Policy Issues Affecting Lesbian, Gay, Bisexual, and Transgender Families

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The debate about whether to allow same-sex couples to marry has emerged as a major political issue in the United States, as evidenced by the rhetoric surrounding the 2004 election campaign and the ongoing attention paid to same-sex marriage in the mass media. Pundits frequently proclaim that if lesbians and gay men win the right to marry, gays will have won the “culture wars.” But such assertions are grossly inattentive to the debates that have dominated discourse in the LGBT community itself over the last thirty years. For many in this community, the current centrality of gay marriage to LGBT politics is both unexpected and undesirable. Indeed, that the issue of gay marriage now dominates the community’s policy agenda indicates to some that gays have lost, rather than won, the culture wars. Other community members argue that winning the right to gay marriage will not constitute a victory in the culture wars. The eradication of homophobia requires pervasive social transformation. Entrenched hostility to gay men and lesbians will not be obliterated through legal change and institutional access alone.

In this chapter, we will discuss the ways in which marriage has always been a controversial, contested terrain for gay men and lesbians. Among the intellectual and political currents we will address are

- the 1970s emphasis that gay liberation will only be achieved as a by-product of women’s liberation and the eradication of gender roles;
- the development of a “queer” politics that validates sexual diversity while challenging heteronormative institutions;
- the reenvisioning of family through the recognition of functional relationships;
- the emergence of conservative voices in the LGBT movement;
- the pursuit of formal equality through strategies based on civil rights.

These intellectual currents, which shaped the dominant discourse in the LGBT community from the 1970s through the 1990s, are neither chronologically nor discursively discrete. But separating them out is useful—and
in fact necessary—for understanding many of the current responses to marriage by the LGBT community. Throughout this chapter, we will discuss some of the dominant intercommunity critiques of these intellectual and political currents. In chapter 6, we will discuss contemporary scholarly writing about same-sex marriage.

WOMEN’S LIBERATION AND GAY LIBERATION

When, in February 2004, San Francisco City Hall threw open its doors and throngs of gay and lesbian couples rushed in to marry, it came as a shock to many. During the 1970s and early 1980s, in the heyday of gay liberation, marriage was the last thing on many lesbian and gay activists’ minds. Lesbian scholar Paula Ettelbrick strenuously argued, “marriage runs contrary to two of the primary goals of the lesbian and gay movement: the affirmation of gay identity and culture and the validation of many forms of relationships.” Furthermore, sexual revolution aimed to create sexual freedom, and marriage was antithetical to this goal.

Many activists in the gay and lesbian liberation movement derived their conclusions about the undesirability of marriage from second-wave radical feminism. Paramount among radical feminist arguments was the assertion that we live in a patriarchal world—a society thoroughly structured by male dominance. Patriarchy represents the world as divided into two distinct sexes. In this dichotomized universe, the female is defined by the absence of typical male qualities: he is autonomous, while she is dependent; he is competitive, while she is nurturant; he is identified with the public sphere of citizenship, while she is identified with the private sphere of domesticity; he is associated with the positive, while she is associated with the negative. Radical feminists assert that these gender roles subordinate women while eroticizing inequality and male dominance. Likewise, gender roles oppress both lesbians, who resist “the female sex role of sexual passivity and the servicing of men,” and gay men, who challenge “everything that masculinity typically connotes, including sex with women.”

Marriage reproduces both patriarchy and the bifurcated gender roles that characterize it; hence, it is a personal relationship with profound political implications. The structural pervasiveness of male power means that the liberal dichotomy between a political, public sphere and an apolitical private sphere is a false one; there is no clearly demarcated boundary between the personal and the political. The power dynamics underlying marriage reveal
the fallacy of the liberal distinction. Scholar Carole Pateman observes that the persistence of male dominance means that women cannot decide to enter marriages as “free” and “equal” individuals. Moreover, marriages themselves are circumscribed by the state in ways that diminish individual freedom, since only two people of the opposite sex can marry. The state then assigns these partners the ascriptive roles of husband and wife. Indeed, marriage is a distinct and distinctively gendered form of contract. As Pateman notes, it entails the performative act of saying “I do,” but thereafter it “can still be invalidated unless another act is performed ... the sex act.” Pateman continues, “Not until a husband has exercised his conjugal right is the marriage complete.”

