also has a commitment to undermining traditional gender roles that place women at a

disadvantage, which can be advanced by providing same-sex couples access to marriage (Okin, "Sexual Orientation" 45; Hunter, "Marriage" 122; Eisenstein, Radical Future 4-7). However, the arguments posited by queer theorists complicate this position. Queer theorists' main claim is that same-sex marriage is a disguise for assimilation, which only serves to further "other" those who cannot or do not fit the heterosexual normative (Brandzel, 189; Butler, "Kinship" 16; Davidson, 253; Sullivan, 143; Warner, The Problem 80-90). What is clear, though, is that both feminist and queer theoretical positions agree on the need to challenge the heteronormative and undermine traditional gender roles.

Considering these two positions, how can we legalize same-sex marriage and still pay heed to disrupting the heterosexual normative? Accomplishing this goal requires changing the arguments currently employed in advancing same-sex marriage. Doing so leads to the resolution of the tension evident between liberal feminist and queer theory. When advancing this issue at the federal level it is imperative to avoid argumentation that further reinforces the heteronormative (Brandzel, 193). To this end, I employ the "politics of difference" outlined by Iris Marion Young to assert that difference must be considered when making legal arguments (Young, Justice 163). I pay special attention to the messaging used to argue for equal access to rights and steer clear of assimilation by abandoning arguments that assert we are all just the same. Instead, I use the language of a politics of difference to develop rights-based arguments contingent upon difference (Young, Justice 157).

Using a politics of difference is crucial to addressing queer theorists' concerns. Specifically, commonly-used arguments claim same-sex couples are just the same as heterosexuals and wish to marry for all of the same reasons. According to queer theorists, these arguments do not upset the heteronormative but, instead, reinforce its dominance through assimilation (Brandzel, 189; Butler, "Kinship" 16; Davidson, 253; Sullivan, 143; Warner, The Problem 92). Difference-based arguments also support liberal feminist theory, which asserts we need to consider access to equal rights and trouble traditional gender roles. Same-sex marriage alone has the potential to challenge traditional gender roles considering there is only one gender in same-sex marriages (Ferguson, 51; Hunter, "Marriage" 121; Okin, Sexual Orientation" 44-5). However, using arguments that do not assert everyone is just the same sets the stage for a wider range of access to the rights associated with the marriage contract. Thus, employing a politics of differences has the potential to put an end to sameness argumentation that works to further the dominance of the heteronormative.

For these reasons, I utilize a politics of difference for advancing same-sex marriage at the federal level as the first step in my "strategic political queer/feminism." By opening the marriage contract to same-sex couples we create the potential to challenge and weaken the traditional values associated with the marriage contract. If marriage is established as a fundamental right that must be made available for same-sex couples, I postulate this can be used strategically to co-opt the Religious Right. Meaning, when they have to confront the fact they no longer have control over the *legal* institution of marriage they will want to again seize control over the *religious*

institution of marriage. This could lead to the Religious Right agitating for state and federal governments to get out of the business of "marriage" and insist that it be a union sanctioned only by religious organizations. The legal rights and responsibilities would be left for states and the federal government to provide.

Once the Religious Right takes back "marriage" an alternative government-sanctioned legal contract can be made available to take its place. To this end, I propose "contracts of care" that carry all of the same rights and responsibilities of the marriage contract. In contrast to marriage, however, contracts of care are open to a wide array of families without carrying the marriage contract's historical weight of oppression. Simply put, contracts of care are open to all families regardless of class, race, sexual identity, gender, or physical ability. Further, these contracts are not based on a sexual relationship, as the marriage contract is today. They are instead a contract into which any family, however defined, can enter.

Based on the map sketched above, in this discussion I explore a legal and political strategy for providing equal access to the institution of marriage for same-sex couples that is grounded in liberal feminist and queer theory. I agree with liberal feminist theory, which asserts that same-sex couples need access to the privileges and responsibilities associated with the marriage contract. On the other hand, I also agree with queer theoretical arguments that marriage is a historically oppressive institution and that, by including only same-sex couples in the marriage debate, still others are left out. Ultimately, I hope to have positioned a "strategic political queer/feminism" that resolves this tension between liberal feminist and queer theory. At the same time,

I hope this new strategy can offer access to fundamental rights for all US citizens while at the same time disrupting the heteronormative and traditional gender roles. Important to this end is a definitional change in legal arguments in line with a politics of difference, which is a critical step to lessening the oppressive nature of the heteronormative. Only when couching the arguments in the context of difference can liberal feminist and queer theoretical concerns be reconciled. This shift in messaging can then be used as a political strategy for opening up legal equality in the institution of marriage and, at the same time, for setting the stage to replace marriage with "contracts of care."

FEDERAL MARRIAGE RIGHTS

Beginning a discussion about accessing the legal rights associated with the marriage contract requires understanding the current status of state and federal marriage rights for same-sex couples. Same-sex couples lack many state rights and all federal rights associated with marriage (Graff, 40-1, Marcus, 413). This is evidenced by the fact that at present 41 states that have legislation or constitutional amendments that limit marriage to one man and one woman (Appendix B). Not only do same-sex couples have to contend with discriminatory state laws, the alternative contracts offered to same-sex couples do not confer equal access to federal rights. For example, even in states that grant same-sex unions under the title of "marriage" these marriages do not come with the same rights and responsibilities as those afforded to heterosexual couples. No same-sex marriage, domestic partnership, or civil union in the US is

recognized at the federal level (Emond, 449-500). As such, relationship contracts for same-sex couples typically offer only limited rights within the state where they were granted.

This limitation of rights specific to same-sex couples is due to the passage of the Defense of Marriage Act (DOMA 1996). Under DOMA "[s]tate – level statuses like domestic partnerships or civil unions currently are not recognized by the federal government or by most other states. Because many important marriage benefits are built into federal laws and programs, state-level measures will be constrained from providing substantial equality in the broadest sense" (Hull, 209). Kathleen Hull makes clear that same-sex couples, no matter what the policies are within the state they live, are not afforded the full range of rights and benefits of marriage because of federal restrictions put in place through DOMA.

DOMA's limiting of rights for same-sex couples at the federal level is a major road block to equal access. Iris Marion Young highlights just some of the vital rights that are denied same-sex couples.

> Marriage entails privileges of property and income – privileges of ownership and inheritance, insurance benefits, credit access, specific tax privileges, social security benefits, survivor benefits for spouses, immigration privileges. Marriage usually confers rights in relation to children, though the privileges of biological parentage sometimes snarl up this benefit. Married people have a privileged access to reproductive technologies, both to aid and to curtail reproduction. They are the preferred clients of adoption services. Marriage gives people the privilege of gaining access to, taking care of, and signing consent forms for their spouses housed in bureaucratic institutions like hospitals, treatment centers, rest homes, or prisons (Young, Intersecting Voices 103).

In Young's laundry list of rights are many that are currently unavailable to most, and in some cases all, same-sex couples because they are denied access to their fundamental rights associated with marriage. Because same-sex relationships are not legally recognized at the federal level, same-sex couples are unable to access many rights that serve to protect their families. For these reasons, same-sex marriage must be addressed at the federal level. Only at the federal level can we put an end to limited access for same-sex couples within the context of state and federal jurisdictions.

As noted, same-sex couples lack equal access to their fundamental rights and responsibilities related to the marriage contract. I say "fundamental" because the US Supreme Court has established through a series of cases that marriage is a fundamental right that can only to be restricted in the most limited of circumstances (Pull, 23-32). In 1923, *Meyer v. Nebraska* was the first case in which the US Supreme Court established marriage as a fundamental right protected under the Constitution through the ninth and fourteenth amendments (Purvis, "Right to Contract" 157). Precedent was further set in 1965 with the case *Griswold v. Connecticut*, where again the US Supreme Court held that marriage is a fundamental right (La Valle, 961-2; Pull, 25). In the now historic 1967 case *Loving v. Virginia,* the Court held once more that marriage is a fundamental right that should not be limited; especially, when the restriction is based on arbitrary reasoning that serves to limit access based only on discrimination (*Loving*, 10). Consistently, the Court has ruled that marriage is a fundamental right and that any restrictions on the institution must be free of a discriminatory basis.

