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LOVING BEFORE AND AFTER THE LAW

Angela P. Harris*

INTRODUCTION

Since the founding of the nation, marriage has played both a central role in the American political imagination and the political economy of the United States—so much so that it makes sense to view marriage as a practice of national citizenship.1 “Citizenship,” as Linda Bosniak and others have noted, can usefully be understood as comprising a number of different dimensions.2 First, there is legal citizenship: formal or nominal membership in an organized political community. Second, there is citizenship as the possession and enjoyment of certain political, civil, and social rights. A third meaning of citizenship is active engagement in the life of the political community.3 Finally, citizenship has been used to describe “the affective ties of identification and solidarity that we maintain with groups of other people in the world.”4

Marriage is intertwined with all four dimensions of citizenship. Most of the legal scholarship has focused on the relationship between marriage and

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Certainly marriage has always been primarily legally regulated at the state and local level. However, as recent scholarship has pointed out, the right to marry and the importance of marriage has frequently occupied a central place in national debates over what it means to be a citizen. See generally Nancy F. Cott, Public Vows: A History of Marriage and the Nation (2000) (arguing that marriage is and always has been a public institution and describing national debates over marriage).


3. Id. at 452.

4. Id. at 479.
the first dimension of citizenship: the effect of legal marriage on national citizenship and vice versa. For the purpose of this Symposium, however, I will focus on the second, third, and fourth dimensions. The right to marry—as the current debate over same-sex marriage, and earlier debates over interracial marriage, polygamy, and slave marriage illustrate—is a right central to citizenship; or, more precisely, legal exclusion from the right to marry the partner(s) of one's choice is understood both by those excluded and the excluders as a denial of full citizenship. Marriage also has been central, I will suggest, to the third dimension of citizenship: active engagement in the public life of the community. If the fundamental unit of political citizenship is the individual voter, the fundamental unit of the U.S. economy is the household, and the ideal type of this household has long been the married couple, with or without children. From the late nineteenth century until the present day, the nuclear family has been treated as the basic unit of labor power; as feminist economists have pointed out, wives' unpaid labor in the home subsidizes and makes possible husbands' full-time wage labor. As business corporations brought the "consumer society" into being, advertisers sought to connect family roles and "family values" to shopping and buying, making the nuclear family central to mass consumption and vice versa. In both realms—the realm of citizenship as rights and the realm of citizenship as participation in public life—marriage is important symbolically and materially.

Moreover, I will argue that these second and third dimensions of citizenship have important consequences for Bosniak's fourth dimension of citizenship, which concerns the politics of group identity. Bosniak refers primarily to the voluntary aspects of identity: how people affiliate themselves with others and come to an understanding of themselves as members of groups. As Iris Marion Young has shown, however, group identity formation is only partly voluntary. Identities are also imposed on individuals, through ideas and images that circulate through national culture and local and regional subcultures. Social and legal practices of inclusion and exclusion, in turn, play an important part in shaping these ideas and images. Bosniak's fourth dimension of citizenship can thus be understood as a kind of "cultural imaginary" in which some group identities come to be identified with national citizenship and other identities are identified as outside the bounds of citizenship.

6. See infra Part III.
7. See id.
8. See Iris Marion Young, Justice and the Politics of Difference 44–48 (1990) (explaining the difference between social groups and mere aggregates of individuals).
I will argue that the legacy of *Loving v. Virginia* looks strikingly different depending on which axis of citizenship one chooses to examine. From the perspective of citizenship as rights, the story I will call "Loving before the law" suggests that the marriage equality movement among gays and lesbians is right to demand access to legal marriage. Throughout American history, withholding the legal right to marry the partner(s) of one's choice has sent the cultural message that certain groups are not suited for full citizenship. The converse, of course, is also true: the belief that certain kinds of marital unions send the "wrong" message about American citizenship has supported decisions to withhold the right to marry.

From the perspective of citizenship as public participation, however, the story I will call "Loving after the law" suggests that the U.S. Supreme Court's gesture of inclusion in *Loving* has little value for today's sexual minorities. Because of a series of economic and social changes affecting the nation as a whole, marriage is increasingly peripheral to the organization of people's lives. Moreover, many of the family privileges and benefits now associated with marriage can be granted through mechanisms not requiring marriage. New "fourth-dimension" stories and images connecting citizenship with what it means to be a family need to be written, and the lesbian/gay/bisexual/transgender (LGBT) movement has much to offer to this project that has nothing to do with marriage.

I. *LOVING BEFORE THE LAW: MARRIAGE AS RIGHTS AND THE FOURTH DIMENSION OF CITIZENSHIP*

Monogamy does not only go with the western Caucasian race, the Europeans and their descendants, beyond Christianity, it goes beyond Common Law. It is one of the primordial elements out of which all law proceeds, or which the law steps in to recognize and to protect. Wedlock... stands in this respect on a level with property.... Wedlock, or monogamic marriage, is one of the "categories" of our social thoughts and conceptions, and therefore, of our social existence. It is one of the elementary distinctions—historical and actual—between European and Asiatic humanity.... It is one of the pre-existing conditions of our existence as civilized white men.... Strike it out, and you destroy our very being; and when we say our we mean our race—a race which has its great and broad destiny, a solemn aim in the great career of civilization.10

Although as a formal matter liberal political theory does not usually concern itself with the question of who should be considered part of "the people"—where and how national borders should be drawn, for example—in practice the business of deciding who is in and who is out is a fundamental question for the state. In this part, I make three claims. First, I argue that in drawing the lines of national citizenship—a practice I will call

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"subjection" with a nod to Michel Foucault—governments (at least, in the United States) have frequently relied on theories and practices of "racialized gender." Second, I will argue that the language of subjection that arises from this confluence of state power, race and gender theory, and practices of racialized gender is expressed in a grammar of bodies. Third, and finally, I will argue that marriage—both symbolically and practically—is an important place where this grammar appears in law, helping to constitute citizenship's fourth dimension.

A. Racialized Gender as a Theory and Practice of Citizenship

Rogers Smith identifies three ideologies of citizenship evident in American political history. The first is the rule of citizenship he calls "liberal," which emphasizes consent. In this view, those individuals who consent to the ground rules of the national political community are and should be American. Second is the ideology of citizenship that Smith calls "republican," which looks more closely at the political labor necessary to sustain self-government in a free society. The republican conception asks whether the prospective citizen has the civic virtues necessary to sustain the practice of self-government, and is concerned with collective supports for developing and maintaining those civic virtues. Smith’s exhaustive examination of U.S. citizenship laws, however, made clear that a third ideology of citizenship has been at least as important to American history as