Marriage therefore reinforces men’s freedom and women’s subordination.

Gay liberationists shared the radical feminist critique of marriage as a gendered institution. Lesbian legal scholar Nancy Polikoff maintained that marriage by lesbians and gay men would be unlikely to undermine stereotypical gender roles and would merely serve to valorize the institution of traditional marriage. “The desire to marry in the lesbian and gay community,” she wrote, constitutes “an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism.” Like radical feminists, gay liberationists also objected to the role of the state in circumscribing sexual relationships. Michael Bronski argued:

the feminist critique of marriage, signed onto fully by the Gay Liberation Front, made clear that the state had no business telling us what we could do with our bodies (especially with regard to reproduction), what we could do in bed, or with whom we could do it. We understood that what the state allowed, or sanctioned, was in the state’s interests, and not ours.

Central to the feminist critique of marriage was an understanding of freedom that went beyond liberal boundaries. For radical feminists, freedom differs fundamentally from formal equality: “We believe that to be equal where there is not universal justice, or where there is not universal freedom is, quite simply, to be the same as the oppressor ... [T]here is no freedom or justice in exchanging the female role for the male role. There is, no doubt about it, equality.” Rather, freedom entails a much more substantial conception of justice and a social transformation that begins with the elimination of gender roles.
Gay liberationists shared this enlarged conception of freedom with radical feminists. Paula Ettelbrick, for instance, emphasized:

the fight for justice has as its goal the realignment of power imbalances among individuals and classes . . . A pure “rights” analysis often fails to incorporate a broader understanding of the underlying inequities that operate to deny justice to a fuller range of people and groups . . . [M]aking legal marriage for lesbian and gay couples a priority would set an agenda of gaining rights for a few, but would do nothing to correct the power imbalances between those who are married (whether gay or straight) and those who are not. Thus, justice would not be gained.⁸

Justice was therefore seen as a much richer phenomenon than equality, one deeply tied to the transformation of power structures within society.

As we will see in the rest of this chapter, the radical feminist problematization of gender roles, critique of marriage, and vision of justice are contested and rearticulated throughout the debate over partnership recognition in the LGBT community. For instance, in her discussion of resistance to same-sex marriage in twenty-first-century North America, legal scholar Josephine Ross draws directly on the radical feminist analysis of gender roles.

The ideal of marriage as straight helps men feel masculine and women feminine. As in much homophobia, discrimination in marriage is based on fear that gays undermine the male/female, masculine/feminine paradigm . . . By preventing gay couples from calling their relations marriages, insecure heterosexuals may feel their own claim to masculinity or femininity enhanced. Hence, the use of gender to determine who can marry and who cannot serves the uses that discrimination always does, of making others feel better . . . The fight against gay marriage is best understood as a desperate attempt to keep the gender line from further eroding, to preserve at least some demarcations between what it means to be a man and what it means to be a woman.⁹

As we will also see later in this chapter, a repudiation of formal equality remains central to the contemporary LGBT critique of marriage. Radical feminist ideas are therefore, in many ways, foundational for the discourse on partnership recognition within the LGBT community.

With any foundational discourse, critiques from within are inevitable. Radical feminism has been challenged for being falsely universalistic and imply-
ing that women everywhere experience gender oppression in similar terms. The black lesbians who created the Combahee River Collective, for instance, stressed the importance of their commonality with, rather than their oppression by, black men. Gay and lesbian critics have also challenged the essentialism associated with the radical feminist analysis of marriage. Nan Hunter, for instance, argues that while “some feminist critiques of marriage posit an unalterable and forever oppressive institution, implicitly assuming that the gendered terms can never change,” same-sex marriage could potentially “destabilize the gendered definition of marriage for everyone.”