Thus, I argue, to gain all of the fundamental rights associated with marriage same-sex couples must take this issue to the federal Supreme Court. Mark Strasser, claims that if this is done, the analogy between same-sex couples and race as a suspect class could logically grant fundamental marriage rights to this group, as was evidenced in *Loving* (On Same-Sex Marriage 133-150). This strategy is consistent with other historical fights for access to civil rights. The first step in advocating for same-sex marriage at the federal level from a legal standpoint is establishing homosexuals as a "suspect class." Doing so is directly in line with the legal arguments employed in the *Loving v. Virginia* case, whereby the Court's ruling granting access to marriage to interracial couples was based on its finding that race is a "suspect class" (Graff, 45-6). "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" (Brandzel, 183).

In *Loving*, establishing African Americans as a suspect class was critical to finding that Virginia's law banning interracial marriage was unconstitutional (Graff, 45-6). Otherwise, as argued by the State of Virginia, the law as written did not violate the fourteenth amendment because the law did not discriminate (*Loving*, 8; Graff 45). Essentially, Virginia alleged the law applied equally to all citizens and did not limit their fundamental right to marry—it merely curtailed everyone's right to marry someone from another race. (*Loving*, 8). Once the US Supreme Court found that African Americans were a suspect class, however, they applied a stricter standard of review to the law and found the law unconstitutional because its only purpose was

discriminatory (Emond, 448; Oh, 597). This denied this minority group the equal protections guaranteed under the fourteenth amendment to the Constitution (*Loving*, 4).

The same principles can be reasoned to be at play for same-sex marriage (Strasser, <u>On Same-Sex Marriage</u> 35, 143). Under current laws, sexual minorities are not denied the right to marry—they are free to marry someone of the opposite sex. Therefore, as in the *Loving* case, it is crucial to establish homosexuals as a suspect class. This would set the stage for same-sex couples to gain access to the fundamental right of marriage through the courts. Establishing homosexuals as a suspect class puts the burden of proof back on the states wanting to uphold marriage restrictions and forces them to show that denying access to marriage for homosexuals has some legitimate state interest other than discrimination.

Getting sexual minorities defined as a suspect class is not about assimilation and acceptance in larger society, it is about rights. Same-sex couples deserve the right to access the contract of marriage because these rights have practical legal implications. The key is to force the issue at the federal level and not rely upon popular votes. Fundamental rights should not be left to public opinion or laws based on discrimination. Leaving fundamental rights to the highest vote is an instance of the tyranny of the majority our constitution seeks to avoid (Gerstman, 172-3; Marcus 403-8). Further, as noted in *Loving*, it is unconstitutional to withhold fundamental rights guaranteed to all citizens based on discrimination (*Loving*, 10, 12).

To accomplish this goal of getting this matter to the US Supreme Court, legal challenges need to be mounted in states where marriage rights are not being granted. If these rights are continually challenged in the states, they will reach critical mass at the federal level and get the attention of the Supreme Court. Once at the federal level, if the Court establishes homosexuals as a suspect class states will need to produce a reason free of discrimination for denying access to the fundamental right of marriage. I suggest they cannot produce such a reason and the laws banning same-sex couples from the marriage contract will have to be struck down. Of course, even as we strive to accomplish this shift at the federal level, the issue of the heteronormative still needs attention in order to properly position this debate.

THE HETERONORMATIVE

The term heteronormative accounts for the pervasive system of heterosexuality (Warner, Fear xxi; Seidman, 114-130). This concept is central to liberal feminist and queer theoretical arguments related to same-sex marriage, which I deal with implicitly when addressing this issue. Further, it is essential to my work related to deconstructing dominant ways of knowing and the silences they create, which is the key commitment of one of my guiding principles, queer theory (de Lauretis, iv; Weed, ix). In particular, the heteronormative is used here to deconstruct the heterosexist institution of marriage. Thus, a basic understanding of the concept is necessary to this conversation considering the implications of same-sex marriage for disrupting the heteronormative. It is also important to note that much of the definitional foundation

of the heteronormative used in queer theory is borrowed from feminist theorists' critique of heterosexuality. This is demonstrative of how well feminist and queer theoretical perspectives can fit together to understand the issues involved with same-sex marriage.

In the context of this discussion, queer theory dictates a commitment to deconstructing the heteronormative while also resisting dominant ways of being. According to queer theorists, heterosexuality is constructed and a liability to feminist and queer theoretical perspectives in that "[i]n American society, sexism is responsible for the creation of a homosexual and heterosexual identity and a masculine and feminine identity that privilege heterosexual men" (Seidman, 114). Therefore, the deconstruction of heterosexuality highlights the oppressive nature of this binary institution of marriage, which is the central underpinning of the heteronormative. To this end, Zillah Eisenstein in her book *Sexual Decoys* states that, "[m]arriage authorizes, institutionalizes, and codifies the meanings and relations of gender: man and woman, husband and wife" (109). Eisenstein understands marriage to essentially be the legal institution that systematizes the heteronormative.

In order for same – sex marriage to be a legitimate cause for liberal feminist and queer theorists it needs to disrupt and dismantle the heteronormative because doing so also disrupts the sex/gender system that holds the heteronormative in place. Disrupting the sex/gender system is the goal of queer theorists, as well as feminists. Specifically liberal feminist theory has a commitment to equal access and the disruption of traditional gender roles that disadvantage women (Eisenstein, Radical

Future 4-7). Queer theory, on the other hand has a dedication to ending the heteronormative, which takes into account traditional gender roles as well (Duggan, 168). If all of these conditions are met in a theory that advances marriage, it can reasonably be considered an outcome worthy of pursuit. As such, a deconstruction of liberal feminist theory and queer theory is in order if one is to negotiate a political strategy for marriage equality. This deconstruction also highlights important issues being ignored in the debate.

DECONSTRUCTING LIBERAL FEMINIST AND QUEER BINARIES

In order to forge a workable theory related to the political problem of same-sex marriage and equal access, it is necessary to deconstruct liberal feminist and queer theoretical considerations in this arena. This is essential for negotiating an alternative to the either /or binary regarding legalization of same-sex marriage that comes out of these two schools of thought. Specifically, this binary is the liberal feminist position supporting legalization same-sex marriage and queer theory's stance of rejecting access to the institution and destroying the marriage contract. If same-sex marriage can be positioned to resist assimilation, trouble the heteronormative, and disrupt traditional gender roles, it can be positioned as a legitimate goal or feminist endeavor in line with liberal feminist and queer theory. My particular goal is to position a legitimate push or motion towards my "strategic political queer/feminism" through the deconstruction that follows.

Liberal feminist theory raises some interesting and important considerations in this debate. First, the issue of equal access at the core of liberal feminist theory lends support to same-sex marriage (Lackoff, 300-301; Tong, 13). However, equal access alone does not disrupt the historically oppressive nature of the marriage contract in relation to race and gender. Merely offering legal arguments in favor of equal access does not trouble traditional gender nor challenge the heteronormative. Thus, if an equal access rhetoric is going to be used in this debate it cannot be based solely on rights.

The next consideration from a liberal feminist theoretical perspective, then, is the need to upset traditional gender roles that place women at a disadvantage (Eisenstein, Radical Future 6). Liberal feminists such as Nan Hunter and Susan Okin claim that same-sex marriage challenges traditional gender roles because by definition only one gender is represented in the relationship (Hunter, "Marriage" 121; Okin, "Sexual Orientation" 45). Okin also claims most same-sex relationships are based upon equality of household responsibilities, which further challenges traditional gender roles ("Sexual Orientation" 44-5). Amy Brandzel further highlights that the very existence of same-sex marriage does, in fact, trouble traditional gender roles of breadwinner and homemaker (188). Same-sex marriage may interrupt gender roles within same-sex relationships. However, this does not guarantee that same-sex relationships do not suffer from unequal distributions of household labor or that same-sex relationships will have any effect on heterosexual marriages. In fact, queer

theorists' claim that same-sex marriage actually serves to reinforce the heteronormative, not disrupt it (Davidson, 253).

Queer theorists' point out that simply allowing access to the institution of marriage emphasizes the heteronormative and its dependence on traditional gender roles because it forces assimilation into the dominant way of being (Walters, 20). As Judith Butler aptly points out, the political framing of the debate does not actually challenge dominant ways of being but subsumes bodies that more closely fit the heteronormative, while at the same time further marking out others who do not or cannot fit this model (Butler, Gender Trouble 183-86). Accordingly, what becomes evident is that we must shift the framing of the political debate for same-sex marriage to become a feasible goal for a "queer/feminism," which I use here as shorthand for liberal feminist and queer theory combined.