11. The term is an homage to Michel Foucault’s play on words: “subjection” means the production of political subjects, but it also is a synonym for domination. Michel Foucault, Two Lectures, in Culture/Power/History: A Reader in Contemporary Social Theory 200, 214 (Nicholas B. Dirks et al. eds., 1994).
12. See infra Part I.A (exploring this term more fully).
14. Rogers Smith offers a well-known quote by historian Philip Gleason to articulate this conception:
   Historically, to be an American, “a person did not have to be of any particular national, linguistic, religious, or ethnic background. All he had to do was to commit himself to the political ideology centered on the abstract ideals of liberty, equality, and republicanism. Thus the universalist ideological character of American nationality meant that it was open to anyone who willed to become an American.”
   Id. at 14–15 (quoting Philip Gleason, American Identity and Americanization, in Concepts of Ethnicity 57, 62–63 (William Peterson, Michael Novak & Philip Gleason eds., 1982)).
15. Id. at 15. In the historical literature, Bernard Bailyn, The Ideological Origins of the American Revolution (1967); Gordon S. Wood, The Radicalism of the American Revolution 95–96 (1991); and J.G.A. Pocock, Between Gog and Magog: The Republican Thesis and the Idealogia Americana, 48 J. Hist. Ideas 325 (1987), have stressed the importance of civic republicanism as an American ideology. Republicanism approaches political belonging as a collective rather than individual matter: "to be a citizen means to have the character and wherewithal necessary to deliberate on and contribute to the common good. See Smith, supra note 13, at 36 ("The conception of society as a democratic republic offers the prospect of political self-governance and of membership in a community of mutually supportive citizens. . . ." [T]here are clear attractions in a civic life that is [sic] expressive of one’s personal dignity, responsive to one’s concerns, and shared with sturdy, loyal peers.")
the first two. This ideology of citizenship rests on “elaborate, principled arguments for giving legal expression to people’s ascribed place in various hereditary, inequitarian cultural and biological orders, valorized as natural, divinely approved, and just.” Smith calls this ideology “ascriptive Americanism,” and argues that U.S. history illustrates the coexistence of all three traditions.

A closer look at Smith’s notion of “ascriptive citizenship” reveals it to be the product of intertwined ideologies of race and gender, or what might usefully be called “racialized gender.” Many examples of racialized gender have been explored by historians and legal scholars. For example, the colonial encounter, as Kathleen Brown has shown, took place along a “gender frontier” in which meanings of gender were undermined and reformed while Europeans struggled to befriend or subdue Native Americans and to exploit African slaves; in this period, ideas about “race,” not yet a full-fledged ideology, began to take shape through cultural and political interactions over proper manhood and womanhood. The federal naturalization laws, which from the eighteenth century forward limited naturalization to “white” persons, similarly gave rise to a complex jurisprudence over the interaction of naturalized citizenship and marriage.

Immigration law has on occasion been used to keep out races considered incapable of self-government, and to address the gender-related problems—such as prostitution—assumed to be attendant on the admission of certain groups, such as Asian women, to the country. Late nineteenth-century

16. Smith, supra note 13, at 18. As Smith observes,

Taken together, nonwhite, nonmale, non-Christian, nonheterosexual peoples have always comprised the vast majority of the world’s population, and they have always added up to far more than a majority of the inhabitants of the territorial United States as well. Yet their places and roles in American society have never been captured by the categories analysts stress in characterizing American politics. They have instead been “lower races,” “savages” and “unassimilables,” slaves and servants, aliens and denizens, “unnatural” criminals and second-class citizens, wives, and mothers.

Id. at 17–18.

17. Id. at 36.

18. I borrow this term from law and history scholar Rebecca Hall, who gives the name “racialized gender” to the way in which gender has been understood through race, and vice versa. Rebecca Hall, Not Killing Me Softly: African American Women, Slave Revolts, and Historical Constructions of Racialized Gender, Women’s Hist. Rev. (forthcoming 2008).


21. See Kerry Abrams, Polygamy, Prostitution, and the Federalization of Immigration Law, 105 Colum. L. Rev. 641, 692 (2005); Volpp, supra note 5, at 411 (noting that Chinese women were associated with prostitution).
American intellectuals and policy makers underwent a “masculinity crisis” in American public life, which they talked about, as Gail Bederman has shown, in terms of both gender and racial identity. Last but certainly not least, the law of slavery, which sought to make use of black women’s reproductive capacity without giving them the full privileges of white female gender, shaped what it meant to be “a lady,” and later laws banning “miscegenation”—the laws that would eventually be struck down in Loving—sought to prevent “race pollution” by controlling reproduction.

Theories of racialized gender, relying on sources as various as the Bible and measurements of cranial capacity, have throughout American history justified these and other practices of exploitation, marginalization, and violence based on hierarchies of race and gender. These practices, in turn, have created or exposed populations whose vulnerability to exploitation, marginalization, and violence is explained theoretically as biological or cultural incapacity. As Smith recognizes, the ideology of racialized gender has traditionally operated alongside liberal and republican ideologies of citizenship. The coexistence obviously produces tensions: the liberal theory of consent, for instance, is based on an egalitarian vision of political belonging that the ascriptive theory flatly rejects. Yet racialized gender has also frequently been reconciled with republican and liberal ideologies. The assertion that lesser races lack the capacity for self-government, for example, reconciles ascriptive theory with republican theory. Even liberal theories of citizenship can be reconciled with ascriptive theory; for example, several of the intellectual architects of liberal theory presumed a common cultural heritage as a foundation for self-government.

Racialized gender can be understood as a prepolitical reality on which government, including liberal government, must build. Ideologies of racialized gender, moreover, historically provided, as Smith notes, an emotional and imaginative basis for patriotism and national feeling that liberal and republican ideologies did not. The ascriptive theory of citizenship is, therefore, not so much a theory separate and distinct from liberal and republican citizenship as it is citizenship’s fourth dimension.


25. See Smith, supra note 13, at 38. I explore these points more fully in a book project in progress, tentatively titled What We Talk About When We Talk About Race: Race and Governance in American Legal Thought.
B. Law in the American Grammar Book

In a famous essay, *Mama's Baby, Papa's Maybe: An American Grammar Book*, the literary theorist Hortense Spillers examines some of the disruptions of northwest European practices of kinship that Atlantic chattel slavery effected, and argues that these disruptions can be understood as a kind of grammar in which the relations of sexual and gender violence at the heart of slavery—and later “race relations” generally—were and are written.\(^\text{26}\) I want to build on Spillers’s work by suggesting that this grammar of racialized gender, which works through bodies and through their relations to one another, legal and illegal, does important work in the legal system by constituting the legitimacy not only of individual families, slave or free, but also the legitimacy of the larger body of “The People.”

In using the metaphor of a grammar, however, I do not want to suggest that the operations of racialized gender are purely rhetorical and symbolic. The concept of racialized gender builds on historian Joan Scott’s understanding of gender as “an integral connection between two propositions: gender is a constitutive element of social relationships based on perceived differences between the sexes, and gender is a primary way of signifying relationships of power.”\(^\text{27}\) Scott observes that, although contemporary theorists often treat gender as synonymous with “women,” the idea of a binary opposition between male and female has frequently been used to legitimate various forms of political hierarchy, and to debate social relations in civil society.\(^\text{28}\) “Political history,” she concludes, “has, in a sense, been enacted on the field of gender.”\(^\text{29}\)

In the West generally, and certainly in the United States, gender is not an isolated discourse; rather, gender is shaped by race. “Race” as a modern category is of very recent vintage compared to “gender”; however, by the eighteenth century it emerged as an important concept within which to think about political belonging, and by the late nineteenth century in the United States and elsewhere it was a central concept of citizenship.\(^\text{30}\) Both

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28. Joan Wallach Scott gives this example: The concept of class in the nineteenth century relied on gender for its articulation. While middle-class reformers in France, for example, depicted workers in terms coded as feminine (subordinated, weak, sexually exploited like prostitutes), labor and socialist leaders replied by insisting on the masculine position of the working class (producers, strong, protectors of their women and children). The terms of this discourse were not explicitly about gender, but they were strengthened by references to it. The gendered “coding” of certain terms established and “naturalized” their meanings. *Id.* at 48.

29. *Id.* at 49.

