

**Investigating Citizenship, Sexuality and the Same-Sex Marriage fight  
in California's Proposition 8**

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## Abstract

My doctoral dissertation examines the discursive strategies of ten organizations engaged in the 2008-2013 same-sex marriage battle of Proposition 8 in California. In November 2008 Californians voted to ban same-sex marriage under the state constitution through Proposition 8. Based on a queer analysis, my dissertation examines why and how same-sex marriage has become a pivot point in debates about larger political issues, including the regulation of sexualities, the criteria for citizenship, the boundaries of state authority, and the nature of social justice. Proposition 8 serves as an influential case study to assess the current political goals of the American gay and lesbian movement, the influence and power of social conservatives in determining the sexualized nature of citizenship, and the implications of allocating rights on the basis of family form, sexuality and sexual conduct.

I examine the political discourses of ten organizations – four social conservative organizations, and six mainstream gay, lesbian and bisexual (LGB) organizations – which rallied for and against Proposition 8 as it progressed through referendum and the courts as *Perry et. al. v. Schwarzenegger*. To conduct the discourse analysis, I use a triangulation of methods, including the public documents of the ten organizations; elite interviews with leaders of the mainstream LGB organizations; and the court proceedings from the *Perry et. al. v. Schwarzenegger* hearings.

I analyze these documents, asking three central questions. First, how did the Proposition 8 organizations frame their discursive arguments in terms of larger citizenship issues including the legitimating of citizens, the boundaries of state authority, and the nature of social justice? Second, how did the Proposition 8 organizations’

discourses reproduce or resist dominant heteronormal, and specifically social conservative, definitions of legitimate citizens, the boundaries of state authority, and the nature of social justice in their attempts to gain social and political inclusions and rights through same-sex marriage? Third, what are the implications of reproducing or resisting, particular heteronormal, social conservative, discourses in relation LGBTQ equality debates?

I argue that through their bid to win same-sex marriage, the mainstream LGB organizations produced heteronormal and exclusionary discourses. As a result, the mainstream LGB organizations created and promoted a limited project of equality that only served the ends of particular kinds of heteronormative homosexual citizens.

## Preface

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## **Chapter One: Introduction**

### **1. Introduction and Statement of Problems**

My doctoral dissertation examines the forces organizing for and against California's Proposition 8 from 2008-2013, its progress through referendum and the courts, and the ongoing politics of same-sex marriage in the United States. I treat California's Proposition 8 as an influential case study and conduct a discourse analysis of ten political organizations involved in the social, political and legal battles over the proposition. My dissertation examines why and how same-sex marriage has become a pivot point in debates about larger political issues, including the regulation of sexualities, the criteria for citizenship, the boundaries of state authority, and the nature of social justice. Specifically, my work examines and challenges the current political goals of the American gay and lesbian movement, the influence and power of social conservatives in determining the sexualized nature of citizenship, and the implications of allocating rights on the basis of family form, sexuality and sexual conduct.

On May 15<sup>th</sup> 2008 the California Supreme Court ruled that an ordinary statute<sup>1</sup> ban on same-sex marriage was unconstitutional. Based on this decision, same-sex marriage became legal and equal to heterosexual marriage in California. Consequently, eighteen thousand same-sex couples got married in the state<sup>2</sup> (Sayre et. al. 2010). In reaction to this decision, opponents to same-sex marriage worked to gather voter support in order to qualify Proposition 8 for inclusion on the November 8, 2008 state ballot. The complete name of the proposition is "California Proposition 8 - Eliminates Right of

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<sup>1</sup> The term "ordinary statute" or "ordinary law" is used to distinguish between statutes and laws that seek to amend the state constitution (constitutional statute/law), and laws that do not seek to amend the constitution but still seek to change state law (ordinary statute/law).

<sup>2</sup> In Chapter Two I outline this history of California's domestic partnership laws, and its same-sex marriage ballot initiatives, referendums and court trials.

Same-Sex Couples to Marry.” It proposed to amend the state constitution to stipulate that: “only a marriage between a man and a woman is valid or recognized in California.” (Sayre et. al. 2010, 10) On November 4<sup>th</sup> 2008, Californians voted on Proposition 8 and with a 52% majority vote same-sex marriage was banned in the state constitution via referendum (Grodin 2009). In late 2012, the Supreme Court of the United States considered the constitutional validity of Proposition 8. On June 26<sup>th</sup> 2013, the Supreme Court dismissed the case and accordingly the Ninth District Court’s earlier decision was upheld: same-sex marriage is once again legal in California, thus closing the Proposition 8 case (Hollingsworth et al. v. Perry et al.).

The case of Proposition 8, 2008 – 2013, unfolded at the height of the same-sex marriage fight in the United States. By the 2000s, same-sex marriage had become one of the most hotly contested social issues in American politics; an issue over which social conservatives, and mainstream gay, lesbian and bisexual (LGB)<sup>3</sup> social movements declared a “culture war” (Richardson 2005); a political tool to unite political parties and organizations, and to galvanize voters; and the pivot point in debates about larger citizenship issues including the recognition and legitimization of particular people as citizens, the boundaries of state authority, and the nature of social justice.

Over the course of the five-year history of Proposition 8, the political landscape of California and the United States has changed substantially in relation to same-sex marriage. Between 2008 and 2013, public opinion polls showed that support for same-sex marriage shifted from a minority to a majority support among Californians and

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<sup>3</sup> Throughout this dissertation, I shift between using LGB, LGBT, LGBTQ, and queer to refer to different organizations and communities. I have respected the identification organizations and communities use to describe themselves. When organizations and communities have not described themselves, I have chosen a description that seems to best suit their politics, location and time period.

Americans (Huffington Post March 28, 2013; New York Times April 20, 2011). While the early 2000s saw twenty-six states constitutionally ban same-sex marriage, four states constitutionally banned same-sex marriage after 2007 (National Conference of State Legislatures 2013). In 2008, both of the national parties and their presidential and vice presidential candidates did not support same-sex marriage. By 2013, in contrast, the Democratic Party, President Obama, Vice President Biden, and one hundred and thirty-one prominent federal Republican representatives had publicly supported same-sex marriage (The Daily Beast February 28, 2013). Finally, the Supreme Court's June 2013 decision on Proposition 8, as well as its repealing of key measures in the Defense of Marriage Act (DOMA) in *United States v. Windsor*, created opportunities for other states to challenge their respective marriage policies. While same-sex marriage was a very divisive and galvanizing issue for mainstream LGB and social conservative organizations, it appears as though the same-sex marriage debate reached its height in terms of public interest, and political saliency and utility.

Proposition 8 serves as an influential case both because it represented many of the complexities of the battle over same-sex marriage in the United States, and because it was the most high profile, expensive, and publicized case of its kind<sup>4</sup>. Proposition 8 also is an influential case because it marked an important moment in American political rights history as it called for the state retraction of citizenship rights on the basis of sexuality and family form (Grodin 2009). The exceptional circumstances of Proposition 8 opened up space for theorists and activists to problematize the nature of the relationship between

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<sup>4</sup> In Chapter Three I enumerate and explain six reasons for why I classify Proposition 8 as an *influential case*.

the state, citizens, and sexuality; calling into question state practices that allocate rights and protections on the basis of sexuality and family form.

In the contemporary American political landscape, social conservatism and its discourses, complicated and conditioned the terms of inclusion and exclusion with regard to marriage; ultimately defining dominant criteria for normal and abnormal, legitimate and illegitimate, acceptable and unacceptable sexualities and family forms (Farney 2012). Social conservatism espouses a heteronormal culture of marriage in which the patriarchal, heteronormal family - complete with one woman, one man, and their presumed biological offspring - is positioned as the natural and normal, and thus the ideal family form (Cossman 2005; Stacey 1997). In the United States, marriage has historically been an institution for which inclusion is granted to those who can conform to the idealized heteronormal family, complete with designated normalized gender and sexual identities, roles and responsibilities. Thus when making claims for inclusion, same-sex marriage advocates had to consider and navigate, assimilate to or resist social conservative and thus heteronormal, criteria and discourses.

As with past and contemporary same-sex marriage battles, the fight over Proposition 8 was waged primarily between mainstream LGB organizations, and social conservative organizations. Admittedly, this division is broad and fails to account for organizations that were critical or apathetic about the politics of state-sanctioned marriage and the pursuit of same-sex marriage, or individuals who did not align themselves with either social conservative or mainstream LGB programs. Yet given that the proposition presented two possibilities for the future of same-sex marriage in California – either it was banned under State Constitution or it was deemed equal to

heterosexual marriage – there remained little room for alternative or critical individuals and organizations to weigh in and effect change in the Proposition 8 debates.

To define and bolster the difference between them, both mainstream LGB and social conservative organizations depended on this dichotomy of possibilities for state-sanctioned marriage. Tensions existed between social conservatives and LGB movements throughout the 20<sup>th</sup> century, however, since the mid-1990s, both movements not only prioritized the fight over same-sex marriage, but constructed marriage as being the embodiment of their respective, and supposedly oppositional, ideologies, political agendas and ultimately their ‘cultures.’ The same-sex marriage debates of the 2000s gave both movements a concrete issue over which to declare a ‘culture war<sup>5</sup>’ (Richardson 2005). Social conservative activists declared that marriage was a sacred, traditional institution reserved for heterosexual citizens, and that the state had a responsibility to protect the exclusivity of the institution in order to assure that citizens are moral, normal and responsible (Farney 2012; Duggan 2010; Roberts 2009). Mainstream LGB activists argued that homosexual citizens were normal and were equal to heterosexual citizens, that same-sex marriage was the last remaining step toward equal citizenship for LGBT Americans, and therefore that the state’s denial of same-sex marriage rights was a denial of equality and justice (Polikoff 2008; Josephson 2005). Proposition 8 was thus birthed from a political moment in which same-sex marriage became more than a policy matter, and but instead was an extension of a previous half decade of equality seeking movements. Same-sex marriage was held as representing the dichotomy between two

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<sup>5</sup> The historical and contemporary motivations for social conservatives and mainstream LGB fixations on same-sex marriage are analyzed in Chapter Three.

possibilities for state-sanctioned marriage, two political cultures and ultimately two citizenship regimes in the state and country.

This thesis argues that these two social movements were not diametrically opposed cultures and they were not promoting vastly different citizenship regimes. Rather, I argue that social conservative and mainstream LGB organizations shared many fundamental beliefs about sexuality, the ideal citizen, the role of the state and social justice: both movements agreed that particular rights and privileges should be allocated according to citizens' ability to assimilate to normalized sexualities and family forms. Proponents of Proposition 8 wanted to maintain the status and privileges of marriage for heterosexual citizens. Opponents of the proposition argued that homosexual citizens deserve the same rights and protections as their heterosexual counterparts (Sayre et. al. 2010; Grodin 2009). The mainstream LGB movement insisted that particular LGB Americans could and would assimilate to the normative criteria of inclusion through their sexuality and family form. To prove the normality and potential for assimilation of LGB Americans, I argue that mainstream LGB organizations involved in Proposition 8 adopted, as opposed to resisted, social conservative and thus heteronormal discourses about sexuality, the ideal citizen and state authority. In so doing, mainstream LGB rendered particular homosexuals as citizens worthy of certain rights, benefits and protections.

Employing a queer<sup>6</sup> critique, this dissertation challenges the culture war narrative by investigating how and why the two sides espoused similar beliefs about elements of

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<sup>6</sup> The definitions of the term "queer" and queer theories are contested and constantly changing. I define the term queer as a pejorative word – historically used to demean, intimidate or ostracize – that is now being reappropriated by its former targets. I use queer as a descriptor for particular kinds of politics/activism and academic critique, and not as a sexual identity. That said, there are activists and communities that define

citizenship regime: the legitimization of particular sexual citizen subjects, the boundaries of state authority, and the nature of social justice. Broadly, I define queer as representing political projects that challenge, complicate and dismantle intersecting and normative categories, hierarchies and exclusions that are manifest through sexuality, gender, race, ability and income and/or occupation. While queer activism and academic theories were galvanized by the HIV/AIDS crisis, both queer entities have been influenced by the feminist, civil rights and sexual liberationist movements, and by postmodern, critical race, radical feminist, indigenous, and crip/ability scholarships (Kafer 2013; Driskill et. al. 2011; Razack et. al. 2010; Ahmed 2006; McRuer 2006). Intersectional queer politics emerged based on the work of women of colour feminists - Angela Davis, Audre Lorde and Kimberlé Crenshaw - who argued that the analysis of gendered oppression must consider how women's race, class and sexuality differently affects their experiences with identity and power, and oppression and privilege (Lorde 2007; Crenshaw 1991; Davis 1981). Queer theorists have engaged with intersectionality by seeking to understand and challenge how one's sexual identity and sexuality-based oppression are conditioned by one's gender, race, class, and ability<sup>7</sup>. To these ends, queer theorists have explored how one's sexuality is constructed in relation to the construction of one's gender, race, class and ability, and have analyzed how one's sexuality is differently regulated and

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themselves as queer. In such cases I respect their use of the term to define their identity. As well, I use the term queer to define activists and communities that are engaged in queer work, I do not use it in these cases to define the implicated individuals' own sexuality.

<sup>7</sup> Crip theory, for example, and queer theory are similar in their attempts to problematize social categorizations, hierarchies, and exclusions. Crip theory, however, is not simply the queer theory of disability studies. Crip theory is a methodology of disability studies that seeks to challenge, disrupt and deconstruct notions of normality/abnormality, health/sickness, independence/dependence in relation to bodies, pleasures and identities. Crip theory questions how bodies and abilities are understood, categorized and valued differently in society, ultimately creating systems of oppression. Queer theorists and activists have been criticized for failing to account for how gender, class, race and sexuality are related to bodies and abilities. Crip theory illuminates such crucial omissions, presents important questions, and offers critical tools for queer, feminist, race and class-based anti-oppression projects (McRuer 2006).

experienced on the basis of one's other identities<sup>8</sup> (Kafer 2013; Driskill et. al. 2011; Razack et. al. 2010; Ahmed 2006; McRuer 2006). In this project, I use queer intersectional theories to understand how the institution marriage and campaign for same-sex marriage differently regulated and oppressed, and excluded and privileged people on the basis of their sexuality, gender, race, class and family form.

Queer theorists use the concept of heteronormativity to define and challenge the ways in which sexuality and gender are separated into patriarchal and heterosexual hierarchically organized and normalized binary categories (Duggan 2002; Cohen 1997; Warner 1993). I argue that this current citizenship regime is heteronormal as it is founded on the heterosexual family and marriage, and heterosexual criteria for the identities, roles and responsibilities of citizens. I further argue that these two sides of the same-sex marriage battle actually both embraced and reproduced heteronormative categories, hierarchies, power relations and exclusions through their reverence for marriage and marriage culture, and by using marriage as a way to separate, elevate and reward particular people as citizens on the basis of their sexualities and family forms.

With this queer analysis in mind, I argue that the political and discursive strategy of mainstream LGB organizations was problematic for several reasons. First, in adopting these discourses, these organizations reinforced a citizenship regime in which citizens are denied or are rewarded particular rights based on their sexuality and family form. Second, instead of challenging the fact that assimilation is required for inclusion, mainstream

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<sup>8</sup> For example, as is discussed throughout this dissertation, LGBT people's sexuality, gender and gender expression may affect their job opportunities and security, consequently affecting their level of income and wealth. Specifically, transgender people and queer women tend to face disproportionate discrimination on the basis of their sexuality, gender and/or gender expression when it comes to gaining and maintaining well-paying employment. As a result, trans people and queer women are more likely to live in poverty, and to lack health insurance. I ask, then, if the prioritization of same-sex marriage stands to benefit people who are experiencing intersectional oppressions from patriarchal, heteronormative and capitalist systems (Johnson et. al. 2005; Josephson 2005; Card 1996).

LGB same-sex marriage organizations and activists asked for the terms of inclusion to be expanded, incrementally, to only accept LGBT Americans who could appear to replicate many of the valued and normalized elements of the heterosexual family (Polikoff 2008; Warner 1999). Citizens who could not fulfill the desired criteria were denied access to certain rights and protections, and are ultimately denied social justice (Fraser 1996). Third, those who could not assimilate were further marginalized within general society and in relation to already privileged LGB citizens. Inequalities and hierarchies among LGBTQ Americans were exacerbated as the population was divided into those who could and those who could not marry.

Accordingly, this dissertation uses a queer critique to examine the social conservative and mainstream LGB organizations of Proposition 8 at the height of the American same-sex marriage fight. Ultimately, this is an in-depth examination of Proposition 8 as an influential case study of the changing relationship between social conservative and mainstream LGB social movements; the strategies of the implicated mainstream LGB and social conservative organizations in California, and in the United States; the evolving nature of same-sex marriage discourses; the influence and power social conservative heteronormal discourses in determining the sexualized nature of citizenship; the effects of the mainstream LGB organizations' assimilationist strategies and normalizing discourses; and the implications of reinforcing the heteronormal citizenship regime in which certain rights and protections are allocated according to sexuality and family form.

This chapter contains three sections: the first section presents the dissertation's theoretical framework; the second section lays out the dissertation's purpose and scope,

and its research question, arguments and goals; and the third section outlines the dissertation's chapter breakdown.

## **2. Theoretical Framework**

This section proceeds in four parts. In the first three sections, I define sexuality, citizenship and social justice, and in the fourth section I discuss the relationship between the three elements. These three elements exist and work together in an important and unique manner in contemporary heteronormal citizenship regime in the United States, one in which the state determines citizenship and curtails social justice based on the regulation of the performance of particular sexual identities and conduct.

### **2.1. Sexuality, Normality and Regulation**

Before defining the specific elements of a citizenship regime, it is important to outline how I define and use the concept of sexuality. According to Michel Foucault, sexuality is seen as a site of power both precious and dangerous that must be protected and/or harnessed in a particular way and to particular ends. There is power in the creation of truth and sexuality becomes immersed in a struggle about who can create the truth about sex and then harness its power (Foucault 1978, 56). As such sexuality has become the theme of political operations, economic interventions, and citizenship regimes. As stated, this dissertation focuses on how sexualities, sexual identities and conduct were constructed and regulated at various sites of power – including, but not limited to the state, the institution of marriage, and political organizations – according to a particular citizenship regime. Emerging theories of sexuality and citizenship have framed the relationship between sexuality, power, the legitimization of political subjects, and the role of the state. Many of these theories of sexuality and citizenship make use of Foucault's

work on two interrelated modalities of power: disciplinary power, and biopower. Accordingly, this section will focus on Western understandings of sexuality, and the relationship between power and sexuality, paying particular attention to the concept of normality in relation to the regulation of sexualities. Queer theory builds off of Foucault's work on the contemporary normalization of sexuality, and as such I offer an introduction to queer theory that will later inform my analysis of existent citizenship regimes, and projects of social justice.

### **2.1.1. Foucault and Disciplinary Power**

Foucault holds that power is omnipresent as it is produced and is present everywhere. Accordingly, Foucault reorients our analysis of power: "Rather than asking ourselves what the sovereign looks like from on high, we should be trying to discover how multiple bodies, forces, energies, matters, desires, thoughts and so on are gradually, progressively, actually and materially constituted as subjects or as the subject. To grasp the material agency of subjugation insofar as it constitutes subjects would, if you like, be to do precisely the opposite of what Hobbes was trying to do in the *Leviathan*." (Foucault 1997, 28) There are constantly multiple sites of power relations that exist at the 'grassroots' of society; interacting and overlapping with each other, and influencing and regulating individual conduct.

Disciplinary power works at the level of the individual body. Foucault explains: "Discipline 'makes' individuals; it is the specific techniques of a power, that regards individuals as objects and as instruments of its exercise." (Foucault 1979, 170) He further states: "Power passes through individuals. It is not applied to them." (Foucault 1997, 29)

Individuals are not inert or consenting targets of power; they are its relays. Hoffman adds:

Power relations are not outside but rather ‘immanent in’ other kinds (economic, knowledge, sexual) of relationships. So ‘power is not an institution [or] a structure’, nor an individual capacity, but rather a complex arrangement of forces in society. (Hoffman 2011, 21)

Disciplinary power operates through various technologies of governance, such as education, medicine and penitentiaries, and through various social institutions such as organized religion that help define social norms, and categorize, divide and regulate individual bodies accordingly (Foucault 2008). The individual is a power effect as power passes through him while constructing him and his conduct (Foucault 2008, 186). Social interactions and relationships push, urge and/or compel individual conduct.

Individuals’ conduct is conditioned through the establishment of norms. Again, Hoffman:

Disciplinary power judges according to the norm. By ‘norm’, however, it should be obvious that Foucault has in mind something other than a strictly legal concept. He depicts the norm as a standard of behavior that allows for the measurement of forms of behavior as ‘normal’ or ‘abnormal.’ (Hoffman 2011, 32)

This is to say that thoughts, dispositions and behaviors are identified, categorized and conditioned according to discourses that constructed and normative truths, values and hierarchies (Cooper 2002). According to Foucault, discourses are productive. “Discourse is, with respect to the relation of forces, not merely a surface of inscription, but something that brings effects” (Foucault, 1997, p.xx). Discourse is not external and superfluous to power and knowledge (or “truth”) coming together, rather power and knowledge are joined in discourse (Foucault 1978; Sedgwick 2008). As such, discourse is not merely the linguistic representation of power relations, but a constitutive element of

power relations. Discourse produces and conditions the dynamics, interpretations and reactions within different power relations.

Individuals modify their own behavior, and also participate in the disciplining of others' behavior, according to social norms for fear of punishment certainly<sup>9</sup>, but also for fear of isolation, demonization, and the denial or loss of privilege. Individuals do resist discourses and truth regimes in their everyday lives, in the banal and in the extreme, subtly and unknowingly or consciously and overtly. Individuals, and groups of individuals are constantly pushing against and testing the boundaries of acceptable behavior. Foucault argues that a 'reverse discourse' is produced when one empowers a category that might have been used to oppress one. Homosexuality, which was established to negatively categorize and pathologize particular sexual thoughts and acts, is one such reverse discourse. Foucault:

The formation of a 'reverse discourse: Homosexuality began to speak in its own behalf, to demand that its legitimacy or "naturalness" be acknowledged, often in the same vocabulary, using the same categories by which it was medically disqualified. (1978, 101)

Individuals, communities, organizations and social movements, have taken the discourse of homosexuality, attempted to remove the negative connotations, and to normalize it (Foucault 1978). Yet there are limitations to a reverse discourse: it is argued that the reverse discourse will remain bound, to a certain extent, within the confines of the discourse it is challenging. For example, by attempting to redefine homosexuality as a positive category, one is still bound to the notion that sexuality can and should be categorized and even pathologized. Moreover, while there is room for experimentation

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<sup>9</sup> Individuals are certainly overtly disciplined in the form of laws and formal punishment and as such regulation occurs in tandem with discipline as individuals willingly modify their conduct according to the norms that are prescribed and environmental conditions that are manipulated.

and evolution, as Foucault argues in *Abnormal*, there are always clear and un-traversable boundaries of what is socially acceptable or in need of reprimand, regulation or ostracization (Foucault 2003).

### **2.1.2. The Regulation of Sexualities**

Of particular importance to this study, is the discipline and regulation of sexuality, and evolving discourses of normal sexuality. I take my theoretical starting point as Foucault's *History of Sexuality*, because this work informs many of the queer theories that I employ. I will inject, where appropriate, contemporary elaborations on Foucault's theories of discourse, regulation, normal/abnormal, and sexuality. The project of the *History of Sexuality* is to trace certain regimes of truth of power-knowledge-pleasure and sexuality that emerged in the eighteenth century 'Western world' and continues to reverberate in the present (Foucault 1978, 12). Foucault takes up the Victorian era as his point of departure arguing that contrary to common understandings, Victorian society was not defined by restrictive societal norms, morality, religious doctrine and proper conduct (Foucault 1978, 5). It is commonly assumed that power was a force that worked through repression: through the restrictions, limitations, punishment and ostracization of 'deviant' actors and actions in society. Ultimately, repression is thought to contain its target.

My aim is to examine the case of a society which has been loudly castigating itself for its hypocrisy for more than a century, which speaks verbosely of its own silence, takes great pains to relate in detail the things it does not say, denounces the powers it exercises, and promises to liberate itself from the very laws that have made it function. (Foucault 1978, 8)

These dominant discourses denounce the powers they exercise: they play off the power of sex but denounce sex as dangerous and in need of regulation. And as a result society, since the eighteenth century, has focused on sexuality, almost to an obsessive degree.

What is peculiar to modern societies, in fact, is not that they consigned sex to a shadow existence, but that they dedicated themselves to speaking of it *ad infinitum*, while exploiting it as *the* secret. (Foucault 1978, 35)

Contemporary American society is certainly obsessed and fixated on gendered and sexual behavior, identity and inclinations. This obsession is indicative of the power that is embedded in sexual relations and behavior. Though Foucault wrote with reference to the Victorian Era, his theory regarding near obsessive fascinations with sexuality, the notion that sexuality is the truth of identity, and the recognition that its power can be harnessed, certainly resonates now wherein sexuality, as a point of power, is manifested in different sites of operation.

In order to understand and eventually harness these sites of power, multiple discourses have converged on sexual relations and sexuality since the Victorian Era.

Never have there existed more centers of power; never more attention manifested and verbalized; never more circular contacts and linkages; never more sites where the intensities of pleasures and the persistency of power catch hold, only to spread elsewhere. (Foucault 1978, 49)

As Foucault argues, competing discourses including religion, psychiatry, biology, medicine, ethics, education and political criticism all have attempted to discern their unique criteria for proper sexuality, be it categorized as moral/immoral, normal/abnormal, healthy/diseased, ethical/not ethical or patriotic/treasonous.

As Foucault recounts, in the eighteenth century Western world, sexuality was understood as an instinctual matter in that everyone is born with certain sexual instincts and civility and normalcy was attained through the mastery of instinct (Foucault 2003,

276). Referencing the Catholic sacrament of confession, Foucault states since the 18<sup>th</sup> century the confession has been used to compel individuals to publically admit to deep and ‘deviant’ inclinations, drives and desires (1978, 58-9). There must be a listener to put it in context, to judge it, and to legitimize it. The listener does not even need to offer an opinion. By engaging with the listener, the speaker is admitting that their “truth” needs to be confessed because it is wrong or ‘deviant’ (Foucault 1978, 62). At the moment of public declaration, the speaking subject becomes the subject of their statement; they are defined by it (Foucault 1978, 44). When a homosexual ‘comes out of the closet’ their declaration is interpreted as a confession of the inner truth about themselves. The difference between the civilized, normal and non-monstrous individual, and the uncivilized, abnormal and monstrous individual is that the former has been socialized into denying or surprising their instincts. Subjects practicing normal sexualities are privileged by the state and various civic institutions, while those practicing, or even thinking about, abnormal sexualities are identified, divided, punished, and conditioned to adhere to social standards (Foucault 1978). This understanding of sexuality survives into the present era. The current western popular narrative of the homosexual experience is that an individual has sexual thoughts, desires or inclinations towards members of the same-sex. After years of self-denial and shame, the homosexual comes to terms with their homosexuality and has to admit to himself or herself that they are gay. The final step, towards becoming a true homosexual, is to risk social ostracization and confess their “truths” to the external world.

### **2.1.3. Sexuality, Normality and Abnormality**

Foucault, and later Sedgwick, Rubin, Butler and Halberstam (and a host of others) contend that the current understanding of acceptable sexuality is dependent on multiple criteria, which are predominantly divided according to normality and abnormality (Warner 1999; Rubin 1993; Foucault 1978). Rubin argues that kinds of sex, and sexuality, are typically divided into binaries of normal, good, natural, blessed sex(uality) and abnormal, bad, unnatural, damned sex(uality). Rubin names several categories that are used to determine whether particular sexualities are normal or abnormal including: the configuration of partners (whether same-sex, multi-generational); the number of participants (whether in pairs, solo, or in groups); the purpose of the sex (whether for procreation, pleasure and/or money); the sexual acts themselves (whether with manufactured objects or bodies only, S&M or vanilla); and the location (whether public or private). Rubin summarizes that same-generation, monogamous, paired, procreative, bodies-only, vanilla, private heterosexuality is at the top of the normative hierarchy where it redeems all the associated power. Homosexuality, particularly non-monogamous homosexuality, is positioned near the bottom, deemed abnormal and punished accordingly (Rubin 1993).