Marriage is socially constructed and therefore should be seen as a patriarchal tool rather than an entity that is inherently patriarchal in character. Indeed, the structure of marriage changed radically in the late twentieth century, after, as Hunter puts it, “two decades of feminist litigation efforts . . . established virtual equality in formal legal doctrine” about marriage.

Hunter argues that if same-sex couples—individuals who share the same status in the world as male or female—gain the right to marry, these relationships could create “the model in law for an egalitarian kind of inter-personal relation, outside the gendered terms of power, for many marriages.” For Hunter, then, marriage is a historically contingent institution that need not necessarily be a mechanism for the perpetuation of male dominance.

QUEER POLITICS AND THE VALIDATION OF SEXUAL DIVERSITY

In the 1980s and early 1990s, the movement for gay liberation sought greater inclusion—explicitly incorporating first bisexuals and then transgender people. Correlated with this, the movement began vigorously to celebrate sexual freedom. As one queer theorist put it, “complete freedom of expression for gay sexuality is the keystone of gay freedom, for it is homosexual activity that makes gay people different.” For queers, conventional mores were seen as undesirable mechanisms to regulate sexuality and inhibit sexual pleasure. Queers countered these repressive tendencies by teaching that “any self-esteem worth having must not be purchased by a disavowal of sex; it must include esteem for one’s sexual relations and pleasures, no matter how despised by others.”

While radical feminists and early activists in the gay liberation movement had focused on the problems emanating from patriarchy, queer theorists
focused on challenging heteronormativity—the dominant, heterosexual-prioritizing norms dictating how society should be organized. They built on the radical feminist critique of gender roles but with a postmodern twist, seeking to destabilize identity categories based on sexual orientation, sex, and gender. Queer theory “calls into question even such apparently unproblematic terms as ‘man’ and ‘woman’” by showing that a “natural” conception of sexuality is “impossible.” Accordingly, queer theorists have sought to recognize and validate a wide “diversity of sexual and intimate relations as worthy of respect and protection.” The goal was to break down the boundaries between sexual minorities and build an inclusive movement of sexual minorities for social change.

For queer theorists, the state is a particularly problematic institution. The state has typically categorized some types of consensual sex as “good” and others as “bad,” creating a stark dichotomy between “deserving” insiders (those willing to conform to heterosexual norms) and “reprehensible” outsiders (queer resisters to conformity). Queer theorists therefore strive to resist such hierarchical tendencies, insisting that “any vision of sexual justice begin by considering the unrecognized dignity of these outcasts, the ways of living they represent, and the hierarchies of abjection that make them secondary, invisible or deviant.”

As a hierarchical, state-sanctioned institution, marriage is the object of much criticism by queer theorists. Marriage is quintessentially a divisive mechanism, enabling the state to distinguish between certain types of consensual sexual relationships that should be rewarded and deemed worthy of protection, on the one hand, and others that are deemed less valuable and potentially punishable, on the other. Lesbian and gay relationships fall into the latter category, along with the sexual relationships of nonmarried adults, especially those who are single parents. Michael Warner writes that marriage thereby “sanctifies some couples at the expense of others.” Warner continues:

It is selective legitimacy. This is a necessary implication of the institution, and not just the result of bad motives . . . To a couple that gets married, marriage just looks ennobling . . . But stand outside it for a second and you see the implication: if you don’t have it, you and your relations are less worthy . . . The enobling and the demeaning go together. Marriage does one only by virtue of the other. Marriage, in short, discriminates.