30. Specifically, “race” stood for the natural limit of politics: racial groups that lacked the basic moral virtue, political aptitude, and/or social and political institutions necessary for self-government could not be assimilated into a democratic society. I explore this claim in more detail in my forthcoming book. For a useful history of race discourse in North
race and gender are naturalizing concepts: although socially created, they purport to rely on innate, essentialized biological and sometimes cultural differences that exist before politics. Both connect with biological processes of reproduction, enabling analogies between physical reproduction and social reproduction. The confluence of the two—racialized gender—has been a key grammar in which relations of political belonging and social hierarchy are debated.

Sometimes uses of this grammar do seem mainly rhetorical. For example, a popular nineteenth-century trope in international law was the phrase “The Family of Nations.” Oppenheim’s 1905 treatise on international law identifies the Family of Nations as the “civilized” nations who together form the community from which emerges the Law of Nations:

> Though the individual States are sovereign and independent of each other, though there is no international Government above the national ones, though there is no central political authority to which the different States are subjected, yet there is something mightier than all the powerful separating factors: namely, the common interests. And these common interests and the necessary intercourse which serves these interests, unite the separate States into an indivisible community. For many hundreds of years this community has been called “Family of Nations” or “Society of Nations.”

Elsewhere, Oppenheim is more specific about the conditions necessary for a state to be considered part of the Family of Nations:

> A State to be admitted must, first, be a civilised State which is in constant intercourse with members of the Family of Nations. Such State must, secondly, expressly or tacitly consent to be bound for its future international conduct by the rules of International Law. And, thirdly, those States which have hitherto formed the Family of Nations must expressly or tacitly consent to the reception of the new member.

As Anthony Anghie has explained, the Family of Nations was a heavily racialized category: it comprised those nations that considered themselves “civilized” (understood, in the argot of the day, in racial terms) and excluded those groupings, like Indian tribes, who were considered “savage” (again, in nineteenth-century political discourse, a racial term). The gendered language of “family” in this context serves a legitimating function: it makes the relationship between these civilized nations look like America, see generally Audrey Smedley, Race in North America: Origin and Evolution of a Worldview (1993).

33. Id. § 27.
something other than pure power relations, and it suggests that the exclusion of savage peoples is natural, meaning prepolitical (just as "the family" is commonly understood as existing before or outside "the political").

At the same time, however, the grammar of racialized gender is profoundly material. Spillers begins her essay with a discussion of the packing of human commodities on slave ships, and addresses more generally the extent to which chattel slavery both respected Western European gender norms (women and not men, for example, were often left unchained on those ships) and defied them (as in the rule, eventually adopted in colonial Virginia, that slave condition follows the mother, a rule that turns European patrilineal kinship relations upside down). As Adrienne Davis and others have written, the bodily realities of sexual exploitation, sexual terror, and sexual reproduction were the engine that drove slavery. To the extent that enslaved and eventually all "black" women were understood as female yet not fully women—not in possession of, for example, the sexual "honor" that white women were expected to guard with their lives—racialized gender was not just a concept, but a set of practices that constituted a very specific and very powerful form of subordination.

C. Marriage as a Scene of Fourth-Dimension Citizenship

In the grammar book of racialized gender, marriage is a key practice, materially and symbolically linking the individual to the family and national bodies through kinship, and linking together ideas about economic, moral, and political self-governance. Proper and legitimate marriages create the body of the people, whose self-government creates the legitimate state. As a corollary, the people defend their collective identity by regulating who may be included in their patrimony through marriage. The question of who is allowed to marry, and what marriage consists of, thus connects marriage with citizenship. An illustration of these connections in nineteenth-century jurisprudence is the federal effort to stomp out polygamy in the Utah territory.

35. For an extended exploration of the idea that "the family" is naturally "outside politics," and its influence on the philosophical tradition, see generally Susan Moller Okin, Justice, Gender, and the Family (1989).


37. For a case study of a lawyer's ultimately failed attempt to defend a slave woman who killed her white rapist based on the theory that she was protecting her "womanly honor," see Melton A. McLaurin, Celia, A Slave (1991).

38. See Cott, supra note 1; see also Sarah Song, Justice, Gender, and the Politics of Multiculturalism 156 (2007) ("What is clear is that the use of polygamy as the federal point of attack proved politically effective, not only for dismantling Mormon power but also for deflecting attention from monogamy and the patriarchal norms associated with it.").
Persecuted out of Illinois and Missouri, their leader Joseph Smith murdered, the members of the new Church of the Latter-Day Saints migrated to the western territory of Utah.\(^{39}\) In 1852, church elder Orson Pratt read aloud a previously secret revelation that had come to Joseph Smith: “plural marriage” was mandated for the Saints.\(^{40}\) As Nancy Cott notes, the Mormons, unlike Chinese women, posed a real threat to the ideology linking republican self-government and political liberty with monogamy: by 1860 the Latter-Day Saints were increasing in numbers and controlled a western territory poised to become a state.\(^{41}\) Cott observes, “Popular novels published in the 1850s, with titles such as *Mormonism Unveiled* and *Female Life among the Mormons*, equated polygamy with political tyranny, moral infamy, lawlessness, and men’s abuse of women; monogamy in contrast represented national morality and lawful authority.”\(^{42}\)

The challenge posed by the Mormons produced a barrage of federal government action against them, a contest that Utah Justice James McKean called “Federal Authority against Polygamic Theocracy.”\(^{43}\) This battle sometimes divided the antipolygamists themselves. For example, radical Republican Charles Sumner, among others, linked polygamy to slavery: “By the license of Polygamy, one man may have many wives, all bound to him by the marriage tie, and in other respects protected by law. By the license of Slavery, a whole race is delivered over to prostitution and concubinage, without the protection of any law.”\(^{44}\) In 1860, Representative Justin Morrill introduced a bill into Congress that would criminalize polygamy in the territories of the United States.\(^{45}\) Everyone in Congress was against polygamy, but congressmen from the slave states hesitated: the bill assumed power in Congress to regulate marriage in the federal territories, thus implying power in Congress to abolish slavery. Two years later, however, the Morrill Bill finally passed (although it proved unenforceable since Utah state agencies did not register marriages and juries would not convict).\(^{46}\) The Poland Act of 1874 took aim at this problem, allowing federal courts in the Utah territory to try federal crimes and permitting courts to empanel juries on which at least half the members would be non-Mormons.\(^{47}\)

The Poland Act was soon challenged in court. Article IV, Section 3 of the Constitution gave Congress the power to “dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” The question, according to the Court in

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40. *Id.*
41. *Id.*
42. *Id.* at 73 (footnote omitted).
43. *Id.* at 111.
44. *Id.* at 74 (footnote omitted).
45. *Id.*
46. *Id.*
47. *Id.* at 112–13.
Reynolds v. United States,48 was whether Congress’s exercise of its power under the Territory Clause to restrict religious practice violated the First Amendment, which protects the free exercise of religion.49 In the view of the majority, there was no First Amendment violation. The Free Exercise Clause deprived Congress “of all legislative power over mere opinion, but... left [it] free to reach actions which were in violation of social duties or subversive of good order.”50

The Court thereafter had no trouble identifying the practice of polygamy as contrary to social duties and good order, and in its opinion reiterated the links between race, civilization, and capacity for self-government characteristic of race theory:

Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. . . .