Assimilation is the main reason why queer theorists conclude we need to reject the institution of marriage and destroy it (Markson, 285; Sullivan, 29). While their assimilation argument is well founded, rejecting the institution of marriage to destroy it seems to be a solution offered to real political problems that offers no tangible political or legal outcomes. The consequences of refusing to consider same-sex marriage as a viable goal are that same-sex couples have no marriage rights to protect their families. Further complicating the matter, same-sex couples do not have the real option of rejecting the institution because they lack access to it. On the other hand, heterosexuals are privileged in our society and enjoy full access to the marriage contract that offers them protections denied same-sex couples under the law. As I see

it, then, the more probable solution is for heterosexuals to reject the institution of marriage if we are to get any traction under queer theorists' position. If heterosexuals stopped getting married it would get some attention and recognition. It also places responsibility upon the privileged group to help end the oppressive nature of marriage.

Nevertheless, it does not truly make sense that the mere rejection of marriage by gays and lesbians, and for that matter by heterosexuals, is going to transform marriage. This tactic also fails to provide needed legal rights associated with the marriage contract. Ann Ferguson supports this point when she claims there is no way to transform marriage in all contexts: "[b]ut marriage is neither an institution with an essential meaning or function, nor an institution that can be reformed in all contexts, of the 'reform or revolution' dichotomy is overly simplistic" (Ferguson, 51). According to Ferguson, it appears that even if heterosexuals and homosexuals were willing to reject the institution, this wouldn't necessarily change the institution, nor offer needed rights associated with marriage. It is not a change or an addition to the marriage institution that is needed. It is the destruction of the institution. Only when we end marriage do we begin to destroy the heteronormative, which is held firmly in place by the sex/gender system codified largely through marriage.

The final point to deconstruct is that making same-sex marriage legal does not necessarily challenge the oppressive nature of the institution regarding different types of families. For example, a focus on racial and ethic groups related to the institution of marriage makes clear that racism is inherent in this institution (Brandzel, 177-9; Josephson, 275). This is an instance of the oppressive limitations of the contract of

marriage in that it excludes difference. These differences are the various types of extended families that are common in racial and ethic communities (Collins, 47). Thus, when liberal feminists argue for access for same-sex marriage they do not make room for the rights of all families and neglect issues related to race because they do not pay adequate attention to this difference. Generally speaking, Chris Weedon makes it clear that when liberal feminists frame arguments for rights they often overlook the differing needs of families that are not white and middle class ("Postmodernism" 82).

Iris Marion Young further examines these problems specifically related to access to marriage rights and race and class. She concludes that same-sex marriage is inadequate because it does not take issues of race into consideration. "Rights of personal access and tax privileges are often not extended to grandparents, brothers and sisters, cousins, or nonkin household members who share resources and care for one another. This fact makes marriage and the nuclear family unjust to racial and ethic groups where extended-family care taking is the norm" (Young, Intersecting Voices 105). This issue is important in the debate because it makes clear that equal access is not resolved through same-sex marriage. What is evident is there are a host of problems, both historically and currently, with the institution of marriage as it relates to the inclusion of difference (Brandzel, 178-9; Josephson, 275-77). In order to achieve the disruption of oppression related to the marriage contract a strategic political plan is needed that can account for these differences.

Because of the history of the marriage contract we need a political strategy that enables a shift in the debate. I hope this shift can produce an end to the either/or binary that is evident when examining marriage in relation to liberal feminist and queer theory. This shift would invoke a politics of difference that works to affirm and account for the differences associated with race, class, gender, and sexual identity, to name a few. If employed correctly, I believe this strategy can offer access to the rights currently available under the marriage contract while at the same time challenging traditional gender roles and troubling the heteronormative, which is the ultimate goal toward ending the oppression associated with the marriage contract. Further, making same-sex marriage a realistic goal of queer/feminism requires challenging and troubling traditional gender roles and the heteronormative (de Lauretis, iv; Duggan, 168; Weed, ix). By creating legal arguments that do not merely reinforce these norms but instead give voice to difference we fulfill the requirement of challenging dominant norms and produce a real challenge to the heteronormative. I believe this change begins to transform the oppression associated with the marriage contract making support of same-sex marriage feasible for both liberal feminist and queer theory. Further, it has the possible effect of ending the either/or binary and thus resolving the tension between these two valuable theories.

ADVANCING SAME-SEX MARRIAGE THROUGH DIFFERENCE

Resolving the tension of the either/or binary between feminist and queer theory related to same-sex marriage and ending LGBTQ oppression within the legal context

of marriage rights requires an alternative strategy. To this end, I employ my strategic queer/feminist political position. This strategy positions legal arguments granting access to the contract of marriage at the federal level. In the context of the legal debate, it abandons use of arguments that position same-sex couples as being just the "same as" heterosexual couples and changes the messaging to align with a politics of difference. Using legal arguments that do not appeal to sameness can open legal access to the marriage contract to same-sex couples while at the same time leaving room for inclusion of further differences. These difference-based arguments have the potential to create access that does not simply mean assimilation, but the appropriation of group differences (Young, Justice 163).

There is a natural tension between the liberal feminists' rights approach to the same-sex marriage debate and queer theoretical arguments in favor of the destruction of marriage (Ferguson, 51). It appears as if these two arguments cannot be resolved because they loom in opposition. However, both arguments are essentially agitating for the same thing: destruction of the heteronormative by ending oppression and discrimination. As such, by bringing these two theories together we can resolve this tension.

I resolve this tension by (re)constructing a liberal feminist and queer theoretical position that troubles both gender norms and the heteronormative. I agree with liberal feminists that access to the marriage contract should be extended to same-sex couples and that doing so can further transform traditional gender roles. Many liberal feminists believe that traditional gender roles can be transformed in marriages

by individuals making a commitment to conducting their marriages in nontraditional ways (Ferguson, 50). On the other hand, I also agree with queer theorists that mere access to the institution for same-sex couples leaves many outside of the legal protections guaranteed by the marriage contract, which is the real danger of assimilation at play (Butler, "Kinship"_16). Queer theorists give glimpses of what needs to transpire in this debate by turning our attention to issues of assimilation (Ettelbrick, 120-3; Markson, 285).

What is truly at stake in this (re)construction is avoiding the assimilation of bodies into the marriage contract. Assimilation is a means of downplaying differences and focusing on sameness, which works to reinforce the heteronormative. It does this by de-emphasizing differences and subsuming bodies that best fit the new, expanded view while further marking out those that cannot or do not fit as the "other" (Butler, Gender Trouble 182-3; Ettelbrick, 125). When we look to our sameness, we lose any hope of transforming the heteronormative because we simply reaffirm its dominance. Thus, the goal of getting recognition for lesbian and gay relationships should be to open up the possibilities of inclusion, not the assimilation of same-sex couples in to the marriage contract. I believe the tension between liberal feminist and queer theory can consequently be resolved by focusing on a politics of difference that transforms and challenges the heteronormative, which meets the objectives of a "good solution" according to both theories.

A politics of difference provides a framework that begins to challenge the heteronormative because access to the marriage contract will not be granted on the

grounds of sameness or, more importantly, assimilation (Young, Justice 164). It does not claim that access should be granted because same-sex couples are just the same as heterosexual couples. Further, this difference-based strategy helps when arguing at the federal level and forces the issue of equal access to rights under state and federal laws. Currently, the issue plays out in state-level ballot measures and propositions that are typically used to amend state constitutions to define marriage as a union between one man and one woman. The old argument that same-sex couples deserve access because they are just the same as heterosexual couples cannot overcome this definitional challenge when providing access (Brandzel, 193). By definition same-sex couples are not the same as the heterosexual couples described in these state constitutions. Because of this, a strategy that abandons sameness arguments can provide access to the institution of marriage while at the same time problematizing the heteronormative. This in turn can open the door for the destruction of marriage as well.

To understand a politics of difference and how it can be used at the federal level I examine this theory developed by Iris Marion Young. Young's theory is that oppressed groups need to gain access to rights, but not through assimilation. Instead, there needs to be room for difference within our legal system in order to grant rights to minority groups that are not the same as the dominant majority. Young writes:

> I criticize an idea of justice that defines liberation as the transcendence of group differences, which I refer to as an ideal of assimilation…Recent social movements of oppressed groups challenge this ideal. Many in these movements argue that a positive self-

> definition of group difference is in fact more liberatory (Young, Justice 157).

According to Young, rights should not be dependent upon the assimilation of oppressed groups. Rather, rights should be extended simply because one is a citizen, which affirms and legitimizes difference. A politics of differences affirms the value of group difference and does not grant access based upon assimilation into the dominant ways of being.