For advocates of queer politics, then, marriage constitutes an exclusionary form of moral regulation that reifies an unjust dichotomy between those the
state deems to be worthy of support and those it denigrates. Most queers therefore argue that as an institution, marriage should be shunned. Judith Butler, for example, maintains:

[T]o demand and receive recognition according to norms that legitimate marriage and delegitimate forms of sexual alliance outside of marriage, or to norms that are articulated in a critical relation to marriage, is to displace the site of delegitimation from one part of the queer community to another or, rather, to transform a collective delegitimation into a selective one. Such a practice is difficult, if not impossible, to reconcile with a radically democratic, sexually progressive movement.19

Queer advocates not only regard marriage as exclusionary, divisive, and antidemocratic; they also emphasize that given the institution’s privileged status, it is entirely inappropriate to talk of marriage as a “free choice.” It is at best a contextually coerced choice, given the prolific array of benefits that accrue to a married couple but are denied to the unmarried. Some argue that it is inappropriate to regard marriage as an exclusively personal decision taken by two committed, long-term partners. When people marry, they actively participate in consolidating hierarchy and reinforcing state power in a way that has consequences for the unmarried. Warner argues:

As long as people marry, the state will continue to regulate the sexual lives of those who do not marry. It will continue to refuse to recognize our intimate relations, including cohabiting partnerships, as having the same rights or validity as a married couple. It will criminalize our consensual sex.20

Queer theorists also argue that supporting marriage would be assimilationist. In other words, it would be a way for LGBT people to minimize, rather than to emphasize, the differences between themselves and heterosexuals. Queer theorists maintain that by marrying, lesbian and gay couples would be endorsing an institution that has historically been associated with heterosexuality. They would be privileging their identity as spouses over their other identities, including their LGBT identities. Marriage might therefore be viewed as an attempt by same-sex couples to forge an alliance with the “mainstream” rather than with the “deviants” at the margins of society—including those LGBT individuals who resist conforming to dominant social norms and expectations. In particular, married lesbian and gay couples might privilege the marital norm of monogamy over the queer ethic of sexual freedom.
But some scholars point out that same-sex marriage can be understood in more ambiguous terms. Same-sex marriage may actually constitute a challenge to heteronormativity rather than an act of assimilation. For instance, as Kenji Yoshino notes, same-sex marriage may be understood as an alliance between LGBT individuals—literally—rather than an alliance with the wider, heterosexual community. Same-sex marriage is also a means of publicly demonstrating both the existence of emotional ties between same-sex couples and the existence of same-sex relationships in which gay or lesbian sex is presumably an important component. Furthermore, same-sex marriage undermines the heteronormative conception of marriage based on ascribed gender roles. Finally, many activists within the LGBT community are agitating for same-sex marriage; hence, supporting it is tantamount to participating in gay rights activism and thus to resisting, rather than accepting, the status quo.21

Both the assimilationist argument against same-sex marriage and the counterargument just outlined are susceptible to criticism by those maintaining that queer theory validates some differences at the expense of others and that queer politics is similarly divisive. Scholar Cathy Cohen notes, for instance, that like other people of color, she feels “distance and uneasiness” in relation to the term *queer*.22 Queer theory and politics are conceived around a dichotomy between queers and straights. Accordingly, queer theorists often fail to address the fact that most people have intersectional identities—in other words, that “numerous systems of oppression interact to regulate and police [them].”23 These systems include race, class, and gender. Because of this oversight, queer politics fails to recognize that power distributions do not correlate with the gay/straight binary. For instance, they overlook the fact that “‘nonnormative’ procreation patterns and family structures of people who are labeled heterosexual have . . . been used to regulate and exclude *them.*”24 On this reading, arguments for or against same-sex marriage that do not address how “identities of race, class, and/or gender either enhance or mute the marginalization of queers, on the one hand, and the power of heterosexuals, on the other,”25 are fundamentally noncompelling.

THE REENVISIONING OF FAMILY THROUGH THE RECOGNITION OF FUNCTIONAL RELATIONSHIPS

Drawing on both feminist and queer insights, LGBT activists began to move toward defining family expansively in terms of functional relationships,
rather than through marriage or blood ties. This led to attempts to develop a legal structure that recognized same-sex relationships for what they were: familial ones. The model for these laws, however, was distinctly not the heterosexual one of marriage. Rather, activists and legal scholars attempted to create mechanisms for legal recognition that started from the reality of LGBT lives.