... [I]t is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests. Professor Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy. . . . An exceptional colony of polygamists under an exceptional leadership may sometimes exist for a time without appearing to disturb the social condition of the people who surround it; but there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.51

Polygamy is connected in this conversation both to inferior races—African and Asiatic peoples—and to despotism, a form of government incompatible with democratic self-government. Persons engaging in polygamy will not make proper American citizens, and so it is appropriate to outlaw the practice.

Despite the challenge the Poland Act and the principles announced in Reynolds posed to Mormon polygamy, the Mormons stubbornly resisted. The Poland Act was thus followed by the Edmunds Act of 1882, which

48. 98 U.S. 145 (1878).
49. Id. at 162.
50. Id. at 164.
51. Id. at 164–66.
criminalized “cohabitation” as well as technical bigamy and deprived anyone who practiced it of the right to vote and hold public office.\(^{52}\) This act was also upheld by the Supreme Court, in *Murphy v. Ramsey*.\(^{53}\) In that opinion, the Court mused,

\[
[N]o legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.\(^{54}\)
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At the state level, as well, the issue of who may marry, and under what conditions, has long been seen as central to the project of government because it engages law in the biological and social reproduction of the people. Marriage is about the politics of subjection, and in that way about citizenship, and racial differences are relevant to the capacity to practice proper marriage. The antimiscegenation cases continue this conversation. Consider the opinion of the Supreme Court of Virginia in *Naim v. Naim*,\(^{55}\) on which the state courts relied to uphold the antimiscegenation statute in *Loving*:

\[\text{In this State marriage ... is a public institution established by God himself, is recognized in all Christian and civilized nations, and is essential to the peace, happiness, and well-being of society. The right, in the states, to regulate and control, to guard, protect, and preserve this God-given, civilizing and Christianizing institution is of inestimable importance, and cannot be surrendered, nor can the states suffer or permit any interference therewith.}\(^{56}\)\]

The regulation of marriage conventionally lies within the “police power” possessed by state and local government to make rules governing the persons within their jurisdiction. The police power is broad, vague, and all

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52. The statute provided, “That no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section,”—that is, with any “polygamist, bigamist, or person cohabiting with more than one woman . . . shall be entitled to vote at any election held in [the territory],” Edmunds Act of Mar. 22, 1882, ch. 47, § 2, 22 Stat. 30, 31 (repealed 1983).
53. 114 U.S. 15 (1885).
54. Id. at 45.
55. 87 S.E.2d 749, 750–51 (Va. 1955). The statute at issue read as follows:

\[\text{It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian . . . . [T]he term “white person” shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasian blood shall be deemed to be white persons.}\]

Id. (quoting Va. Code Ann. § 20-54 (1950)).
56. Id. at 752 (quoting State v. Gibson, 36 Ind. 389, 402–03 (1871)).
encompassing, limited only by specific provisions of constitutional law.\footnote{For a useful exegesis of the origins of the police power, see Markus Dirk Dubber, \textit{"The Power to Govern Men and Things": Patriarchal Origins of the Police Power in American Law}, 52 Buff. L. Rev. 1277, 1319–20 (2004).}

The police power has traditionally also been used to protect and shape the social body, in the name of public health and safety and the protection of public morals. For example, in the early twentieth century the Massachusetts courts defended their state laws prohibiting access to contraception in this way:

Manifestly [the statutes] are designed to promote the public morals and in a broad sense the public health and safety. Their plain purpose is to protect purity, to preserve chastity, to encourage continence and self restraint, to defend the sanctity of the home, and thus to engender in the state and nation a virile and virtuous race of men and women.\footnote{Commonwealth v. Allison, 116 N.E. 265, 266 (Mass. 1917).}

From this perspective, the police power is gendered at least twice over. Its intellectual source, Markus Dubber has argued, is the power that the patriarch was said to have to dispose of things within his household. The police power is thus gendered by being literally patriarchal: the state is imagined as a householder and a patriarch, and the citizens under its jurisdiction as the members of the household.\footnote{Dubber, supra note 57, at 1286–87.} Like the power of a traditional patriarch, the police power is expansive, seldom examined, and almost totally untheorized.

Second, the police power is gendered in that it is the primary source of power for the government regulation of sex, reproduction, and family relations. Judges and legislators well understand the connection between gender, law, and the state. Consider this quote from a California abortion case, in which the court rhapsodized about the connection between the patriarchal family and the state:

The state is the paramount creation of man. It derives from the family. The evolutionary processes by which it evolved afford no basis for discount of the power and the obligation of the modern state to discipline, preserve and perpetuate the race. It has supplanted the tribe and the clan and succeeded to all the privileges and duties of the family. Either through a monarch, a dictator or a legislature, the modern state maintains the office of the patriarch who had succeeded to the functions of the primaeval father to prescribe rules and to regulate and administer family affairs. Laws created by its lawmakers have the absolute control of society except to the extent abridged by its organic law.\footnote{People v. Gallardo, 243 P.2d 532, 535–36 (Cal. Dist. Ct. App. 1952).}

The police power is thus also gendered in that a central concern in the late nineteenth and early to mid-twentieth centuries has been protecting and regulating the body of the nation, which involves control of the family through gender and racial regulation. Access to abortion and contraception, antimiscegenation laws, and eugenics regulation, as well as marriage

\footnote{For a useful exegesis of the origins of the police power, see Markus Dirk Dubber, \textit{"The Power to Govern Men and Things": Patriarchal Origins of the Police Power in American Law}, 52 Buff. L. Rev. 1277, 1319–20 (2004).}
regulation all have been accomplished by means of the police power. The police power has been a central source for literally and figuratively embodying the nation through racialized gender, and marriage regulation should be placed in this context.

Whereas in the nineteenth-century Mormon controversy race was a shadow tainting the practice of polygamy but not necessarily the persons engaging in the practice, in twentieth-century antimiscegenation law race appeared as a natural condition of persons that has produced two different peoples under the same legal rule. In this situation it was the responsibility of the state to keep them reproductively and spatially separated, to defend “racial purity” and “separate development” and avoid the specter of “mongrelization.”

The project of segregation involved both the protection of property for whites and the protection of property in whiteness itself. Eva Saks argues that in southern miscegenation law, legislatures and judges created a new kind of property—property in “blood”—and treated miscegenation as a crime against this property. Poor whites, especially, were considered in need of legal protection for this property. More broadly, however, antimiscegenation laws, along with trusts and estates laws, helped ensure that all families with property in “white blood” also maintained control over wealth. Keeping “bloodlines” separate and distinct by race kept up the value of property in blood, and property in land and resources. In protecting these various forms of property, courts also saw themselves as protecting the institution of marriage. For example, in Green v. State, the Supreme Court of Alabama considered “whether or not the State may make the marriage of a white person with a person of the negro race, a punishable offense.”

61. The history of eugenics regulation clearly demonstrates the operation of racialized gender in American law. See, e.g., Edwin Black, War Against the Weak: Eugenics and America’s Campaign to Create a Master Race (2003); Wendy Kline, Building a Better Race: Gender, Sexuality, and Eugenics from the Turn of the Century to the Baby Boom (2001); Alexandra Minna Stern, Eugenic Nation: Faults & Frontiers of Better Breeding in Modern America (2005); see also Dorothy Roberts, Killing the Black Body: Race, Reproduction, and the Meaning of Liberty (1997).