To achieve this goal, we first need to argue for legal access to the marriage contract for same-sex couples at the federal level. As outlined above, it is important to argue at the federal level because only having state-level rights does not give same-sex couples full legal access to fundamental federal rights. In fact, marriage without federal recognition denies access to more than 1,000 rights to same-sex couples (Appendix A). Essential to achieving the goal of accessing federal rights is the establishment of gays and lesbians as a suspect class in the legal context, an end which is directly supported by a shift in the legal arguments from a sameness position to a difference approach that advocates for rights based upon access through group difference. Further, this move toward legal equality and inclusion is directly in line with liberal feminist theory under which equal access is a key consideration. Simply employing a legal rhetoric is not going to satisfy queer theoretical arguments, however. Instead, by employing a politics of difference that falls in line with and supports the legal reasoning, my strategic queer/feminist political position brings

together liberal feminist and queer theory to trouble the heteronormative and offer access to fundamental rights.

The reasons for using a politics of difference are highlighted by examining the use of arguments that position gays and lesbians as just the same as heterosexuals. If we examine the *Goodridge* case from a critical queer theoretical position, the arguments made bring to light the use of assimilation and how it works to reinforce the heteronormative, not weaken or trouble it. In *Goodridge,* the plaintiffs sought to position same-sex couples as being the same as heterosexual couples: "[t]he plaintiffs in this case seek to marry for the same mix of reasons as heterosexual couples who choose to marry" (Appellant's Brief, Goodridge, 2). The language in this case equates same-sex couples with heterosexual couples, which fails to challenge the heteronormative. This point is made by queer theorists: "[w]hile 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 that the anxieties of queer theorists are well founded" (Brandzel, 193). If, instead, the language in legal arguments was shifted to difference so as not to make appeals to the heteronormative, arguments could be made focusing exclusively on access to rights which would open the possibility of inclusion.

Difference-based arguments for access to the rights and responsibilities associated with the marriage contract which account for, recognize, and value difference are a real challenge to the heteronormative. Bringing focus and value to difference highlights inclusion that is not simply assimilation. It calls our attention to

the fact that lesbians and gays are different and emphasizes the discriminatory nature of their exclusion from fundamental rights. On the other hand, affirming group difference has the potential to position other ways of being as visible and valuable options.

For these reasons, achieving the goal of advancing same-sex marriage and providing access to fundamental rights while at the same time troubling the heteronormative requires employing a new strategy. I suggest a strategic queer/feminist political position. The first and most plausible step is to open up the institution of marriage to same-sex couples. Accomplishing this requires arguments for same-sex marriage at the state Supreme Court level. We also need to make a push for legal arguments that work to establish gays and lesbians as a suspect class. Doing so will gain critical mass and achieve Federal Supreme Court review, which is the critical step in granting access to the fundamental federal rights that are currently denied. Second, in making the case for same-sex marriage the argument needs to be reframed to move towards citizen rights-based reasoning through a politics of difference. This would include arguments that affirm and value difference, not a mere push for assimilation or the use of messages that appeal to sameness. Instead, it would focus on the fact that all citizens should be granted access to the rights that are guaranteed by the US Constitution. This move will open up the institution in a way that does not simply reinforce the heteronormative, but will weaken the historically oppressive nature of the institution because it opens space for the affirmation of differences. When the institution is opened to same-sex couples based on a message

that is inclusive of difference, it leaves the door open to access for "other" citizens who are left out of the current debate. Finally, using this strategy to open the contract of marriage to same-sex couples creates a real possibility of destroying the institution altogether and positioning a more desirable solution. Only by destroying the institution of marriage and replacing it with contracts open to all citizens will the possibility of real inclusion and access occur. As further discussed below, using this strategic queer/feminist political position presents an opportunity to destroy the marriage contract through the use of an unlikely advocate.

THE DESTRUCTION OF MARRIAGE: SUBVERSION AND CO-OPTION OF THE RELIGIOUS RIGHT

Once same-sex marriage is legalized at the federal level, I believe it will create a backlash from the Religious Right. I suspect this backlash will be something of a "Defensive of Marriage Act II," whereby the Religious Right will fight to take the word marriage out of the legal context and place it squarely in the hands of church leaders. When same-sex marriage becomes legal on a federal level there is no other way for the Religious Right to win except to take marriage, which they claim to be an institution created by God, out of the legal context and back to their churches with them. As such, "marriage" becomes something only religious organizations can sanction, which effectively creates a situation where gays and lesbians will no longer be able to get "married." Specifically, lesbians and gays will not be able to get married in the legal context nor through churches belonging to the Religious Right.

However, even today more progressive churches currently perform same-sex marriages and unions. When marriage is removed from the legal context they can still perform these marriages. Nevertheless, same-sex couples will not be able to get married in the sense that marriage will no longer be a legal contract and religious organizations will have the right to deny same-sex marriage in their own church.

When I implicate the Religious Right I refer to the religious factions in the US that have formed an alliance to block same-sex marriage and the advancement of political rights for the LGBTQ community. I use the term Religious Right to indicate not only the Christian Right but also traditionalist religious sects such as the Catholic Church, various evangelical churches, mainline Protestant Churches including the Methodist Church and Presbyterian Church, Church of Jesus Christ of Latter Day Saints or Mormons, and Orthodox Judaism (Rom, 4-5; Campbell, 137-145; Cahill, 155-165). David Campbell and Carin Robinson provide further definition: "[t]raditionalists from within various branches of Protestantism have joined forces with like – minded Catholics, Mormons, Jews, and Muslims to oppose gay marriage because they all share a belief in a transcendent authority, namely God, that holds the institution of marriage as limited to relationships between men and women" (133). The term Religious Right, thus, comprises the above religious denominations that work together and separately to derail LGBTQ rights in the US.

It is also vitally important to give special attention to Mormons because in recent history they have targeted the progression of homosexual rights, especially in California. The latest example was the Mormons' concerted efforts to block same-sex

marriage in California through proposition 8 (Galle, 370-1; Shotwell, 671-3). Mormons also staged the earliest attempt to block same-sex marriage in California. "Consider one of the earliest ballot initiatives against gay marriage, Proposition 22 in California, which was on the ballot in 2000. The campaign in favor of Proposition 22 featured cooperation among Catholics, evangelical Protestants, and Mormons" (Campbell, 139). Katie Lofton further explains that "[t]he Mormon Church directly supported the initiative, encouraging its members to provide financial and other support. The Mormon Church conducted similar campaigns in support of comparable measures in Alaska and Hawaii" (Lofton, 321). Thus, it is clear the Mormons have played a very successful role in blocking same-sex marriage.

The influence of the Religious Right is a primary reason why same-sex marriage is not legal today (Cahill, 165). This group has effectively conspired to get measures on ballots that change state constitutions to define marriage as between one man and one woman. "The idea that the Constitution should be amended to limit individual liberty and even to circumscribe the nearly sacrosanct doctrine of state's rights is testament to the degree of influence of the Religious Right" (Gilreath, 108). The Religious Right is well funded and has religious followers that are effectively influenced to vote for these discriminatory amendments.

In fact, the sheer volume of voters and money attributable to the Religious Right is a leading reason why I predict that a backlash from the Religious Right is sure to ensue if and when the federal recognition of same-sex couples is achieved. Also, the size of the membership of the Religious Right and their commitment to their

respective religious faiths makes it imperative to consider their influence on the advancement of the issue at hand. "The religious denominations with by far the largest memberships in the United States appear to be implacably opposed to same-sex marriage" (Rom, 4). Gilreath notes that "[o]ne cannot discuss the place of the gay individual in American society without also discussing the American fundamentalist religious phenomenon that has done much to shape gay life and to keep the progression in America noticeably more limited than the progression of gay rights in most of the remaining democratic West" (Gilreath, 43). It is clear the Religious Right has a stronghold on LGBTQ politics in the US, most notably because of their large numbers and commitment. With the influence of the Religious Right established in this debate I now turn attention to my proposed destruction of marriage through the subversion and co-option of the Religious Right.

How will opening the institution of marriage to same-sex couples weaken the marriage contract and produce the foundation for destroying the institution of marriage? I surmise that opening the institution of marriage to same-sex couples at the federal level will subvert and co-opt the Religious Right based on the very stronghold that religion has on marriage. Once the US Supreme Court establishes gays and lesbians as a suspect class, makes same-sex marriage legal and strikes down anti-gay legislation no more avenues exist that the Religions Right can maneuver to ban government-sanctioned same-sex marriage. Just as in *Loving v. Virginia*, discrimination will be struck down. In anticipation of the legalization of same-sex marriage, subversive messages need to be circulated from a seemingly conservative

base; perhaps someone such as Andrew Sullivan. These subversive messages would revolve around the idea that churches should have the sole say over the union of marriage due to its long history and tradition of being a religious ceremony. This co-option of the Religious Right to agitate for change would work to further what queer theorists and many feminist wanted all along, the separation of marriage from legal rights.