Rubin states that the institutional form of the contemporary monogamous, self-sufficient, heterosexual nuclear family is a more recent development than certain conceptions of homosexuality (Rubin 1993). The concept of homosexuality actually developed before heterosexuality. In the 19<sup>th</sup> century, homosexuality was thought to define the improper or stagnated sexual development of individuals' gender identification, and some physicians thought that everyone experienced homosexual

tendencies before puberty. Adults who exhibited homosexual tendencies after puberty therefore were thought to be immature and underdeveloped, and on this basis abnormal and 'deviant'. The notion of heterosexuality as we now understand it, did not emerge until the 19<sup>th</sup> century. Before that, people were either thought to develop sexually in a normal or abnormal fashion; they were not divided into heterosexuals and homosexuals. Individuals were expected to develop according to the heterosexual norm. Individuals who deviated from this heterosexual norm were pathologized and assigned a sexual identity. Those exhibiting 'normal' sexual development and behaviours were not assigned a sexual identity. The 'deviants' were assigned a sexual identity due to the notion that their stagnated sexual pathology lead to and was indicative of other social deviations, abnormalities and dangers (McWhorter 2004).

Throughout the 20<sup>th</sup> century, the notion developed and became widely accepted, that sexualities comprise coherent identities. All people, homosexual and heterosexual, were thought to possess a categorizable and definable sexual identity, which was almost exclusively divided based on whether one was attracted to the same-sex or the 'opposite-sex.' Defining one's sexuality in terms of an identity has meant that sexuality is seen as a fundamental element of one's essence, character, and relationships, and that their identity determines everything from their hobbies to their political interests. These identities have engendered western understandings of sexuality, and have contributed to the building of communities and social movements on the basis of similar, and often oppressed, sexual identities. Also, these identities are reproduced in liberal attitudes that homosexuals are born as homosexuals, are a minority with an immutable identity and are therefore worthy of minority rights protection (Polikoff 2008). As I discuss throughout this work, however,

these strict sexuality identity categories are problematic as they are restrictive, and have therefore motivated hierarchies and exclusions within LGBTQ communities and movements.

All of this being said, our present understandings of normality in relation to heterosexuality and homosexuality is neither timeless nor universal. The designation of what is sexually normal and abnormal changes via the production of knowledges in different time periods and locations. Rubin states that there have been several, recent, periods of heightened sexual regulation and persecution within Western states. Namely, the 1880s, 1950s and 1980s were host to various campaigns for sexual purity and morality focusing on different abnormalities, such as obscenity and contraception, homosexuality and prostitution, and homosexuality and pedophilia. In each case, the state was charged to step in and save children, families, and society from the perverse and detrimental actions and lifestyle of sexual ‘deviants’ (Rubin 1993, 6).

At the same time, what is deemed to be “normal” also changes according to time, place, circumstance, and discourse. Warner explains that the majority of the population does not fully, consistently or perpetually engage in sexualities and sexual acts that are deemed to be ‘normal.’ The designation of ‘normal’ therefore is not reflective of quantitative and measurable phenomena (Warner 1999). Instead, the designation of ‘normal’ reflects the many competing discourses that pathologize, categorize and regulate sexuality. As such, the categories of normal widen and constrain their borders. What was once abnormal can potentially be deemed normal depending on shifting discourses. For example, Rubin states that heterosexuality can be good/normal or bad/abnormal but is

rarely the latter while homosexuality has been predominantly bad/abnormal, until recently (Rubin 1993).

Normality thus gains its power, in part, through what Foucault calls “dividing practices,” which include and exclude different sexualities and sexual beings. Normality compels people to seek acceptance, inclusion and the designation of normal because of the negative implications of exclusion, but also because there is potential for their inclusion (Foucault 1972). The terms of inclusion can be widened, as long as the widening does not fundamentally or drastically disrupt or alter the category to which one is seeking inclusion. As I argue throughout this dissertation, homosexuals, particularly those seeking inclusion into the institution of marriage, have been faced with having to prove that they can assimilate to the criteria of inclusion while also asking for the terms of inclusion to be widened just enough to let them in.

Based largely on Foucault’s discussions of the disciplinary power of categorizing and regulating sexuality according to the normal/abnormal binary, queer theory and activism has developed, in part, as a project to challenge the normative categorization and regulation of sexualities (Warner 1993). Accordingly, queer theorists and activists engage in projects to problematize and pull apart the strict sexual identity categories – both normal and abnormal, heterosexual and homosexual – that are reproduced through various discourses and institutions in society. Instead of relying on strict identity categories, queer theorists and activists have conceived of sexuality as betraying fixed categories by being fluid and ever-changing throughout one’s life and depending on one’s lived circumstances (Halberstam 2005).

Further to these ends, queer theorist Michael Warner popularized the term

“heteronormativity,” to discuss the ways in which gender and sexuality are separated into hierarchically organized and normalized binary categories (Warner 1993). Cohen states: “By ‘heteronormativity’ I mean both those localized practices and those centralized institutions which legitimize and privilege heterosexuality and heterosexual relationships as fundamental and ‘natural’ within society.” (Cohen 1997, 440) Heteronormative theory posits that a cycle of normativity occurs as heterosexuality is held as being the most normal sexuality, and is therefore assumed to be the most natural, good and proper sexuality, which then perpetuates the assumption that it is the most normal sexuality.

Queer theorists and activists soon realized, however, that because heteronormativity is so pervasive and powerful, some LGB citizens have been attempting to assimilate into heteronormative identities and institutions rather than challenge the exclusionary nature of these social norms. Accordingly, Lisa Duggan developed the term “homonormativity,” which she defines as “a politics that does not contest dominant heteronormative assumptions and institutions but upholds and sustains them.” (2002) As stated, the ascription of normality is based not on statistical facts, but on discourses that privilege heterosexuality. Theorists have argued that heteronormative discourses have dominated social institutions such as the family and marriage. Instead of challenging the heteronormative institutions and discourses, and their terms of inclusion and exclusion, homonormative subjects ask to be included into the institutions, such as marriage, promising to assimilate to its terms. In so doing, homonormative subjects are legitimizing and sustaining the institutions to which they seek inclusion.

This shift toward seeking acceptance and inclusion within contemporary political and economic systems is a marked divergence from the liberationist roots of North

American LGBT politics. The liberationist movement was not merely pushing for sexual liberation but calling for economic redistribution, and pushing back against the liberal rights regime, which privileges citizens according to sexuality (Josephson 2005; Card 1996). Finally, queer theory's concepts of heteronormativity and homonormativity are useful for understanding both how sexuality is regulated according to a normal/abnormal binary, and how sexual subjects, particularly abnormal sexual subjects, respond to normalizing powers. Later in this Chapter, I discuss queer theory's resistances and alternatives to heteronormativity and homonormativity, specifically in relation to the same-sex marriage debate.

These queer theories of heteronormativity and homonormativity demonstrate that disciplinary power is imminent in the normative regulation of sexuality, sex and sexual relations. At the same time, biopower is also present in sexuality, sex and sexual relations. Foucault states that sexuality is a political issue because it is located at: "the point of intersection of the discipline of the body and the control of the population." (Foucault 1980, 125) In other words, sex is a conduit to access both the life of the body and life of the species, it is the norm that connects disciplinary power and biopower (Foucault 1978, 146).

#### **2.1.4. Biopower and Sexuality**

Biopower is different from discipline in that the focus is no longer wholly on the actions of individuals. The state, and social institutions and relations, do not depend mainly on disciplinary punishment, or regulatory surveillance and conditioning of individuals. Instead, the state conceives of its population in terms of a living breathing entity that must survive as a whole. All relationships that contribute, involve and make-

up population development and maintenance become the interest of governments and the state. Thus biopower is all about the reproduction of populations (Foucault 1997, 25-46). Not only are states concerned with the survival of the population, they are concerned with the survival of particular populations. States, and governmental agencies, pay attention to birth, death, and disease statistics. Accordingly, focus was turned toward public hygiene, medicine, and the centralization of medical and health statistics (Foucault 1997, 246). The state, through ever changing technologies of governance, determines who lives and who is left to die within its boundaries (Foucault 1978, 25).

In *The History of Sexuality: Volume I* Foucault states that the “socialization of procreative behavior” is a mechanism of power/knowledge centering on sex, which he describes accordingly:

A socialization of procreative behavior: an economic socialization via all the incitements and restrictions, the ‘social’ and fiscal measures brought to bear on the fertility of couples; a political socialization achieved through the ‘responsibilization’ of couples with regard to the social body as a whole (which had to be limited or on the contrary reinvigorated), and a medical socialization carried out by attributing a pathogenic value – for the individual and the species – to birth control practices. (Foucault 1978, 104-5)

Disciplinary power and biopower are present in the production of sexual subjects. As Foucault states, the combination of the two led to the intensification of surveillance, the meticulous orderings of space, and constant medical and psychological examinations (Foucault 1978, 146). In addition, citizens’ sexual practices, specifically those tied to reproduction, became a matter of state interest (Foucault 2007, 56-7). “It was essential that the state know what was happening with its citizens’ sex, and the use they made of it, but also that each individual be capable of controlling the use he made of it.” (Foucault 1978, 26) Sexual discipline became not only a matter of morality and normality, but also

a matter of race reproduction. Individuals' sexual conduct is to be self-regulated toward the reproduction of the desired population (Taylor 2011; Foucault 1978, 26).

### **2.1.5. A Current Model of Normal Sexualities**

In sum, it is important to note that in referring to modern Western conceptions of sexuality, I am not suggesting these conceptions are homogenous. I do however adopt Mohanty's position that "it is possible to trace a coherence of effects resulting from the implicit assumption of 'the West' (in all its complexities and contradictions) as the primary referent in theory and practice." (2003, 17–18) While it is impossible (ineffective and undesirable) to define the myriad of sexualities in Western states, it is possible to list several characteristics that are held as defining modern Western sexuality. Here I take the notion modern "Western sexuality" not as a descriptor for the sexualities of citizens living in Western states, but rather as the ideal model of modern Western sexuality — the standard construction of acceptable, healthy, normal sexuality against which the sexualities of citizens and non-citizens are judged. Modern Western sexuality, as it is very broadly defined today, has been constructed and shaped by many social, economic and political forces, each of which has attempted to channel the power of sexuality toward its own ends (Weeks 2010). The contemporary ideal model of modern Western sexuality is thus characterized by several tenets: sexuality (desire and attraction) is held to be innate, unchangeable and at times pathological; innate sexuality manifests as a coherent identity; an individual's sexual identity is only genuine and legitimate if desires are acted upon and/or if the individual is 'out' to their family, friends and community; sexual identities (and acts) are categorized, valued and regulated according to binary

categories of normal and abnormal; and sexuality and sexual conduct are harnessed to reproduce the desired population.

## **2.2. Who Has Access? Citizenship, Liberal Rights, Identity Politics and Social Justice**

The contemporary ideal model of modern Western sexuality is reproduced within and thus sustains the liberal regime of citizenship. Before I present the relationship between citizenship and sexuality, I briefly define the liberal regime of citizenship, focusing on rights, social justice and identity politics. To ground my research, I employ Jane Jenson's concept of citizenship regimes. Jenson has defined citizenship regimes in relation to the Canadian state's transition from a welfare to a neoliberal citizenship regime. Her formulation however, is applicable to and useful in the American context.

Jenson defines citizenship regimes as:

The institutional arrangements, rules and understandings that guide and shape concurrent policy decisions and expenditures of states, problem definitions by states and citizens, and claims-making by citizens. (Jenson and Phillips 2001, 72)

Jenson and Papillon unpack this definition by enumerating four elements of citizenship regimes including:

(1) The formal recognition of particular rights (civic, political, social, cultural, as well as individual and collective) and access to mechanisms for the exercise of these rights, a citizenship establishes the boundaries of inclusion and exclusion of a political community. In doing so, it identifies those entitled to full citizenship status and those who only, in effect, hold second-class status (Jenson and Papillon 2000, 246).

(2) A citizenship regime also prescribes the democratic rules of the game for a polity. Among these democratic rules, we include the institutional mechanisms giving access to the state, the modes of participation in civic life and public debates and the legitimacy of specific forms of claims making (Jenson and Papillon 2000, 246).

(3) A citizenship regime, through the recognition of formal status to individuals as well as its use of cultural and historical references to qualify the community, also contributes to the *definition of a nation*, in both the narrow passport-holding sense

of nationality and the more complicated notion of national identity (Jenson and Papillon 2000, 246).

(4) By defining the rules and practices of membership, a citizenship regime sets the geographical borders of the political community, giving meaning to the frontiers between states (Jenson and Papillon 2000, 246).

For the purposes of this project, I focus on Jenson and Papillon's first two elements of citizenship regimes. It is beyond the scope and intent of this project to analyze how same-sex marriage is used to defined national identity, and demarcates state borders. Taking together Jenson's broader definition of citizenship regimes and the first two of her four elements, I understand a citizenship regime to be defined in terms of: the criteria for inclusion into equal citizenship, the nature of social justice, and the roles, authority and institutions of the state.

### **2.2.1. Citizenship Inclusion and Rights**

In terms of the criteria for inclusion into equal citizenship, many theories of liberal citizenship find their foundation in T.H. Marshall's definition of citizenship, which is based on three sets of rights: civil or legal rights, political rights and social rights. The oldest of the three, civil or legal rights, are institutionalized through the law. Civil/legal rights include freedom of the person, freedom of speech, thought and faith, the right to own property and engage in contracts, and the right to justice. Political rights are "institutionalized in the parliamentary political system and councils of local government" and include the right to vote, and to participate in the exercise of political power (Richardson 1998, 84). The third set of rights legally emerged in the 20<sup>th</sup> century and includes the right to a certain level of economic welfare and security, and the ability to live according to prevailing social standards (Marshall 2009). Jacqueline Stevens points out that Marshall's theory of rights and citizenship is often misinterpreted. She argues

that while Marshall does enumerate these three types of rights, he does not state that the rights are allocated in succession – from civil to political to social rights – or that the rights are allocated uniformly to all citizens. Specifically regarding the relationship between the allocation of political and social rights, Stevens states:

Marshall shows that social benefits can be, and indeed were, conferred in complete independence from the granting of political rights. Far from being a consequence of political rights, social benefits may be the condition for denying political rights, if they figure the recipient as lacking independence. (Stevens 2010, 57)

Social rights have been allocated to people who have been perceived as failed or inadequate, such as women and marginalized people, because of their inability to be politically and economically independent. The three types of rights, therefore, are not guaranteed or consistently available to all members of a community but are dependent on individuals' approximations to the criteria and ideals of citizenship.

With this more complicated reading of Marshall's theory of rights, we turn to his definition of citizenship:

Citizenship is a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed. There is no universal principle that determines what those rights and duties shall be, but societies in which citizenship is a developing institution create an image of an ideal citizenship against which achievement can be measured and towards which aspiration can be directed. The urge forward along the path thus plotted is an urge towards a fuller measure of equality, an enrichment of the stuff of which the status is made and an increase in the number of those on whom the status is bestowed. (Marshall 2009, 149-50)

Thus according to Marshall, citizenship is a status, replete with rights and duties, which a state bestows onto members of a particular community. Status, rights and duties, are granted, or denied, according to the standard of the ideal citizen as envisioned by state and society.

I define citizenship as a legal status, replete with rights and privileges, whose terms of inclusion are determined by criteria including nationality, race, sex, sexuality and birthplace (Harder and Zhyznomirska 2012). According to Jenson, the state grants citizenship, in part, by allowing particular individuals to access, claim and invoke particular rights. Castles and Davidson explain: “Even those with formal membership have often been denied some of the rights vital to citizenship, so that they have not fully belonged.” (Castles and Davidson 2000, vii) Conversely, as Stevens states, citizenship does not guarantee access to all types of rights (Stevens 2010). The ability to access, claim and invoke rights is granted on the ability of individuals to assimilate to specific normative criteria of desired identity (Stychin 1998; Yuval-Davis 1997). The population effectively becomes divided into the normalized and the unassimilable, and citizens with equal rights and those with curtailed rights, respectively. In short, certain rights are curtailed, restricted or retracted until the citizen conforms to state and socially normalized roles and associated conduct (Castles and Davidson 2000; Stychin 1998). Thus citizenship is both porous and exclusive. Because citizenship is a social construction, criteria for belonging are subject to change and contestation, depending on a multitude of forces. Depending on the political and economic circumstances, the criteria and parameters of inclusion and exclusion can change; for example, it might expand its population in the interest of buttressing its strength and defensive capacity. Conversely, the state could invoke discourses of exclusion in order to foster a sense of belonging, national solidarity, and patriotism (Stychin 1998).

Criteria for political belonging are also often used as tools for creating and maintaining hierarchal power, empowering the ‘normal’ population, and excluding and

punishing certain groups of people. Accordingly, it is held that historically and presently, marginalized people have not experienced equal citizenship status as they have been denied access to these three sets of rights. Critiques have focused on how racial minorities, the poor and women have been denied civil, political and social rights on the basis of their race, class and/or gender (Richardson 1998). Sexual ‘deviants’ pose an exception as they have not been denied political rights solely on the basis of their sexuality (although they have been vastly underrepresented in western political systems), but they have been denied civil rights as sexuality has still not been protected against discrimination in many jurisdictions (Richardson 1998).

In the face of these exclusions and hierarchies marginalized communities have pursued several avenues toward attaining state acknowledgement and inclusion, and citizenship rights and protections. There have been LGBTQ communities and movements that have sought to work outside of the liberal rights regime, for example by seeking to dismantle the current liberal rights regime, and I discuss these radical movements in the coming sections. The dominant challenge to these exclusions from equal citizenship has come in the form of identity politics and rights claiming. The current citizenship regime is based on the construction and regulation of identities, predominantly on the basis of race, religion, sex, class, ability and/or sexuality. While these identity categories may have a basis outside of the influence of the state and society, as Foucault argues, these identities have been largely determined and homogenized, and their relative significance in society has been produced and reinforced through a host of state policies. A key element of the production of these identities is to claim that the identities are based on nature and that they are thus immutable. The strict categorization of the identities can

thus be based on nature, thereby absolving the state of its role in producing and differently treating subjects with particular identities. Identities have been defined and reproduced in order to maintain specific power relations. In terms of sexuality, the homosexual identity was defined by a host of bodies, all of which reinforced the strict category of homosexuality by establishing specific negative parameters of belonging.

In the mid-20<sup>th</sup> century, identity politics emerged to challenge the production and reproduction of hierarchal identity categories and relations, such as those based on race, sex and sexuality. Broadly, social movements based on identity politics sought to both redefine the negative characteristics of a given identity, and to demand inclusion into equal citizenship in order to mediate the undeserved marginalization (Lloyd 2005). Queer theorists and activists have been critical of the liberal rights regime, identity politics and, as will be discussed in the next section, the political strategy of using same-sex marriage as an avenue toward equal citizenship rights. Regarding the liberal rights regime and identity politics, it is argued that while civil and political rights afford particular people formal protections, these rights are unavailable to the most marginalized in society, and produce little substantive change when they are granted. Specifically in terms of rights against discrimination, abuse and oppression, critiques point to several systemic problems that impede the realization of social justice.

First, there is a very high threshold for exercising these rights because of the need to establish and defend identity categories. In the liberal tradition, one can make rights claims on the basis of belonging to a distinguishable identity group that is recognized by the government. Identity groups hold more legitimacy if their identity is seen as biologically determined and/or immutable. Lacking biological determination or

immutability, citizens are expected to take responsibility and change their actions/identity in order to avoid discrimination or abuse. Thus in this system, the identity category, which was largely determined through oppressive power relations, remains intact and even reinforced as citizens make claims on the basis of this identity.

There are divisions in the mainstream gay and lesbian, and queer communities about whether sexuality is biologically determined, and moreover, whether communities should rely on such conceptions of identity in order to attain rights. Some have argued, for decades, that the gay gene (or a gay brain or body) causes homosexuality and makes homosexuals and heterosexuals biologically different (Sullivan 1997). If lesbian and gay activists abandon the "gay gene" argument, they risk losing the meager grounds they currently possess for claims making. Sexuality is understood to be biologically determined by certain gay activists and certain social conservatives<sup>10</sup>, albeit from different perspectives and to different ends. Queer theorists hold that sexuality should not be essentialized into strict identity categories because sexualities are not natural, universal or stagnant but change over space and time. Queer theorists and activists accordingly argue that identity categories (such as lesbian, gay and bisexual) are normalized and that identity-based politics are confining and exclusionary. As is discussed throughout this work, a group's understanding of sexuality is one of several factors that determine whether they believe that individuals should be allocated or denied rights, regulated, punished or privileged based on their sexuality.

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<sup>10</sup> In the next Chapter, I detail the social conservative understanding of sexuality. Suffice it to say, that certain social conservatives, predominantly religious right groups, claim that sexuality is in fact a choice. But to them, the choice is whether to act on innate or learned thoughts and desires. Whether the desire is innate or learned, they hold that religious faith and practice can train the individual to overcome such perverse urges. And once these urges are controlled, the individual will have no need for special rights and should instead assimilate into the norms of society.

Queer critiques of identity-based politics extend beyond challenging the limiting categories of identities. As with other critics of identity politics, queer theorists argue that the hierarchies that exist in broader society, along the lines of sex, race, class and ability, are replicated within identity communities. In other words, those who experience forms of privilege because of identities other than their sexuality, tend to experience similar privileges in relation to other LGBTQ people, and within their LGBTQ communities (Aiello et. al. 2013; Hariatworn 2008). Thus peoples' experiences of oppression and discrimination are not uniformly determined by their shared identities, and yet in order to make a claim on the state, the identity group must present a united front and articulate coherent and attainable demands. A primary manifestation of these privileges is that the voices, needs and experiences of the most privileged dominate the political discourses, debates, goals and strategies of the identity group to which they belong. Young argues that this problem engenders identity-based politics: while identity groups are usually established to protect the needs and rights of the marginalized, the needs of the group are often essentialized in favor of the most privileged, and accordingly the non-privileged within the identity group can be further marginalized, silenced and disempowered (Young 1990). Therefore the needs that are presented to the state are predominantly the needs of the most privileged within an identity group.

This tendency to distill the complex needs of identity groups down to a number of issues is problematic for another reason. Those who are most privileged within a particular identity may only experience oppression or discrimination on the basis of a single identity, in this case their sexuality. Looking at discrimination on the basis of singular identities and issues does not account for the complex ways in which multiple

oppressions intersect and materialize in daily life and affect lived experiences. As I argue throughout this project, the realization of a single issue such as same-sex marriage does little, if anything, to remedy the challenges of non-privileged members of the identity group. And yet the single issue of the privileged within the identity group can come to dominate any state, media and/or public attention that is afforded to the group. Once the issue is resolved, either through state concession or denial, the identity group risks losing the attention and potential help of the state on the remaining issues of the more marginalized within the identity group.

Second, the threshold for exercising these rights is also high because the citizens in question are burdened with demonstrating<sup>11</sup> that they have been treated unequally – through abuse, neglect or the denial of certain rights and protections – because of their (supposed) biological and/or immutable identities. Discrimination and abuse most prominently manifest in systemic, daily and subtle ways. Yet rights and protections are predominantly granted only to individual, overt, blatant and provable incidents of discrimination abuse or neglect. As such, the daily, systemic and subtle experiences of discrimination and abuse are unacknowledged, delegitimized and unmediated (Crawford and Nichols 2012).

In this regime, the state acts as the ultimate arbitrator of determining which identity groups are legitimate and which grievances warrant state acknowledgement and intervention. All intervention and accommodation occurs on the terms and by the means of the state. Moreover, it is argued that these accommodations are actually small concessions on the side of the state, which produce the effect of addressing certain

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<sup>11</sup> Rights are very hard to access by the average person: the language of rights policies can be complicated and confusing; and it is costly and time consuming to pursue a human rights case.

grievances without actually disrupting fundamental power imbalances. The state remains the ultimate arbitrator of legitimate identities and grievances. The acceptance of formally excluded citizens legitimizes the state as open, benevolent and responsible. At the same time, citizens bolster the legitimacy of the state through their campaigns to gain the state's attention, acknowledgement, acceptance and protections. Formal but not substantive equality is granted once identity groups are recognized (categorized), acknowledged (allowed to speak) and accepted (depoliticized). Ultimately, therefore, accommodation occurs on the terms of the majority (Richardson 2005).

Third, in order to access rights, and thus equal citizenship, a certain amount of assimilation to criteria of normality is required. As Foucault argues, excluded populations can accept or resist the terms of inclusion (Foucault 1978). The excluded groups could ask for the boundaries of membership to be expanded but this requires a certain amount of assimilation. Of course citizens exist as already assimilated subjects; assimilation to the norm must occur in order to ward off complete revolution within and toward the governing institutions (Cossman 2005; Blasius 1994; Warner 1993). Foucault reasons that if 'deviant' groups are assimilable, the state would be inclined to demand their conformity and grant them equal citizenship rights for the sake of national cohesion and state control of the population<sup>12</sup> (Foucault 2003, 299).

As Angus Cameron states, the boundaries of inclusion and exclusion occur according to the normal/abnormal binary. He says: "The social exclusion/inclusion

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<sup>12</sup> The unassimilable populations are, of course, a concern for the state, but as Foucault argues in his theory of biopower, they are left to die as their abilities, lifestyle and values do not enable them to compete and survive in the neoliberal individualized and privatized governmentality. These deviant populations are ineffectual and therefore would only be a threat to the state should they reproduce and overtake or infiltrate the desired population. The state therefore manipulates the conditions of their existence to the point where they cannot survive and thus stifles any threat (Foucault 2003, 299).

debate is an exercise in normative boundary setting – a means of distinguishing between a form of social being characterized by normality, morality, responsibility, independence and competitiveness and a form of social being marked by difference, redundancy, pathology, immorality and obsolescence.” (Cameron 2006, 401) Identities, be they racial, gendered or sexual, are categorized and valued as either normal or abnormal. If individuals want to move into a space of inclusion they have been required to assimilate to a normal, and therefore valued, identity.

In liberal regimes, practitioners of identity politics have long stood on the premise of seeking to move from positions of social and political exclusion to positions of inclusion in order to gain attendant status, rights, protections and privileges. Accordingly marginalized and excluded subjects have had to wrestle with whether it is beneficial and productive to acquiesce to their societies’ and governments’ normalized terms of inclusion (Goodin 1996). Past and current equal rights identity politics campaigns certainly have assured some marginalized populations serious and needed protections, in terms of employment, pay and housing rights and protections against abuses, mistreatment, or neglect. But in fighting for and eventually gaining these rights, marginalized populations are essentially asking to be accepted as part of the rights-bearing, normal majority. Groups that choose the path of assimilation are capitulating to a politics in which equality comes with acceptance and the quickest route to acceptance is assimilation. In order for these marginalized identity groups to be equal citizens and gain rights they must mask or deny their ‘otherness,’ while at the same time making a claim on the basis of their immutable identity (Polikoff 2008).

In the vein of Foucault’s call for resistance, Goodin states that oppressed or

excluded groups should neither seek to expand the boundaries of inclusion to accept their people nor attempt to change themselves in order to gain acceptance. Pursuing either political strategy only reinforces the legitimacy of the division between inclusion and exclusion.

The true source of our anxieties, I shall argue, lies not in the practice of exclusion but in that of inclusion. The problem is not—not just, not even principally—that too many people, or the wrong people, have been 'left out'; nor is the proper remedy more 'inclusive' communities. Instead, I argue, the problem of exclusion is that there *is* an inclusive community, be its catchment broad or narrow. And if *that* is the problem, then the solution is not to make our communities more inclusive but rather to change their nature—making them at one and the same time both less exclusive and less inclusive. (Goodin 1996, 344)

Likewise Young argues that those involved in identity politics should actually resist, question and challenge the very notion, worth and effects of exclusionary and inclusionary social and political boundaries (Young 2002).