63. Eva Saks quotes one court writing in 1877 just as the upheavals of Reconstruction were coming to a close: “[I]t is . . . a fact not always sufficiently felt, that the more humble and helpless families are, the more they need this sort of protection. Their spirits are crushed, or become rebellious, when other ills besides those of poverty, are heaped upon them.” Eva Saks, Representing Miscegenation Law, 8 Raritan 39, 50 (1988) (quoting Green v. State, 58 Ala. 190, 194 (1877)).

64. For a detailed case study in Louisiana of how the law of inheritance worked with antimiscegenation laws and gender laws involving “legitimate” and “illegitimate” children to keep black and white branches of the same family apart, see Virginia R. Dominguez, White by Definition: Social Classification in Creole Louisiana (1994).

65. Green, 58 Ala. at 191.
Alabama court saw this ruling, however, as "a very narrow and an illogical view of the subject." For one thing, marriage was by no means a simple contract, but rather a civil institution. The court expanded on the function of this institution:

This institution is, indeed, "the most interesting and important in its nature of any in society." It is through the marriage relation that the homes of a people are created—those homes in which, ordinarily, all the members of all the families of the land are, during a part of every day, assembled together, where the elders of the household seek repose and cheer, and reparation of strength from the toils and cares of life; and where, in an affectionate intercourse and conversation with them, the young become imbued with the principles, and animated by the spirit and ideas, which in a great degree give shape to their characters and determine the manner of their future lives. These homes, in which the virtues are most cultivated and happiness most abounds, are the true officinae gentium—the nurseries of States. Who can estimate the evil of introducing into their most intimate relations, elements so heterogeneous that they must naturally cause discord, shame, disruption of family circles and estrangement of kindred? While with their interior administration, the State should interfere but little, it is obviously of the highest public concern that it should, by general laws adapted to the state of things around them, guard them against disturbances from without.

The court concluded,

Manifestly, it is for the peace and happiness of the black race, as well as of the white, that such laws should exist. And surely there can not be any tyranny or injustice in requiring both alike, to form this union with those of their own race only, whom God hath joined together by indelible peculiarities, which declare that He has made the two races distinct.

The state’s antimiscegenation law was therefore upheld, and in the name of protecting marriage Aaron Green, a black man, and Julia Atkinson, a white woman, had their marriage voided.

Given this context—the role of marriage in the intersection of the second and fourth dimensions of citizenship—what is the legacy of Loving v. Virginia? Loving is important to celebrate and to mark because in that decision, if only in a fleeting and oblique way, the Court recognized and disrupted the grammar of racialized gender. Striking down Virginia’s antimiscegenation statute, the Court held, "There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy."
The Court’s reasoning here is cryptic. But with the words “White Supremacy,” the Court rejected Virginia’s argument that the evenhandedness of the racial barriers to marriage satisfied the Equal Protection Clause, and the Court acknowledged political domination rather than recognition of “natural” difference as the aim of the statute. The Court thus made an important intervention not only with respect to the second dimension of citizenship—the distribution of legal rights—but also the fourth dimension of citizenship—the connection between citizenship and political and social identity.

From this perspective, we can see why Loving is a case that speaks both to the movement for racial justice and the movement for the rights of sexual minorities. Antiequality advocates in the contemporary same-sex marriage debate, like antipolygamy and antimiscegenation advocates in previous centuries, make the connection between proper reproductive relations and citizenship. Marriage forms the body of the nation which governs itself in a liberal democracy. As in those previous debates, marriage and family relations are imagined to be the “natural” foundation on which the state is built. One recent critic of “genderless marriage” literally argues that cross-sex marriage is prepolitical: “man/woman marriage is a pre-political institution, while genderless marriage must of necessity be a post-political, law-constructed, and hence fragile institution.”70 The fundamental purpose of this prepolitical institution, according to this writer, is to protect children and also apparently to protect gender itself.71 The insistence that the state

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70. Monte Neil Stewart, Eliding in Washington and California, 42 Gonz. L. Rev. 501, 512 (2007); see Maggie Gallagher, If Marriage Is Natural, Why Is Defending It So Hard? Taking Up the Challenge to Marriage in the Pews and the Public Square, 4 Ave Maria L. Rev. 409, 417 (2006) (“Marriage as a natural institution that exists in some form in every known society rests on three core facts of human nature: Men and women are powerfully attracted to a sexual act that makes new life; making babies is optional for individuals, but not for societies; and babies need a father as well as a mother. Sex makes babies, society needs babies, and babies need their mothers and fathers. These three ideas together form the heart of the marriage idea as a virtually universal social institution.” (footnote omitted)).

71. Monte Neil Stewart describes these social goods as “produced materially and even uniquely by the man/woman meaning and therefore the social goods . . . must disappear when that meaning is de-institutionalized.” Stewart, supra note 70, at 506. Stewart writes, The man/woman marriage institution is:

1. Society’s best and probably only effective means to make real the right of a child to know and be brought up by his or her biological parents (with exceptions justified only in the best interests of the child, not those of any adult).

2. [T]he most effective means humankind has developed so far to maximize the level of private welfare provided to the children conceived by passionate, heterosexual coupling (with “private welfare” meaning not just the basic requirements like food and shelter but also education, play, work, discipline, love, and respect).

3. The indispensable foundation for that child-rearing mode—that is, married mother/father child-rearing—that correlates (in ways not subject to reasonable dispute) with the optimal outcomes deemed crucial for a child’s—and therefore society’s—well being.

4. Society’s primary and most effective means of bridging the male-female divide.
must protect and defend distinctions that are nevertheless "natural" might seem a little odd, but much of the affective and emotional power of the fourth dimension of citizenship lies in this asserted connection of legal and political institutions to the "natural."

D. Rights and Scenes of Citizenship

The analogy between the fight against same-sex marriage and the fight against cross-race marriage has been used to suggest that we, as queers, need and are entitled to our "Loving moment." Like others, however, I am uncomfortable with that conclusion, nested as it is in the familiar liberal paradigm in which identity groups excluded by prejudice one by one seek entry into the American story. For me, a more productive approach to Loving's legacy is the argument that in both antimiscegenation laws and prohibitions against same-sex marriage, governments have incorporated caste distinctions into their marriage law, which should be considered a violation of the Reconstruction Amendments of the Constitution. From this perspective, Loving speaks to the movement for marriage equality because rules restricting marriage are always deserving of strict scrutiny—not because of the sacredness of the institution, because of a special scrutiny uniquely required of racial classifications, or because the individual right to marry is constitutionally protected in and of itself, but because marriage is a key site where law has historically influenced the fourth dimension of citizenship. Strict scrutiny is therefore warranted under basic principles of political liberalism, and prohibitions on same-sex marriage should be viewed as unconstitutional.

We already accept the proposition that when state power is being used against its citizens, vigilance—including antimajoritarian legal rules—is necessary to prevent the exercise of tyranny. Loving suggests, in a fleeting and inadequate way, the possibility of a corollary principle that when state power is being used to determine who "the People" will be, when the police power is being exercised to produce and reproduce the social body of the people, strict scrutiny is necessary to disrupt the establishment of caste. In this way, the law can be used to promote a liberal and egalitarian vision of the fourth dimension of citizenship.

A look at Loving before the law, then, both illustrates the close relationship between the second and fourth dimensions of citizenship with respect to marriage, and suggests an argument for marriage equality that goes beyond the second-dimension argument that like groups should

5. Society's only means of conferring and transforming the identity and status of a male into husband/father, and a female into wife/mother—statuses and identities particularly beneficial to society.
6. Social and official endorsement of that form of adult intimacy—married heterosexual intercourse—that society may rationally value above all other such forms. That rationality has been demonstrated in the scholarly literature and remains, to date, unrefuted.