One of my basic assumptions in this strategic political plan is that based on the sheer number of individual members of the Religious Right they can get just about anything passed through voter initiatives. Therefore, I contend, if we can subvert the Religious Right with the legalization of same-sex marriage we open up the real possibility of getting them to co-opt the political objective of removing marriage from its legal context. Essentially, the Religious Right is the reason why we do not have same-sex marriage. The first legal battle backed by the Religious Right focusing on same-sex marriage was fought in Hawaii (1993). Katie Lofton and Donald Haider-Markel argue this very point, stating that the conservative backlash to the Hawaii case and the enactment of state constitutional amendments defining marriage as between one man and one woman were the workings of the Religious Right. "[S]ame-sex marriage evokes a strong religious-based morality…The practice (marriage) not only deals with a set of legal obligations and rights, but also includes a social and religious component…Indeed, marriage is a creation of religious traditions" (Lofton, 315). Thus, it is clear that the reason same-sex couples do not have access to the institution of marriage is because of the push for state constitutional amendments largely

implicating the Religious Right. If we can also co-opt them into removing marriage from the legal context, it seems at least the legal destruction of marriage is a real possibility.

The move I advocate for when making marriage open to same-sex couples subverts the Religious Right's control over marriage. This also opens the possibility for co-option that would lead conservatives back into their churches for marriage recognition. I predict the legalization of same-marriage will prompt the Religious Right to vehemently argue for taking marriage out of the legal context and back to their religious organizations. In anticipation of this response, once the institution of marriage is open to same-sex couples we need to push the subversive message of taking marriage out of the legal context and putting it back into the church. If, as expected, this message is co-opted by the Religious Right I believe they will lobby government and voters to remove marriage from government control. In the eyes of the Religious Right, marriage is a sacred institution between man and woman, and God is the only one who confers this status. Thus, if same-sex marriage is legalized it is feasible the Religious Right will react this way because their remaining options for controlling marriage are limited. To this end, I hope the co-option of the Religious Right, with all of their many resources, will be able to destroy state-sanctioned marriage.

If we are successful in separating marriage from legal rights, then what? What about practical implications of accessing rights, which is where we began this whole conversation. Most, including the Religious Right, will still want and need

government rights related to relationships. If the Religious Right is successful in advancing the destruction of marriage, they will need some other government contract that will ensure the rights currently associated with marriage. Thus, Federal recognition of the right of same-sex couples to marry will force a new type of contract to provide legal rights in relationships. Iris Marion Young suggests universal domestic partnerships, which would carry all of the same legal rights and responsibilities as the current marriage contract. But do we need universal domestic partnerships as highlighted by Young or do we need something different?

DECONSTRUCTION OF DOMESTIC PARTNERSHIPS

Why not just make universal domestic partnerships the legal goal of this discussion? Important to this conversation is the deconstruction of the word domestic. This is important because the term “domestic” is used in numerous alternative contracts that offer same-sex couples some of the rights associated with marriage. Deconstructing this word makes visible the domestication of this contract. It connotes the everyday meaning of the word, as in “to domesticate.”

A straightforward definition by the *Encarta* dictionary identifies “domestic” as relating to home; relating to family; not wild kept as a farm animal; not foreign; enjoying home. (Encarta) As a noun, this word means household servant, product not originating abroad (Encarta). At first blush, these definitions show a pattern with this word domestic that has implications for various possibilities; none of them seem very palatable. Deconstructing domestic highlights its relation to assimilation language at

work. Consider that to domesticate means, "[t]o make fit for civil life or the civilized home and family…to adapt to life in intimate association with and to the advantage of humans…to bring to the level of ordinary people" (Merriam-Webster's Collegiate Dictionary, 2003). This has a tone of assimilation when related to relationships, especially when the definition employs terms like to make fit, to adapt, and ordinary people in relation to the family.

This brings into focus questions regarding the implications of what a family is, generally and politically. Using the dictionary definitions as context, it appears that to domesticate gays and lesbians through "domestic partnerships" is a form of adapting or assimilating them into the prevailing definition of family. However, it is clear that they do not meet the ordinary definition of family because they are marked out as the "other" through their lack of domestication. This lack of domestication is evidenced by the fact that they lack marriage rights.

As previously noted, domestic partnerships do not offer all of the same rights as the marriage contract. For example, consider that DOMA effectively denies to same-sex couples 1,138 federal rights (Appendix A). Because of the definitions of "domestic" and the current status of domestic partnerships lacking full access to marriage rights, the word domestic should be thoughtfully considered when used to advance same-sex marriage rights and, in turn, to offer alternative contracts to the institution of marriage.

This deconstruction highlights the political problems surrounding the meaning of the word domestic, which seems to implicate assimilation. This is because when

used to refer to a contract for same-sex couples it offers only limited access because it lacks admission to federal rights. An additional issue is that it is a contract offered only to same-sex intimate, coupling relationships. Why are the intimate coupling relationships an issue here? The reason is because the focus on intimacy fails to give voice to different forms of families not based upon relationships where the partners are presumed to have regular sexual relations with one another.

Young emphasizes this issue when she examines the link between sexual rights and the marriage contract. She writes: "[t]he assumption remains strong, moreover, that a family implies that some member of the household has regular sex with another member of the household" (Intersecting Voices 109). And that, furthermore, "[t]he legal and cultural abolition of the idea of sexual rights, and the formal disconnect of sex from family, would truly be a revolutionary change" (Young, Intersecting Voices 109). Privileging coupling relationships that are presumed to have a sexual component creates a hierarchy of access for families that care emotionally, physically, and financially for each other but that are not sexually intimate. This highlights issues surrounding the definition of the family as it relates to the institution of marriage.

THE FAMILY

Issues of inequality come into play when we consider that marriage is also used to define a family. Defining the family through marriage highlights issues of difference because, as stressed by Patricia Hill Collins, the traditional definition of family silences those that do not fit nicely into these parameters. "Situated in the

center of family values debates is an imagined traditional family idea. Formed through a combination of marital and blood ties, "normal" families should consist of heterosexual, racially homogeneous couples who produce their own biological children" (Collins, 47). One of the problems with the traditional idea of family is that, "[i]t is organized not around a biological core, but a state sanctioned, heterosexual marriage that confers legitimacy not only on family structure itself but on children born in this family" (Collins, 47). Collins, thus, purports that, "[i]n general, everything the imagined traditional family ideal is thought to be, African-American families are not" (Collins, 47). Accordingly, what is brought to light for many African-American families is the fact that they do not fit this traditional notion of what defines a family.

Essentially, if a family does not meet the traditional definition, then its members cannot access legal rights and responsibilities that are extended by the state related to the marriage contract. Thus, not only same-sex couples need access to marriage rights; all families need access regardless of what their family looks like. As discussed above, the use of domestic partnerships does open ideas about the inclusion of difference related to families. However, they too have a history of being unequal. Accordingly, I present an alternative to accessing marriage rights in the form of "contracts of care."

CONTRACTS OF CARE

Once state sanctioned marriage is destroyed, it will open the door for alternative contracts that carry the same rights associated with marriage. At that time, discussion can be had as to what different types of relationships and contracts would look like. This process, however, is not about removing the state from relationships. It is still desirable to provide legal protections to all families.

> [T]he removal of all legal definition, relation, and adjudication of family relationships would not serve justice, for several reasons…Legal regulation of families is necessary to protect adults who are vulnerable within families, either because of choices they have made that render them economically dependent or because they are old, ill, or disabled (Young, Intersecting Voices 107).

However, our goal should not be to remove all state involvement in familial relationships, but to extend the meaning of family to include all families within its protections. This point is pertinently outlined by Young:

> If we are not to privilege particular relationships or ways of life, then what it means to be a family must be redefined and pluralized. I define family as people who live together and/or share resources necessary to the means of life and comfort; who are committed to taking care of one another's physical and emotional needs to the best of their ability; who conceive of themselves in a relatively long-term, if not permanent relationship; and who recognize themselves as a family (Intersecting Voices 105-106).