Two main goals dominated lesbian and gay family law during the 1980s. First, gay and lesbian legal scholars sought to broaden the scope of legal protections for families, ensuring that legal protections could be created for nonmarried families without biological ties. These protections were designed to reflect the way in which caregiving relationships often functioned within lesbian and gay families. In other words, the goal was to ensure that “insofar as government controls the benefits and legal rights of family, function, not morality, should govern family definitions and legal access to such benefits.” Second, gay and lesbian lawyers recognized that “good family policy must distribute family benefits more democratically, not just to those who can or choose to marry, or who are biological parents, but also to those functioning in the role of family.”

In promoting these goals, lesbian and gay legal scholars stressed that their priority was to “value equally all family forms.” Providing benefits only to narrowly circumscribed families—such as two-parent, heterosexual families—discriminates against all others and therefore contravenes any public policy aimed at supporting the well-being of family as lived, as opposed to family as represented in dominant social norms. Moreover, the two-parent-plus-children model is often at odds with gay and lesbian families’ creative parenting relationships, which frequently allocate a parenting role to more than two individuals. A functional approach to family recognition is sufficiently flexible to support these relationships and others that do not fit the dominant normative model.

As a result of the functional approach to family recognition, law and policy began to recognize relationships that were not based on blood or marriage, in three vital ways: through domestic partnership agreements (more closely discussed in chap. 3), through the acknowledgment of coparent status for nonmarried partners (discussed in chap. 2), and through second-parent adoption (discussed in chap. 2). Many advocates of this approach rightly view it as a successful way of extending support to families and thereby expanding both the definition of family and the appreciation of divergent family forms.
But the functional approach to family recognition has not been without its critics. For instance, despite the goals of many legal scholars, neither law nor policy has adapted to recognize relationships that transcend a pairing of two adults and (sometimes) their dependent children. In many ways, functional relationships in law and policy therefore resemble a “thin” form of marriage. In other words, they reflect coupled relationships that are less subject to state control and definition but that accrue fewer state-sanctioned benefits. Under such circumstances, some critics argue that supporting domestic partnerships and other functional relationships without also “degendering” marriage by enabling gay men and lesbians to participate in that institution “creates a second-class status rather than an alternative” to marriage.

Furthermore, critics argue that state recognition of functional relationships splits the LGBT community, legitimizing some of its members at the expense of others. Lesbian legal scholar Julie Shapiro, for instance, notes that second-parent status is of “no use to lesbians raising children born into their partner’s previous heterosexual relationship, where the father remains a legal parent to the child,” since such status provides no protection to the relationship between nonlegal parent and child in these situations. In addition, notes Shapiro, lesbians with “a history of drug or alcohol abuse, a criminal record, or an unconventional lifestyle” are frequently unable to qualify for second-parent adoptions. “In serving the needs of some but not all nonlegal mothers,” Shapiro concludes, “second-parent adoptions reinforce the idea that there are two distinct categories of lesbians raising children: ‘real’ lesbian mothers, who may be able to adopt if they are fortunate, and those other lesbians, whose status as women raising children is diminished.”

Indeed, state recognition of functional relationships splits the LGBT community in other ways, too. Domestic partnership and second-parent adoption have associated financial costs. Domestic partner benefits, for instance, are frequently taxed, whereas spousal benefits are tax-exempt. Similarly, second-parent adoption is only available to those who can afford expensive lawyers fees. One commentator notes:

Queer parents are not only educated, comfortable, employed, dual-income, guppy (gay upwardly mobile, professional) couples. We are also people who live in cars with our kids, and people who live in rural areas in economically stressed regions with little to look forward to in the way of work or education . . . We are families on welfare, living in public housing. We
are incarcerated, we are homeless. We are people whose desire to parent is every bit as strong as the middle-class candidate, but we lack . . . the funds to cover legal counsel (a basic requirement in a society where our children can still be taken away from us based on our sexual orientation).32

Many within the LGBT community cannot afford to purchase protection for their families. Marriage would therefore be a much less expensive and significantly more accessible way to acquire familial benefits and protections for low-income LGBT families.