Id. at 504–06 (internal quotation marks and footnotes omitted).
receive like legal rights. It acknowledges the two-way traffic between law and culture that shapes what citizenship means.

II. LOVING AFTER THE LAW

Another dimension of marriage as citizenship, however, leads us to very different conclusions about the significance of *Loving* fifty years later. This is the dimension of citizenship that focuses on public participation. Marriage is an important site for the production of citizenship here as well. Marriage has long functioned as a key institution within civil society, connecting civil society, state, and market institutions. In this system, state-sanctioned marriage creates families, which then work in partnership with market institutions to anchor the economy. The vision of marriage as anchoring labor relations is at least as old as the late nineteenth century, when, as Joan Williams has argued, the ideology of “domesticity” made it possible and desirable for husbands to become “breadwinners,” working for wages for forty or more hours per week and receiving a “family wage” in the work place, while wives were assigned the unpaid but cherished work of child and elder care, as well as the job of providing emotional support for and sexual services to the breadwinner.72 This flow of unpaid dependency work, feminist economists have argued, subsidizes the production of goods and services in the wage sector of the economy.73 “Families,” again defined socially and legally around marriage, are also expected to absorb the economic risks of debt, unemployment, bankruptcy, and health care crises. To support marriage as an institution providing dependent care, for instance, the social security system was structured to accommodate the breadwinner/homemaker family.74 Another historically important federal

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73. See Nancy Folbre, *The Invisible Heart: Economics and Family Values* 89 (2001) (“Parents subsidized capitalists, producing workers that employers could hire without paying the actual cost of producing and training them.”); see also Martha Albertson Fineman, *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* 2, 5 (1995) (observing that, for most of us, “the ‘family’ has as its core a sexual tie” and suggesting instead that the mother-child unit be considered the core of a family).

74. As Nancy Folbre explains, From its inception, Social Security provided benefits for the wives of eligible workers as well as the workers themselves (husbands of eligible workers were not added until the 1970s). A married retiree receives an additional stipend for his spouse, making his monthly check far larger than it would have been if he were single. Furthermore, Social Security provides a form of life insurance for family members: if a covered worker dies before retirement, survivors’ benefits are provided for his spouse and minor children. In this way, Social Security subsidizes the traditional breadwinner/homemaker family.
benefits program, Aid to Dependent Children (which later became Aid to Families with Dependent Children), was similarly crafted to accommodate the nuclear family, according benefits to women who lacked husbands and providing for them and their children but subjecting them to elaborate scrutiny and moral disapproval.\footnote{75}

Marriage as a form of public participation connected with citizenship has also been linked to consumption. In the early twentieth century, the emerging consumer society helped usher in a more egalitarian vision of the nuclear family.\footnote{76} In the period following World War II, advertisers appealed to widespread yearning for "family values" by promoting consumer goods for the home.\footnote{77} Indeed, home buying itself, along with commodities linked with the home, had long been promoted to young married couples as a rite of passage connected with full economic and social citizenship.\footnote{78}

Marriage has traditionally worked in partnership with state institutions as well as market institutions. Child care can be seen not only as an economic function but as a social and political one, and as Maggie Gallagher notes, traditionally "[m]arriage existed to encourage men and women to create the next generation in the right-context and simultaneously to discourage the creation of children in other contexts—out of wedlock in fatherless homes."\footnote{79} Marriage fosters the production of healthy, safe, and well-socialized children. The same-sex marriage debate has revived an old conservative argument about the link between marriage and citizenship as well: marriage tames sexual energies by channeling them, reducing the social chaos that sexual promiscuity and especially male fecklessness is thought to bring.\footnote{80} Finally, feminist scholar Linda McClain argues that the

\footnote{75. See Jill Elaine Hasday, Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations, 90 Geo. L.J. 299, 357-68 (2002) (arguing that Aid to Dependent Children and its successor welfare programs have been built around gendered family responsibility norms).}

\footnote{76. Gary Cross, An All-Consuming Century: Why Commercialism Won in Modern America 43-46 (2000) (describing how, between 1900 and 1930, consumer culture fostered a more egalitarian vision of the family while reinforcing the nuclear family structure).}

\footnote{77. See id. at 97 (describing how, in the 1950s, conservatives saw the middle-class family as a protection against "sexual license, a cosmopolitan culture, and the welfare state," and in turn associated shopping for and buying consumer goods with middle-class life).}

\footnote{78. See id. at 74 (describing the prevalent belief among political leaders in the 1930s that "government encouragement of home ownership would create 'good citizenship'").}


James Q. Wilson suggests that marriage also makes men healthier:

Most married men have wives who tell them what to eat, urge them to stay home instead of going to saloons, keep them away from rowdy gangs, and reduce the amount of alcohol they drink. . . . Married men are likely to have wives who urge them to stop smoking, cut back on drinking, and eat a more nutritious diet.

state has an obligation to promote not marriage as an end in itself but “healthy marriage[s],” which are premised on gender equality and equal respect.81 In these visions, marriage—the centerpiece of the ideology of domesticity—produces civic virtue, in the language of republican ideologies of citizenship, furthering the project of democratic self-government.

The first thing to notice here is, again, a connection to the affective and identitarian fourth dimension of citizenship. Getting married and doing the things that are publicly associated with marriage—starting a career, buying a home, raising children—shapes marriage as social citizenship. Marriage in this vision is a kind of social glue that builds networks of common purpose. This is not exactly the republican vision of political actors coming together to deliberate on the common good; it is more privatized than that. But it does help create in the national imaginary various images of the ideal citizen—the hardworking taxpayer, the soccer mom, “Joe Sixpack.”82

The second thing to notice, however, is that marriage is a declining institution. Rachel Moran reports some statistics:

Today, approximately one out of every four American households is comprised of an adult living alone. In fact, more households now consist of a single person than of a traditional nuclear family.... Of people over the age of eighteen, forty five percent of females and forty percent of males are unmarried. These changes cannot be attributed simply to a decision to delay marriage, although this is an important factor. According to the latest census results, high proportions of middle-aged and older women are single. For example, among females aged thirty-five to thirty-nine, fourteen percent are never married, seventeen percent are divorced or separated, and one percent are widowed, for a total of thirty-two percent of all women in that age cohort. And, of females aged forty-five to fifty-four, nine percent are never married, twenty-one percent are divorced or separated, and three percent are widowed, for a total of thirty-three percent. Although divorce accounts for a substantial percentage of unmarried women, their single status is not simply

82. Lauren Berlant argues that marriage as a public practice of citizenship has so influenced fourth-dimension citizenship that “the political public sphere has become an intimate public sphere.” As she puts it,

In the new nostalgia-based fantasy nation of the “American way of life,” the residential enclave where “the family” lives usurps the modernist promise of the culturally vital, multiethnic city; in the new, utopian America, mass-mediated political identifications can only be rooted in traditional notions of home, family, and community. Meanwhile, the notion of a public life, from the profession of politician to non-family-based forms of political activism, has been made to seem ridiculous and even dangerous to the nation.

temporary. Only half of divorced women report that they have remarried after five years, while seventy-five percent remarry within ten years.83

If marriage is declining overall, it is declining even more steeply among groups racialized as nonwhite. Richard Banks and Su Jin Gatlin report that, "[c]ompared to White women, African American women are less likely to ever marry, more likely to divorce, and less likely to remarry after divorce."84

Naomi Cahn and June Carbone argue that these steep declines in marriage are the product of a combination of economic and social forces.85 These include increased economic pressures that make the breadwinner/homemaker partnership idealized by the ideology of domesticity increasingly difficult to achieve; a national shift from a manufacturing to an information and services based economy that demands extensive postsecondary education for the good jobs; greater acceptance of nonmarital sexuality and nonmarital births, which in turn triggered higher rates of divorce and cohabitation; and a redefinition of marriage as what happens if you find the perfect “soul mate,” rather than what you do when you reach a certain age and are ready to “settle down.”86 Cahn and Carbone argue that one result has been the evolution of a new middle-class ethic about marriage and family life, which involves delayed family formation preceded by a period of happy (or anxious) “single life.”87 They also suggest that this new ethic is better fitted to the economic and social realities of declining marriage rates than the traditionalist ethic.