As I discuss throughout this dissertation, the tensions that emerge while establishing an identity group, and proving the capacity for assimilation in order to attain inclusion and rights, have produced many significant and dangerous effects within American LGBTQ communities and movements. Bernstein warns that the current mainstream lesbian and gay movement is abandoning its emphasis on being different from the 'straight majority' in favour of a moderate politics that highlights similarities to the straight majority (Bernstein 2003). Specifically, in the fight for same-sex marriage, this push for assimilationist and normalized politics has resulted in the narrowing of the LGBTQ movements' definitions of who belongs to the marginalized community, and who is worthy of state rights and protections. As such, the goal of equal citizenship, and social justice, is pushed further out of the grasp of the most marginalized.

Given these limitations in the liberal rights regime, queer critiques argue that even when citizens are granted formal rights, such as the right to marry, they do not experience substantive change in terms of having: their voices heard and acknowledged; the alleviation of daily violence, discriminations and oppressions; and the amelioration of quality and longevity of life. Calls for social justice, as opposed to merely seeking inclusion and formal rights, focuses on seeking substantive change in terms of citizens' representation, opportunity to voice their experiences and concerns, and amelioration of their daily quality and longevity of life.

### **2.2.2. Social Justice**

I use social justice as a program for challenging the limitations of identity politics and the citizenship regime. Although Jenson does not specifically mention social justice, theories of social justice are helpful for bringing together Jenson's ideas about legitimate problem articulation and claims making. I define social justice as a political program that seeks to mediate economic, social and political inequalities by accounting for the systems of oppression (including but not limited to patriarchy, racism, heteronormativity and capitalism) that condition citizens' (and non-citizens') economic, social and political lives. This political program is founded on the premise that individuals must be included in the political process, and allotted the platform and resources to articulate their experiences, needs and goals so that political change can advance the needs of the most marginalized citizens, and that challenge the many oppressions, exclusions, discriminations and violences in everyday life. I base my definition of social justice largely on the work of Nancy Fraser. Fraser purports that there are two types of claims for social justice: for economic redistribution, and for recognition (Fraser 1996). As I

address, Fraser argues that these types of social justice claims should function together, as such both of these types of social justice claims are important to this study.

First, the concept and project of social justice, in terms of economic redistribution, finds its roots in the postwar West when social rights were established, as part of burgeoning welfare state systems, to account for some of the substantive shortcomings of civil and political rights, particularly the social inequalities that were caused and exacerbated by laissez-faire liberalism. Laissez-faire liberalism unintentionally revealed that the ‘social’ – the collectivity, the public, society – could compensate for or even remedy inequalities that were the products of this political and economic system. As Brodie states: “The idea of the social grew in complexity in response to laissez-faire governance and its inherent incapacity to comprehend, let alone ameliorate the human costs exacted by early industrial capitalism.” (Brodie 2007, 95)

Laissez-faire liberalism’s prioritization of private profit and market growth produced economic inequalities that individuals were unable to surmount on their own. Proponents of social justice therefore argued that a social solution was needed in which the entire economic system is reexamined, challenged and rearranged to mitigate social inequality. Collective bodies including social and religious organizations, and later state programs emerged to offer public aid to individuals who – because of their sex, race, religion, ability, occupation and/or social position – were unable to succeed in the laissez-faire system<sup>13</sup> (Brodie 2007). Under this economic regime, the nature of citizenship, the

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<sup>13</sup> The connection between the social and justice grew out late 19<sup>th</sup> century social democratic parties and labour movements’ call for social rights and citizen equality (Brodie 2007). Brodie explains this connection: “In contrast to liberalism’s promise of individual dignity, autonomy, and rights, the economic inequalities generated by unregulated market forces were deemed as being unjust, the product of structural flaws that modern “just” societies could ameliorate through redistribution. Social justice thus had a ‘substantial political content,’ which recommended the alleviation of poverty and the reduction of

role of the state, and the realm of the social were all expanded. Regarding the changing nature of citizenship, Brodie states: “Social liberalism prescribed that all citizens could make a claim to a measure of equality, social security, and collective provision as a right of citizenship, independent of their status in the market or their personal character.” (Brodie 2007, 98) Citizens were granted the ability to make claims for rights and protections that ensured that their identity (gender, race, religion, ability, and/or social status), would not determine their chances of economic survival<sup>14</sup>. The state assumed new roles as it regulated the market, assumed control of collective resources, and expanded and governed the social, all in order to support the most destitute citizens. Accordingly, the social was expanded and valued as a realm capable of handling common resources and mitigating social inequality (Isin et al., 2008). Thus social rights and social justice include the right to a certain level of economic welfare and security and the right “to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society.” (Marshall 2009, 149) As Richardson states, these rights are institutionalized through the welfare state, through state sponsored health, welfare, social security, unemployment and education benefits and programs (Richardson 1998).

Second, as Fraser states, social justice is also conceived in terms of recognition.

She states:

Here the goal, in its most plausible form, is a difference-friendly world, where assimilation to majority or dominant cultural norms is no longer the price of equal respect. Examples include claims for the recognition of the distinctive

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inequalities ‘as a matter of justice rather than charity.’ (Brodie 2007, 97) Initially, social aid came predominantly from charity organizations that served largely as a reactionary and temporary solution. Moreover, charities were always susceptible to being controlled by private and/or religious interests.

<sup>14</sup> For example, particular disability benefits were established for people who could not participate in the labour market, and thus were unable to earn a livable wage, because of a disability (McRuer 2006).

perspectives of ethnic, “racial,” and sexual minorities, as well as of gender difference. (Fraser 1996, 3)

Recognition should occur without requiring assimilation to social and political norms, otherwise the state is not mitigating or remedying the discrimination, underrepresentation of a group of citizens but instead puts the onus on the citizens to assimilate. Fraser further outlines four defining elements of the politics of recognition. First, recognition seeks to challenge “cultural” injustices, which include cultural domination, nonrecognition, and disrespect.

Examples include cultural domination (being subjected to patterns of interpretation and communication that are associated with another culture and are alien and/or hostile to one’s own); nonrecognition (being rendered invisible via the authoritative representational, communicative, and interpretative practices of one’s culture); and disrespect (being routinely maligned or disparaged in stereotypic public cultural representations and/or in everyday life interactions). (Fraser 1996, 7)

Second, to challenge these cultural injustices, Fraser suggests cultural or symbolic change.

This could involve upwardly revaluing disrespected identities and the cultural products of maligned groups. It could also involve recognizing and positively valorizing cultural diversity. More radically still, it could involve the wholesale transformation of societal patterns of representation, interpretation, and communication in ways that would change everybody’s sense of identity. (Fraser 1996, 7)

Fraser’s third defining element states that identity groups are defined by “the relations of recognition, they are distinguished by the lesser esteem, honor, and prestige they enjoy relative to other groups in society.” (Fraser 1996, 9) Fraser specifies that the politics of recognition understands difference and identity formation in two ways: either as preexisting and ordered by social and cultural valuations and hierarchies; or as created through “a discursive framework of binary oppositions.” (Fraser 1996, 9) As stated

throughout this Chapter, I approach sexual identities as socially constructed identities, which have been constructed through a normal/abnormal binary. Taking these three elements in mind, the queer program for social justice, as outline in my project, requires the more radical “transformation of societal patterns” of how sexuality identities are constructed, valued, and regulated through the heteronormal state institution of marriage.

Iris Marion Young agrees that recognition is essential for social justice. Individuals need to be accepted as members of the political in order to have access to forums and institutional avenues for political participation in the decision-making processes that affect them.

I have defined justice as the institutionalized conditions that make it possible for all to learn and use satisfying skills in socially recognized settings, to participate in decision-making, and to express their feelings, experience, and perspectives on social life in contexts where others can listen. (Young 1990, 91)

Access to the public is necessary for three main reasons. First, individuals need access to the public in order to voice their opinions, present their points of view, and highlight discrimination or oppression that they have experienced as a result of their identity and/or status (Fraser 2005; Young 1990). Second, as discussed, access can not be contingent on assimilation, otherwise the experiences, voices and needs of the marginalized will not actually be acknowledge, much less addressed. Third, in voicing their experiences and opinions, it is hoped that social, economic and political inequalities can be acknowledged by the government and fellow citizens, and that these inequalities can be addressed (Young 1990).

Fraser does argue that the two elements of social justice necessarily function together because injustices in terms of redistribution occur, in part, on the grounds of

recognition. Moreover, the lack of recognition makes it possible to ignore unjust redistributions.

It is often assumed that the politics of redistribution is exclusively concerned with injustices of class, whereas the politics of recognition, reductively equated with “identity politics,” is exclusively concerned with injustices of gender, sexuality, and “race.” This view is erroneous and misleading. It treats recognition-oriented currents within the feminist, antiheterosexist, and antiracist movements as the whole story, rendering invisible alternative currents dedicated to righting gender-specific, “race”-specific, and sex-specific forms of economic injustice that traditional class movements ignored. The definitions proposed here, in contrast, take account of such currents by treating redistribution and recognition as dimensions of justice that can cut across all social movements. (Fraser 1996, 6)

Still, Fraser has been criticized, by Lisa Duggan and Judith Butler, for creating too stark a dichotomy between redistribution and recognition politics. Specifically, Duggan states:

Fraser’s goals – to formulate a nonidentitarian politics of recognition that doesn’t displace redistribution, or slide into essentialist tribalism – are directed toward overcoming the identity politics/left economism split by elaborating the most progressive tendencies on each side. Yet her reiteration of the distinction, in a predominantly static rather than dynamic relation to each other and to the institutions of political economy, tends to entrench the split she describes in ways that implicitly replicate the hierarchy she eschews. (Duggan 2010, 82)

Duggan argues that identities, power relations and economic distribution are not distinct entities but rather are bound up together. Rather, unjust redistribution is produced through raced, gendered and sexualized identity formations and relations, and thus the unjust redistribution and recognition are not dichotomous but are fundamentally mutually constitutive. With these criticisms and additions in mind, I use Fraser and Young’s formulations of social justice to highlight and challenge identity politics and liberal rights programs as they manifest in Proposition 8’s same-sex marriage fight. Specifically, I consider how normative oppressions (on the basis of sexuality), constructed identities, state legitimization, recognition, and rights granting, and economic redistribution function together through the institution of marriage. With these criticisms and additions

in mind, I use Fraser and Young's formulations of social justice to highlight and challenge identity politics and liberal rights programs as they manifest in Proposition 8's same-sex marriage fight.

### **2.3. Marriage: Sexuality, Citizenship and the Regulatory Role of the State**

In terms of the role and authority of the state, Jenson points to the "institutional arrangements, rules and understandings that guide and shape concurrent policy decisions and expenditures of states." State-sanctioned marriage is one such institution that guides and shapes state policy and expenditures. The institution of marriage determines, to a certain extent, government policies and expenditures in regard to citizens' private, sexual and familial lives. Marriage becomes the mechanism through which citizens can make rights claims, and reciprocally marriage becomes the institution through which the state can regulate citizens' private, sexual and familial lives. I address these two functions of marriage in the following two sections.

I discuss theories of sexuality and citizenship, which have been developed to specifically trace and analyze how sexuality is embedded and harnessed in the relationships between states and citizens. Citizenship extends beyond the public political arena and very much occurs within individuals' private lives. The so-called private is increasingly regulated by the public. The benefits of citizenship are doled out according to individual's public and private conduct. Intimate relationships, be they marriage-like relationships, and/or relationships based on sex, are institutionalized by economic forces (to reproduce the neoliberal productive family and privatize dependence); harnessed by states (to reproduce the desired population); and manipulated by ideologies and discourses (to set the boundaries of normal and healthy conduct).

The performance of citizenship thus becomes connected to the performance of sexual and familial relationships, and sexualities. Under this heteronormal citizenship regime, rights are granted to protect, reward or uphold people's intimate decisions and lifestyles (Cossman 2005; Plummer 2003; Stevens 1999). As Weeks argues, this system manifests as a collision between private choices, conduct and relationships, and public values, duties, responsibilities, identities and belongings (Weeks 1998). Butler adds that the state, and state discourse, renders the illegitimate populations apolitical: they are unacknowledged by the state as their concerns and survival is individualized and privatized (Butler 2002). Thus claiming citizenship on the basis of sexuality, traditionally sequestered to the private realm, poses a challenge to traditional notions of the public/private divide as the claim surpasses "the limits of the personal sphere by going public, but the going public is, in a necessary but nevertheless paradoxical move, about protecting the possibilities of private life and private choice in a more inclusive society." (Weeks 1998, 37) Here the public sphere is used to obtain a private space for the individual<sup>15</sup>. Bell and Binnie hold that when gays and lesbians are making claims for sexual rights, they have necessarily spoken the language of family form and practice, more often than not failing to live up to both the form and function of the normal family (Bell and Binnie 2000). This failure occurs because, according to Richardson, citizenship is fundamentally heterosexual, requiring citizens to perform their citizenship according to gendered and sexualized roles in order to access the acceptance, rights, protections and

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<sup>15</sup> As Lehr, Pateman and Griswald argue, the gendered structure of the family, for example, influences the role and powers of men and women in civil society and in relation to the state (Lehr 2003, 130-132; Pateman 1988, 7; Griswald 1998, 16). Liberal discourse marks a stark separation between the realms in order to diminish the relative power and influence of the family structure, its hierarchies and gendered roles (Brown 1995, 144). Wendy Brown adds that liberal discourse has divided society into the state, economy (civil society), and the family. Brown states, however, that these realms of society are fluid and interdependent (Brown 1995, 144).

statuses that are granted to ideal, normal citizens (Richardson 1998). To be ideal and normal citizens men and women are required to engage in a heterosexual union and assume their respective gender roles as either the private, nurturing and reproducing wife and mother, or as the public, authoritative and productive husband and father.

The connection between heterosexuality and citizenship is produced and reproduced through state-sanctioned marriage, and reinforced through dominant culture, religions and media. The institution of marriage is the most obvious site for the privileging of heteronormativity; enshrining state regulation of the sexual and familial relationships between citizens; and ensuring, through regulation, that particular people as citizens reproduce and are reproduced according to the criteria of the state.

Carole Pateman expands upon the function and structure of marriage and writes that marriage is, in fact, a three party sexual contract among the husband, wife and the state. Pateman states: “the marriage contract is not, in fact, a contract between the spouses, but rather they agree together to accept a certain (externally defined) status.” (1988, 166) In fact, the state, not the spouses, negotiates the terms of the contract. In turn, the spouses who chose to engage in the contract gain public status (Pateman 1988). Thus social conservatives maintain that marriage is a natural, foundational and private institution that the state must protect, without intervening too deeply into the privacy and freedom of the husband and wife, while the same-sex marriage movement is asking for state intervention into the private lives of certain homosexual relationships.

Marriage, as a sexual contract between citizens and the state, conditions male and female citizens in particular and systemic ways. Pateman has articulated the relationship between the social contract and the sexual contract. The social contract can only be

established by men who willingly consent to be governed by the state. As compensation for their consent and subsequent loss of authority, men become masters of their households. Women are not equal partners or subjects in the contract; rather they are the contested property; the object of the marriage contract. The sexual contract legitimizes this relationship and the husband becomes the legal master over his wife and children<sup>16</sup> (Pateman 1988).

According to Pateman and Brown, the marriage contract maintains a patriarchal structure through all of society, in both the public and private realms (Brown 1995; Pateman 1988). The ‘individual’ in civil society is defined as the antithesis to woman in the private realm. The private is natural, necessary and non-voluntary while the public requires a conscious and voluntary commitment. Thus, when women enter a sexual contract, they are incorporated into civil society through their membership in the family, but they do not become equal or legitimate citizens like their male counterparts. Under the sexual contract, women become legally subordinate to male citizens. Women contribute to society by reproducing future citizens and attending to the domestic needs of their husbands, who are already citizens. Yet wives and mothers do not gain recognition outside of the family, legally or economically, for their contributions to society (Pateman 1988, 11). Turning back to Stevens’ interpretation of Marshall’s theories of rights, when women have been unable to access civil and political rights, and economic stability through the institution of marriage, they have been granted certain

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<sup>16</sup> Pateman argues that the marriage/sexual contract maintains patriarchy in the private and public spheres. The sexual contract is not limited to the private sphere and does not limit patriarchy to the private sphere (Pateman 1988, 12). The sexual contract is dependent on its civil nature and consequent legal power. According to Rousseau, the social contract allows individuals, voluntarily, to “subject themselves to state and civil law: freedom becomes obedience and, in exchange, protection is provided.” (Pateman 1988, 7) Pateman terms this relationship ‘civil mastery’ and ‘civil subordination.’ (1988, 7)

social rights to mitigate the economic effects of their marriage status (Stevens 2010). Thus marriage is fundamentally an institution through which citizenship, rights and protections are administered, and one's participation in the marriage contract determines the rights to which one has access.

Based on Foucault's elaboration of discipline and biopower, marriage is also a means through which the state can regulate the reproduction of ideal citizens and populations. First, marriage is an institution through which the state regulates individuals. The state thus recognizes and protects certain family units through the institution of marriage in order to ensure that citizens act in a way that will benefit the state and the American people (Metz 2010). As Metz argues, the state wants to hold onto the ability to control the institution of marriage, which currently has powerful social meaning. And in turn, by presiding over the terms of marriage, the state bolsters and legitimizes the notion that marriage (and heterosexuality) is a natural, traditional and timeless institution (Metz 2010). Therefore, the institution of marriage can be used to constitute identities and subjects by maintaining marriage as an exclusive right associated with particular protections and privileges (Metz 2010; Grindstaff 2003; Eskridge 2000; Stychin 1998). As Metz explains, the constitution guarantees a right to marriage: "Marriage is a fundamental right. Substantive due process promised by the Fourteenth Amendment, therefore, requires that the state protect it." (Metz 2010, 29) The state is able to manipulate couples and demand specific conduct, mold identities, and offload responsibilities in exchange for this fundamental right. And the family accordingly becomes an institution for population control, boundary drawing, and granting of membership (Rankin 2000; Anthias and Yuval-Davis 1993).

Second, the debate surrounding the sanctity of marriage, the heterosexual family, and the allocation of corresponding rights has been framed in terms of the supposed universal function of the family to perpetuate a race of people, a population, via biological reproduction (Foucault 2007; Butler 2002). Butler challenges the notion that the reproductive nuclear family is the universal foundation of societies (Butler 2002). As Butler argues, economic, environmental, ideological and religious forces are all responsible for the formation and reproduction of communities, cultures, populations and nations (Butler 2002). Still, marriage is presented, by states and different political forces, as the primary means by which populations are reproduced. The reproduction of populations requires more than the reproduction of bodies but also encompasses the reproduction, teaching and passing on of particular valued cultures, values, morals, roles and responsibilities, in order to assure the ideal citizen. Through marriage, and reproduction, future citizens are trained into assuming the morally correct, and gendered and sexual citizenship roles and responsibilities (Stychin 1998).

Thus there are heteronormal gender and sexual criteria that determine the ideal American citizen, and the criteria have been framed and reproduced through heterosexual marriage. To reproduce and reward these ideal citizens, marriage has been established as an exclusive institution, which compels citizens to prove that their identity can fulfill the criteria of the state in order to gain access to the particular rights of marriage and thus to equal citizenship. Throughout American history, individuals have been excluded from the institution of marriage based on their identities be it class, race, religion, ability, sexuality and/or family form (Farrow 2010; Josephson 2005). The state has incrementally opened its terms of inclusion for marriage and accordingly certain citizens have been

granted access to the associated rights, and ultimately to equal citizenship. This incremental opening has produced several effects: marriage is made exclusive and status bearing, and thus becomes a coveted institution.

At the same time, ever-more responsibilities are being downloaded onto the private sphere of the family. Neoliberalism has eroded the public social sphere by abolishing and/or privatizing particular social welfare programs and protections, and by idealizing individuality. Neoliberal states have been heavily deferring to the private sphere to offer the goods and to provide the services needed for citizens' survival. Where once the state had expanded the public social sphere to account for systemic inequalities that were caused by laissez-faire capitalism, the neoliberal state is now supporting any private solution that avoids state dependence (Brodie 2008). In the absence of the public social sphere, variant social institutions or organizations – families, churches, non-governmental organizations, and/or corporations – assume the roles and perform tasks of the gutted state. But with the idealization of individuality and the lack of public funding, public, communal institutions are losing the battle, and private organizations are increasingly occupying formally social, public space and responsibilities (Duggan 2002). Dependence within one's family is acceptable because it alleviates dependence on the state, but also because the ideal family is thought to reproduce ideal "good" citizens: independent producers and consumers. Dependence on the family is imposed even when families have come apart. For example, federal and state governments in the US have been focused on determining paternity in order to enforce financial responsibility for children, predominantly through child support payments (Smith 2007). Still, in order to avoid the breakdown of the family, and consequent attempts at state dependence,

marriage has been promoted to bind and oblige the privatization of financial dependence (Smith 2007).

The power of marriage is evident as same-sex marriage has been presented as a vital issue to the citizenship, discrimination and equality of LGB citizens. As is discussed in the next Chapter, beginning in the 1980s, based on their exclusion from the institution of marriage, LGB citizens as an identity group, have argued that the denial of marriage rights is a form of discrimination and exclusion, perpetuated by the state. Instead of challenging this exclusionary, regulatory and private institution, the same-sex marriage advocates have been asking for inclusion into the institution in order to access the symbolic legitimacy, rights, protections, statuses and ‘equal citizenship’ that are administered through marriage. In so doing, they are inviting the state into their private lives and endorsing privatization. The next Chapter offers a history of the same-sex marriage fight in the United States, paying particular attention to the arguments and discourses that have been produced by same-sex marriage advocates since the 1970s.

#### **2.4. Queer Critique of pursuing Marriage as the path to Equal Citizenship and Social Justice**

In this section I offer a brief overview of queer critiques of same-sex as an avenue toward achieving citizenship rights and social justice. In the final Chapter of this dissertation I discuss queer alternative definitions, and political goals and strategies for social justice. Instead of focusing on why gay and lesbian Americans should be allowed to marry, Eskridge argues that a postmodern critique, upon which queer critiques are based, focus on the terms of the debate, the merits of the goal itself, and the implications of pursuing same-sex marriage as a political project:

A postmodern inquiry would examine the debate itself, to see how reformist rhetoric, arguments, and strategies might play themselves out in ways that are counterproductive or even reactionary. One might ask how the terms of the debate might affect the people involved in it, and whether the particular debate represents the best approach for changing the status quo [...] Postmodern criticism of same-sex marriage typically maintains that the process by which this 'reform' is achieved, or the discourse resulting from the process, carries with it dangers for the supposed beneficiaries and their allies – such as sacrificing their distinctiveness for conformity with traditional mores. (Eskridge 2000, 200)

Eskridge raises several important, critical and queer questions, to which I have added several more, including: What are the terms of the debate - the language, rhetoric, reasoning, discourses used? Who is involved in the fight for same-sex marriage? Who has decided that this is a worthwhile goal for lesbian and gay Americans? Who stands to benefit from same-sex marriage? Who is left behind? What political goals and ideals are being sacrificed for this political goal? What happens to differences, agency and autonomy within LGBTQ communities once same-sex marriage is realized? Will same-sex marriage change the status quo, specifically how sexuality is understood and addressed in contemporary American politics and society?

As these questions demonstrate, queer theorists/critiques and politics/activisms seek to problematize and challenge social categorizations, hierarchies and exclusions that are manifest in the pursuit and attainment of same-sex marriage. Specifically, they argue that the shift in the LGBT movement to assimilationist and heteronormal politics is exemplified through the same-sex marriage fight. The mainstream gay and lesbian movement has argued that all homosexuals are 'have-nots' because all heterosexuals are 'haves'. In terms of same-sex marriage, ever more same-sex couples (who are predominantly affluent, white and male) are finding themselves on the accepted, privileged side of the normal/abnormal divide. Accordingly, queer activists and theorists

have argued that the divide between heterosexuals and homosexuals is misplaced. As Cooper explains:

The hetero/homo divide emerged as the pivot point which lesbian and gay politics and identity were forged. While the liberal wing of the movement worked to declare the divide misplaced: that respectable lesbians and gay men had been placed at the ‘wrong’ side of the border, more radical gay and queer forces positioned themselves as *the* other – the site from which normative heterosexuality could be effectively challenged. (Cooper 2002, 243)

For Cooper, queer activists and theorists critique sexual politics and regulation from the ‘other’ side of the divide between the normal and abnormal, the accepted and the ostracized. Warner states: “‘Queer’ gets a critical edge by defining itself against the normal rather than heterosexuality.” (Warner 1993, xxvi) And as Warner argues, the most important fault line in the debate surrounding same-sex marriage is not between social conservatives and mainstream gay and lesbian same-sex marriage advocates, but between same-sex marriage advocates and queer theorists and activists. He says:

I am trying to point out the way current conflicts within the gay and lesbian movement, especially debates about public sex and marriage, are not so much debates with shared assumptions, as points of conflict and miscomprehension between increasingly divergent worlds. (Warner 1999, 71)

Accordingly, Polikoff argues that some same-sex marriage advocates are positioning themselves on the “wrong side of the culture wars over acceptable family structures,” as they engage in debates about privileging particular family forms, thus emulating the heteronormal hierarchal valuing of sexualities and family forms (Polikoff 2008, 98).

Interestingly, queer critiques of the same-sex marriage fight have been compared to the social conservative position. Both camps hold that homosexuality is not biologically determined and both are against same-sex marriage. These seeming similarities have been used by social conservative activists to try to expose divisions and

weaknesses within the LGBTQ community. As I have discussed, however, the comparison is misplaced. Queer critiques and social conservatives do not share the same perspectives on sexuality and marriage. Queer theorists argue that all sexualities are social constructions and therefore ‘unnatural,’ and that the privileging of any private/domestic relationship is unjust. Still, mainstream gay and lesbian activists have reacted to these accusations by insisting that they have reverence for the institution of marriage. They have so much respect, they argue, that they are committed to joining the institution without fundamentally disrupting the core heteronormal values of the institution. The mainstream LGBs’ campaign to prove that they are worthy of marriage leaves little room for criticism or challenges to marriage itself. Queer theorist Eric Stanley explains this silencing of dissent:

The way the marriage movement is framing any critique of their precious institution is either you are one of us (gay married) or you are one of them (homophobe). This helps silence the much needed debate and public discourse around such issues [...] Even in allegedly ‘progressive’ circles any mention of the implicit links between marriage, misogyny, and racism in the U.S. gets shut down by a ‘gay married.’ (Stanley 2010, 17)

The current same-sex marriage debate in the United States is steeped in reverence for the institution, and draws deep fault lines of “culture war” opposition. According to the mainstream LGBs, either one is pro-marriage or homophobic, and, in opposition, the social conservatives argue that either one is pro-marriage or they are against the traditional family. Both formulations silence possibilities outside of state-sanctioned marriage, and state regulation of sexualities and family forms.

Accordingly, I will now address how queer activists and scholars have critiqued the normalizing and regulatory nature of state sanctioned marriage, and the mainstream gay and lesbian movement’s impulse to assimilate in order to attain inclusion and

equality. To do so, I discuss the queer critique that same-sex marriage reinforces the strength of an exclusionary, normalizing and regulatory institution, which ultimately denies social justice to the most marginalized LGBTQ citizens.

In the case of same-sex marriage, it appears that some gay and lesbian individuals and couples are insisting that they can and will assimilate to the heteronormative criteria of state belonging through their kinship structure, roles and responsibilities (Lehr 1999). According to Meeks and Stain, the fight for same-sex marriage has certainly exemplified the impulse toward a politics of normalization.