Thus, Young comes to a definition of family that leaves room for difference and can be included in contracts of care. I concur with her definition. It does not force or require assimilation into the heteronormative. In fact, this is a great example of what a politics of difference can look like when we end the oppression of state sanctioned marriage that requires assimilation.

In addition to suggesting we redefine family and extend equal access, Young offers universal domestic partnerships as a solution to the marriage contract. This is not a completely new concept considering we already have examples of what domestic partnerships can look like. States such as California and Oregon offer domestic partnerships that extend all of the same rights and responsibilities of marriage at the state level. Young takes the idea of domestic partnerships a step further.

> Domestic partnership, in the universalized and enlarged form that I conceive it, would carry all the current rights and obligations of marriage having to do with property, support, resources, and access to one another in institutionalized settings – rights of joint ownership, inheritance, to be carried on medical and life insurance policies; immigration rights; rights to visit partners housed in hospitals or prisons; rights to be consulted in treatment options; rights to sign on consent forms for; and rights to claim continued support at the time of partnership dissolution (Young, Intersecting Voices 110).

Young's solution values all families and goes a long way toward reaching the end goal that my political maneuvers aim to accomplish. However, for all the reasons stated above, I advocate for a comprehensive inclusion of all families into the legal protections, rights and responsibilities associated with marriage through what I term "contracts of care."

When I use the term "contract of care" I refer to a concept similar to Young's use of universal domestic partnerships. I draw upon her work as it relates to the need to open up access to legal rights and responsibilities that extends the rights of the marriage contract. Further, I hope contracts of care will provide legal rights to more than just monogamous, heterosexual couples that are presumed to have sex. The main concept behind contracts of care is that they extend all of the rights traditionally

associated with marriage based upon a commitment of emotional and economic support for the individuals involved. This makes these rights available to many more families and undermines the notion that the rights associated with marriage should only be extended to those having sexual relations.

Contracts of care carry all of the rights that marriage currently does. However, the distinction is that contracts of care affirm the differences associated with the multitudes of family relationships. This is because these contracts are not contingent on a sexual relationship, but would be extended to families that care for one another emotionally, physically, and financially. They represent a disconnection from a singular definition of a traditional family and do not privilege heterosexual couples. These contracts would be open to a maximum of six persons who are established as cohabiting adults committed to the long term care and financial support of one another. They would also include the rights associated with children that are involved with these relationships as all adult members of the relationship would be presumed to have responsibility for the children that are subsumed in their relationship. Contracts of care would also incorporate rights related to the work place including insurance and leaves of absence to care for family members. This comprehensive definition would also serve to end the exclusive rights associated with blood kin especially in relation to children.

Contracts of care offer a solution to assimilation, access to legal rights, and an end to an intimate legal contract that has a long history of oppression. This is because contracts of care value and affirm differences in the multiple forms that family can

take. Contracts of care also disrupt the historical oppression associated with marriage because at present these contracts do not have a history. They would not be a form of assimilation into the dominant heteronormative because the traditional heterosexual couple and family are not taken as the norm for entrance. Legal rights would be based upon the understanding that the people involved are committed to the long term care of one another. Thus, offering contracts of care as an alternative contract to marriage offers all of the same legal rights while troubling the heteronormative and completely undermining traditional gender norms.

Also important to note is policy formation in relation to contracts of care. We need to use a politics of difference in this instance so that we provide access and disrupt assimilationist measures with contracts of care. As previously mentioned, if access is lent in terms of a universal subject position we risk inclusion through assimilation. To mitigate this effect we need to consider some basic questions when formulating these contracts of care. Such as: Does this contract account for issues involving race, class, gender, and sexual identity in relation to access? Are the differences made visible and affirmed? A politics of difference is accounted for if the questions posed in relation to race, class, gender, and sexual identity are made visible and access is made available to all said groups. Doing so ensures these differences are voiced, visible, and positioned as being valued and legitimate. Young validates this point as well when she states that, "[p]olicies that take notice of the specific situation of oppressed groups can offset these disadvantages" (Young, Justice 173). Policy

questions in line with my contracts of care provide access that values difference not assimilation.

CONCLUSION

The arguments raised and positioned as an either/ or binary in relation to liberal feminist and queer theory raise some valuable points that should not be dismissed. However, as queer theorists aptly demonstrate binaries of opposition can be problematic (Butler, Gender Trouble 179-183). Dichotomies are at the root of the heteronormative which confers privileges to heterosexuals while it disadvantages sexual minorities (Seidman, 114-130). Thus, employing a binary of opposition in relation to either allowing same-sex marriage or destroying marriage in my estimation is problematic because it continues to employ the use of reasoning that has resulted in the privileged status of heterosexuals. With these considerations in mind my conclusion is that the use of my strategic political queer/feminism will lend insight to reworking this strict either/or binary that assert practical steps that have the potential to strike a balance between liberal feminist and queer theory, and in practical terms opens legal access.

With this tension between liberal feminist and queer theory visible it is important to note that I am not dismissing or completely diminishing all of the theoretical tensions that exist between the two. Instead, I seek to position a possible solution to either/or binaries in relation to marriage. The focus here is to destabilize this binary in such a way that it troubles the heteronormative. This trouble is produced

through the employment of a politics of difference, which resists assimilation. This highlights the practical as well. Directly bound together here are the practical issues of access to benefits and responsibilities and the legal contract of marriage. What is made evident then is that to access the benefits associated with the legal contract of marriage one has to be able to access this contract. Presently, marriage is inextricably linked to state and federal benefits. My work seeks to destroy this link. With contracts of care I position the destruction or removal of marriage from the legal context in which it currently exists. Further, these contracts open important state and federal rights to all families that perceive of themselves as being in a long term relationship that are committed to the emotional, physical, and financial care of said family.

CONCLUSION

Liberal feminist and queer theories are the driving moral reasoning behind my considerations regarding legalizing same-sex marriage. These theories take account of the issues involved with positioning a normative question in relation to the normative subject (Walker, "Moral Epistemology" 365-8; Weedon, Feminist Practice 74; "Postmodernism" 75). Further, I approach this political problem by asserting that the desirable outcome is equitable access, which is a basic tenet of liberal feminist theory (MacKinnon, 117). Not only is liberal feminist theory concerned with legal access, it also recognizes the need to trouble traditional gender norms (Eisenstein, Radical Future 6). These are important considerations in the debate about same-sex marriage and I believe legal access should be extended to all citizens. However, the current framing of the issue related to accessing the institution of marriage for same-sex couples leaves many "others" unable to access these same legal rights (Davidson, 252; Markson,285). Queer theorists enter this debate by aptly demonstrating that the current debate surrounding same-sex marriage is often a form of assimilation (Brandzel, 189). The political problem evidenced by queer theorist is that the use of assimilation positions "others" who cannot or do not fit within the institution of marriage (Butler, "Kinship" 16).

With these issues in mind, I attempt to create a strategy that values difference and while at the same time extending legal access. This is the balance I wish to achieve with the melding of liberal feminist and queer theories. In outlining my

project for inclusion, I hope initially opening the marriage contract to same-sex couples will strategically lead to the removal of the term "marriage" from the legal context. To this end, I rely on precedent establishing marriage as a basic, fundamental right guaranteed by the Ninth and Fourteenth amendments of the Federal Constitution that should not be denied to any citizen. The US Supreme Court set this precedent through the cases of *Meyer v. Nebraska* (1923), *Griswold v. Connecticut* (1965), *Loving v. Virginia* (1967), *Zablocki v. Redtail* (1978), and *Turner v. Safely* (1987) (Purvis, "Right to Contract" 157; Pull, 25; Parshall, 11; Strasser, On Same-Sex Marriage 6; Graff, 45).

In reviewing the case law on marriage rights, it is clear we must make legal arguments asserting the right of all citizens to access the institution of marriage and to establish same-sex couples as a historically oppressed group or "suspect class." The classification of race as a suspect class in the *Loving* case was pivotal in the court's finding that Virginia's law banning interracial marriage was unconstitutional (Oh, 597). With race established as a suspect class, Virginia failed in its burden of proving that its anti-miscegenation laws were enacted for reasons free of discrimination and were necessary to some vital state security interest. This is because the Supreme Court employed a "strict scrutiny" standard of review, which makes it nearly impossible to enact laws that limit fundamental rights for such groups (Fallon, 1273;Winkler, 227).