Now, it is of course possible that marriage equality will rescue marriage itself and that a flood of boys and girls marrying one another will make marriage once again the cornerstone of adult social life, but I doubt it. If Cahn and Carbone are right that the decline in marriage is the product not simply of weakened moral codes, but of structural economic changes coupled with complex evolutions in social norms and reproductive technologies, it seems unlikely that same-sex marriage will save the day.

86. See generally Cahn & Carbone, supra note 85, at 12–13.
87. Naomi Cahn and June Carbone’s larger argument is that family models in the United States have polarized into two competing models: “red families” and “blue families.” Id. at 1. The regions politically dominated by the Republican Party—the “red states”—are more likely to both preach and attempt to practice traditional family values, including early marriage and childbirth and higher fertility rates. Id. at 2–3. Regions dominated by the Democratic Party—the “blue states”—have adopted in theory and practice the new middle-class model, which “posits a substantial separation from the beginning of adulthood and the assumption of family responsibilities.” Id. at 58.
Marriage seems destined simply to be less central to American citizenship in the new political economy. Perhaps we are looking at yet another example of a subordinated group getting a right just at the moment when it is no good anymore.

But even putting aside the decreasing importance of marriage in American social life, why should we as queers want to perpetuate the link between marriage and citizenship anyway? There are several reasons why marriage ought not to be considered, in Marc Spindelman’s elegant term, "homosexuality’s horizon" in the first place.  

First, of course, there is the antiassimilation argument: to the extent that the desire for marriage equality is a function of the desire to assimilate, to achieve “recognition” for a disadvantaged group by proving that “we are just like you,” the quest is both misguided and undesirable. It is misguided because legal rights can be, and are, undercut by social practices. As Rachel Moran has documented, despite Loving, African Americans remain undesirable marriage partners, less likely to marry interracially than any other racialized group in the United States.  

I have argued elsewhere that just as Brown v. Board of Education failed to signal the end of school segregation, the dream that same-sex marriage will usher in a world in which prejudice against gay and lesbian families has been abolished—or even been significantly abated—is a suspect one.  

Assimilation is not only unlikely, it is arguably undesirable. 

There is the privilege argument: the drive to assimilate inevitably privileges the already privileged, those white affluent Log Cabin Republicans who have everything except the right to marry. Assimilation encourages all the rest of us to disavow the truly queer, the people who could not assimilate if they tried. It therefore is complicit with subordination, the impulse to align oneself with power and reject the powerless. 

Assimilation also reduces the energy for innovation. In a social world where marriage is fast declining, should we not be trying to think beyond marriage, to honor plural forms of love and commitment instead of fetishizing one of them? As a “single” person, I have a dog in this fight. There is a way in which the marriage equality fight further entrenches the social norm under which we all have to pair up with each other and retreat with our soul mates into smug coupledom or be thought psychologically unstable, romantically undesirable, selfish, or pitiable. Why should the

91. For a classic statement of this argument, see generally Michael Warner, The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life (1999).
92. For a spirited popular denunciation of this social norm, see Bella DePaulo, Singled Out: How Singles Are Stereotyped, Stigmatized, and Ignored, and Still Live Happily Ever
sexual-pair bond—the sexual family—be the primary connection between intimate life and the state? Why not the mother-child bond? Why not a variety of other kinds of relationships that might have a number of legal rights and obligations attached? Assimilation is the enemy of creativity.

Second, consider the argument that lesbian feminists have made for years: marriage has traditionally served as a site that reconciled old-style patriarchal power with newfangled liberal state power by throwing a blanket of privacy over “the family,” in so doing giving state sanction to physical and sexual violence and abuse within the household. In this context, marriage must be seen as linked with the criminal justice state in fostering the subordination of women and children, and the link between marriage and a reluctance to challenge family violence remains. In most jurisdictions, it remains much harder to prosecute marital rape than nonmarital rape. In many jurisdictions, the penalties for marital rape remain lower than for nonmarital rape. And in many jurisdictions, marriage is still seen as the “solution” to statutory rape. Even where prosecutors attempt a more sensitive approach, if the parties evince an intent to marry, then prosecutors often assume there is no harm and therefore no reason to prosecute in statutory rape cases. Yet the existence of a formal relationship does not mean there is no violence, exploitation, or coercion.

Marriage here is a key site for the “intimacy discount,” the tendency of the criminal justice state to treat crimes within “the family” as less serious

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93. See Fineman, supra note 73, at 5.

94. For examples of creative thinking, see Nancy Polikoff, Beyond (Straight and Gay) Marriage (2007) (explaining how many of the family rights and benefits currently understood as linked to marriage could be given to all kinds of families, marital and nonmarital); Laura T. Kessler, Transgressive Caregiving, 33 Fla. St. U. L. Rev. 1 (2005) (arguing that family caregiving can be a practice of political resistance, through a historical analysis of laws regulating the sexuality, reproduction, and parenting of African Americans, sexual minorities, and straight men); and Laura A. Rosenbury, Friends with Benefits?, 106 Mich. L. Rev. 189 (2007) (suggesting that greater legal recognition of friendship within family law could facilitate gender equality).

95. See Catharine A. MacKinnon, Toward a Feminist Theory of the State 193 (1989) (“When the law of privacy restricts intrusions into intimacy, it bars changes in control over that intimacy through law. The existing distribution of power and resources within the private sphere are precisely what the law of privacy exists to protect. . . . [T]he legal concept of privacy can and has shielded the place of . . . marital rape.”).

96. See Michelle J. Anderson, Marital Immunity, Intimate Relationships, and Improper References: A New Law on Sexual Offenses by Intimates, 54 Hastings L.J. 1465, 1470 (2003) (asserting that twenty-six states retain marital immunity in one form or another). Anderson concludes, “The law in more than half the states today makes it harder to convict men of sexual offenses committed against their wives.” Id. at 1472–73.

97. Id. at 1490.

98. For a thoughtful exploration of these issues in the context of statutory rape prosecutions, see Kay L. Levine, The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload, 55 Emory L.J. 691 (2006).
than crimes outside the family. Is expanding the scope of the intimacy discount by allowing more relationships to get the halo of formal legal recognition really a good thing from the perspective of the people—adults and children—who suffer violence at the hands of their intimate partners?