Finally, the functionalist approach elicits criticism from those within the LGBT community who simply want to be married. Lawyer Evan Wolfson has observed: “when it comes to the marriage issue, the gay community—men and women—has been far ahead of the ‘leaders’ . . . They have made the personal political; they know what they want, and it includes equal marriage rights.”33 For those sharing this perspective, state recognition of functional relationships will always be an inadequate solution; marriage is the goal. This is why dozens of same-sex couples have sued for the right to marry since 1971.

**CONSERVATIVE VOICES IN THE LGBT MOVEMENT**

Reacting in part to the ravages of the AIDS epidemic, such prominent gay social conservatives as Andrew Sullivan and William Eskridge began to write about marriage as a means to reject queer values, promote monogamy in gay relationships, and stabilize gay life. In a 1989 essay, for instance, commentator Andrew Sullivan acknowledges the early radicalism of the gay liberation movement. He argues, however, that a fundamental change has taken place in the self-perception of the gay and lesbian community: “a need to rebel has quietly ceded to a desire to belong. To be gay and to be bourgeois no longer seems such an absurd proposition. Certainly since AIDS, to be gay and to be responsible has become a necessity.” Marriage, Sullivan believes, “is conservative in the best sense of the word.” It will likely make gay men less promiscuous, while married gay couples will provide stable role models for gay youth. Sullivan argues that gay marriage promotes “social cohesion, emotional security, and economic prudence,” thereby extending family values to gay and lesbian households. To conservatives, he offers a challenge: “why not coax gays into traditional values rather than rain incoherently against them?”34
Similarly, law scholar William Eskridge remarks that the rebellious, anti-assimilationist strand dominating gay activism is the socially constructed product of context. “We are gender rebels because that role has been thrust upon us by oppressive dividing practices, including legal discriminations like the exclusion from marriage,” he writes, continuing, “If those dividing practices were to collapse, we might tend to meld back into society’s mainstream, which does not inevitably strike me as baleful.”35 Eskridge anticipates that constant confrontation with an anti-gay environment served to radicalize his generation of activists. The next generation, however, will likely encounter far less hostility and therefore be significantly less inclined to disengage from the mainstream.

Eskridge gives little credence to arguments, derived from radical feminism, suggesting that gay men and lesbians should shun marriage because it is a fundamentally oppressive institution. These arguments essentialize marriage, he maintains. Marriage does not necessarily cause Western women’s subordination, which, Eskridge claims, “may be more deeply related to social attitudes about gender differences than to the formal construct of marriage per se.” If this is the case, says Eskridge, advocating on behalf of same-sex marriage “does not buy into a rotten institution; it only buys into an institution that is changing, as women’s roles and status are changing in our society.”36

Eskridge also attacks the queer theorists’ claims that gay marriage would divide the gay community into married “insiders” and unmarried “outsiders,” with the insiders most likely to be privileged gay white men and the outsiders most likely to be women, people of color, and the less affluent. Eskridge argues that “there is no evidence—such as polls, surveys, or theoretical models—suggesting that the marriage option would be disproportionately exercised by rich gay men than by men and women of color, lesbians, or less affluent bisexuals and homosexuals.” Furthermore, marriage is not likely to change the existing hierarchies within the lesbian and gay community. “The gay man is already more likely to be an insider,” Eskridge asserts, adding, “Allowing him to marry another man will not change that.”37

Other LGBT scholars, however, make compelling criticisms of conservative approaches to same-sex marriage. They point out, for instance, that Eskridge does not adequately address issues of race and poverty. Thus, Darren Leonard Hutchinson emphasizes that it is most unlikely that people of color and other marginalized groups would “meld back into the main-
stream” if restrictions on civil marriage and other legal prohibitions were lifted. “[P]oor gays and lesbians and gays and lesbians of color, unlike the white and affluent, are excluded from society before they ever discover their sexual orientation,” he maintains, concluding, “Therefore, they cannot meld back into the mainstream—they have never been part of it.”