The first step toward gaining access to marriage for same-sex couples through the courts requires strategically constructing legal arguments that do not appeal to

"sameness" but, instead, employ the messaging of a politics of difference. The politics of difference outlined by Iris Marion Young affirms and values differences (Young, Justice 163). Also important is taking the legal fight to the federal level. Only at the federal level can we end the Religious Right's takeover of state legislation and state constitutions to define marriage as a union between a man and a woman. Success at the federal level will also create legal access to many federal rights, access which is currently lacking. Critical to advancing same-sex marriage to the federal level is taking the necessary steps to reach the US Supreme Court. This entails arguing in the lower courts and State Supreme Courts to gain critical mass so the issue of same-sex marriage will be reviewed by the Supreme Court.

Perhaps the most critical aspect of this strategy is employing a politics of difference. By using a politics of difference inclusion of same-sex couples can be positioned not as an instance of assimilation, but as a move to affirm and value difference. Doing so makes the move towards same-sex marriage a tenable goal for both liberal feminist and queer theorists. This is because affirmation and valuation of differences can be positioned to meet the requirements of both. Using a politics of difference troubles the heteronormative and, in turn, troubles traditional gender roles by asserting the value of different types of families. Arguing through difference also leaves the door open for "others" who are not framed by the current same-sex marriage legal debate by valuing all types of families, not just heterosexual procreating families (Young, Justice 105, 157, 164). This part of my strategy aims to challenge the heteronormative privilege currently at work in denying same-sex

couples access to a legal contract that protects their families. Opening marriage to same-sex couples will begin to chip away at the stronghold the heteronormative exercises. Nevertheless, allowing same-sex marriage does not completely destroy the heteronormative. It does trouble it, but does not put an end to heterosexist privilege and the history of oppression associated with the marriage contract.

Ending the privileged status of the heteronormative in relation to the marriage contract can only transpire when we remove the marriage contract from its legal context. I believe opening marriage to same-sex couples will serve as a subversive co-option of the Religious Right to advocate for the removal of state-sectioned marriage. I expect doing so will force the Religious Right back into their churches to affirm marriage. As outlined in the literature review, the main reason same-sex couples now lack access to their legal rights associated with marriage is that the Religious Right has co-opted state legislation and constitutional amendments to define marriage as between a man and a woman (Cahill, 165; Schacter, "Courts" 1191). Therefore, it seems clear the Religious Right has a powerful hold and sway in the politics of marriage (Gilreath, 108).

Essentially, when legal arguments are made asserting the value of difference and access to the marriage contract is granted to same-sex couples at the federal level, it will subvert the Religious Right because they will no longer be able to restrict legal access to same-sex couples. This will force the Religious Right to affirm their marriages through their churches. If the Religious Right is forced back into their churches to affirm the sanctity of marriage, a co-option is possible. This co-option

will occur when, in anticipation of the legalization of same-sex marriage, the idea is planted that churches should take the word marriage out of its legal context and place it back in the hands of church leaders. Co-option will facilitate the Religious Right's agitation for the removal of "marriage" from its legal, state-sanctioned position and replacing it with rights and responsibilities through a different state-sanctioned contract. I conclude this subversion and co-option of the Religious Right will entice them to lobby for what we queers and feminists have wanted all along, the destruction of the legal marriage contract.

Marriage is riddled with a host of political issues centered on concerns of access and equal rights, which are bound up with racism, sexism, and heterosexism (Young, Intersecting Voices 105; Brandzel, 172; Seidman, 114-130; Warner, The Problem 82). This effectively positions the destruction of the legal institution of marriage as the most plausible way to end the heteronormative. Once the legal institution of marriage is removed from the legal landscape, it can be replaced with "contracts of care" that are open to all types of families. This, I hope, will be a serious move towards ending heterosexual privilege.

My strategic political queer/feminism is a practical theory that can be applied toward creating a society that recognizes and upholds the rights of all citizens. This approach offers not only a solution to the liberal feminist and queer theory either/or binary related to the same-sex marriage debate, it also offers access to same-sex couples in the most immediate sense. It is a progressive theory that, if employed correctly, offers a strategy for eliminating the privileged status of heterosexuals within

the context of marriage by affirming the value of difference. I anticipate this strategy of employing a politics of difference will lead to the co-option of the Religious Right. This will result in the removal of marriage from its current legal context to be replaced with what I offer as "contracts of care," which are open to all families.

So what about the alternative in this strategy? What if we don't win federal rights for same-sex marriage? These questions are in line with step four of my methods—starting over or the examining the solution and the "[e]xtent it fulfils, and to what extent it modifies the initial project" (Foucault, <u>Archaeology</u> 46; Scheurich, 97). Because my political strategy has not yet been employed, I can only speculate as to what the results might be. Thus, attempts to understand the outcomes of such a solution are cursory. If same-sex marriage does not win at the federal level, we cannot necessarily subvert the Religious Right nor will we be able to co-opt them to canvass our message of removing marriage from the legal context in which it now exists. We would still lack needed rights due to legislation largely put in place through voter initiatives lead by the Religious Right. So what changes if same-sex couples are not granted access to our fundamental federal marriage rights? Virtually nothing. The laws currently in place barring same-sex couples from fundamental rights will still be there blocking access and making group difference a liability in our society, at least in the context of marriage. Same-sex couples, and all sexual minorities for that matter, will still be positioned as an abject "other" the marriage contract wishes to purge its parameters of. Essentially, this is the system now in place. As such, I don't anticipate any substantial changes.

This is why I feel it is critical to address the fundamental right of marriage at the federal level. Without overturning state laws that make same-sex marriage illegal and removing federal legislation, we continue to lack access to marriage rights. Not only is the US Supreme Court the only court that can once and for all overturn the discriminatory legislation and state constitutional amendments that currently block access, it also does not appear there are any other clear options to making access to these legal rights a reality. Traditionally, civil rights laws have been won and lost at the federal level. If we try our case at the federal level the possibility of failure exists. However, I think this is a failure worth risking because without federal recognition we will continue to lack full access to the rights and responsibilities associated with the marriage contract. If we do face failure, then what? Realistically, I do not see losing anything other than respect and faith in a Supreme Court that is supposed to uphold the sanctity of the Federal Constitution, a document committed to granting fundamental rights to all citizens.

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APPENDICES

APPENDIX A

Federal Rights Denied to Same-Sex Couples

In January 2004, the Government Accounting Office produced a report entitled Defense of Marriage Act: Update to Prior Report. This document updated the GAO's 1997 report wherein it concluded that 1,049 federal statutory provisions existed in which federal benefits, rights and privileges were implicated by marital status (1). Because of the Defense of Marriage Act, same-sex couples are necessarily excluded from enjoying these federal protections (1). The 2004 report concluded that as of December 31, 2003, the number of federal statutory provisions conferring federal benefits, rights and privileges based on marital status had risen to 1,138 (1).

The GAO organized its report into 13 general categories capturing the types of federal protections denied to same-sex couples as follows:

> CATEGORY 1—SOCIAL SECURITY AND RELATED PROGRAMS, HOUSING, AND FOOD STAMPS
>
> This category includes the major federal health and welfare programs, particularly those considered entitlements, such as Social Security retirement and disability benefits, food stamps, welfare, and Medicare and Medicaid. Most of these provisions are found in Title 42 of the United States Code, Public Health and Welfare; food stamp legislation is in Title 7, Agriculture.
>
> CATEGORY 2—VETERANS' BENEFITS
>
> Veterans' benefits, which are codified in Title 38 of the United States Code, include pensions, indemnity compensation for service-connected deaths, medical care, nursing home care, right to burial in veterans' cemeteries, educational assistance, and housing. Husbands or wives of veterans have many rights and privileges by virtue of the marital relationship.

CATEGORY 3—TAXATION

While the distinction between married and unmarried status is pervasive in federal tax law, terms such as "husband," "wife," or "married" are not defined. However, marital status figures in federal tax law in provisions as basic as those giving married taxpayers the option to file joint or separate income tax returns. It is also seen in the related provisions prescribing different tax consequences, depending on whether a taxpayer is married filing jointly, married filing separately, unmarried but the head of a household, or unmarried and not the head of a household.

CATEGORY 4—FEDERAL CIVILIAN AND MILITARY SERVICE BENEFITS

This category includes statutory provisions dealing with current and retired federal officers and employees, members of the Armed Forces, elected officials, and judges, in which marital status is a factor. Typically these provisions address the various health, leave, retirement, survivor, and insurance benefits provided by the United States to those in federal service and their families.