Third, as Angela Onwuachi-Willig and others have explored, marriage is still being touted by the state as the solution to poverty—especially for African American women. Now, not only has the information and services economy made the breadwinner/homemaker bargain obsolete; even the new norm of the two-breadwinner household (where the wife comes home to a “second shift” of unpaid household and care work) is no longer adequate to absorb the financial risks of life in the contemporary wage economy. Marriage is not only not lifting people out of poverty; it is not saving people from falling into poverty. And child rearing—the activity that conservatives hope to promote and protect with heterosexual marriage—increasingly represents financial disaster for middle-class people. Bankruptcy scholar Elizabeth Warren has found that “having a child is now the single best predictor that a woman will end up in financial collapse.”

99. See id.; see also Dan Markel, Jennifer M. Collins & Ethan J. Leib, Criminal Justice and the Challenge of Family Ties, 2007 U. Ill. L. Rev. 1147 (arguing for a “Spartan presumption” against family ties benefits in the criminal justice system).

100. Marc Spindelman makes this point forcefully:

What is to happen when . . . same-sex relationships receive protections not because they are like marital relations, but because that is what they are? The expectation is that when they attempt to obtain legal redress for what they’ve endured, survivors of same-sex sex abuse in marriage will find that to the old obstacles they faced—the social, hence legal, nonexistence of their injuries—a new one has been added. As married women who are sexually injured have struggled against heteronormativity’s male dominance within marriage, so, too, lesbians and gay men now will. To overcome it, they must upend it in the form Goodridge gives it: the full, load-bearing weight of the putative goodness of marriage itself, seen and understood as Goodridge sees and understands it, the cornerstone of civil society and social stability. If so, how much sexual violence will need to be proved to have happened before that wall will budge from its foundations? How much more than in a case of sexual injury caused by a perpetrator who’s not married to his victims? Will a single act of rape be enough or will multiple rapes be required? Must rape be accompanied by an “external” display of coercive force, say, a knife, a hammer, or a gun, to counter the idea that sexual violence that takes place in a relationship of gender equals must have been wanted if it took place, because it could otherwise easily have been stopped? Must violence actually be used? How about consented-to, but unwanted, sex, as in, for example, sex given to stave off non-sexual, but physical, domestic abuse? (This happens.) What about sex that takes place when a spouse is in an alcohol or drug-induced stupor or asleep? (This does, too.) How about domestic sexual hectoring that makes home life insufferably hostile? For sex abuse to be seen, must a couple already be on their way out marriage’s door? Spindelman, supra note 88, at 1388 (footnotes omitted).


education costs and the financial sacrifices parents make to meet those costs. Health care is another factor that makes middle-class families financially vulnerable.\textsuperscript{103} The result, Warren finds, is steeply climbing rates of bankruptcy among middle-class people.\textsuperscript{104}

These data suggest that we are witnessing a slow but steady free fall of the American middle class, from which marriage cannot save most people. The expansion of consumer credit has permitted many families to sustain a middle-class standard of living despite income shortfalls and financial crises, but as the present subprime mortgage crisis demonstrates, the kind of bubble economy that the expansion of personal debt makes possible cannot last forever.\textsuperscript{105}

Finally, at least since the 1950s, marriage has served as the cornerstone of a very specific fourth dimension of citizenship: the consumer voter. In this model of political citizenship, marriage, with the expectation of breeding to follow, is the formal entry point into a politics of consumption in which for the sake of "the family" one seeks to purchase a "nice," "safe" neighborhood with a lawn and good public schools, effecting a literal or symbolic entry into the suburban gated community life.\textsuperscript{106}

As Richard Briffault has argued, however, the consumer voter and the politics of suburbia that it fostered have contributed to the rupture of any sense of linked fate between the traditional inner city and the traditional


\textsuperscript{104} Warren writes, Before Congress chopped away at access to the bankruptcy courts in 2005, the bankruptcy filing rate was on a steep climb, showing little let up. By the early 2000s, more people filed for bankruptcy each year than suffered a heart attack. More filed bankruptcy than were diagnosed with cancer. More filed bankruptcy than graduated from college. And, in an era when traditionalists decry the demise of the institution of marriage, Americans filed more petitions for bankruptcy than for divorce. Heart attacks, cancer, college graduations, divorce: these are markers in the lives of nearly every American family. And yet, most Americans have more friends and coworkers who have gone through bankruptcy than any one of these other life events.


\textsuperscript{106} For a more detailed version of this argument, see Harris, supra note 90, at 1550–54.
The politics of the consumer voter is a politics of stratification both in terms of class and race. It is the politics of "no new taxes" and the privatization of public goods like schools, libraries, and police. New demographic patterns are now sending the upper middle class back into the cities, where they are the source of economic redevelopment and gentrification that displaces poor people of color into older suburbs or unincorporated areas. But the geographic reverse exodus to the city has not changed the politics of individual entitlement and class segregation. Rather, cities are being redesigned according to the consumption desires of the upper class and upper middle class, in which luxury consumption is always available and the lower classes—especially the black and brown poor—are out of sight.

The question, then, is, Why do we want to promote these links between marriage as public participation citizenship and marriage as citizenship in the social imaginary, either as queers or as colored people? The argument is that by getting the right to marriage, we will transform marriage, but is it not equally likely that marriage will transform us?

III. CITIZENSHIP, AGAIN: BEYOND LOVING

Marriage, I have argued, is a key site of national citizenship both in the dimension of citizenship that has to do with rights-bearing subjects, and the dimension of citizenship that has to do with public participation. Both these dimensions, moreover, have a mutually constitutive relationship with the fourth dimension of citizenship, the affective and identitarian politics of cultural citizenship. The legacy of Loving appears quite different from these two perspectives. From the perspective of marriage’s link to the state construction of proper citizens, access to marriage for gays and lesbians should be a constitutionally protected right, not because marriage holds any special position in human life but because the denial of the right, understood in its historical context, signals that state power is being used to enact a system of caste. From the perspective of marriage’s link to citizenship through certain kinds of participation in the market, in family relations, in civil society, and in politics, Loving seems increasingly irrelevant, if not an unhelpful diversion from the more pressing problems of keeping the financial wolf from the door.

How can these two very different conclusions be reconciled? Perhaps political theater is the answer: as we win the fight for marriage equality in each state, there can be mass marriages on courthouse steps, immediately followed by mass divorces. Perhaps only queers should get married, and

109. See id. at 24–25.
the heterosexuals should all refuse to get married and file for domestic partnership instead.

A more practical answer is the work of deconstructing and reworking what we mean by “family.” In a forthcoming article, Melissa Murray describes “the networked family,” arguing that the need to see how the idea of the self-sufficient nuclear family fails to match the reality that the functions we traditionally ascribe to “the family” are in fact distributed in modern life, from babysitters to relatives to various kinds of market and nonmarket relations.110 Nancy Polikoff argues convincingly that the LGBT agenda should not take its cues from the right-wing marriage movement, but rather the work of gay and lesbian activists from the 1970s, who sought to craft a vision of legal and social support for all kinds of families, regardless of marriage.111 Finally, it is important to engage the point made by Katherine Franke and by Martha Fineman: more state involvement is not always better. Nonmarital and other queer relationships might be healthier—more creative, more plural—in the absence of government regulation.112

Marriage equality is “necessary but not sufficient,” as Chai Feldblum recently put it.113 More broadly, the interaction between dimensions of citizenship makes plain that changing the law of marriage is not the only way to expand citizenship’s meaning. Changes in the social and cultural realm may promote the citizenship of sexual minorities as much or more than formal legal entitlements. As we celebrate Loving, then let us give it two cheers: for the past and the present, but not for the future.

111. This is the argument of Nancy Polikoff’s book. See generally Polikoff, supra note 94.