Proponents of lesbian and gay marriage have tended to embrace what we call a politics of normalization. We define a politics of normalization as a rhetorical strategy that simultaneously advances the cause of gay civil rights while constructing rigid and regulative definitions of ‘normal’ gay sexuality. Not every form of civil rights politics is normalizing, but normalizing arguments have been dominant in the struggle for same-sex marriage. (Meeks and Stein 2006, 137)

Instead of challenging the fact that these rights and social protections are allocated according to state sanctioned kinship formation, mainstream gay and lesbian activists have decided to simply ask to be included in the institution of marriage (Butler 2002). And as Meeks and Stein argue, both the goals and discourses of the same-sex marriage advocates have normalizing effects. The goal of same-sex marriage is itself normalizing, as homosexual couples have to prove that they can fulfill the heteronormal criteria of marriage, which requires monogamy, life-long commitment, and the possibility of procreation. This assimilationist political goal and its discourses also reinforce the primacy of the state’s role in regulating the institution of marriage, and consequently regulating citizens’ sexualities and family forms. Same-sex marriage advocates are asking for heteronormal homosexual sexual and familial relationships to be

acknowledged condoned and protected by the state<sup>17</sup> (Blasius 1994). In conforming thusly, the individual agrees to be governed by the regulations of the state, and thereby legitimizes marriage as a state-institution, as an avenue toward rights and equalities.

A queer critique holds that the fight for same-sex marriage does not acknowledge the historical or contemporary exclusions upon which the institution of marriage is founded, nor does it acknowledge the new exclusions that are created through the legalization of same-sex marriage. Several queer activists and scholars argue that this push for same-sex marriage is a capitulation to an institution that has historically been patriarchal and racist. Few same-sex marriage advocates critique the institution by referencing the feminist analysis of the patriarchal nature of marriage<sup>18</sup> (Josephson 2005), or the critique that marriage has historically been an anti-poor and racist institution (Farrow 2010). Spade and Willse explain that marriage has historically been used to punish and regulate women, poor and non-white citizens and non-citizens:

Marriage is a coercive state structure that perpetuates racism and sexism through forced gender and family norms. Right wing pro-marriage rhetoric has targeted families of color and poor families, supported a violent welfare and child protection system, vilified single parents and women, and marginalized queer

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<sup>17</sup> Modern American gay and lesbian identities, movements and communities largely grew out of chosen or forced exclusions from the family. Accordingly, gay and lesbian liberation politics were largely founded on both the rejection of the nuclear family, the proliferation of different familial and sexual relations, and on the expansion of individual freedoms. Yet the push for same-sex marriage has confused these goals: “That gay identity, which starts with freedom from the family, has led us so inexorably and vehemently back to the institution of same-sex marriage ironically symptomizes this confusion. It is through marriage that gay people fully become individuals, and this discourse of individualism is precisely the point at which sexual regulation and gay ‘liberation’ meet” (Eng et. al. 2005, 14). Denying the gay and lesbian movement’s early call for individual freedom, the same-sex marriage movement is capitulating to the envelopment of individual rights within family rights. Same-sex marriage is a relational right as individuals are asking for recognition and equality not just based on their sexuality but on their relationship with another citizen (or non-citizen).

<sup>18</sup> Some pro-same-sex marriage scholars, such as Badgett, argue that many homosexual couples are conscious of the historically patriarchal nature of marriage, and thus work to resist replicating the hierarchal male/female, husband/wife, father/mother roles (Badgett 2009). But the queer critique is not primarily concerned about individuals living in patriarchal or non-patriarchal family models, but about how the state benefits from and manipulates the family model to privatize dependence and regulate citizens and their sexualities (Eskridge 2000).

families of all kinds. Expanding marriage to include a narrow band of same-sex couples only strengthens that system of marginalization and supports the idea that the state should pick which types of families to reward and recognize and which to punish and endanger. (Spade and Willse 2010, 3)

It is argued that this push for the legalization of same-sex marriage does not challenge the oppressions that are manifest in the patriarchal, heteronormal and racist political institution, but instead upholds and sustains this political institution by demanding inclusion (Vaid 2012; Duggan 2002).

Marriage has ostracized and punished non-heterosexual citizens including homosexual, polyamorous, polygamous, single, transgender and gender-non-conformist people (Cossman 2005; Butler 2002; Bell and Binnie 2000; Warner 1999). According to Meeks and Stein, marriage “has been used to disqualify queer people from full citizenship.” (Meeks and Stein 2006, 145) Richardson adds:

Rather than critiquing social institutions and practices that have historically excluded them, as did gay and lesbian/feminist activists in the 1960s and 1970s, over the last decade the politics of sexuality has increasingly been about seeking access into mainstream culture through demanding equal rights of citizenship. (Richardson 2005, 515)

Richardson, and Meeks and Stein are thus pointing to the troubling fact that same-sex marriage advocates are seeking equality through an institution that has historically been used to exclude them from equal citizenship.

In order to be accepted, homosexuals must very closely resemble or replicate the heterosexual ideal in terms of their social position (gender, gender expression, income, race, and ability), their sexuality (monogamous, vanilla, intra-generational etc.), and their family form (monogamous, procreative, single-family etc.). Those who are the most privileged within the LGBTQ communities because of their social position, sexuality and family form can be included within the institution of marriage, without fundamentally

disrupting the institution itself. Etleback points out that with the granting of same-sex marriage, rights will be gained by the already privileged LGB Americans but social justice will be further denied to those who cannot/will not assimilate<sup>19</sup>:

A pure rights analysis often fails to incorporate a broader understanding of the underlying inequalities that operate to deny justice to a fuller range of people and groups. In setting our priorities as a community, we must combine the concepts of both rights and justice. At this point in time, making 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 marriage (whether gay or straight) and those who are not. (Ettelbrick 2004, 258)

Cooper furthers that when gay and lesbian citizens ask to be included into heteronormal institutions, such as marriage or the military, in order to gain rights and equalities, they are actually denying social justice by causing inequalities in resources, entitlements, freedoms, authority and discursive/cultural recognition (Cooper 2002). As Jenson articulates, it is up to the state to determine both whose voices are heard and consequently which problems (inequalities, injustices) are acknowledged as legitimate and therefore worthy of state intervention and expenditure (2008). In terms of marriage, familial and sexuality-based problems, inequalities and injustices that cannot be articulated through the frame of state-sanctioned marriage are denied legitimacy, avenues for claims making and ultimately social justice. Thus while mainstream LGB same-sex marriage advocates see marriage as a route toward social equality, marriage only solves a particular kind of economic disparity. In the United States economic and care responsibilities are downloaded and privatized through marriage. Many social benefits come through employment benefits rather than public programs. As such, financial benefits are attained

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<sup>19</sup> Some lesbian feminists, the often overlooked and silenced population of the gay and lesbian movement, argue that attaining marriage rights offers them little advantage, protection or freedoms when faced with disproportionate poverty levels. For these activists, marriage does not lead to social justice in the face of punitive welfare legislation that emphasizes dependence on fathers of their children, and unaccommodating daycare, healthcare and employment insurance policies (Johnson et. al. 2005; Josephson 2005; Card 1996).

through marriage when one or both spouses have employment benefits. For those who can marry but do not have resources to share - such as employment benefits and other insurances, and capital and property - marriage is hardly an avenue toward social justice. Marriage functions to share resources and benefits among a particular class of citizens, while marriage does not offer financial help or security to citizens who are in need of capital, resources, insurances and benefits (Spade 2006).

Thus queer theorists argue that the expansion of the boundaries of marriage will not fundamentally disrupt an exclusionary institution, but will merely redraw the lines of exclusion. In this regard, Butler argues that expanding the criteria and boundaries of inclusion actually redefines the populations that are excluded.

It is important to mark how the field of intelligible and speakable sexuality is circumscribed so that we can see how options outside of marriage are becoming foreclosed as unthinkable, and how the terms of thinkability are enforced by the narrow debates over who and what will be included in the norm (Butler 2002, 18).

In asking for marriage rights, same-sex couples are effectively sacrificing other sexually 'deviant' individuals, reinforcing who are and are not deemed normal. In this vein, Stanley states:

Ironically, if you look at the rhetoric of the Freedom to Marry movement and the Republican Party, their similarities are frighteningly apparent. In their ideal world we would all be monogamously coupled, instead of rethinking the practice of "coupling." They want us working our jobs, not working toward collective and self-determination, remembering anniversaries not the murder of trans-people, buying wedding rings not smashing capitalism. The vision of the future the Republicans and gay marriage movement have offered will render most of us already in the margins of the picture (trans-people, sex workers, queers of color, HIV positive people, non-monogamous people etc.) as the new enemy of the regime of married normalcy they hope to usher in. (Stanley 2010, 18)

With the expansion of marriage to homosexuals and the legitimization of their sexuality, citizens are now free to be heterosexual or homosexual, but the abnormal sexualities are

rendered unthinkable. The delegitimized populations are necessarily defined and presented as being beyond regulation, transformation, assimilation and therefore beyond formal recognition (Ettelbrick 2004; Butler 2002). Thus ultimately through the legalization of same-sex marriage, heteronormal same-sex couples are granted access to an elevated position in society - replete with acceptance, status, rights and protections – because the lines of normality have been redrawn to include them to the exclusion of sexually ‘deviant’ and marginalized citizens.

In sum, many queer theorists and activists reject the liberal rights and equality project, seeking instead to challenge and dismantle the racist, sexist and heteronormal oppressions of this current citizenship regime (Polikoff 2008; Cossman 2007; Bell and Binnie 2000). The liberal equal rights framework, upon which marriage is premised, may afford certain citizens formal protections, it does little to challenge common assumptions of acceptable sexuality and the ways in which heteronormativity permeates society. Queer theorists have challenged the normalizing and exclusionary nature of the heteronormal citizenship regime by arguing that rights, citizenship and ultimately social justice should not be attached to family form, sexuality and sexual conduct (Warner 1993). Richardson explains:

A further concern has been to explore the political and policy implications of different models of citizenship in relation to forms of inclusion and exclusion that are related to sexual status. The focus here is on examining how useful various frameworks of citizenship may or may not be in furthering ‘sexual justice.’” (Richardson 2000, 258)

Accordingly the LGB identity politics of prioritizing marriage as an appropriate avenue to attaining acceptance, legitimacy, rights, and citizenship is fundamentally problematic. With the prioritization of same-sex marriage, social justice, in terms of voices heard and

needs met, is shallow as large segments of the population are denied political representation, economic protections and social status. Under the current regime, wherein avenues for claims making are ever-narrowing, social stability and survival is reserved for the few who lead normalized and assimilated gendered, sexual and familial lives.

Throughout the rest of this dissertation, I conduct a queer critical analysis – focusing on the themes of normalization, assimilation and exclusions – of the discourses and strategies of the eight organizations involved in the 2008-2013 fight for same-sex marriage through California’s Proposition 8. The next Chapter offers a history of the discourses used in same-sex marriage fights in the United States since the 1970s, the history of domestic partnerships, same-sex marriage and Proposition 8 in California, profiles of the ten Proposition 8 organizations of this study, and my discourse analysis methodology.

### **3. Purposes and Scope of the Research, Research Questions, Arguments and Goals**

#### **3.1. Purpose and Scope of the Research**

The case of Proposition 8 – and more broadly the fight over same-sex marriage in the United States – revealed that marriage was a politically and discursively powerful institution in that country. In many ways, the issue of same-sex marriage was much more than a policy issue. It was used to represent, promote and condition the ideologies and cultures of mainstream LGB and social conservative social movements. Since the 1970s, social conservatives have had a renewed interest in defining and protecting ‘traditional’ heterosexual marriage particularly in the face of what are deemed as destructive forces such as feminist, LGBTQ and other anti-oppression movements. The fight against same-sex marriage has been used to address all of these pro-traditional family fundamental concerns of the social conservative movement (Farney 2012). At the same time, same-sex

marriage has been presented as the priority and even the primary goal of LGBTQ politics in the United States. Despite a myriad of other issues that have hindered LGBTQ citizens' attainment of equality and social justice, pro-same-sex marriage organizations have represented marriage as the most desirable and 'winnable' route toward equal citizenship for certain LGB citizens of the United States (Richardson 2005; Bell and Binnie 2000). For both the mainstream LGB and social conservative movements, therefore, the fight over same-sex marriage has not only been a top priority, but has also been used to frame each movement's fundamental constructions of human nature and sexuality, the role of the state in citizen's sexual and familial lives, and the model citizen.

Throughout the 20<sup>th</sup> century, there were flashpoints of tension between the social conservative and mainstream LGB movements including: the pathologization and medical treatment of 'deviant' sexualities, the targeting and firing of homosexuals in public and private organizations and institutions, the heightened police surveillance and raids of gay bars and establishments, the Anita Bryant and Harvey Milk fights over gay rights ordinances, and the HIV/AIDS crisis. In each of these flashpoint moments, the social conservative movement and mainstream LGB movement were pitted against each other, and consequently their respective ideological stances and political agendas were reinforced, and their supporters were galvanized. While these flashpoint moments of antagonism were influential in shaping the relationship between these two movements, same-sex marriage became the pivotal social issue over which the two movements engaged and battled with each other (Bronski 2011). Arguably it was the most discussed and contentious social issues in the last twenty years in American politics, having taken

the place of abortion and reproductive health as the signifier for more generalized anxiety about the decline of morals and family (Farney 2012).

On one side, social conservatives value hierarchies, inequality, and state regulation of morality and sexuality, and hold the patriarchal, heterosexual family as the foundational unit of society. They demand continued governmental intervention to privilege, empower and reward citizens in traditional families in order to stop moral decay, and uphold economic meritocracy and social hierarchy (Cossman 2005). Same-sex marriage opponents have used conservative discourses to argue that traditional marriage needs to maintain its historical and religious definition, that the traditional family needs to be foremost in state and national politics, and that ‘future citizens’ are best raised by heterosexual parents who pass on the appropriate gender, sexuality, family norms, patriotism and morality (Lucas 2007; Rimmerman 2007).

And in opposition, mainstream gay and lesbian activists are said to represent progressive and liberal culture by believing in political and social equality for all citizens regardless of sex or sexuality, thus dismantling social hierarchies and economic meritocracies. They push for an expanded understanding of the ‘normal’ family to include same-sex couples, and their dependents, as recipients of all the political and economic rights and privileges of their heterosexual counterparts (Polikoff 2008; Chauncey 2004; Bernstein 2003; Cooper 2002; Warner 1999). Accordingly, same-sex marriage advocates have primarily used progressive liberal democratic rights discourses to argue that same-sex marriage is a matter of equality, justice, and individual freedom (Ettelbrick 2004).

Each side also maintains that the two political agendas are oppositional and incompatible. Yet this thesis demonstrates, based on a queer critique, that this stark division between discursive constructions and/or cultures was misplaced as both movements reinforced a heteronormal citizenship regime that held marriage as an institution through which the state administered particular rights and protections, ultimately regulating sexuality and the family form of its citizens. In contrast, this dissertation argues that the debate over same-sex marriage actually represented a moment of assimilation and inclusion, and the reproduction of inequality and hierarchies within current dominant political structures and institutions. In asking to be included in state-sanctioned marriages, mainstream gay and lesbian same-sex marriage advocates reinforced the normalizing and privileging nature of the institution of marriage.

These criticisms notwithstanding, the political power of same-sex marriage was further seen as the mainstream LGB movement not only prioritized same-sex marriage, but argued that same-sex marriage was the last or at least most important, remaining step in the equal rights trajectory of the American LGBT movement. For these mainstream LGB activists, the history of American LGBT political life was unfolding according to a particular trajectory in which the final goal is the attainment of equal rights. To this end, mainstream LGB activists fought for the decriminalization of homosexuality and then for formal protections against discrimination and harassment. Since the 1990s, in particular, mainstream LGB activists were concerned with issues such as hate crime legislation, the repeal of Don't Ask Don't Tell, and the extension of anti-discrimination protections, but same-sex marriage was presented as the most important step in the 70-year battle for liberal equal rights (Bronski 2011).

Moreover, this LGBT liberal rights trajectory was presented as one step in the broader American historical liberal rights trajectory: the slow and incremental journey toward realizing liberal rights and equality for all Americans. With regard to the ‘progressive’ history of human rights and equality in the United States, LGB equality – to be attained primarily through same-sex marriage – was cast as one of the last remaining steps toward equal citizenship for Americans. According to this trajectory, the attainment of equal citizenship rights for LGB Americans necessarily came after women and then racial minorities were accepted as worthy of formal rights and protections. This version of American liberal rights history gained popular support within and outside of the mainstream LGB movement. In his 2013 inauguration address, President Obama stated:

We, the people, declare today that the most evident of truths – that all of us are created equal – is the star that guides us still; just as it guided our forebears through Seneca Falls, and Selma, and Stonewall; just as it guided all those men and women, sung and unsung, who left footprints along this great Mall, to hear a preacher say that we cannot walk alone; to hear a King proclaim that our individual freedom is inextricably bound to the freedom of every soul on Earth. (Obama 2013)

Obama’s reference to Seneca Falls, Selma and Stonewall represented the linear progression of American liberal rights from the women’s rights movement, to the civil rights movement to the LGBT rights movement.

Obama did acknowledge that women had yet to experience full substantial equality, saying: “It is now our generation’s task to carry on what those pioneers began. For our journey is not complete until our wives, our mothers, and daughters can earn a living equal to their efforts.” (Obama 2013) Obama also acknowledged the unequal treatment of immigrants, but curiously failed to address the lack for substantial equality for racial minorities. In the same vein, however, he did allude to same-sex marriage as

the most important avenue toward equality for LGB Americans as he continued: “Our journey is not complete until our gay brothers and sisters are treated like anyone else under the law – for if we are truly created equal, then surely the love we commit to one another must be equal as well.” (Obama 2013) By referring to love, as opposed to sexuality or sexual orientation, Obama was speaking about protecting the loving relationships between homosexuals. Yet Obama remained ambiguous about how the state would protect homosexual loving relationships, be it through domestic partnerships, same-sex marriage rights or other such policies.

As I argue throughout this dissertation this positioning of same-marriage as the most important, and even final, goal on the ‘progressive’ trajectory of the LGBT politics was problematic for several reasons. First, this incremental progression, and the slow opening of the terms of inclusion, was premised on a necessary exclusion of particular people. While the (eventual) attainment of same-sex marriage was presented as a watershed moment for gay rights activism, the expansion of marriage to include same-sex couples was actually only a victory for a small proportion of America’s LGBTQ communities; notably those who could most closely replicate the ideal heterosexual family model complete with two monogamous partners. Concessions were made to open marriage to include same-sex couples in large part because marriage would not be opened to include non-monogamous couples. By pursuing same-sex marriage, and touting it as the climax for the LGBT movement, mainstream LGB activists and organizations adopted a linear, incremental, and ultimately exclusionary political program (Spade 2006). Second, as Ettelbrick argues, this narrative that the LGBT movement’s historical trajectory necessarily concluded with the attainment of same-sex marriage was based on a

revisionist history of American LGBTQ politics, organizing and mobilizing (Ettelbrick 2004). Same-sex marriage was not a priority for LGBTQ activists and organizations before the mid-1990s. In fact, even when same-sex marriage emerged as a priority for mainstream LGB activists and organizations, it was against the general consensus of the LGBTQ community. Elements of the modern American LGBTQ movement found their roots in political organizing that was actually very critical of the institutions of the family and marriage. Thus while discussions about the possibility and desirability of fighting for and attaining same-sex marriage rights were emerging within mainstream LGB organizations, D’Emilio argues that LGB communities had developed a “full-fledge multi-plank platform on family issues” that extended beyond same-sex marriage (D’Emilio 2007, 48-9). Regarding the family, LGB organizations focused on partnership recognition as well as spousal benefits in the workplace, same-sex parenting and reproduction, and public school sexuality and family policies (D’Emilio 2007). Several mainstream LGB activists tried to make the argument that these early goals were stepping stones on the way to marriage. Ettelbrick holds that these policies were proposed as alternatives to marriage, and as ends in themselves (Ettelbrick 2004). In light of these revelations, it is critical to challenge the notion that same-sex marriage was a progressive, inevitable and therefore desirable goal for all LGBTQ Americans on the route to equal citizenship.

Third, for many mainstream LGB same-sex marriage advocates, marriage was seen as the final step in the attainment of citizenship equality. The fight to legalize same-sex marriage, therefore, reduced the equality of citizenship to marriage equality. I argue that this reduction of equal citizenship to marriage equality narrowed the LGBTQ

political project by framing equal citizenship in terms of one's inclusion in the institution of marriage: a private sphere institution that has regulated citizens' private and public lives by administering legitimacy, status, privileges and rights on the basis of citizens' sexes, sexualities and family forms.

In sum, therefore, the project to access equal citizenship through the institution of marriage was problematic for several reasons: access to equal citizenship, complete with rights and protections, were dependent on citizens' sexualities and idealized family forms; assimilation to normative criteria was required to be accepted into the institution; exclusions from the institution, and therefore from equal citizenship, were justified; dissenting and marginalized voices within and outside of the movement were silenced; and possibilities for alternative goals and resistances within and by the movement were curtailed. When we consider all of these criticisms against the prioritization of marriage as the primary avenue to equal citizenship for LGBT Americans, we must question exactly what kind of citizenship regime, ideal citizen, and social justice program was being produced and reproduced when marriage becomes the route to citizenship equality.

### **3.2. Dissertation Research Questions, Arguments and Goals**

Proposition 8 is an influential case study and will be used to assess the changing relationship between social conservative and mainstream LGB social movements; the strategies of the implicated mainstream LGB and social conservative organizations in California, and in the United States; the evolving nature of same-sex marriage discourses; the influence and power social conservative heteronormal discourses in determining the sexualized nature of citizenship; the effects of the mainstream LGB organizations' assimilationist strategies and normalizing discourses; and the implications of reinforcing

a heteronormal citizenship regime in which certain rights and protections are allocated according to sexuality and family form.

Using California's Proposition 8 as the influential case study, my doctoral dissertation conducts a discourse analysis of public documents of ten of the organizations involved in Proposition 8, elite interviews of four of the mainstream LGB organizations involved in Proposition 8, as well as the briefs, transcripts and decisions from the three court cases that considered the validity of Proposition 8 (*Perry et. al. v. Schwarzenegger* (2010), *Perry et. al. v. Brown* (2012), and *Hollingsworth et. al. v. Perry et. al.* (2013)).

My research asks the following questions:

*Why and how has same-sex marriage become a pivot point in debates about larger citizenship issues including the legitimization of citizens, the boundaries of state authority, and the nature of social justice?*

To further focus this main question, my dissertation poses three sub-questions:

*How did the Proposition 8 organizations frame their discursive arguments in terms of larger citizenship issues including the legitimating of citizens, the boundaries of state authority, and the nature of social justice?*

*How did the Proposition 8 organizations' discourses reproduce or resist dominant heteronormal, and specifically social conservative, definitions of legitimate citizens, the boundaries of state authority, and the nature of social justice in their attempts to gain social and political inclusions and rights through same-sex marriage?*

*What are the implications of reproducing or resisting, particular heteronormal, social conservative, discourses in relation LGBTQ equality debates?*

This dissertation argues that the Californian mainstream LGB organizations involved in Proposition 8 adopted and reproduced social conservative heteronormal discourses in their campaign for liberal rights and equal citizenship more broadly. These political organizations reinforced a heteronormal citizenship regime that rewarded 'normal' citizens for their sexuality, sexual conduct and family form, while defining, regulating

and punishing "abnormal" populations who were unwilling or unable to conform to the desired family model. To demonstrate this main argument, this dissertation is guided by four main goals:

1. Challenge and disrupt the dominant narrative that American LGBTQ politics were necessarily following a trajectory of liberal rights citizenship, and that attaining marriage rights was the most important, or even final, step toward realizing equal citizenship rights for LGB Californians and Americans.
2. Employ queer theories of sexuality and citizenship to challenge heteronormal, social conservative citizenship regimes, which allocated citizenship rights and protections on the basis of sexuality and family form.
3. Analyze how particular elements of a heteronormal social conservative citizenship regime - including the regulation of sexuality, the production of particular citizens, the role of the state in citizens' private lives, and the nature of social justice - were conditioned, reproduced and reinforced through same-sex marriage debates and activisms.
4. Analyze and challenge how "No On Proposition 8" mainstream LGB organizations were reproducing, adapting and/or resisting dominant social conservative, and thus heteronormal, discourses in their efforts to gain social and political rights and protections through same-sex marriage.

#### **4. Brief Research Plan and Chapter Breakdown**

##### **4.1. Brief Research Plan**

To answer these four questions and fulfill these four goals, I conducted a discourse analysis to discern the how ten Californian pro- and anti- same-sex marriage organizations understood and constructed three elements of their citizenship regime: the regulation of citizens; the boundaries of state authority, and the nature of social justice. I deployed a discourse analysis, which focuses not on the validity of various organizations' truth claims, but rather on the ways in which truth claims, which constitute discourses, were put forward, manipulated and disseminated. Following Eskridge's definition of postmodern discourse analysis, my project seeks: "to understand how these strategies and processes fit into larger power relations and practices of subordination." (Eskridge 2000,

199) Accordingly, I look specifically at how discourses and debates surrounding same-sex marriage were constituted according to a particular heteronormal citizenship regime, and how this citizenship regime manifested in the regulation of sexuality and family form. This dissertation concludes by presenting and analyzing alternative queer citizenship regimes that are based on an ethos of social justice, and political equality that embrace, rather than punish or regulate, citizens' private familial and sexual conduct.

To address these larger questions, I study the organizations on both sides of the same-sex marriage debate in California, divided broadly into social conservatives, and mainstream LGB organizations. Chapter Three offers an explanation for how and why each organization was selected for this study based on their "active involvement" in the Proposition 8 2008-2013 campaigns and trials<sup>20</sup>. I study the discourse of the selected organizations starting in May 2008 when the California Supreme Court ruled that restricting marriage to heterosexual couples was unconstitutional in *Re Marriage Cases*, and I follow the organizations until the Supreme Court decision on the Proposition 8 *Hollingsworth v. Perry* case in June 2013.

This dissertation uses a triangulation of methods, as I look at three different types of sources for my discourses analysis: public documents and communications of ten political organizations; elite interviews with the leaders of four of the mainstream LGB organizations; and the briefs, transcripts, and decisions from the three Proposition 8 cases

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<sup>20</sup> The criteria for 'active involvement' are based on several factors including, the money each organization raised and supplied to the Proposition 8 campaigns and trials; the number of members they represent; the nature and number of projects they have initiated in support of or opposition to the proposition (be it funding and creating advertisements and documentaries, hosting rallies, contacting politicians and media, running information campaigns, and/or hosting public meetings); the organizations' public association with the trial; the organizations' self-appointment or self-identification as leaders in the campaigns; and the organizations' involvement in the court trials.

*(Perry v. Schwarzenegger (2010), Perry v. Brown (2012), and Hollingsworth et. al. v. Perry et. al. (2013))*.

First, this dissertation provides a discourse analysis of the public documents of key organizations in the Proposition 8 case. I collected and examined the ten organizations' public documents: websites; blog entries (of the founders and/or leaders of the organizations); flyers; newsletters; press releases; open letters; public emails; published reports papers or documents; and campaign advertisements, documentaries and videos. I analyzed these documents to discern how specific discourses were privileged and thereby determined the criteria for legitimizing subjects, state authority and social justice.

I focused on the organizations that represented the current debate among social conservatives, and the gay and lesbian movements. The six prominent mainstream gay and lesbians organizations on the 'No' campaign included: Equality California, Join the Impact, Courage Campaign, the Los Angeles Gay and Lesbian Center, National Gay and Lesbian Task Force, and the American Foundation for Equal Rights. The four organizations on the 'Yes' campaign can be broken into religious and political organizations, though the two entities certainly overlap and support each other despite their claims. Religious communities, especially the Mormon Church, played a key role in mobilizing Californians in favour of Proposition 8 (Galle 2009). And political organizations, such as Protect Marriage: Yes on Prop 8, the American Family Association and the National Organization for Marriage were prominent, well organized and funded, and ultimately succeeded in winning the November 2008 ballot measure.

Second, I conducted interviews with the leaders of four of the ten political organizations listed above. While my initial plan was to interview leaders from the ten organizations, despite email and phone invitations, none of the social conservative organizations agreed to an interview. Lacking interviews with the social conservative organizations meant that the elite interviews were not part of the comparative analysis between the discourses of the social conservative and mainstream LGB organizations. Instead, I conducted and analyzed the elite interviews as a separate ‘within case study,’ which offered an in depth analysis of the rationales of mainstream LGB leaders.