Indeed, Hutchinson argues that there are good reasons to anticipate that women, people of color, and the less affluent would be less likely to marry than affluent white men. The marginalized status of people who are oppressed on multiple dimensions—through a combination of race, sexuality, gender, or class—is not likely to be significantly enhanced by gaining marriage rights. Members of these groups are likely to experience continued oppression regardless of access to civil marriage, and they consequently may also be less inclined to marry if the option were available to them. Marriage, in other words, would not be “the only reform that truly matters” for members of these groups. Furthermore, Hutchinson notes that anthropological evidence also suggests that the nuclear family is less prominent in communities of color and that heterosexuals of color—especially African Americans and Latinos—are less likely to marry than heterosexual whites. It is at least reasonable, therefore, to assume that gay men and lesbians of color who grew up in unmarried families and who share a similar economic background will in turn give less priority to marriage.

Critics have noted how inherently conservative arguments have seeped into the current advocacy for gay marriage—differentiating between “worthy” gay men and lesbians, who are “virtually normal” and desirous of marriage, and “less worthy” others. Lisa Duggan, for instance, notes that a recent pamphlet by a major LGBT advocacy organization uses conservative rhetoric to make a case for gay marriage, claiming: “Denying marriage rights to lesbian and gay couples keeps them in a state of permanent adolescence . . . Both legally and socially, married couples are held in greater esteem than unmarried couples because of the commitment they have made in a serious, public, legally enforceable manner.”

Duggan argues that there are grave implications of advocating for gay marriage in these conservative terms, especially for a movement that seeks social justice. Such language, she says, “insults and marginalizes unmarried people, while promoting marriage in much the same terms as the welfare reformers use to stigmatize single-parent households, divorce and ‘out of wedlock’ births.” Moreover, by emphasizing the supremacy of marriage rather than disentangling the religious, economic, symbolic, and kinship
aspects of marriage, LGBT community leaders reinforce a traditional hierarchy that privileges marriage above all other relationships. Duggan argues that they also fail to democratize the distribution of benefits by advocating for a “flexible menu of choices for forms of household and partnership recognition open to all citizens, depending on specific and varying needs.”

As an alternative to the conservative approach to marriage promotion that derives from within the LGBT community, Duggan recommends the philosophical position articulated by Kay Whitlock of the American Friends Service Committee. Whitlock stresses:

We cannot speak about equal civil marriage rights and the discrimination that currently exists without also speaking of the twin evil of coercive marriage policies promoted with federal dollars . . . For us, it is critical that the LGBT movement work for equal civil marriage rights in ways that do not further reinforce the idea that if a couple is married, they are more worthy of rights and recognition than people involved in intimate relationships who are not married . . . We do not want to convey the message that marriage is what all queer people should aspire to. We also do not want the discussion of marriage to overwhelm and suppress discussion about a broader definition of human rights and basic benefits that ought to accompany those rights.

Critics of gay conservatism therefore argue that the pursuit of same-sex marriage should not obscure the more progressive goals of the movement for LGBT equality.

THE CIVIL RIGHTS STRATEGY OF COMBATING DISCRIMINATION

The gay conservative focus on marriage is closely tied to the prioritization of marriage as a policy goal for the LGBT movement. Tom Stoddard, former director of Lambda Legal Defense and Education Fund argued that “marriage is . . . the political issue that most fully tests the dedication of people who are not gay to full equality for gay people, and also the issue most likely to lead ultimately to a world free from discrimination against lesbians and gay men.” Similarly, lawyer Evan Wolfson, who played a leading role in the Hawaii same-sex marriage case *Baehr v. Lewin*, maintains that “marriage is the central legal and social issue of our society.”
By 1993, the LGBT movement had definitively adopted a civil rights strategy aimed at ending discrimination on the basis of sexual orientation. Being denied the right to marry, according to these arguments, constitutes inequality before the law. On this paradigm, marriage becomes an institution that should be accessible to all—gay and straight alike. Legislation becomes the main vehicle for achieving this end.