CATEGORY 5—EMPLOYMENT BENEFITS AND RELATED PROVISIONS

Marital status comes into play in many different ways in federal laws relating to employment in the private sector. Most provisions appear in Title 29 of the United States Code, Labor. However, others are in Title 30, Mineral Lands and Mining; Title 33, Navigation and Navigable Waters; and Title 45, Railroads. This category includes laws that address the rights of employees under employer-sponsored employee benefit plans; that provide for continuation of employer-sponsored health benefits after events like the death or divorce of the employee; and that give employees the right to unpaid leave in order to care for a seriously ill spouse. In addition, Congress has extended special benefits in connection with certain occupations, like mining and public safety.

CATEGORY 6—IMMIGRATION, NATURALIZATION, AND ALIENS

This category includes federal statutory provisions governing the conditions under which noncitizens may enter and remain in the United States, be deported, or become citizens. Most are found in Title 8,

Aliens and Nationality. The law gives special consideration to spouses of immigrant and nonimmigrant aliens in a wide variety of circumstances. Under immigration law, aliens may receive special status by virtue of their employment, and that treatment may extend to their spouses. Also, spouses of aliens granted asylum can be given the same status if they accompany or join their spouses.

CATEGORY 7—INDIANS

The indigenous peoples of the United States have long had a special legal relationship with the federal government through treaties and laws that are classified to Title 25, Indians. Various laws set out the rights to tribal property of “white” men marrying “Indian” women, or of “Indian” women marrying “white” men. The law also outlines the descent and distribution rights for Indians’ property. In addition, there are laws pertaining to health care eligibility for Indians and spouses and reimbursement of travel expenses of spouses and candidates seeking positions in the Indian Health Service.

CATEGORY 8—TRADE, COMMERCE, AND INTELLECTUAL PROPERTY

This category includes provisions concerning foreign or domestic business and commerce, in the following titles of the United States Code: Bankruptcy, Title 11; Banks and Banking, Title 12; Commerce and Trade, Title 15; Copyrights, Title 17; and Customs Duties, Title 19. This category also includes the National Housing Act (rights of mortgage borrowers); the Consumer Credit Protection Act (governs wage garnishment); and the Copyright Act (spousal copyright renewal and termination rights).

CATEGORY 9—FINANCIAL DISCLOSURE AND CONFLICT OF INTEREST

Federal law imposes obligations on members of Congress, employees or officers of the federal government, and members of the boards of directors of some government-related or government chartered entities, to prevent actual or apparent conflicts of interest. These individuals are required to disclose publicly certain gifts, interests, and transactions. Many of these requirements, which are found in 16 different titles of the United States Code, apply also to the individual's spouse.

CATEGORY 10—CRIMES AND FAMILY VIOLENCE

This category includes laws that implicate marriage in connection with criminal justice or family violence. The nature of these provisions varies greatly. Some deal with spouses as victims of crimes, others with spouses as perpetrators. These laws are found primarily in Title 18, Crimes and Criminal Procedure, but some statutory provisions, dealing with crime prevention and family violence, are in Title 42, Public Health and Welfare.

CATEGORY 11—LOANS, GUARANTEES, AND PAYMENTS IN AGRICULTURE

Under many federal loan programs, a spouse's income, business interests, or assets are taken into account for purposes of determining a person's eligibility to participate in the program. In other instances, marital status is a factor in determining the amount of federal assistance to which a person is entitled or the repayment schedule. This category includes education loan programs, housing loan programs for veterans, and provisions governing agricultural price supports and loan programs that are affected by the spousal relationship.

CATEGORY 12—FEDERAL NATURAL RESOURCES AND RELATED PROVISIONS

Federal law gives special rights to spouses in connection with a variety of transactions involving federal lands and other federal property. These transactions include purchase and sale of land by the federal government and lease by the government of water and mineral rights.

CATEGORY 13—MISCELLANEOUS PROVISIONS

This category comprises federal statutory provisions that do not fit readily in any of the other 12 categories. Federal provisions that prohibit discrimination on the basis of marital status are included in this category. This category also includes various patriotic societies chartered in federal law, such as the Veterans of Foreign Wars or the Gold Star Wives of America (16-18).

APPENDIX B

Statewide Marriage Prohibitions*

States with constitutional amendments restricting marriage to one man and one woman (29 states).

Alabama (2006)
Alaska (1998)
Arizona (2008)
Arkansas (2004)
California (2008)
Colorado (2006)
Florida (2008)
Georgia (2004)
Kansas (2005)
Idaho (2006)
Kentucky (2004)
Louisiana (2004)
Michigan (2004)
Mississippi (2004)
Missouri (2004)
Montana (2004)
Nebraska (2000)
Nevada (2002)
North Dakota (2004)
Ohio (2004)
Oklahoma (2004)
Oregon (2004)
South Carolina (2006)
South Dakota (2006)
Tennessee (2006)
Texas (2005)
Utah (2004)
Virginia (2006)
Wisconsin (2006)

States with laws restricting marriage to one man and one woman.
(12 states).

Delaware
Hawaii
Illinois
Indiana
Maine
Maryland
Minnesota
North Carolina
Pennsylvania
Washington
West Virginia
Wyoming

States where the law or constitutional amendment has language that does, or may, affect other legal relationships, such as civil unions or domestic partnerships. (18 states).

Alabama
Arkansas
Florida
Georgia
Kentucky
Idaho
Louisiana
Michigan
Nebraska
North Dakota
Ohio
Oklahoma
South Carolina
South Dakota
Texas
Utah
Virginia
Wisconsin

*Excerpted from the Human Rights Campaign report on Statewide Marriage Prohibition Laws.

APPENDIX C

Marriage Equality & Other Relationship Recognition Laws*

States that issue marriage licenses to same-sex couples.
(5 states and D.C.)

Connecticut (2008)
District of Columbia (2010)
Iowa (2009)
Massachusetts (2004)
New Hampshire (2010)
Vermont (2009)

States that recognize marriages by same-sex couples legally entered into in another jurisdiction.
(2 states)

Maryland (2010)
New York (2008)

States that provide the equivalent of state-level spousal rights to same-sex couples.
(5 states)

California (1999, 2005)
Nevada (2009)
New Jersey (2007)
Oregon (2008)
Washington (2007, 2009)

States that provide some state-level spousal rights to same-sex couples.
(4 states)

Colorado (2009)
Hawaii (1997)
Maine (2004)
Wisconsin (2009)

States that do not have a registry but provide certain benefits to statutorily defined domestic partners.
(2 states)

Maryland
Rhode Island

*Excerpted from the Human Rights Campaign report on Marriage Equality & Other Relationship Recognition Laws.

APPENDIX D

Hospital Visitation Laws*

States extending equal hospital visitation rights to same-sex spouses or partners through marriage equality or statewide relationship recognition.
(10 states and D.C.)

California
Connecticut
District of Columbia
Iowa
Massachusetts
Nevada
New Hampshire
New Jersey
Oregon
Vermont
Washington

States extending equal hospital visitation rights to same-sex spouses or partner through specific provisions as part of a limited relationship recognition statute.
(5 states)

Colorado
Hawaii
Maryland
New York
Wisconsin

States extending hospital visitation rights through a designated visitor statute.
(8 states)

Delaware
Illinois
Kentucky
Minnesota
Nebraska
North Carolina
Virginia
West Virginia

States extending hospital visitation rights to a designated healthcare agent.
(2 states)

Georgia
South Carolina

*Excerpted from the Human Rights Campaign report on Hospital Visitation Laws.

APPENDIX E

Parenting Laws: Second Parent Adoption*

States where second-parent adoption is an option for same-sex couples statewide.
(10 states and D.C.)

California
Colorado
Connecticut
District of Columbia
Illinois
Massachusetts
New Jersey
New York
Pennsylvania
Vermont
Wisconsin

States where second-parent adoption is an option for same-sex couples in some jurisdictions.
(16 states)

Alabama
Alaska
Delaware
Hawaii
Iowa
Louisiana
Maryland
Minnesota
Nevada
New Hampshire
New Mexico
North Carolina
Oregon
Rhode Island
Texas
Washington

States where same-sex couples are prohibited from adopting.
(3 states)

Florida
Mississippi
Utah

Parenting Laws: Joint Adoption*

States where joint adoption is an option for same-sex couples statewide.
(14 states and D.C.)

California
Colorado
Connecticut
District of Columbia
Illinois
Indiana
Iowa
Maine
Massachusetts
New Jersey
New York
Oregon
Vermont
Washington
Wisconsin

States where joint adoption is an option for same-sex couples in some jurisdictions.
(2 states)

Nevada
New Hampshire

*Excerpted from the Human Rights Campaign report on Parenting Laws in the U.S.