Accordingly, I used these elite interviews to compare the different mainstream LGB organizations’ understandings of sexuality, family and marriage, and rights, citizenship, and social justice. To these ends, I interviewed the four organizations’ leaders, asking questions regarding the nature of their organizations’ membership; their organizations’ political goals (including and beyond same-sex marriage); their organizations’ reasons for prioritizing same-sex marriage; the shortfalls and/or problems with the prioritization of same-sex marriage; whether or not same-sex marriage excluded and/or did not help some LGBTQ Californians; their organizations’ understanding of sexuality (be it an identity, orientation, biologically determined, constructed or other); their organizations’ understanding of the role of the family and marriage in society; their organizations’ understanding of the state’s role in citizens’ private lives; their organizations’ idea of the model citizen; their organizations’ definition of social justice and/or political/social equality; and their organizations’ perception of and relationship with the anti-same-sex marriage organizations.

Third, I analyzed the court documents from the three trials of Proposition 8: *Perry v. Schwarzenegger* (2010), *Perry v. Brown* (2012), and *Hollingsworth et. al. v. Perry et. al.* (2013). Since the success of Proposition 8 a federal lawsuit, *Kristin M. Perry v. Arnold Schwarzenegger*, was filed in the District Court for the Northern District of California. The suit challenged the federal constitutionality of Proposition 8. On August 4<sup>th</sup> 2010, the court ruled that Proposition 8 was indeed unconstitutional, and the Supreme Court upheld this ruling in June 2013. Accordingly, for my third approach I follow and analyze the case to discern how the discourses that were deployed during the Proposition 8 campaigns from 2008-2013 were filtered through, and were changed by the court system in these three trials of Proposition 8.

The Proposition 8 case and trials are the subject of my third method because six of the ten organizations were involved in the trials, either by offering briefs in support of either the plaintiffs or defendants; or as sponsors and interveners in the trials. As such, the trials offered a continuation of the discourse analysis of the majority of ten major organizations' same-sex marriage discourses. Moreover, given the cases' ascent to the Supreme Court, as discussed, the Proposition 8 case is likely to affect how same-sex marriage is pursued – be it through ballots, court trials and/or legislative change - in other states. Specifically, it is likely to affect the discourses that are used in cases in other states and again at the federal level. As Etleback argues, the American court system has tended to have the effect of limiting progressive, radical and/or sudden changes in law. The courts rest on precedent and require bargaining from all actors involved (Ettelbrick 2004). Therefore, the proponents and defendants in the trials had to navigate the courts' precedential understandings of citizenship, marriage, sexuality, discrimination, and

justice. Accordingly, analysis of the trials focused on how the parties defined the relationship between sexuality and citizenship; defined the relationship between sexuality, discrimination and rights; and consequently made the case for whether marriage rights should be afforded to citizens to mediate discrimination through equal citizenship.

#### **4.2. Chapter Breakdown**

This dissertation has nine chapters. Chapter One is the introduction, complete with theoretical framework, and dissertation research scope, questions, goals and arguments, and brief research plan. Chapter Two offers a detailed history of Proposition 8 (and the histories and roles of the ten organizations involved) within the context of the historical battle for same-sex marriage in the United States. Particular attention is paid to defining social conservatism, and mainstream LGB discursive strategies. Chapter Three details the dissertation's discourse analysis methodology with an explanation of how I collected my three kinds of sources, and how I conducted the discourse analysis using the qualitative computer program *Dedoose*.

Chapters Four and Five present the discourse analysis of the empirical research drawn from the ten organizations according to the elements of the citizenship regime: Chapter Four focuses on the social conservative organizations; and Chapter Five focuses on the mainstream LGB organizations. Chapter Six provides the 'within case study' of the elite interviews. Chapters Seven and Eight address the three trials of Proposition 8. Chapter Seven analyzes the plaintiffs and defendants' discourses regarding the relationship between sexuality, discrimination, citizenship and same-sex marriage, while Chapter Eight analyzes each side's discourses regarding the proper function of marriage,

be it procreation or love. Chapter nine concludes with an analysis of queer alternatives for pursuing equal citizenship through same-sex marriage, and a discussion of how this dissertation contributes to contemporary research in political science, particularly to the history and meaning of same-sex marriage debates in the California and the United States; sexual regulation theories; citizenship theories; and social justice theories.

## **Chapter Two: The Rise and Fall of Proposition 8**

### **1. Introduction**

This Chapter details the historical context of Proposition 8, paying particular attention to the role of social conservative and mainstream LGB activism, in order to situate and analyze the discourses of Proposition 8 at the height of the American same-sex marriage fight. In the first section, I define the current state, ideological tenets, and goals of social conservative, and mainstream LGB activists, specifically in relation to same-sex marriage. The second section of this Chapter outlines the history of same-sex marriage discourses in the United States in order to contextualize the discourses that were reproduced and produced in the Proposition 8 fight. The third section outlines the history of domestic partnerships, same-sex marriage in California, and Proposition 8. Taken together, these three sections provide historical and contemporary context to this project, specifically giving perspective to the current state and preoccupations of social conservative and mainstream LGB forces, and the discursive arguments that have been employed throughout the Proposition 8 fights.

### **2. The Battle Lines of Proposition 8: Social Conservatives and Mainstream LGBs**

As stated in Chapter One, my characterization of the competing sides in the Proposition 8 fight is broad, as there were individuals and organizations that were critical or apathetic about the politics of state-sanctioned marriage and the pursuit of same-sex marriage, and there were individuals who did not align themselves with either social conservatives or mainstream LGBs. Yet the nature of Proposition 8 – that it is a question of whether or not same-sex marriage should be banned under the State Constitution – forced two sides in the debate, and two possibilities for same-sex marriage in California.

As a result, those involved in the debate divided themselves into two oppositional groups: social conservatives who support Proposition 8; and mainstream LGBs who oppose Proposition 8.

Little attention has been paid to voices that do not fit easily into this dichotomy of possibilities, and that are, for example, critical of all forms of state-sanctioned marriage. I did not seek to limit my analysis to organizations that were firmly for or against Proposition 8, however, all of the prominent organizations in the debate defined themselves in terms of either being for or against the Proposition and same-sex marriage. There were LGBTQ organizations in California that were vocal in their opposition to the prioritization of same-sex marriage within the LGBTQ community. As I discuss throughout this project, these dissenting voices were largely delegitimized and silenced by the mainstream LGB organizations, further enforcing the stark divide between supporters and opponents of same-sex marriage. I address the arguments of the oppositional LGBTQ organizations in the conclusion of this dissertation.

Accordingly, this section provides an analysis of the two social movements, social conservative and mainstream LGB, that were the locus of this moment in this moment in American history. Specifically, I discuss each side's origins, their major ideological tenets, their beliefs about sexuality and the family, and the reasons for their respective preoccupation with same-sex marriage.

## **2.1. Social Conservatism**

Social conservatism has become an important, though not monolithic or uncontested, force in American politics and society since the mid-1970s. Traditional

conservatism<sup>21</sup> had formidable influence on American politics and governance until the 1970s when a wave of neoliberalism and social conservatism changed the focus and goals of right-wing politics in the country (Rayside 2007). As is detailed in this section, social conservatives played the principle role in opposing same-sex marriage since the 1970s. Therefore, in this section I outline the historical growth and role of social conservatism in American politics, paying particular attention to its positions on gender, sexuality and the family in order to give historical and contemporary context to Proposition 8's social conservative organizations' motivations, goals, and discourses.

America's current social conservative movement finds its roots in the New Right and the Religious Right groups that gained momentum in the mid-1970s. The New Right was predominantly a network of lobbyists and direct mail organizations concerned with more traditionally conservative issues such as government intervention into the economy. Unlike their traditionalist predecessors, however, members of the New Right argued that certain social issues should be of concern to the state. In order to amass and unite support on the right, the New Right allied with the Religious Right<sup>22</sup>. The amalgamation was largely a fundamentalist Protestant and evangelical-based backlash against secularization

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<sup>21</sup> Broadly, there are three strands of conservatism that have existed throughout the course of American political history: traditional, laissez-faire (neoliberalism) and social conservatism. According to Farney, traditional conservatism finds its roots in the French Revolution of 1789. Traditionalists maintained a consistent presence in American politics throughout the first half of the twentieth century. Traditionalists hold the following tenets: political and social change is inevitable but must be undertaken cautiously; society should be based on cooperation, community, tradition, hierarchy and authority; and there should be a distinct separation between the political and civil society (which includes family and religion). Traditionalists differ from social conservatives in two main ways: unlike social conservatives, traditionalists maintain that the state should not be involved in the personal realms/lives of its citizens; and unlike social conservatives, traditionalists believe in a distinct separation between church and state. Despite these differences, traditionalists were critical in the ascension of New Right and Religious Right within the Republican Party in the 1970s (Farney 2012). Neoliberalism is thoroughly defined in this dissertation, however, it is important to note that neoliberals have found common ground with traditionalists' call for small government and minimal state intervention in the private realm of civil society.

<sup>22</sup> Shortly after the emergence of the New Right, Religious Rights groups emerged, including the Moral Majority and the Christian Coalition (Farney 2012).

and the feminist movement's push for abortion rights and the Equal Rights Amendment (ERA). Both right-wing groups played an important role in the elections of Presidents Ronald Reagan and H. W. Bush (Farney 2012). By the late 1980s, however, both the New Right and Religious Right had come together under the 'social conservatism' banner, which now refers to religious, moral and social conservative movements and groups in North America<sup>23</sup>. The New Right and Religious Right groups' political agendas elided with a strong alliance between social conservatives and the Republican Party,<sup>24</sup> with a resulting entrenchment of social conservatism in American political discourse and governance.

There is a wealth of literature that provides compelling descriptions of the current state of American social conservatism. For example, George Lakoff states that social conservatism is based on several generalized beliefs about human nature and society. Social conservatives believe that humans are naturally selfish and imperfect. Social conservatives argue that Christian religion and tradition should be used to teach individuals to be unselfish, cooperative and loyal members of society, and to teach individuals proper moral conduct. Moreover, humans need higher authorities to teach individuals how to act in society, and to regulate or punish individuals who do not conform to society's rules or morals codes (Lakoff 1996). Historically, social

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<sup>23</sup> It should be noted that it is difficult to separate religious and non-religious social conservatives. Admittedly, the vast majority of social conservatives make an appeal to religion, in association with tradition and morality, when making truth claims. As such, I will discuss social conservatism as an entity comprised of both religious and non-religious followers, but I will indicate when their ideological tenets diverge.

<sup>24</sup> James Farney argues that while the New Right and Religious right aided in the elections of Ronald Reagan, George H. W. Bush and George W. Bush, the presidents, and the Republican Party have been hesitant to pursue many social conservative policies for fear of alienating more moderate supporters. Still the Republican Party and its leaders have employed social conservative discourses to maintain its relationship with and support from social conservative voters and groups (Farney 2012).

conservatives have depended on churches, community organizations, families and the state to teach and reinforce moral order and community loyalty.

The family, in particular, is foundational to society according to social conservatives because it instills tradition, morality, responsibility, proper gender roles, and religious devotion. David Popenoe, conservative academic and activist, states:

The underlying purpose of all social institutions is to guide behavior in socially useful ways, toward the maintenance of an orderly social life in which citizens practice the social virtues of being kind and considerate, trusting and trustworthy, responsible and hardworking, honest and cooperative, and respectful to rules and legitimate authority. These virtues are essential underpinnings not only of social order but of civilization itself. They are the essence of the kind of society most people want and in which they thrive. Too seldom realized is the fact that only in such a society can true self-fulfillment be achieved. Marriage and the family are the pivotal institutions. They are the seedbeds of social virtue. They teach, cajole, promote, and reinforce moral and civil behavior [...]An individualism unencumbered by families and other social institutions, then, brings personal freedom of a sort, but it also brings a high level of individual deviance and social disorder in which the social virtues are largely absent or are 'used' cynically, as in financial scams and dishonest relationships. (Popenoe 1996, 46-47)

As Brenda Cossman explains: "Individuals are first and foremost members of communities, united by common morals, values and traditions. Within this vision, the family is the basic unit of society, forging individuals together through its moral authority, instilling children with moral values and traditions." (2005, 433) The social conservative ideal family is heterosexual and patriarchal. Social conservatives believe that proper families must have a mother and a father who are married (heterosexual), and that the father should be the economic and moral head of the household while the mother assumes a subservient role as the nurturer of their children (patriarchal). Social conservatives view women as lacking the rationality, cunning and power that are required of civilized men: women are therefore mere dependents and responsibilities (Horn 2006; Blankenhorn 2005; Popenoe 2005; Bennett 2002; 2001; Griswald 1998). Harvard

academic, and noted conservative, Harvey Mansfield asserts that men are stronger, more aggressive, rational, intelligent and social, and should therefore work directly in the public realm as political and economic actors (Mansfield 2006). This heterosexual and patriarchal model is based partially on familial arrangements that were championed with the development of capitalism, and partially on Christian religious doctrine.

‘Family values’ discourse, which champions the heteronormal and patriarchal family as the most moral, stable, healthy, and self-sufficient family model, emerged as a very powerful, emotive and effective tool of social conservative groups and politicians in the 1990s (Stacey 1997). The term gains its power from its association with American history, tradition, religion, and nationalism. Accordingly, family values, and the family, have become almost sacred entities in American politics. Throughout the 1980s, 1990s and 2000s, the power of “family values” was recognized by activists and politicians on both the right and the left; both camps used the term to defend and promote various political goals ranging from welfare reform to education to military conduct to marriage policy (Stacey 1997). Judith Stacey argues that in the 1990s liberals, feminists and especially gay rights activists recognized the power of family values discourse, and in order to end the social conservative monopoly on the discursive power of the term, attempted to redefine the term to include ‘alternative families’ that were not based on traditional gender roles, hierarchies or structures (Stacey 1997).

According to Farney, a major distinction between social conservatism, and traditionalism and neoliberalism is social conservatism’s view of the proper role of the state in citizens’ private lives. As stated, social conservatism holds that state is tasked with ensuring that its citizens adhere to particular social morals and norms, specifically in

relation to gender, and sexuality. Farney states: “Social conservatives believe that conservatives ought to use the state to defend their substantive positions on such matters as abortion, homosexuality, pornography, euthanasia, and what they refer to as ‘radical feminism.’ They do not forgo the defense of their substantive positions for the sake of keeping civil society and the state separate.” (2012, 22)

Forgoing divisions between the state and civil society, social conservatives argue that the state can access and regulate citizens’ private gender and sexual lives through society’s most foundational institution – the family. In turn, the authority of the family is bolstered by public policy. Marriage contractually binds the state and families to each other. Citizenship is conceived and constructed according to a heteronormal citizenship regime that champions the family as a foundational unit of society and marriage as an institution through which the state should allocate political rights and economic protections to regulate the familial lives of its citizens (Metz 2010; Blankenhorn 2005; Cossman 2005; Popenoe 2005; Bennett 2001; Bernstein 2001).

Since the 1960s, social conservatives have argued that marriage is simultaneously being abandoned by heterosexuals through divorce, women’s economic independence, single-parenthood and multi-generational systems of care (Horn 2006; Blankenhorn 2005; Popenoe 2005; Bennett 2002), and marriage is being attacked by feminists and denigrated by homosexuals (Duggan and Kim 2005; Marecek 2003; Faludi 1991). Moreover, since the 1980s we have seen the deterioration of the public, social sphere (Brodie 2007). With the privatization of public social services and economic protections, the idealization of the individual, and the deterioration of the social sphere and community, social conservatives fear that churches, families and communal traditions

have weakened and disappeared. Accordingly, social conservatives have attempted to strengthen and promote the family (as well as Christian religion and tradition) in the face of this neoliberal erosion of the social.

In the 1970s and 1980s, social conservatives were primarily concerned with the advances of the feminist movement, and their attendant abortion and ERA battles. Still, homosexuality, and all constructed 'deviant' sexualities, were important targets of many social conservative organizations. Americans living non-heterosexual lives were understood as being the antithesis to the American ideal (Fetner 2001). There were flashpoints of tension between the social conservatives, and the gay and lesbian liberation movement as it appeared as though gay and lesbian Americans were gaining more acceptance in American society and were making political advances: cities and counties were adopting gay rights ordinances, legal challenges to state sodomy laws were underway, and homosexuality was removed from the American Psychiatric Association's list of mental disorders (Fetner 2001). Moreover, as I discuss in the next section, social conservatives became concerned about same-sex marriage beginning in the 1970s and 1980s because of select court challenges for same-sex marriage. While all of the court challenges for same-sex marriage in these decades failed, social conservative groups pressured state governments to ban same-sex marriage in their constitutions (Lahey and Alderson 2004). The issue gained further traction with the Hawaii court decisions in the 1990s, galvanizing social conservatives in their fight against homosexuals and homosexual-friendly legislation.

Through the course of the 50-year battle between LGBT and social conservative forces, the priorities of both sides shifted under the influence of national politics, other

social movements and each other. With these shifting priorities anti-gay discourses evolved. Roberts explains: “Antigay rhetoric has evolved from arguments viewing homosexuality as sinful and unnatural, to ones portraying homosexuals as diseased or pathological, to claims asserting that homosexuals disrupt the social good.” (Roberts 2009, 6) Haider-Markel divides the changing discourses of anti-gay social conservatives temporally: in the 1960s, homosexuals were seen as national security threats, in the same camp as communists; in the late 1960s and 1970s, homosexuals were chastised as immoral, sexually perverse, immature, and self-gratifying, and as predators to children; in the 1980s, gay and lesbians American were still largely seen as immoral but also as a minority of the population that was rightfully or wrongfully fighting for civil rights; and in the 1990s, with the visible growth of the AIDS epidemic, homosexual men, particularly, were viewed as a health threat (Haider-Markel 2001). I would add that in the 2000s, anti-gay discourses were based on family values and focused on the alleged inability of homosexuals to replicate the ideal family, be it morally, economically or reproductively. Thus social conservative understandings of sexuality, and homosexuality have shifted in the past fifty years. Despite themselves, even some social conservatives did not conceive of sexuality as being a timeless or one-dimensional phenomenon.

Many of the formal organizations of the New Right and Religious Right had disbanded by the late 1980s. The loss of these national organizations did not mark the end of the social conservative movement. Instead, strategies and priorities changed in the 1990s. While its national influence ebbed during Clinton’s Presidency, the movement remained strong at a grassroots level. The movement continued to oppose feminist and women’s rights advances but, beginning in the mid-1990s, homosexuality and

homosexual rights, equality and acceptance became a major concern for social conservatives (Farney 2012). Herman argues that many social conservatives would agree that in the 1990s, a top priority was the fight against gay and lesbian political activists and political gains (Herman 1997). Although social conservatives were unable to directly work with and within the ruling party during Clinton's term, their influence can be seen in three of Clinton's major policy initiatives - Don't Ask Don't Tell (1993), the Defense of Marriage Act (1996), and the Personal Responsibility and Work Opportunity Reconciliation Act (1996) – all three of which are based on and promote a patriarchal and heterosexual family model. Since the 2000s homophobic legislation has surged in the form of restrictions on adoption by homosexual couples (Stacey and Biblarz 2003); welfare laws that punish non-heterosexuals in an unprecedented manner (Snyder 2003); the denial of inclusion in non-discrimination legislation; and state ballot initiatives to ban same-sex marriage (Soule 2004; Witt and McCorkle 1997).

The debate over the inclusion of gay men and lesbians in the military was the first major battle between social conservatives, and gay and lesbian activists in the 1990s. By 1996, however, same-sex marriage became, and has remained, the primary focus of both the social conservative movement and the mainstream gay and lesbian movement (Farney 2012). While there are currently many variants of social conservatism in the United States, the fight against same-sex marriage has united these factions. Farney states: "State ballot initiatives on [gays in the military and same-sex marriage] led to a flourishing of smaller-scale social conservative movements and allowed social conservatives to reach out to previously immobilized voters and to re-energize those activists who had become weary after a generation of struggle over abortion." (Farney 2012, 67)

Over the last two decades, social conservatives in the United States have taken a proactive position, and have pressured their federal and state governments to ban or retract same-sex marriage rights (Fetner 2001; Herman 1997). In tandem with these efforts, social conservatives have embarked on campaigns to promote the benefits of marriage for heterosexuals, such as economic protections and benefits, custody and adoption rights, and social status (Stacey, 1997). Social conservatives have long held that these rights, benefits and protections should be reserved for heterosexual couples both to reward heterosexual couples for marrying and (hopefully) bearing children, and to encourage heterosexual couples to get married. Duggan states: “Since the Reagan 1980s, the emphasis on the importance of marriage as a national political issue has been anything but progressive. Various efforts to “promote” marriage have been attached to welfare reform since 1996.” (Duggan 2010, 2) Heterosexual marriage promotion has come in many forms since the 1990s: government marriage and fatherhood education programs attached to or in lieu of welfare assistance; abstinence and marriage education in schools; military restrictions on whether homosexuals can serve; restrictions on adoptions outside of any marriage, heterosexual or homosexual; and tax and welfare incentives for (heterosexual) marriage<sup>25</sup> (Smith 2007; 2001-2002). Duggan furthers: “A vigorous conservative ‘marriage movement’ has arisen with a long list of goals for

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<sup>25</sup> The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) was centrally devised around the idea that responsible, heteronormative behavior was the cure for poverty. Accordingly, the PRWORA allocated \$20 million annually for four years to the five states that are most successful in reducing illegitimacy, and have a lower ratio of live births to abortions than they did in 1995. State governments have tried a variety of tactics such as birth control, the morning after pill, abstinence education, adoption promotion, family planning programs, family caps on welfare benefits, paternity testing, and marriage promotion to reduce out of -wedlock births (Smith 2001-2002). Since the passage of the PRWORA, however, marriage promotion continues to be many social conservatives, fatherhood movement advocates and politicians’ preferred solution to single-mothers’ welfare dependence. In fact under the 2005 reauthorization, states can cut funding to anti-poverty programs such as childcare and cash benefits if they reallocate that money towards marriage promotion programs (Smith 2007).

shoring up ‘traditional’ marriage: restricting the grounds for divorce, punishing adultery, teaching abstinence, and bringing children and teenagers more tightly under the authoritarian control of parents.” (Duggan 2010, 2) As stated, social conservatives believe that the government should teach and enforce proper moral order onto its citizenry. Government support for heterosexual marriage ensures that particular traditions, morality, responsibilities, gender roles, and Christian religious doctrine are protected and reproduced.

According to social conservatives, governments that support same-sex marriage abdicate their core role as the moral guide for citizens<sup>26</sup>. Social conservatives fear that government support for new family forms – including homosexual, single-parent, multi-generational, and friendship-based families – will result in social acceptance of morals, gender roles and spiritual or religious beliefs that conflict with social conservative tradition. Thus social conservatives have attempted to defend marriage by fortifying the boundaries of exclusion and by strengthening heterosexual marriage by offering privileges to a growing population of ‘deserving’, ‘good’ and ‘moral’ citizens.

## **2.2. Mainstream LGB Same-Sex Marriage Advocates**

In this section, I discuss the mainstream LGB movement and organizations’ reasons for prioritizing marriage as the most important remaining step in the liberal equal rights trajectory of the American LGBT movement. The American gay and lesbian movement is comprised of many different factions including mainstream gays and

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<sup>26</sup> Social conservatives claimed that the federal government was promoting a skewed and detrimental vision of the American family. Since the 1970s, social conservatives have attacked government programs and laws that pertained to welfare, divorce, day-care, affirmative action, abortion, and gay rights as causing moral, social and national decay (Horn 2006; Blankenhorn 2005; Popenoe 2005; Bennett 2002; 2001). Admittedly, all of these programs and laws allowed the structure and definition of the family to evolve away from the patriarchal, nuclear model. But according to social conservatives, the disappearance of morality, structure, social roles and self-reliance that came with the breakdown of the traditional family also contributed to the nation’s rising poverty, crime rates, and welfarism (Cossman 2005, 435).

lesbians, conservative homosexuals, gay and lesbian libertarians<sup>27</sup>, and queers. Of these factions, three are most pertinent to my study: mainstream gays and lesbians, conservative homosexuals and queers. Each of these three factions will be discussed throughout this Chapter. Among these three, the mainstream gays and lesbians are the most prominent, powerful and vocal advocates for same-sex marriage in the United States.

Mainstream LGB movements and organizations tend to focus on attaining liberal rights and equality through avenues of formal politics including: working with political parties and politicians, lobbying state and federal governments, and initiating and supporting challenges to law through the courts (Bernstein 2003). Queer organizations in contrast argue that while the liberal equal rights framework may afford people formal protections, it does little to challenge common assumptions of acceptable sexuality and the ways in which heteronormativity permeates society. Accordingly, many queer organizations reject the liberal rights and equality project, seeking instead to challenge and dismantle racist, sexist and heteronormal structures and discourses.

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<sup>27</sup> Gay libertarianism grew as an offshoot of the libertarian groups that were gaining momentum in the 1960s. Gay libertarianism thus maintains principles similar to the larger movement including: limited state intervention in the private, social and economic lives of citizens; the promotion of individual rights; freedom of speech; the valuing of personal privacy; and the privatization of health, education and insurance services. While libertarians agree with conservatives on many issues, including the primacy of the individual, limited state involvement into the market and the dismantlement of the welfare system, libertarians also share principles with some left wing theories including, and most pertinently, queer theory and politics (The Libertarian Party 2010). Gay libertarians share many of their principles with queer theorists and activists including: the call for limited state intervention and involvement in the private sexual lives of citizens; a rejection of heteronormativity in political and social institutions and practices; and the promotion of community-based care, dependency and justice systems. The two camps differ in two main ways. First, their support for social services: while many queer theorists and activists hold that the state needs to account for and help to remedy social and economic inequalities, libertarians argue that all state activity confines individual and community freedom, and thus state institutions need to be dismantled. And most pertinently to this study, while some queer theorists and activists argue that including homosexual Americans in the institution of marriage only reinforces the hierarchal and exclusionary nature of state run marriage, some libertarians argue that same-sex marriage is a necessary step toward the end of deinstitutionalizing marriage, and the de-privileging of particular personal relationships (Outright Libertarians 2010).

The present-day mainstream gay and lesbian movement finds its roots in the assimilationist politics of the 1950s. The Mattachine Society and the Daughters of Bilitis were founded in 1950 and 1955 respectively as assimilationist gay and lesbian organizations that wanted homosexuals to be recognized and accepted as good citizens. They did not criticize or demand the reform of heteronormative or anti-gay state institutions and public organizations. Rather they sought to change public perception about homosexuality, arguing that homosexuals were not mentally ill, predatory or diseased, but good people who are capable of being upstanding citizens (Seidman 2002). Shortly after the infamous Stonewall riots in 1969, a liberationist movement emerged based on radical feminism, lesbian feminism, anti-war politics, and black liberation. It argued that the assimilationist movement left the heterosexual system intact, sought assimilation over the celebration of difference, and reinforced the legitimacy of formally heterosexist institutions (Seidman 2002).

Richardson argues that since the 1990s, assimilationism has experienced a resurrection through mainstream gay and lesbian activism, most noticeably through the discourse of equal rights (2005). As Richardson states: “This is a politics that by invoking – and simultaneously constituting – a ‘gay movement’ that seeks incorporation into the mainstream, rejects the earlier political language of women’s, lesbian and gay liberation in favour of a ‘lesbian and gay equality’ rhetoric.” (Richardson 2005, 516) As will be seen throughout this study, the discourse of equality has become a driving force in the mainstream gay and lesbian movement.

These reformers do not wish to change America beyond altering the status of gays from outsider to citizen. An assimilationist agenda does not necessarily protest the dominant status of heterosexuality; it’s about minority rights, not toppling the majority. Nor do these reformers wish to challenge the broader spectrum of

sexual-intimate norms that govern behavior, such as the norm of marriage, monogamy, or gender norms of sexuality. Assimilationists press America to live up to its promise of equal treatment of all of its citizens they wish to be a part of what is considered a basically good nation; this requires reform, not revolution. (Seidman 2002, 175)

In order to gain equality, oppressed groups must prove that they are identifiable, and that they have been treated unequally, be it through abuse, neglect or the denial of certain rights and protections, when compared to the majority of the population, and they must ask for a remedy from the state. Bernstein warns that the current mainstream lesbian and gay movement is abandoning its emphasis on being different in favor of a moderate politics that highlights similarities to the straight majority<sup>28</sup> (Bernstein 2003). The reemergence of assimilationist politics is manifest in the mainstream gay and lesbians' fight for equal rights for sexual minorities through same-sex marriage. For mainstream gay and lesbian activists, marriage is seen as an avenue toward equal citizenship and the supposed resulting social, economic and cultural equality (Polikoff 2008).