The civil rights approach derives, in large part, from the liberal theory of personhood. Liberalism claims that everyone is equal from a moral point of view and therefore that people should be treated similarly by law and government. In other words, everyone is due equal respect. The implication of moral equality from a legal perspective is that unless a rational case can be made to justify differentiating between different people or groups, the law should treat everyone the same. Liberalism also claims that people are equally rational and capable of discerning their own conception of the good life. From a legal perspective, they therefore acquire a right to negative liberty, or a right to privacy that would enable them to pursue their chosen ends without government interference.

From this reading of law and personhood, LGBT lawyers and activists argue that gay men and lesbians deserve the same access to marriage as their heterosexual counterparts. Marriage is a basic constitutional right that cannot legitimately be denied in the absence of a compelling interest by the state. Furthermore, gay men and lesbians encounter discrimination when they are granted the right to marry opposite-sex individuals but denied the right to marry a same-sex partner. As Wolfson puts it, “the denial of one’s ability to choose a same-sex spouse violates substantive constitutional guarantees such as the right to privacy, the right of personal liberty, and the fundamental right to marry as such.”

The civil rights perspective is much in evidence in ongoing court struggles for same-sex marriage. Plaintiffs in recent lawsuits have sued their states to gain the right to marry based on the due process and equal protection clauses of their respective state constitutions. For instance, the complaint filed in *Hernandez v. Robles*, a New York case, argues:

The right to marry is one of the deeply personal liberty and privacy interests protected by the due process clause of the New York State Constitution, Art. I, section 6. The exclusion of Plaintiffs and other same-sex couples from legal marriage violates this fundamental right. The right
to equal protection of the laws under the New York State Constitution, Art. I, section 11, also prohibits the State’s discriminatory marriage scheme, which, by drawing impermissible distinctions based on sexual orientation and sex, denies all same-sex couples access to this extraordinarily significant legal institution.47

The Massachusetts judges who ruled in favor of same-sex marriage in that state also recognized the importance of due process and equal protection for lesbian and gay families.

There have been definite advantages for the LGBT movement pursuing a strategy of legal advocacy based on civil rights. Urvashi Vaid notes:

Through its emphasis on the equality of all human beings, the civil rights framework gave us what we most needed, some hope that we would one day be accepted by society as fully as we accepted ourselves . . . [T]he adaptation of the minority group model to our experience worked: we achieved some legal and legislative recognition that people ought not to be stigmatized because of their sexual orientation. We came to realize that gay and lesbian people shared a common legacy of discrimination, harassment, violence and rejection, as well as common aspirations of justice, fairness and human dignity.48

Yet a civil rights-based approach has its limitations. As Vaid explains, “civil rights are principally mechanisms to gain access” to civil society; they are not a “means to implement fundamental social change.”49

Critics of the civil rights strategy recognize that it can at best enable the LGBT community to attain formal equality with their heterosexual counterparts. Although the achievement of formal equality will unquestionably be beneficial, it is also the case, as Hutchinson argues, that “extreme poverty, subtle and systemic discrimination, and other current effects of historical subordination limit the benefits that a formal equality framework can deliver to oppressed classes.” The focus on same-sex marriage as a policy goal for LGBT advocates bespeaks the movement’s prioritization of and commitment to formal equality—rather than to substantive equality or material redistribution. However, as Hutchinson notes, “[LGBT people] who face structural barriers to social resources (e.g., institutionalized racism and poverty) require much broader social reform, including policies that eradicate the pervasive material conditions of inequality.”50
CONCLUSION

As the discussion in this chapter has shown, the debate about partnership recognition in the LGBT community has always been and remains a fiercely contested terrain. Advocates and scholars have consistently argued over the role of marriage, as well as over the conceptions of freedom, equality, and justice that the movement should prioritize. Against this intellectual backdrop, chapter 5 will describe the way in which anti-gay legislators and Republicans have successfully made marriage for same-sex couples a wedge issue in U.S. politics.