This politics of equal rights reproduces a particular understanding of sexuality and identity. Mainstream LGB organizations and activists have argued that sexuality is an immutable characteristic in order to make the case that lesbian and gay citizens comprise an identifiable category of oppressed people. While queer theories and activists have been questioning western understandings of sexuality, arguing that sexuality is actually fluid and amorphous, mainstream LGB activists and theorists have sought to demonstrate that sexuality is biologically determined, and therefore unchangeable. Mainstream LGB activists may feel compelled to make such arguments because the liberal rights model administers rights and protections against discrimination if it can be demonstrated that the

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<sup>28</sup> By the 1970s, the civil rights movement and the feminist movement inspired and motivated many gay rights activists to challenge dominant culture and politics (Bull and Gallagher 1996).

group in question cannot change the characteristics that are the basis of the discrimination. If the characteristics are changeable, the state reasons that the members of the group can and should change the characteristic in order to avoid discrimination. Therefore this equal rights politics, as exemplified through same-sex marriage, requires assimilation to the state's definition of a legitimate characteristic. Thus mainstream LGB activists have been focused on proving the immutability of homosexuality. In so doing, they have created narrow parameters for defining sexuality, and homosexuality in particular, wherein homosexuality is held as being a biologically determined, exclusive attraction to members of the same-sex<sup>29</sup>. Ultimately, this limited understanding of sexuality produces exclusions within LGBTQ communities as it is only those who fit this fixed definition of sexual identity who stand to benefit from the rights and protections that are being administered, in this case through same-sex marriage.

The conservative gay movement played a significant role in influencing the broader gay and lesbian movement to pursue conservative political goals, namely marriage equality (Bell and Binnie 2000). The conservative gay movement, which emerged in the 1990s, is based largely on assimilationist politics. Prominent conservative gay theorists, such as Andrew Sullivan and Bruce Bawer, support the privileged status of marriage and argue that homosexuals can and should be civilized within this foundational institution (Richardson 2005). In an editorial in *Newsweek* regarding the legalization of same-sex marriage in the state of New York, Sullivan states:

And that is why it has been such a tragedy that conservatives decided this was a battle they were determined to fight against, an advance they were dedicated to reversing. It made no sense to me. Here was a minority asking for responsibility

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<sup>29</sup> Bisexuality, as defined by an attraction to members of 'both' sexes, presents challenges to this characterization, and these challenges were addressed during the Proposition 8 fight, especially in the *Perry v. Schwarzenegger* cases.

and commitment and integration. And conservatives were determined to keep them in isolation, stigmatized and kept on an embarrassing, unmentionable margin, where gays could be used to buttress the primacy of heterosexuality. We were for them merely a drop shadow for heterosexuality. What they could not see was that the conservative tradition of reform and inclusion, of social change through existing institutions, of the family and personal responsibility, all led inexorably toward civil marriage for gays. (Sullivan 2011)

Cossman furthers that gay conservatives argue that ‘good’ homosexuals can and do exist and that these individuals should be recognized as equal citizens by the state despite their sexual orientation<sup>1</sup> (Cossman 2005). Cossman and Lehr both argue that conservative gay activists and theorists seek to normalize homosexuality by regulating the behavior of homosexuals according to the norm, to ultimately render sexual difference and sexual identity invisible, private and seemingly unrelated to debates about social justice (Cossman 2005; Lehr 1999). Sullivan states in his Newsweek editorial:

Of course this is new and not so new. For a long time, gays and lesbians braver than I was were effectively married and lived together, risking violence and opprobrium and isolation. For decades these bonds existed, and we knew of them even if we never spoke of them. I saw them up close as a young man in the darkest years of the AIDS plague. I saw spouses holding their dying husbands, cradling them at the hour of their death, inserting catheters, cleaning broken bodies, tending to terrified souls. This proved beyond any doubt for me that gay couples were as capable of as much love and tenacity and tenderness and fidelity as heterosexual couples. And when I heard their bonds denigrated or demonized, dismissed or belittled, the sadness became a kind of spur. For so long, so much pain. For so many, so much grief compounded by stigma. But we did not just survive the plague. We used it to forge a new future. And in the years of struggle, as more and more heterosexuals joined us, we all began finally to see that this was not really about being gay. It was about being human. Just like being gay is no longer necessarily about being an outsider. It is about being an American. (Sullivan 2011)

As Bell and Binnie state: “In effect, what Sullivan wishes to do is to *depoliticize* homosexuality – to cast off its aura of radicality and transgression – and to slot it into mainstream American values.” (Bell and Binnie 2000, 45) Based on the assumption that homosexuals, specifically gay men, are prone to promiscuity, non-monogamy and cannot

bare children alone, Sullivan, and the like, state that by granting rights according to marriage status, the state can expand the number of economically self-sufficient, monogamous, and reproducing families, regardless of sexual orientation (Cimino 2007; Richardson 2002; Bell and Binnie 2000; Sullivan 1997; Bawer 1994).

While gay conservatives initiated the fight for same-sex marriage, in many ways, by the late 1990s they were by no means the only supporters of same-sex marriage. Thus it is important to note that there are several reasons why this study is focusing on mainstream pro-marriage gay and lesbian organizations, as opposed to gay conservative individuals and organizations. First, as stated, same-sex marriage has come to dominate the political agendas of most mainstream gay and lesbian organizations. Second, gay conservatives do not have as many organizations as their mainstream counterparts, and choose instead to influence the agendas of other organizations rather than create their own, as is seen with the Republican Party's Log Cabin Republicans. In contrast mainstream gay and lesbian organizations have built the momentum and almost taken over the fight for same-sex marriage. Finally, many mainstream gay and lesbian same-sex marriage advocates see marriage as a path to citizenship equality and social acceptance, while gay conservatives see same-sex marriage as a private institution of economic self-sufficiency. Gay conservatives agree with neoliberalism, which holds that families should be economically self-sufficient, and which relegates sexuality to the private sphere of freedom. Marriage here is seen as an avenue to fulfill one's responsibilities to society as a consumer, producer and reproducer. Ultimately marriage is a vehicle toward economic stability, and will necessarily lead to the de-radicalization and civilizing of gay individuals and communities (Bell and Binnie 2000). Conversely, and as will be

discussed later in this Chapter, mainstream gay and lesbian same-sex marriage activists see marriage as opening up the door to a host of citizenship rights, benefits and privileges that are held as assuring political equality, and social acceptance.

These two sections have explained why and how both social conservative and mainstream LGB movements have prioritized same-sex marriage as a critical social issue; one that both sides use to represent and wage their culture war. The next section details the how the conflict between these two sides – and their seemingly conflicting notions of sexuality, the family, citizenship, and marriage – has played out through the history of same-sex marriage in the United States.

### **3. A Brief History of Same-Sex Marriage Fights and Discourses in the United States**

I offer a brief history of same-sex marriage victories and backlashes in the United States, and of the relationship between social conservative and LGBTQ organizations. Paying particular attention to how the debate surrounding same-sex marriage has been characterized by particular discourses on both sides, this section seeks to contextualize the Proposition 8 discourses.

While the issue of same-sex marriage was first raised by homosexual couples challenging marriage laws in several states throughout the 1970s and 1980s, opponents of same-sex marriage were reactionary at first but rapidly aggressive in both developing anti-same-sex marriage tactics and attempting to control the discourses and framing of the debates. After the end of George W. Bush's Presidency in 2008, the same-sex marriage opponents continued to aggressively ban same-sex marriage while same-sex marriage advocates aggressively fought for the legalization of same-sex marriage, largely

through state and federal courts, and their same-sex marriage discourses began to gain traction in the debates, ultimately swaying public opinion.

### **3.1. 1970s-1980s: The First Attempts at Attaining and Banning Same-Sex Marriage**

In the early 1970s, the first attempts to gain same-sex marriage rights came in the form of court challenges, as opposed to mobilizing in the public arena. Influencing public opinion and gaining political support were not seen as viable avenues for attaining same-sex marriage rights because public opinion strongly opposed homosexuality. Jack Baker and Michael McConnell are held to be pioneers in the same-sex marriage debates in the United States. The couple applied for a marriage license in Minnesota in 1970, and was denied on the basis that the applicants were of the same sex. The couple filed suit against the county clerk claiming that the Minnesota constitution and its laws did not specifically prohibit same-sex marriage but the Minnesota trial court and state supreme court ruled against them and the Supreme Court decline to hear their case<sup>30</sup> (Newton 2010).

This early case and others<sup>31</sup> took inspiration from the Supreme Court's decision in *Loving v. Virginia*, which struck down bans on "interracial" marriage in Virginia and fifteen other states in 1967 (Johnson 2009). The Supreme Court decision stated that "marriage is one of the 'basic civil rights of man,'" and advocates for same-sex marriage

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<sup>30</sup> McConnell and Baker received some relationship-based state rights by unconventional means. Newton explains: "As their case was working its way through the courts, Baker and McConnell continued to pursue other avenues of formalizing their relationship. In August 1971, McConnell legally adopted Baker, and they began to enjoy a few of the rights afforded legally married 'opposite-sex' couples. At about the same time, they applied for a marriage license in Blue Earth County, Minnesota, were granted the license, and were married by a Methodist minister in Mankato, county seat of Blue Earth County." (Newton 2010, 1)

<sup>31</sup> Similarly, two women, Tracy Knight and Marjorie Jones, applied for a marriage license in Kentucky. Knight and Jones were also denied a license and the courts ruled against them, as Newton recounts: "When Knight and Jones sued to force the clerk to issue a license, the district court rejected their claim, relying almost exclusively on definitions of marriage found in standard dictionaries of the time. The court noted that state statutes were essentially silent on the issue of same-sex marriage, so it had no statutory or case law precedent on which to base its decision. Jones and Knight did not pursue their case beyond the court of appeals." (Newton 2010, 2) Other challenges to marriage law were filed in many states throughout the 1970s and 80s but all of them were defeated (Koppelman 2006).

attempted to use this argumentation to make the case for same-sex marriage (Johnson 2009). In the 1971 Minnesota case, the state's Supreme Court dismissed the argument, stating: "[I]n commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex." (Johnson 2009, 277) Subsequent same-sex marriage cases in this era, also attempted to evoke *Loving v. Virginia*, and all such arguments were rejected by the respective courts (Johnson 2009).

The comparison between the *Loving v. Virginia* case and the cases to legalize same-sex marriage has been problematized by both anti-same-sex marriage campaigns, and LGBT and queer academics and activists (Johnson 2009). Anti-same-sex marriage campaigns have argued that the comparison is an insult to the struggles and victories of the civil rights movement. The right to same-sex marriage, they further, is not comparable in importance to the rights that were motivating the civil rights movement. Moreover, they state that the evocation of *Loving v. Virginia* is an attempted to cast anti-same-sex marriage advocates as "bigots" (Johnson 2009).

Some LGBT and queer academics argue that the comparison of same-sex marriage with *Loving v. Virginia*, or more broadly the civil rights movement, risks alienating people of colour as it implies that the civil rights movement is over, and that the fight for gay rights, in the form of same-sex marriage, is the only remaining civil rights issue in the United States (Johnson 2009). Katherine M. Franke offers a more nuanced argument for why the two cases should not be compared. Franke states that LGBT and queer activists should not be depending on *Loving v. Virginia* because while the decision legalized "interracial" marriages, it did not address the state's ability to

regulate and punish sexual relations outside of marriage. Based on the Supreme Court decision in *McLaughlin v. Florida* (1964), the state could continue to regulate and punish non-marital sex as long as it was not on the basis of the race of those involved (Franke 2008). Comparatively, in the case of *Lawrence v. Texas* (2003), Franke argues, the Supreme Court's decision that state sodomy laws were unconstitutional meant that limits were placed on the state's ability to regulate non-marital sex between consenting adults. *Loving v. Virginia* and same-sex marriage cases, therefore, are both characterized by the state's legitimization, and thus regulation, of particular relationships and sexual activities to the exclusion of non-marital relationships and sexual activities (Franke 2009). All of these criticisms against evoking *Loving v. Virginia* and then *Lawrence v. Texas* have influenced subsequent same-sex marriage debates, as I will discuss later in this chapter.

These early cases also revealed that American marriage laws did not address the sexes of the two persons who could marry. Marriage laws were silent on the sex composition of couples, in part, because same-sex marriage was not thought to be a possibility much less a threat. Both LGB and social conservative organizations had not seriously considered the issue of same-sex marriage before the 1970s. As Ettelbrick points out:

Not so long ago, the term 'gay or lesbian family' was an oxymoron – a legally impossible and functionally undesirable notion. Lesbians and gay men did not fit into the world's understanding of family. At the same time, the idea of 'family' had not yet been claimed by lesbians and gay men (Ettelbrick 2004, 905).

The gay liberation movement (spanning from the 1960s-80s) had focused on experiencing and promoting sexual liberation, overturning sodomy laws, combating violence and discrimination, challenging heterosexual and patriarchal society and its institutions, and building community outside of traditional families (Seidman 2002).

While many of these goals differentiate gay liberationists from the contemporary mainstream LGB movement, the latter goal of building communities outside of traditional families is starkly juxtaposed to the mainstream movement's current focus on attaining same-sex marriage rights. D'Emilio points out that there was a modest family agenda among the gay liberationist movement in the 1980s. However, it primarily focused on defending the rights of lesbians who had become mothers in heterosexual relationships and were being denied custody on the grounds of their sexuality rather than fighting - as mainstream activists do currently - for the right of lesbians to choose to become mothers. Ultimately, the liberationist slogans of "smash monogamy" and "smash the nuclear family" more accurately embody gay liberationist sentiments toward the traditional family and marriage (D'Emilio 2007). As D'Emilio asks:

Where does 'family' fit in this story? What kind of a policy agenda around family will a movement produce when the primary influences on this movement have been the hippie counterculture (think 'communes, free love, Woodstock Nation') and radical feminism (think 'Down with the patriarchy!')? (D'Emilio 2007, 47)

Thus it was not only unfathomable but also largely undesirable that same-sex marriage was an appropriate or desirable political goal for LGB Americans.

Likewise, social conservatives were not concerned with same-sex marriage until LGB people and couples began challenging state marriage laws in the 1970s. There were flashpoints of tension between social conservatives and LGB organizations, most famously Anita Bryant's 1970s campaigns against gay rights ordinances (Fetner 2001; Haider-Markel 2001). Comparatively, the social conservatives' early fight against same-sex marriage in the 1970s has garnered less infamy in American LGB history. Before and after the same-sex marriage challenges, social conservatives constructed homosexuals as deviant, immoral, perverse and self-gratifying people who were a threat to the morality of

American society and the security of the American nation. After these court challenges, however, homosexuals were progressively constructed as threats to society and the nation through their attempts to unsettle and challenge the status and strength of the American nuclear family.

While at first, social conservatives fought against same-sex marriage only after LGB challenges to marriage laws, they rapidly became aggressive in their campaigns against same-sex marriage. In the 1970s and 80s, social conservatives dealt with the threat of same-sex marriage by attempting to influence government representatives as well as court decisions on the definition of marriage. Many state governments, also reacting and then aggraving, began to find ways to reinforce the 'traditional' definition of marriage in law. As Lahey and Alderson explain:

Once it became clear that queer couples expected to be treated like any other couple, however, most governments began to scramble to find ways to reinforce the unstated presumption that many politicians have had that marriage is for heterosexuals only. (Lahey and Alderson 2004, 19)

Lahey and Alderson enumerate four basic strategies that state governments have used to reinforce the heterosexual presumption in their marriage laws:

[1] Appeal to courts to apply religious doctrine to prevent queer couples from marrying, including assumptions about the procreative purposes of marriage; [2] heterosexualize neutral definitions of 'spouse' to create the impression that marriage has always been exclusively heterosexual; [3] enact 'defense of marriage' prohibitions on same-sex marriage; [4] create segregated legal structures to give some limited legal recognition to lesbian and gay relationships while keeping them out of the institution of marriage. (Lahey and Alderson 2004, 19-20)

First, states have appealed to courts to invoke Christian religious doctrines and traditional values to justify denying marriage rights to same-sex couples. Thus early discourses of the same-sex marriage debate were largely shaped by Christian religious groups, social

conservatives and state governments. These actors focused on religious doctrine concerning the family, proper gender roles, and the supposedly unbreakable connection between marriage and procreation. Many state governments overtly referenced Christian religious texts or would secularize religious doctrine as ‘common knowledge’ to justify the restriction of marriage to heterosexual couples. In terms of parenting, same-sex marriage opponents argued that same-sex couples were incapable of teaching proper gender roles, family values and religious morality (Ettelbrick 2004).

Second, once same-sex couples began challenging the gender-neutral language of marriage laws, state governments pushed through legislation that clearly defined marriage as involving one man and one woman. Third, in what can be deemed the first wave of bans against same-sex marriage, many state governments began to implement ‘defense of marriage acts’ (DoMAs) to clarify the gender-neutral language of their marriage laws. Many DoMAs have been constitutionally embedded, placing them out of reach of ordinary courts and legislatures (Lahey and Alderson 2004). By 1980, half of the states had passed DoMAs, as laws or constitutional amendments, specifically defining marriage as a legal entity involving a single ‘opposite-sex’ couple (Newton 2010).

Fourth, several state governments have allowed same-sex couples to enter domestic partnerships or civil unions, instead of marriages. Domestic partnerships and civil unions are segregated legal structures that give couples (same and sometimes different sex) many of the same legal statuses that are granted to married couples. Civil unions, for example, extend rights to same-sex couples, but these rights are recognized only in the state where the couple resides. Domestic partnerships can vary in breadth and are available to both same-sex and different-sex couples, providing some state-level

spousal rights to unmarried couples, including same-sex couples (National Conference of State Legislatures 2013). The strategy of creating a segregated non-marriage legal structure avoids court rulings that might legalize same-sex marriage, maintains marriage as a 'sacred' institution, and appeases voters on both sides of the same-sex marriage debate.

In these early days of the same-sex marriage fight, coherent discourses in support of same-sex marriage were lacking for two main reasons. First, there were few challenges to marriage laws and they all took place through the courts, leaving little opportunity for the broader LGBT communities to influence and/or adopt the arguments that were put forward in the courts, much less produce discourses. Second, broader LGBT communities did not offer strong support for same-sex marriage, lacking the will and means to articulate and produce arguments and discourses in favour of same-sex marriage. The social conservatives, on the other hand, were able to produce coherent discourses in opposition to same-sex marriage, which evoked Christian religious doctrine concerning the family, proper gender roles, and the supposedly unbreakable connection between marriage and procreation. I suspect that the social conservatives were able to produce such discourses because they were based on the major established tenets of their ideology, and because they saw same-sex marriage as a direct threat to these tenets. Therefore social conservatives were better able to apply their already established arguments at the onset of the same-sex marriage debates. Conversely, because the LGBT communities were largely unconcerned and/or opposed to same-sex marriage, they lacked the pro-family ideological history or foundation to quickly deploy discourses in favour of same-sex marriage.

### **3.2. 1990s: The Prioritization of Same-Sex Marriage, and Social Conservative Backlashes**

It is difficult to discern exactly when the attainment of same-sex marriage rights became a priority for LGB activists, organizations and communities. Josephson has identified 1989 as a watershed year:

The debate within the queer community in the United States over marriage as a worthy goal began in earnest in 1989, with essays by Tom Stoddard and Paula Ettelbrick who argued, respectively, for and against advocacy groups taking up the challenge. (Josephson 2005, 273)

There is some debate about the significance of the events of 1989. Warner, for example, argues that marriage was not a priority before the election of Bill Clinton in 1992 (Warner 1999). D’Emilio contends that it is a mistake to ignore the marriage movement that surfaced earlier in the 1980s. D’Emilio recounts:

At the marriage March on Washington in October 1987, one of the unforgettable moments was the mass ‘wedding’ of same-sex couples on the steps of the National Cathedral. But the event was as much a public expression of love and commitment in the face of AIDS and American homophobia as it was a step in the campaign for the right to marry. (D’Emilio 2007, 52)

Even when same-sex marriage emerged as a priority for mainstream LGB activists, and organizations, it was against the general consensus of the gay and lesbian community. While discussions about the possibility and desirability of fighting for and attaining same-sex marriage rights were emerging within mainstream LGB organizations, D’Emilio argues that LGB communities had developed a “full-fledge multiplank platform on family issues” that extended beyond same-sex marriage (D’Emilio 2007, 48-9). Regarding the family, LGB organizations focused on partnership recognition as well as spousal benefits in the workplace, same-sex parenting and reproduction, and public school sexuality and family policies (D’Emilio 2007).

After two significant events in the 1980s – the ‘lesbian baby boom’ and the HIV/AIDS crisis – the issue of same-sex marriage was singled out and prioritized by a small but powerful group of elite conservative and mainstream LGB activists and their organizations. First, the ‘lesbian baby boom’ occurred as lesbians increasingly birthed children from heterosexual sexual relationships and/or artificial means, and attained custody of children through second parent custody and adoption. This increase in lesbian parenting exposed the complications with custody, child support, spousal benefits and property rights that were experienced by homosexual parents and partners (Chauncey 2004). Second, the HIV/AIDS crisis exposed the restrictions that homosexual couples faced when trying to access hospital visitation, inheritance, property, and custody rights. Moreover, as a result of the AIDS crisis, many gay men began to question the morality, safety and repercussions of the trope of the promiscuous lifestyle that was held to be synonymous with male homosexuality in the 1960s and 1970s. Riding this growing wave of temperance, a movement of self-proclaimed gay conservatives emerged, seeking to change society’s notions of homosexuality and the ‘gay lifestyle.’ (Chauncey 2004, 121)

Beginning in the 1990s, conservative gay and mainstream LGB activists and organizations worked to make sure that same-sex marriage was the priority for mainstream LGB activism through three main tactics. First, substantial financial support was dedicated to court challenges and litigation expenses, and as a result a number of lawyers launched litigation projects throughout the country. Second, a few influential and well-heeled supporters implored national mainstream LGB organizations to focus on same-sex marriage. Warner notes this phenomenon in the Human Rights Campaign and the National Gay and Lesbian Task Force, which had the resources, contacts and

notoriety to set the priorities of American mainstream gay and lesbian organizations (Warner 1999). Third, these organizations produced campaigns to advance the idea that same-sex marriage is the necessary next (and even final) step for LGBT rights activism in the country (Warner 1999). As such, since the 1993 March on Washington, marriage has been one of three main issues that have dominated popular national discourse regarding homosexual Americans' political and social needs and wants (Warner 1999). The other two issues were the military's Don't Ask, Don't Tell policy (Britton and Williams 1995), and hate crime legislation (Spade and Willse 2000). These issues and their corresponding institutions – marriage, the military and the liberal justice system - were prioritized because conservative and mainstream LGB activists were invested in politics and discourses of assimilation and normalization.

The first positive court ruling on same-sex marriage came in Hawaii in 1996. In *Baehr v. Miike* 1996 the First Circuit Court for the state of Hawaii ruled that denying same-sex marriages is unconstitutional, and in violation of the equal protection clause. Based on this decision, same-sex marriage was legal in Hawaii for twenty-four hours until the decision was stayed. This decision was ultimately overturned by a state-wide referendum that empowered the state legislature with the ultimate authority in defining marriage<sup>32</sup> (Newton 2010). Although avenues to same-sex marriage were closed in

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<sup>32</sup> Newton offers a history of same-sex marriage in Hawaii after the *Baehr v. Miike* 1996 decision: “[Judge] Chang’s ruling motivated the state legislature to take action in order to preserve the intent of the existing marriage law, that is, to restrict the practice to one man and one woman. In March 1997, the legislature adopted legislation calling for a statewide vote on a constitutional amendment restricting marriage in the state to one man and one woman. Two months later, the state also passed legislation creating an entity called reciprocal beneficiaries, which provided benefits on about 60 matters for same-sex couples equivalent to those for opposite-sex couples. In November of 1998, voters ratified the proposed constitutional amendment, permitting (but not requiring) the state legislature to limit marriage to opposite-sex couples. At the time of that vote, the status of the original Baehr lawsuit was still in limbo because of Judge Chang’s ruling and the vote on the constitutional amendment. In December 1999, the state supreme court resolved that ambiguity by ruling that the legislature’s action in limiting the scope of marriage in the

Hawaii, other state governments and the federal government quickly mobilized to implement legislation and constitutional amendments that clearly defined marriage as a union between one man and one woman. In 1996 alone, 32 states had introduced legislation specifically banning same-sex marriages (Farney 2012; Newton 2010; Koppelman 2006).

Also in 1996, the U.S. Congress passed and President Bill Clinton signed the Defense of Marriage Act (DOMA), which was implemented in part to appease social conservative voters and organizations that feared that the Hawaii decision would be replicated in other states. Accordingly, discourses of family values, religion and tradition engendered discussions and debates of DOMA. As Lucas states: “Instead of attacking the provisions for spousal benefits to same-sex couples, Republicans were able to focus the debate on the less controversial and more popular task of defending the definition of traditional marriage.” (Lucas 2007, 251) Accordingly, DOMA was presented as fortification for traditional marriage against the homosexual agenda, the threat of same-sex marriage, and the perceived deterioration of the family (which was thought have been abandoned by single mothers, and homosexuals) (Rimmerman 2007).

Regarding the development of same-sex marriage discourses, beginning in the 1990s same-sex marriage advocates pointed to the unjust and unequal social and political realities facing LGB Americans. They argued that the legalization of same-sex marriage would function to remedy many of these substantial and subtle inequalities, and injustices. To substantiate their claims, activists and their lawyers relied on personal

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state made the Baehr case moot.” (Newton 2010, 24) As it currently stands, same-sex marriage remains constitutionally banned in the state, but civil unions for same-sex and opposite-sex couples was legalized in 2011 (finally, after a similar bill was vetoed by Governor Linda Lingle in July 2010).

testimony and expert research in the areas of psychology, sociology and economics, thus providing the basis for group claims making. Lahey and Alderson further:

Exhaustive lists of the many legal and economic benefits that were given only to couples who could marry were also produced, enabling courts to appreciate the magnitude of the injustice being done (Lahey and Alderson 2004, 48).

By pointing to these instrumental benefits of same-sex marriage, advocates were able, in a few cases, to displace the traditional religious and biological reasoning that had heavily characterized earlier same-sex marriage cases, and in so doing “enabled the courts to conclude that unless the state could produce some compelling justification for continuing to discriminate against queer couples, they ought to be permitted to marry” (Lahey and Alderson 2004, 48). These discourses of equality and the functional benefits of marriage, gained traction in the Hawaii decision of 1996. In the Vermont Supreme Court ruling of 1999, much attention was paid to connection between marriage, procreation and child rearing. Still, the Vermont Supreme Court ruled that same-sex couples were entitled to the same legal rights as married couples<sup>33</sup> (Lahey and Alderson 2004). To these ends, *Loving v. Virginia* was cited, as Johnson explains:

The Vermont Supreme Court relied on *Loving* in *Baker v. State*, the groundbreaking 1999 decision, which resulted in the Vermont Legislature passing a first-in-the-nation civil union law. Chief Justice Amestoy, writing for the majority, focused less on the race component of *Loving* and more on the U.S. Supreme Court's view that guaranteeing a fundamental right to marry was essential to the welfare of society. When viewing *Loving* through this wider lens, the Vermont court saw plenty of parallels between the earlier case and today's debate on same-sex marriage. Other courts have relied on *Loving* for this more general principle of marriage equality when holding that same-sex couples have a constitutional right to marry. (Johnson 2009, 278)

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<sup>33</sup> To avoid granting same-sex marriage rights, the Vermont legislature chose to allow same-sex couples to enter civil unions, which granted the couples the same rights and benefits as marriage without the title (Lahey and Alderson 2004). In 2009, the Vermont legislature initiated and approved a same-sex marriage bill, making it the first state to grant same-sex marriage without being enjoined to do so by a court (National Conference of State Legislatures 2013).

The use of *Loving v. Virginia* focused on rights and equality, as opposed to a comparison between discrimination on the basis of race and sexuality. Yet ultimately, these discourses of discrimination, injustice and inequality, and the functional benefits of marriage did not satisfy many state courts throughout the 1990s (D’Emilio 2007; Lucas 2007).

### **3.3. 2000s: Same-Sex Marriage Victories, and Election Ballot Measures**

While DOMA had been enacted in the previous decade, in the first half of the 2000s same-sex marriage debates occupied the national stage as never before. Tensions had existed between social conservatives and LGB movements throughout the 20<sup>th</sup> century, however in the 2000s same-sex marriage gave both movements a concrete issue over which to declare a ‘culture war’ (Richardson 2005). As discussed in Chapter One, Richardson argues that this stark division between worldviews and/or cultures is misplaced, as both movements, in their own way, reinforced marriage as an institution through which the state regulates sexuality and family form. The either/or dichotomy limits possibilities for family policy outside or beyond marriage (Richardson 2005). Both social conservative and mainstream LGB movements continue to be invested in other social issues, for reasons that have been outlined in the previous section, same-sex marriage has been used to represent each movement’s worldview and political agenda; to distinguish themselves from each other, and demonize their counterpart; to represent two possibilities for the future of state-sanctioned marriage; to collect, motivate and galvanize supporters and voters; and ultimately, to represent and implement their desired citizenship regimes.

In the 2000s, same-sex marriage opponents continued to use conservative discourses to argue that traditional marriage had to maintain its historical and Christian definition, that the traditional family needs to be foundational in state and federal politics not least because ‘future citizens’ are best raised by heterosexual parents who embody the appropriate gender, sexuality, family norms and morality (Lucas 2007; Rimmerman 2007). Conversely, same-sex marriage advocates have used progressive liberal democratic rights discourses to argue that same-sex marriage is a matter of equality, justice, and individual freedom. To this end, in the 2000s<sup>34</sup>, advocates increasingly used the term “marriage equality” as opposed to same-sex marriage or gay marriage (Ettelbrick 2004). It was hoped that using the discourse of “marriage equality” would have multiple effects. For example, more voters and politicians would sympathize with the cause because ‘equality’ is easier to digest than ‘same-sex;’ moderate voters would respond well to the liberal democratic language of equality, justice and rights; and these ‘rational’ and ‘logical’ arguments could surmount the affective power of the discourses of tradition, religion and family values (Third Way 2011). Ultimately, however, the marriage equality discourses reinforced the notion that certain homosexuals are normal and deserve to be equal to heterosexuals. The discourses of normality thus grew in significance throughout the 2000s. In the 2000s same-sex marriage advocates increasingly argued that certain homosexuals replicated the normal ideal form (monogamous, and long-term) and functions of marriage (emotional and familial dependency, economic self-sufficiency, reproduction), and homosexuals therefore should be accepted into the institution of marriage. They further argued that the inclusion of

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<sup>34</sup> It is difficult to discern the origins of the term “marriage equality” because many academics and activists have retroactively labeled ‘same-sex marriage’ and gay marriage as “marriage equality.”

homosexuals into the institution of marriage would not fundamentally disrupt the institution, but rather would assure that normal homosexual citizens would actually strengthen the institution.

During these years, LGB issues and rights were again thrust into the national spotlight when the Supreme Court ruled in *Lawrence v. Texas* (2003) that state sodomy laws were unconstitutional (Rimmer 2007). According to D'Emilio, although most states had already lifted their sodomy laws, the *Lawrence v. Texas* ruling lifted the final remaining laws that had criminalized homosexual sex, and that had been used to justify discrimination in the areas of housing, jobs, custody and marriage. This decision therefore “closed a chapter in U.S. history that stretched back to the earliest years of English colonization of North America.” (D'Emilio 2007, 43) While many LGBTQ organizations reacted to the *Lawrence v. Texas* decision with elation, attention quickly turned to whether state-by-state and/or federal same-sex marriage policies would be the next achievement. D'Emilio argues that the *Lawrence v. Texas* ruling was an achievement in itself for LGB rights and protections, as opposed to being a stepping-stone to the attainment of same-sex marriage (D'Emilio 2007). As discussed, Franke adds that *Lawrence v. Texas* was about the liberation of non-marital sexuality from state intervention. Therefore the assertion that *Lawrence v. Texas* was a stepping-stone to same-sex marriage is problematic as marriage brings sex and sexuality back under the regulation of the state (Franke 2009). Yet opponents to same-sex marriage drew a direct causal connection between *Lawrence v. Texas* and same-sex marriage. Justice Antonin Scalia expressed the connection in his dissenting judgement saying that the ruling “leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples.” (D'Emilio

2007, 43) Accordingly, social conservative leaders and organizations used *Lawrence v. Texas* to foster fear that same-sex marriage would be an inevitable reality.

Before, during and after *Lawrence v. Texas* was being considered, there were several successful same-sex marriage cases in the country that also fueled the social conservative backlash to same-sex marriage (Schacter 2009; Lucas 2007). In the 2004 Massachusetts *Goodridge v. Dep't. of Public Health* case, the court decided that the denial of same-sex marriage violated the constitution (Schacter 2009). This decision led the Mayor of San Francisco, Gavin Newsom, to declare that denying same-sex marriage violated California's constitution. Within weeks of this declaration, thousands of same-sex couples were married in San Francisco. County and city officials in many other jurisdictions, including Albuquerque, New Mexico, New Paltz and Nyack, New York, Asbury Park, New Jersey, and Portland, Oregon followed Newsom and began performing same-sex marriages (Lahey and Alderson 2004). Social conservatives ramped up fear by pointing to Mayor Newsom's now famous proclamation that "As California goes, so goes the nation. It's inevitable; this door is wide open now. It happened, whether you like it or not, this is the future and it's now." (Lahey and Alderson 2004)

This 'marry now, litigate later' approach was controversial, in part, because it took marriage out of the courts and into the legislatures. This meant that public opinion and voter behavior was an increasingly important force that could be manipulated and exploited by both sides of the fight. To capitalize on this momentum and to appease his base, President George W. Bush endorsed a constitutional amendment in 2004 banning same-sex marriage throughout the United States but it failed in both houses in Congress (Lucas 2007). Conversely, many Democrats did not want same-sex marriage to become

an issue in the 2004 election because they knew, as did the Republican Party, that the issue could and would be used to motivate otherwise uninterested right-wing citizens to vote in the election. While the majority of Democratic party supporters supported some form of LGB rights, the issue of same-sex marriage did not have the power to motivate otherwise uninterested moderate voters (Lucas 2007).

Social conservative organizations and the Republican Party ensured that the issue of same-sex marriage was influential in the 2004 Presidential elections. In order to motivate voters, and to unite social conservative voters and organizations with the Republican party, Karl Rove, President Bush's chief strategic adviser, worked with Republicans to make sure that anti-gay initiatives and referenda would appear on November ballots in 2000, 2004, 2008, 2012 to help Republicans (The Atlantic August 25, 2010). These state initiatives and referendums have proved to be very effective tools for motivating voters (Lucas 2007). Although it is argued that moral issues did not determine the outcome of the 2004 election – the economy and terrorism defined the election – by the end of 2004, the issue of same-sex marriage was the most controversial and powerful moral issue in federal and state politics. Thus the initiation of Proposition 8 in 2008 was very much a result of this history of same-sex marriage in the United States, wherein the Right used same-sex marriage ballot measures as a political strategy to motivate and swing the electorate.

The forty-year battle over same-sex marriage has not been one-sided. In the United States, opponents and supporters of same-sex marriage experienced successes and failures in their respective endeavors. That said, each side's successes ebbed and flowed throughout the decades. While the issue of same-sex marriage was raised by LGB

activists in the 1970s, social conservatives quickly dominated same-sex marriage battles and debates until the early 2000s. The mid 2000s saw a shift in public and political support for same-sex marriage, and consequently same-sex marriage advocates experienced successes in several states. Proposition 8 was initiated amid a high point of tension between social conservatives and mainstream LGBs, and accordingly, Proposition 8 serves as an important case study of the current state of the relationship between social conservatives and mainstream LGBs, and of same-sex marriage debates and discourses in the United States.

### **3.4. Two Main Rationales for Same-sex Marriage**

Before discussing the initiation of Proposition 8, here I outline the two main rationales that mainstream LGB organizations used to fight for same-sex marriage beginning in the 1970s, and leading up to the late 2000s: “rights-based” and “social-benefit” rationales.

First, according to Michael, instrumental “rights-based” rationales for same-sex marriage are defined accordingly: “Rights-based rationales focus on the functional rights gained from either marriage or adoption. Such functional rights are very often economic-based benefits and protections derived from marriage and adoption, and for this reason, they may also be referred to as “functional” or “economic-benefit” rationales.” (Michael 2003, 1442) While some same-sex marriage advocates claim that there are as many 1,138 federal rights that marriage conveys (Hunt 2005), Sunstein and Thaler divide these instrumental rights and benefits into six main categories that vary according to state law. First, there are tax benefits that come with marriage. The tax system offers significant rewards to many couples when they marry. These benefits mainly benefit middle or upper

class couples, or cases in which one partner is making substantially more money than their partner. The government provides a marriage ‘bonus’ for those in traditional relationships complete with a breadwinning father and stay-at-home mother. Couples make joint tax returns and can save money, depending on how their joint income relates to joint filing tax laws<sup>35</sup>. Couples can also transfer property and money between each other without being subject to various tax penalties. In short, the tax system makes it financially advantageous to be married when couples have money or assets in the first place. Second, married couples have access to several exclusive entitlements including leave, medical, education, housing, insurance and employment benefits under the Family and Medical Leave Act, the Veterans’ benefits programs, private benefits programs, and entitlement programs for federal employees (Sunstein and Thaler 2008).

Third, ownership benefits are administered through marriage. As Sunstein and Thaler explain, “under both state and federal law, spouses may have automatic ownership rights that mere partners lack. In community-property states, people have automatic rights to the holdings of their spouses, and they cannot contract around the legal rules. Governments impose firm mandates here [...] The idea of ‘tenancy by the entirety’ establishes legal unity to married couples, in a way that also grants ownership benefits (and burdens) to those involved.” (Sunstein and Thaler 2008, 380-1) Here non-married couples are excluded from making legal claim to their partners, close friends, or

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<sup>35</sup> As McCaffery argues, American income tax law was based on the traditional family model in which there was a primary or sole breadwinner. Although changes have been made to tax laws to account for some of the inequalities between single, marriage and non-married coupled citizens, the joint filing tax laws continue to disadvantage particular women in marriages. For example, if a woman is the lower earner in the marriage her income may bump the joint income of the married couple into a higher tax bracket, thus negating the relative impact of the capital produced by the lower income earner. As well, McCaffery argues, joint filing can also lead to a “marriage penalty” in which higher taxes are paid by some married couples that would not be paid by two otherwise identical single people with the same income (McCaffery 1999).

dependents' property, despite their commitment to said relationship or their contributions to shared resources and properties.

Fourth, with inheritance and other death entitlements, a member of a married couple obtains a number of benefits at the time of death. Again, as Sunstein and Thaler state: "legal rules favor wives and husbands of those who die without a will, and some states forbid people from refusing to leave money to the person to whom they are married. Under the Uniform Probate Code, those who die intestate give much of their estate to their spouse, even if they had children. In wrongful-death actions, spouses automatically qualify for benefits; the status of members of unmarried couples is far less clear." (Sunstein and Thaler 2008, 380-1)

Fifth, married individuals are entitled to surrogate decision-making rights. Married individuals are given the right to make decisions in the event that their spouse is incapacitated: they may be appointed as the formal guardian, and charged with making decisions regarding care, residence and money, as well as medical options. Finally, with evidentiary privileges federal courts, and a number of state courts, recognize marital privileges, including a right to keep marital communications confidential and to exclude adverse spousal testimony (Sunstein and Thaler 2008, 380-1).

Further, as Michael states, instrumental rights-based rationales are not only economic but can be functional in nature as well. Adoption and custody, citizenship and immigration<sup>36</sup> rights fall under this category. The discriminatory nature of adoption laws

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<sup>36</sup> Historically, American immigration policy has been discriminatory against homosexuals, as it has been based on a nuclear family model in which same-sex partners have not been eligible for sponsorship by their spouses or partners, and custody agreements have not been recognized (Schulzetenberg 2003).

is very often cited as grounds for legalizing same-sex marriage<sup>37</sup>. In some states, custody, second parent adoption and guardian rights are exclusively afforded to married couples. In the majority of states, co-parent adoption is allowed but in several states, including Arkansas unmarried people are bared from adopting children (Polikoff 2008; Maxwell and Mattijssen 2000). Thus if same-sex couples cannot marry, they cannot adopt. Same-marriage is therefore seen as a means of guaranteeing second-parent and adoption rights. Here, the legalization of same-sex marriage is sought for the functional reasons of assuring parents and children are legally united and receive the accompanying protections and benefits.

At the same time, Michael says that “social-benefit” rationales are used by equality seeking groups and are defined as “the social benefit couples derive from the removal of the perceived second-class status of civil-unions and the comfort couples gain in having access to a title for their relationship that is unambiguous and recognizable.” (Michael 2003, 1442-3) Above all, perhaps the most important benefit of same-sex marriage for mainstream LGB advocates is the supposed implicit or accompanying acceptance of certain heteronormal homosexuals and same-sex couples by state governments, the federal government, and the American people (Hunt 2005). General acceptance of same-sex marriage is said to be both indicative of growing tolerance in society as well as paving the way for further acceptance. And according to this logic, many same-sex advocates make the argument that when homosexuality is legitimized through marriage homosexuality will be easier to incorporate in mainstream American

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<sup>37</sup> Adoption rights have actually been retracted from same-sex couples in Arkansas, for example, because marriage is defined as a union between one man and one woman. Arkansas’ adoption law stipulates that unmarried couples cannot adopt children. Advocates of this bill admitted that they consciously worded the policy thusly to ensure that same-sex couples would be excluded from adopting children (Chicago Tribune December 3, 2008).

society: popular culture, media, education programs, state and federal policies, programs and laws, and the general public are sure to be more accepting of homosexuality.

Moreover, the LGB organizations have fought for marriage in particular, as opposed to civil unions or domestic partnerships, because of the cultural and social power and significance of marriage. In the state of California, through domestic partnerships, same-sex couples have access to all of the state rights and benefits that are available through heterosexual marriage. Thus the mainstream LGB organizations have been specifically fighting for same-sex marriage because of the special social meaning and benefits that accrue through marriage. Unlike domestic partnerships, the institution of marriage carries historical, traditional, cultural and social significance. Marriage is an elevated institution, which affords its members certain social benefits in the form of legitimization, acceptance, and normalization of citizens, and their sexuality and relationship. Through their fight for the legalization of same-sex marriage, the mainstream LGB organizations have projected their reverence for the institution of marriage, and have bolstered the strength and power of marriage by being so committed to and adamant about wanting to be accepted into the institution. Their commitment to the institution of marriage is seen as they argue that the acceptance of homosexuals into the institution will not fundamentally change the form or function of marriage, and will not weaken marriage in society. This sentiment certainly harkens to the mainstream gay and lesbian movement's assimilationist roots. Thus for many mainstream gay and lesbian activists, the legalization of same-sex marriage is about more than marriage, it is about being accepted as equal to heterosexual citizens, belonging to a powerful institution, and acquiring the status and prestige that comes with the marriage contract.

#### **4. The Story of California's Proposition 8**

The story of Proposition 8 begins with the 1977 rewriting of marriage law in California. Like several other states in the 1970s, the California legislature sought to clarify the gender ambiguity in its marriage code, which, prior to 1977, defined marriage as "a personal relation arising out of a civil contract, to which consent of the parties making that contract is necessary." (Traiman 2008) Legislators were concerned that the marriage code could be interpreted to include same-sex couples. To remedy this ambiguity, marriage was redefined as a union exclusively between one man and one woman.

Throughout the 1970s and 1980s, there were attempts to afford same-sex couples marriage-like rights, despite the state ban, by recognizing the domestic partnerships of same-sex couples. The term "domestic partnership" is said to have been created in 1979 by Berkeley municipal employee Tom Brougham who wanted to create a lower tier of legal relationship for employee benefits from the Berkeley City Council and University of California, Berkeley. Eventually several municipalities, including San Francisco, adopted domestic partnership measures based on Brougham's proposal<sup>38</sup>. These domestic partnership measures were limited to their respective municipalities (Traiman 2008). In 1999, however, there was a major shift in Californian domestic partnership law when California became the first state to enact a domestic partnership registry without being provoked by court intervention. After four attempts beginning in 1995, the Domestic

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<sup>38</sup> In 1982, the San Francisco Board of Supervisors adopted a measure based on Brougham's proposal, and extended health insurance coverage to domestic partners of public employees. San Francisco Mayor Dianne Feinstein vetoed the measure, however. In 1984, Berkeley was the first city to pass a domestic partnership policy for municipal employees, and West Hollywood followed suit in 1985 by opening domestic partnerships to all citizens (Traiman 2008).

Partnership Act of 1999 was passed by the state legislature and signed by the governor, and domestic partnerships were offered by the state starting in 2000 (Koppelman 2006). California's domestic partnership laws have been criticized from same-sex marriage opponents and supporters as either being too generous to same-sex couples, or being lesser than equal marriage rights. By 2007 California's domestic partnerships afforded couples, both homosexual and heterosexual, all of the same state rights as married couples. The only remaining difference between domestic partners and married couples in California was that married couples were afforded exclusive federal rights and protections (Traiman 2008).

Following the trend of state bans on same-sex marriage through DoMAs, and the federal government's 1996 Defense of Marriage Act, activists and legislators initiated and supported Proposition 22 to ban same-sex marriage in California. The initiative was authored by Republican state Senator William Knight, and supported heavily by the organization Protect Marriage, which is one of the ten Proposition 8 organizations examined in this dissertation. Largely replicating the 1977 redefinition of marriage, Proposition 22 aimed to extend the ban on same-sex marriage by declaring that the state of California would not recognize any same-sex marriages, even those legally performed outside of California. In 2000, the Proposition was put to state referendum and passed with a 61% majority. With this passage, Section 308.5 was added to the Family Code, which read, "Only marriage between a man and a woman is valid or recognized in California." (Currans 2007; Hubins 2001)

As stated in the previous section on the history of same-sex marriage fights across the United States, San Francisco Mayor Gavin Newsom reacted to the 2004

Massachusetts *Goodridge v. Dep't. of Public Health* case, by declaring that the ban on same-sex marriages violated the state's constitution, and by allowing the city to license and perform same-sex marriages (Schacter 2009; Lahey and Alderson 2004). In 2005 and again in 2007 the California legislature voted to adopt same-sex marriage but both of the bills were vetoed by governor Arnold Schwarzenegger. He justified his decision by saying that same-sex marriage should be settled by the courts or another statewide initiative or referendum (Lambda Legal July 1, 2014).

Same-sex marriage was finally legalized when the Supreme Court of California ruled on the constitutionality of banning same-sex marriage, through the 1977 and 2000 statutes, in *Re. Marriage Cases*. *Re. Marriage Cases* was initiated by the city of San Francisco, Lambda Legal, the National Center of Lesbian Rights, the ACLU, and several gay and lesbian couples after a lower court ruled that the city of San Francisco acted unlawfully in issuing marriage licenses to same-sex couples<sup>39</sup> (Lambda Legal July 1, 2014). On May 15, 2008, the Supreme Court of California ruled in a 4-3 decision that the ban on same-sex marriage violated California's constitution, specifically "by denying these couples their fundamental right to marry and by discriminating against them in violation of the equal protection clause" (Lambda Legal July 1, 2014). As reported by the Los Angeles Times:

The majority opinion, by Chief Justice Ronald M. George, declared that any law that discriminates on the basis of sexual orientation will from this point on be constitutionally suspect in California in the same way as laws that discriminate by race or gender, making the state's high court the first in the nation to adopt such a stringent standard. (Los Angeles Times May 17, 2008)

Accordingly, same-sex marriage was legalized in California and during the summer of 2008 18,000 same-sex couples were married across the state. The first legal marriage was

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<sup>39</sup> See *Lockyer v. City and County of San Francisco* (2004)

between Daughters of Bilitis founders Del Martin and Phyllis Lyon, whose marriage was officiated by Mayor Gavin Newsom<sup>40</sup> (Lambda Legal July 1, 2014).

In 2007, before the State Supreme Court's decision in *Re. Marriage Cases*, opponents of same-sex marriage attempted to qualify Proposition 8 for the 2008 ballot. Since Proposition 22 was only a statute, it was subject to judicial review and could be, as it was, abolished by the state court<sup>41</sup>. As such, Proposition 8 was initiated to amend the state constitution to ban same-sex marriage. Specifically, it proposed adding a new section (7.5) to Section 2 of Article I of the California Constitution, reading, "Only marriage between a man and a woman is valid or recognized in California." Protect Marriage was the official sponsor of the initiative to place Proposition 8 on the November 2008 ballot. At the time of its initiation, Proposition 8 was also supported by many conservative religious communities, notably the Mormon Church, and by many socially conservative organizations, including two other organizations examined in this study: the American Family Association and the National Organization for Marriage. Supporters of Proposition 8 needed 694,354 valid petition signatures to qualify the proposition for ballot. They submitted 1,120,801 signatures, and on June 2, 2008 the initiative was approved for inclusion on the November 2008 ballot. Opponents of the proposition presented a petition to the California Supreme Court, arguing that constitution revisions of this nature could only be placed before voters by the Legislature or a constitutional

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<sup>40</sup> For this study, I do not look at the May 15, 2008 decision in which the California Supreme Court struck down California Marriage Law (Proposition 22), ruling that the state constitution guarantees a right of same-sex marriage. I have to set parameters around the scope my study and to do so I will be focusing on the discourse that began with the initiation, campaign, success and aftermath of Proposition 8.

<sup>41</sup> Although Proposition 22 was struck down by the time Proposition 8 was approved for the November 2008 ballot, proponents of Proposition 8 initiated the proposition to strengthen Proposition 22 (which at the time of initiation in 2007 had yet to be struck down), and once Proposition 22 was struck down, to amend the constitution to make it more difficult for any court to overturn the banning of same-sex marriage.

convention. On July 16, 2008, the court denied the petition without comment, and Proposition 8 remained on the November 2008 ballot.

Shortly after the passage of Proposition 8 on the November 2008 ballot, the California Supreme Court accepted three lawsuits against Proposition 8, which were consolidated as *Strauss v. Horton*. The three lawsuits were filed by the couples and organizations from *Re. Marriage Cases*, as well as the ACLU of Northern California, and the cities of San Francisco and Los Angeles, and the county of Santa Clara. The state of California presented as the respondents in the case, and Protect Marriage were accepted as interveners. There were four issues under consideration during the case: whether Proposition 8 is a revision<sup>42</sup>; whether Proposition 8 violates separation of powers<sup>43</sup>; whether Proposition 8 invalidates existing marriages; and whether voters can override inalienable rights. On May 26, 2009, the California Supreme Court ruled that Proposition 8 was valid. The majority opinion stated:

As explained below, Proposition 8 does not abrogate any of these state constitutional rights, but instead carves out a narrow exception applicable only to access to the designation of the term “marriage,” but not to any other of “the core set of basic substantive legal rights and attributes traditionally associated with marriage.” (Strauss v. Horton Decision 2009)

The court also ruled that the 18,000 same-sex marriages that were performed between June and November of 2008 would remain valid under the grandfather clause principle (Strauss v. Horton Decision 2009).

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<sup>42</sup> The lawsuits claimed that Proposition 8 was a constitutional revision rather than an amendment, which both require that a majority of voters approve the ballot initiative. A revision, defined as a "substantial alteration of the entire constitution rather than to a less extensive change in one or more of its provisions," also requires the prior approval of 2/3 of each house of the California State Legislature. (Strauss v. Horton Decision 2009)

<sup>43</sup> The lawsuits argue that the legislative branch of the government cannot supersede the judiciary function to protect of minority groups via the Constitution and the Bill of Rights (Strauss v. Horton Decision 2009).

Three days before the California Supreme Court handed down its decision in *Strauss v. Horton*<sup>44</sup>, the American Foundation for Equal Rights (AFER) filed suit to the U.S. District Court for the Northern District of California to challenge the validity of Proposition 8. The AFER initiated the suit, *Perry v. Schwarzenegger*, on behalf of the plaintiffs, two same-sex couples, Kristin Perry and Sandra Stier, and Paul Katami and Jeffrey Zarrillo. Bipartisan lawyers Ted Olson and David Boies represented the case for the AFER and the plaintiffs. The plaintiffs argued that Proposition 8 violated the due process and equal protection clauses of the Fifth and Fourteenth Amendments. There was opposition to the initiation of the *Perry v. Schwarzenegger* case, for example Lambda Legal and the American Civil Liberties Union (ACLU) opposed the filing because they believed that the challenge would fail and further legitimize the banning of same-sex marriage in California and in other states. The official proponents of the proposition, Protect Marriage, stepped in as interveners to represent and defend the proposition against the plaintiffs' charges after California's governor and attorney general refused to defend the proposition. After several weeks of briefs, testimony, and arguments in the winter of 2010 (see Chapters Seven and Eight) Judge Vaughn Walker overturned Proposition 8 in August of 2010, holding that the proposition violated the due process and equal protection clauses of the United States Constitution (Lambda Legal July 2, 2014).

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<sup>44</sup> While *Strauss v. Horton* was an important case in the Proposition 8 story, it is not included as one of the trials in my discourses analysis because it was the *Perry v. Schwarzenegger*, which was brought through to the Supreme Court. Given the influence and effects of the *Perry v. Schwarzenegger* on Proposition 8 and same-sex marriage across the country, I have opted to focus on the three trials of the *Perry v. Schwarzenegger* case (later *Perry v. Brown* (2012), and then *Hollingsworth et. al. v. Perry et. al.* (2013)). In Chapters Seven and Eight I analyze the arguments that were put forward by the plaintiffs and defendants in each of the *Perry v. Schwarzenegger* trials. As such, here I briefly discuss each case's initiation and decision.

While the state of California did not appeal Judge Walker's decision, the defendant-interveners, Protect Marriage, did challenge the decision, appealed as *Perry v. Brown*, before the Ninth Circuit Court of Appeals. In February of 2012, the Ninth Circuit Court held that Protect Marriage, the proponents of Proposition 8, had standing to represent the case as the state of California had refused to do so. The Ninth Circuit Court also upheld Judge Walker's decision that Proposition 8 violated the Fourteenth Amendment's equal protection clause, and was thus unconstitutional. A stay remained in place while the case was appealed to the United State Supreme Court (Santoro and Wirth 2013).

The proponents of Proposition 8 appealed the Ninth Circuit Court's decision after the Ninth Circuit denied a rehearing. In December of 2012, the Supreme Court agreed to hear the case, now called *Hollingsworth v. Perry*, and testimony was heard in March 2013 (Lambda Legal July 2, 2014). Lawyers Ted Olson and David Boies continued to represent the case for the AFER and the two same-sex couples, and Protect Marriage were interveners as the official proponents of the proposition. On June 26, 2013 the Supreme Court issued its official ruling in the case with a 5-4 decision. The Court held that official sponsors of a ballot initiative do not have Article III standing to appeal a decision when public officials refuse to do so. In more concrete terms, Protect Marriage did not have standing to appeal the Ninth Circuit's ruling to either the Ninth Circuit or the Supreme Court. As such, the Supreme Court's decision meant that Judge Walker's ruling was the final decision on the Proposition 8 case. Two days later, the Ninth Circuit ended the stay on the decision and same-sex marriages were able to resume in the state of California (Lambda Legal July 2, 2014). The Supreme Court decision was seen by some

analysts as a safe decision as the court ruled on the validity of Protect Marriage's standing to represent the case, as opposed to ruling on the constitutionality of banning same-sex marriage by popular vote. Still, many anticipate that the *Hollingsworth v. Perry* decision set a precedent for similar same-sex marriage fights in other states. Moreover, while the Supreme Court was considering *Hollingsworth v. Perry*, it was also hearing the *United States v. Windsor* case, in which the court repealed key measures of the 1996 Defense of Marriage Act (DOMA). Taken together, the two cases have significantly shaped same-sex marriage litigation in the country (O'Mahoney 2014).

Based on all of these events, this dissertation focuses on the story of Proposition 8, starting after the May 2008 decision in *Re. Marriage Cases* and ending with the June 2013 Supreme Court decision in *Hollingsworth v. Perry*, by analyzing the discourses that were produced by ten of the organizations involved in Proposition 8.

## **5. Conclusion**

This Chapter has provided the historical and contemporary context on which my dissertation proceeds to conduct a discourses analysis on the ten organizations' discourses regarding sexuality, family and citizenship, and the state, social justice and marriage. To set this foundation, this Chapter has addressed the current state and preoccupations of social conservative and mainstream LGB forces; the discursive arguments that have been employed throughout various same-sex marriage fights in the United States; and the history of domestic partnership and same-sex marriage laws in California. The next Chapter outlines my methodology and offers more detail on the exceptionality of the Proposition 8 case.

## **Chapter Three: Methodology**

### **1. Introduction**

This Chapter outlines the discourse analysis methodology for this project. The first section explains why I classify Proposition 8 as an influential case for the study of current same-sex marriage discourses in the United States. The second section addresses the ten organizations that I studied, offering justifications for the choice of the organizations; the histories, structures and mandates of each organization; and the roles that each organization played in the 2008-2013 fight over Proposition 8. The third section details the triangulation of methods for this project, which is a discourse analysis of the organizations' public communications, elite interviews with leaders of the mainstream LGB organizations, and the three Proposition 8 court trials.

### **2. Proposition 8 as an Influential Case Study**

Over the course of its initial six-month campaign, and then during its five year journey through the courts, Proposition 8 gained national and international attention because of its potential impacts on how the issue of marriage, and same-sex marriage particularly, would be resolved in the rest of the country. Accordingly, I have classified California's Proposition 8 as an influential case study<sup>45</sup>. Seawright and Gerring broadly define an influential case study as:

The intensive (qualitative or quantitative) analysis of a single unit or a small number of units (the cases), where the researcher's goal is to understand a larger class of similar units (a population of cases) (Seawright and Gerring 2008, 296).

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<sup>45</sup> Because I am engaging in a qualitative analysis, I am not selecting Proposition 8 under the assumption or prediction that the case will have a statistical impact on the relations between particular variables in the study. I use Proposition 8 as an influential case study to understand a group of similar units and their shared political reality.

I have classified Proposition 8 as an influential case study for several reasons related to its importance in: shaping concurrent and future discourses surrounding same-sex marriage; changing the relationship between social conservative and mainstream LGB movements; influencing the outcome of same-sex marriage law in other states and federally; and destabilizing the current heteronormal citizenship regime in which certain rights and protections are allocated according to sexuality and family form. Proposition 8 continues to garner this level of influence and importance for six main reasons that I describe below.

### **2.1. Proposition 8 and Public Interest, Influence and Support**

First, Proposition 8 garnered an exceptional level of public attention: it was a high profile, well funded/expensive and intensively publicized case. Proposition 8 was high profile in part because the campaigns on both sides of the debate were supported by powerful national organizations: the ‘Yes’ side was supported by the Mormon Church, American Family Association (AFA), and the National Organization for Marriage (NOM); and the ‘No’ side was initially supported by the National Gay and Lesbian Task Force (NGLTF), the Human Rights Campaign (HRC), and the Lambda Legal Defense Fund. The involvement of these organizations pointed both to the importance of Proposition 8 on a national level, and the potential for these organizations to mount similar campaigns in other states. In terms of resource and monetary support, the amount raised for and against Proposition 8’s 2008 campaigns totaled \$73 million, with \$35.8 million and \$37.6 million raised by each side respectively. These figures far exceeded any other 2008 state ballot or federal office campaign in the country, except the presidential campaigns (Mercury News November 3, 2008). Though the money

diminished after the 2008 vote, substantial financial support continued through the court cases. This unprecedented level of monetary support indicated that many parties were particularly and passionately invested in this proposal.

Finally, Proposition 8 received intense state, national and international media attention. Both camps received celebrity endorsements and the Presidential and Vice Presidential candidates of both parties weighed in on the proposal. In American media, Proposition 8 was presented as the most important proposal of its kind and was accordingly profiled in most of the major national newspapers, media outlets and garnered a substantial presence on the Internet, especially on YouTube (Sayre et. al. 2010). Based on these three indicators, to an unprecedented degree, previously uninvolved or non-implicated citizens became involved in, or at least aware of, the battle over same-sex marriage in the country. Proposition 8 brought the same-sex marriage debate outside of traditional LGB and social conservative organizations and communities and into the mainstream.

## **2.2. Demographics Significance of the California Case**

Second, Proposition 8 was an influential case because the demographic makeup of California serves as an indication for the ways in which party identification, religious affiliation, race and age are correlated with same-sex marriage support, revealing deep-seated social cleavages. Not only is it the largest US state in terms of population, it is composed of many different and powerful religious groups. Religious affiliation traditionally has been an indicator for support of same-sex marriage (Burack 2008). While voting patterns enforce the theory that religious voters are very likely to be against same-sex marriage, the correlations between party identification and positions on same-

sex marriage are more complicated (Egan and Sherrill 2009). California has historically vote Democrat in federal elections, but that clearly did not lead to the defeat of Proposition 8. According to exit polls, 36% of Democrats voted against same-sex marriage (Sacramento Bee November 5, 2008). While party identification is a significant indicator of same-sex marriage support, the division between Democrats and Republicans did not perfectly align with the worldviews of social conservative and mainstream LGB politics (Egan and Sherrill 2009). Moreover, by the time Proposition 8 reached the Supreme Court in late 2012, public and party support for same-sex marriage had shifted significantly: a majority of the American population, a majority of Democrats and a growing number of Republicans supported marriage (or some form of segregated non-marriage legal structures such as civil union or domestic partnerships). While many claim that California, and the United States in general, are comprised of a dichotomous party system, the fault line between the two parties was not one of sexual politics. Rather, Proposition 8 showed that these contentious issues of sexuality crosscut traditional partisan lines.

Like party identification, race has been thought to be a major indicator for same-sex marriage support. Immediately after Proposition 8 passed, some supporters of same-sex marriage blamed African Americans for voting against same-sex marriage (Manjoo 2008). It was reasoned, based on faulty exit polls, that African Americans voted in unprecedented numbers to support Barak Obama, and at the same time voted against same-sex marriage. This reasoning is premised on the false assumption, held both by mainstream LGB organizations and many in the broader community, that African Americans are more likely to be socially conservative than their white counterparts

(Morrison 2013; Cohen 2012). A report on Proposition 8 by the NGLTF assessed seven demographic indicators: party identification, ideology, religiosity<sup>46</sup>, age, race, gender, and knowledge of gays/lesbians. Of the seven indicators studied, race placed fifth in terms of impacting voter support or opposition to same-sex marriage. Party identification, ideology, religiosity, and age, in that order, had the highest impacts on voters' position on same-sex marriage (Morrison 2013; Egan and Sherrill 2009). The slight difference in support between African America and white voters was explained by higher levels of religiosity among African Americans. Based on the realities of Proposition 8, major parties, mainstream LGB organizations and social conservative organizations will have to continue to negotiate the ways in which they interact with different voter populations, and the ways in which they approach same-sex marriage and other contentious social issues.

### **2.3. Proposition 8 and Minority Rights on State Ballot**

Third, while California's Proposition 8 was one of many cases in which the legality of same-sex marriage was decided by state ballot, the uniqueness of Proposition 8 sets a precedent for how tensions between social conservative and mainstream LGB worldviews will be resolved in American politics. During the 2008 elections, Florida and Arizona also put comparable measures on their ballots, Proposition 2 and Proposition 102 respectively. Both measures passed and eventually led to a constitutional ban on same-sex marriage in these states. Still, Proposition 8 is the only case in which the ballot measure proposed to retract formally allocated rights. This referendum style completely negates the democratic principle of protecting minorities from the tyranny of the majority (Lewis 2009). Groups advancing hate and discrimination can and have been able to retract the rights of groups they disdain (Herrera 2009). While the eighteen thousand

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<sup>46</sup> The NGLTF used the term 'religiosity' to describe voters' devotion to a recognized religious affiliation.

same-sex couples who were married between May and November 2008 remained married after November 2008, same-sex couples were barred from getting married after the proposal passed. In 2010, United States District Court Judge Vaughn Walker overturned Proposition 8 in the case *Perry v. Schwarzenegger*, ruling that it violated both the due process (4<sup>th</sup> and 5<sup>th</sup> amendments) and equal protection (14<sup>th</sup> amendment) clauses of the United States Constitution. Judge Walker's decision led to the reinstatement of same-sex marriage in the state (*Hollingsworth et al. v. Perry et al.*). Thus Proposition 8 raised important questions about putting decisions about which populations should be given citizenship status and the corresponding rights and constitutional protections to a state ballot.

#### **2.4. Same-sex Marriage vs. Domestic Partnership in California**

Fourth, Proposition 8 was an influential case because California currently has a comprehensive domestic partnership registry, yet same-sex marriage was presented as a vitally important issue by mainstream LGB organizations. This focus reveals the legal significance, and social power and meaning of the institution of marriage. In 1999, California became the first state to legislatively enact a domestic partnership registry without being provoked by court intervention. Further, the Domestic Partner Rights and Responsibilities Act, enacted in 2005, added nearly all the state rights and responsibilities of marriage to domestic partnerships. The last remaining difference between marriage and domestic partnership in California was eliminated when state law was changed in 2007 to allow couples registered in a domestic partnership to change their surnames and jointly file state income taxes (Lambda Legal July 1, 2014).

Still, at the time of Proposition 8's initiation, there remained several important areas in federal law and laws in other states, in which domestic partnerships were not fully equal to marriages. Under the Defense of Marriage Act (DOMA) (1996), the federal government did not recognize same-sex marriage or domestic partnerships between same-sex citizens as it does heterosexual marriages. The lack of recognition by the federal government meant that all rights and benefits allocated by the federal government to heterosexual marriages (federal tax, immigration, social security, veterans benefits etc.) did not apply to Californian domestic partnerships or same-sex marriages. In 1996 the U.S. Congress passed and President Bill Clinton<sup>47</sup> signed DOMA, which laid out two main provisions: it reinforced state power, enabling states to refuse to recognize same-sex marriages performed in other states; and it redefined marriage for the purposes of the federal government as "only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." (Defense of Marriage Act 1996) The Supreme Court has since repealed certain provisions of DOMA. In June 2013, the Supreme Court struck down Section 3 of DOMA, which defined marriage for federal purposes as exclusively heterosexual. As such, same-sex married couples are now eligible for federal rights and benefits (*United States v. Windsor*). Although it is currently being assessed by the federal government, the Supreme Court did not strike down DOMA's Section 2, which stipulates that states do not have to recognize same-sex marriages performed in other states (*United*

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<sup>47</sup> There are many theories as to why President Clinton approved of DOMA: Clinton was facing the 1996 presidential election and wanted to muzzle the topic to impede it from becoming a salacious election issue; Clinton felt pressure from social conservatives who were gaining momentum in the mid-1990s; Clinton's decision to approve of Don't Ask Don't Tell (DADT) was criticized from both sides for being either too lenient or too restrictive/punitive toward homosexuals in the military; and in light of DADT, Clinton wanted to take a clear stand in support of the traditional family values (Rimmerman 2007).

States v. Windsor). This continued refusal of ‘full faith and credit’ means that couples in a Californian domestic partnership or marriage may not have rights recognized in relation to health insurance and medical visitation, child and spousal support, and taxes in other states (Rimmerman 2010). As of June 2013, if same-sex couples are prohibited from getting married in their own states, they are not eligible for those federal benefits that are attached to marriage (United States v. Windsor). It could be argued that these discrepancies between Californian law, other state laws and federal law cannot be resolved by Californian lawmakers. Thus even if same-sex marriage had been recognized in California since 2008, it would not have compelled federal or state governments to also recognize same-sex marriages. As such, the difference between same-sex marriages and domestic partnerships, that of federal and other state recognition, were not going to be resolved through the repeal of Proposition 8 alone.

Same-sex supporters countered that in changing the constitution to define marriage as a union between one man and one women, a precedent is set in which same-sex couples’ domestic partnership rights could be legally retracted (Sayre et. al. 2010). Also, other rights thus far acquired by gay and lesbian Californians, and Americans in general, are exposed to attack and retraction. This is already seen with Proposition 8 and similar propositions, as rights to education, housing, immigration and employment have been threatened (New York Times November 20, 2008). Ultimately, it was argued that the retraction of rights once again excludes some populations from attaining the benefits of equal citizenship, set precedence for a further retraction of rights (exposing particular citizens to discrimination and violence), and set an example for how other states define

marriage in their constitutions and allocate the accompanying rights and privileges (Lewis 2009).

At the same time, given that Californian same-sex domestic partnered couples have the same rights as married heterosexuals, it could be argued that Proposition 8 and the subsequent battle was all about the definition and symbolic status of one word: marriage. Actors on both sides of the Proposition agreed that this is a battle worth waging. Those against same-sex marriage argued that the traditional and Christian religious institution of marriage has always been heterosexual, and moreover it is a sacred covenant between one man and one woman. It is the foundational relationship in society. As such, this institution is more than a state sanctioned contract, such as a domestic partnership agreement, it is a social institution replete with meaning that needs to be honored. Same-sex marriage advocates agreed that marriage is a traditional institution and one that is laden with meaning, status and privilege. They therefore wanted to be a part of the institution in order to acquire all of its associated status and privilege. Moreover, same-sex marriage advocates argued that because marriage offers status and privilege, it is a vehicle for social acceptance. They reasoned that allowing same-sex couples to marry would normalize and legitimate homosexuality and thereby produce further social acceptance of homosexuality in general. While similar debates are being waged across the country, California offered a striking example of how control over the term or symbol of marriage is politically powerful.

## **2.5. Proposition 8 and the Supreme Court**

Fifth, this was an influential case because the constitutional validity of Proposition 8 has been tried at the Supreme Court. In June 2013, the Supreme Court

dismissed the case, finding that the case was invalid because a private citizen cannot represent a state statute of this nature, as was the case when the Governor of California and implicated state officials refused to defend the statute through appeal at the Ninth District Court (Hollingsworth et al. v. Perry et al.). Accordingly, California Supreme Court Judge Walker's decision was upheld and same-sex marriages resumed in California as of June 2013. Even though the case was dismissed by the Supreme Court, at this level a decision will have important implications for the state of same-sex marriage at state and federal levels including decisions on the relationship between federal and state marriage laws, and the application of equal rights protections in same-sex marriage cases (O'Mahony 2014; Cruz 2013). The decision will also have implications for the future political preoccupations of mainstream LGB and social conservative organizations in California and throughout the country.

## **2.6. The Discourses of Proposition 8**

Sixth, Proposition 8 was an influential case because opponents and supporters of Proposition 8 adopted, reproduced and deployed many of the discourses that have engendered American same-sex marriage debates and fights since the issue was raised in the 1970s. They used these discourses in their efforts to define the proper form and function of state-regulated marriage: opponents deployed discourses of Christian religious tradition and freedom, morality, proper gender roles, the 'natural' connection between reproduction and marriage, family values, and the importance of heterosexual families in society; supporters deployed discourses of equality, discrimination and stigma, social and political rights and protections, assimilation and normalization, parenting and child rearing, love and romance, and economic self-sufficiency. While each

of these discourses was used in other same-sex marriage court challenges, legislative initiatives and ballot measures - in different combinations and to varying degrees of success - they were all deployed in the fight over Proposition 8. Moreover, these discourses were combined in unique and important ways in the Proposition 8 case, amounting to more than the sum of individual discourses. As I discuss in the next section, the sum of these discourses is determined by and reproduces a particular heteronormal citizenship regime.

Proposition 8 was unique and important for these six reasons, pointing to the proposition's influence on how same-sex marriage will be debated, and legislated contemporarily and in the future. First, Proposition 8 garnered an exceptional level of public attention: it was a high profile, well funded and expensive, and intensively publicized case. Second, the demographic makeup of California serves as an indication for the ways in which party identification, religious affiliation, race and age were correlated with same-sex marriage support. Third, California's Proposition 8 was unique because it proposed to retract formally allocated rights. Fourth, despite California's comprehensive domestic partnership registry, same-sex marriage was been a priority for Californian mainstream LGB organizations. Fifth, the constitutional validity of Proposition 8 was tried at the Supreme Court. Sixth, opponents and supporters of Proposition 8 adopted, reproduced and deployed many of the discourses that have informed American same-sex marriage debates and fights since the issue was raised in the 1970s, and are likely to have influence in the future direction of same-sex marriage discourses across the United States. When these six reasons are considered together, it becomes clear that Proposition 8 is an influential case because it is the embodiment and

potential culmination of a particular moment in the same-sex marriage battles in the United States.

## **2.7. Proposition 8 in the National Context**

Same-sex marriage was first raised in the 1970s, and it became the primary focus of the mainstream LGB and social conservative organizations in the mid/late 1990s. When Proposition 8 was initiated in 2008, the debate over same-sex marriage had been raging at the national level for at least a decade: same-sex marriage had become the social issue that united right-wing organizations and the Republican party; the solidified priority of mainstream LGB activists; an issue that was being (or had already been) considered by almost every state's government; the most galvanizing social issue in the 2000 and 2004 (and consequentially the 2008) federal elections<sup>48</sup> (Farney 2012; Lucas 2007); and the issue over which mainstream LGB and social conservative organizations waged a culture war (Richardson 2005). As stated, this latter dichotomy between cultures did not mirror party, class or race divisions, rather it was presented as a division between traditional and progressive (though not radical) social politics.

During the Proposition's six-month campaign, same-sex marriage was not supported by the majority of the American public, the presidential and vice presidential

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<sup>48</sup> As is discussed in Chapter Three, while DOMA had been enacted in the previous decade, in the first half of the 2000s same-sex marriage debates occupied the national stage like never before (Farney 2012). There were several events that placed same-sex marriage on the national level in the 2000s: the Supreme Court's *Lawrence v. Texas* decision against anti-sodomy laws (D'Emilio 2007); several successful same-sex marriage court challenges (Lucas 2007); mayors declaring that same-sex marriage would be legalized in their cities (Lahey and Alderson 2004); and the Republicans' strategy to place anti-same-sex marriage propositions on state ballots during the 2000, 2004, 2008 and 2012 federal elections (Lucas 2007). Before the 2000s, the legality/constitutionality of same-sex marriage was largely decided in state courts. Various state governments had taken steps to change their state's definition of marriage to explicitly exclude same-sex couples (Newton 2010; Lahey and Alderson 2004). This meant that public opinion and voter behavior was an increasingly important force that could be manipulated and exploited by both sides of the fight.

candidates, or the two major political parties. Yet over the course of the five years between the 2008 initiation of Proposition 8 and its consideration in 2013 before the Supreme Court, it appeared that the progressive side of this supposed culture war was winning. A majority of Americans (51% as of 2011) and the majority of Californians (61% as of 2013) supported same-sex marriage (Huffington Post February 28, 2013; New York Times April 20, 2011). President Obama and Vice President Biden publicly denounced DOMA and offered their support for same-sex marriage, and the Democratic Party added “marriage equality” to their 2012 national platform (Democratic Party 2012). Predictably, the Republican Party’s 2012 national platform stated: “We reaffirm our support for a Constitutional amendment defining marriage as the union of one man and one woman” (Republican Party 2012). Still, in the 2012 election, same-sex marriage was not discussed in any of the Presidential or Vice Presidential debates. While there were propositions calling for state constitutional bans on same-sex marriage, a majority of voters in three<sup>49</sup> out of four states with propositions approved of same-sex marriage (Huffington Post November 06, 2012). In response to the Proposition 8 Supreme Court hearing, one hundred and thirty-one Republicans signed an amicus brief submitted to the Supreme Court arguing that marriage is a fundamental right that should not be denied to gay and lesbian Americans. The signatories have argued, based largely on the core tenets of libertarianism, that individual freedom should be defended by the state and accordingly there should be minimal state intervention in citizens’ private lives (The Daily Beast February 28, 2013). Perhaps most telling, The Mormon Church, which was the largest single donor in the Proposition 8 campaign, and thus sustained the anti-same-

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<sup>49</sup> In the 2012 election, Maine, Maryland and Washington state voters approved of same-sex marriage while Minnesota voters approved a state constitutional ban on same-sex marriage (Huffington Post November 06, 2012).

sex marriage campaign, quietly left the Proposition 8 fight to curb the negative attention it had been receiving for its aggressive anti-same-sex marriage campaigning (Mother Jones July/August 2013).

These recent events indicate that there has been a major shift in same-sex marriage politics and debates in the U.S.: same-sex marriage no longer galvanizes right-wing voters as it once did; same-sex marriage is no longer uniting right-wing voters, organizations and the Republican party; and the American population is getting more progressive on this social issue. Moreover, as a result of the Supreme Court's action on October 06, 2014, 34 states and the District of Columbia now allow or could allow same-sex marriage, while 16 states still prohibit it<sup>50</sup>. These changes indicate a tipping point in the legalization of same-sex marriage across the United States (Washington Post October 17, 2014).

Still, while there may be propositions that seek to retract formally expanded same-sex marriage rights, the cases will likely not replicate Proposition 8's level of prominence and influence. Proposition 8 is likely to remain the most high profile, expensive and publicized state battle over the definition of marriage in the United States.

Proposition 8 is an exceptional and influential case because it represented the watershed political moment in the same-sex marriage fight. Since its 2008 initiation and passage, the landscape of same-sex marriage politics has changed dramatically in

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<sup>50</sup> On October 6, 2014, the Supreme Court declined to hear appeals in all the cases it had been asked to consider from appellate courts in the Fourth, Seventh, and Tenth Circuits. Consequently, the circuit courts' decisions to strike down marriage bans were maintained in Indiana, Oklahoma, Utah, Virginia, and Wisconsin. The Supreme Court's action also led to the legalization of same-sex marriage in Colorado, North Carolina, West Virginia, and Wyoming. Finally, the decision is expected to affect other states, including Kansas and South Carolina, within the three circuits. In addition, on October 7, 2014, by the Ninth Circuit made a decision, which invalidated bans on same-sex marriage in Idaho and Nevada, consequently affecting Alaska and Arizona and potentially Montana as well (Washington Post October 17, 2014).

California and the national context: the political utility and divisive power of same-sex marriage is waning. Proposition 8 spurred these changes on and at the same time, the debate and discourses of Proposition 8 evolved in accordance with changes in social and political opinion. Ultimately, the organizations involved in Proposition 8 will continue to shape how marriage, same-sex marriage, sexuality, and citizenship rights are understood and debated in California, in other states, and in the national context.

### **3. The Major Organizations of Proposition 8**

The history of Proposition 8 demonstrates that the fight over the legalization of same-sex marriage in California has been waged between mainstream LGBs, and social conservatives. I have selected ten organizations for my research: four that supported Proposition 8 and six that opposed it. The organizations were selected on the basis of their active involvement in the Proposition 8 campaigns between July and November 2008, their consequent reaction to the victory of Proposition 8 from November 2008 until June 2013, and their role in the court trials that followed the passage of Proposition 8. My criteria for ‘active involvement’ are based several factors including, the money each organization raised and supplied to the Proposition 8 campaigns and trials; the number of members they represented; the nature and number of projects they initiated in support of or opposition to the proposition (be it funding and creating advertisements and documentaries, hosting rallies, contacting politicians and media, running information campaigns, and/or hosting public meetings); the organizations’ public association with the trial; the organizations’ self-appointment or self-identification as leaders in the campaigns; and the organizations’ involvement in the court trials.

While this project focuses on political organizations and social movements, it does not seek to engage in the current debates in social movement theory, many of which aim to discern if, how and why a particular social movement and/or political organization is successful in their endeavors. To discern the success of a social movement and/or political organization, social movement theories focus on, among other things, organizational structure, resource development, relationships with governmental actors, and opportunity pathways. My project does not intend to explain if, why and how the organizations involved in Proposition 8 were successful; rather it analyzes the nature, and implications of the organizations' discourses.

That said, I do pay attention to the structure of the ten organizations in order to give context to the discourses they have produced. The structures of the ten organizations can be broadly categorized as either grassroots/community-based versus hierarchical/institutionalized. Hierarchical/institutionalized organizations have: structured and hierarchal governance models; relatively stable membership and leaders; and dependable or semi-dependable sources of funding. Grassroots/community-based organizations tend to have: less structured governance models (they may reject hierarchal models); fluctuating and ever-changing members, and revolving leaders (if they have leaders at all); and few, if any, sources for funding and/or resources. When it is discernable and relevant, I indicate the structure of the organizations.

The four prominent organizations on the 'Yes' campaign include the Mormon Church, Protect Marriage: Yes on Prop 8, the American Family Association (AFA) and the National Organization for Marriage (NOM). The six prominent mainstream gay and lesbians organizations on the 'No' campaign include Equality California, Join the Impact,

Courage Campaign, the Los Angeles Gay and Lesbian Center, the National Gay and Lesbian Task Force (NGLTF), and the American Foundation for Equal Rights (AFER). In the following two sections, I discuss the structures, histories and mandates, and the nature of involvement in Proposition 8 of the ten organizations.

### **3.1. Organizations in Support of Proposition 8**

I have identified four main organizations that worked in support of Proposition 8. Of the four organizations, only Protect Marriage was established specifically for the proposition. Two organizations, the American Family Association and the National Organization for Marriage, are national organizations that have taken an inordinate interest in same-sex marriage and Proposition 8. Finally I have identified the Mormon Church as an influential organization because it raised 71% of the funds used in support of Proposition 8 and was instrumental in the initiation and eventual banning of same-sex marriage in California (Galle 2009).

Protect Marriage was founded in 2001 as the Proposition 22 Legal Defense and Education Fund (Protect Marriage 2011). The organization reformed in 2005, and has been the flagship organization for the fight against same-sex marriage in California for several reasons: it was the official sponsor of the initiative to place Proposition 8 on the November 2008 ballot, it contributed \$40,042,107.93 to the 2008 campaign (California Secretary of State 2011); it claims to have 100,000 active members; and it was the only organization defending Proposition 8 in *Perry v. Schwarzenegger* cases. They define themselves as:

A broad-based coalition of California families, community leaders, religious leaders, pro-family organizations and individuals from all walks of life who have joined together to defend and restore the definition of marriage as between a man and a woman [...] Traditional marriage is the foundation of society and has served

our state well for centuries. California's constitutional marriage amendment exists to strengthen society, encourage monogamous and loving marriages and to provide the optimal environment to ensure the well-being of children. (Protect Marriage 2011)

One of Protect Marriage's three primary programs was the Proposition 8 Legal Defense Fund, which supports their "top-notch legal team" (Protect Marriage 2011). The second program was an Educational Foundation to support academic research that proves that children need a mother and father for their emotional, educational, moral and civic development. Finally, Protect Marriage had an Action Fund, which enabled them to communicate with and recruit Californians for the cause of defending 'traditional marriage' (Protect Marriage 2011).

The second organization, the American Family Association, was founded in 1977 by Donald E. Wildmon who was the pastor of First United Methodist Church in Southaven, Mississippi at the time. According to the organization, Wildmon was on the "frontlines of America's culture war" for 32 years (America Family Association 2011). The AFA touted itself as "one of the largest and most effective pro-family organizations in the country." (America Family Association 2011) They had over two million online supporters and approximately 180,000 paid subscribers to the AFA Journal, the ministry's monthly magazine. In addition, AFA owned and operated nearly 200 radio stations across the country under the American Family Radio (AFR) banner. The AFA's mission statement was as follows: "The American Family Association exists to motivate and equip individuals to restore American culture to its moral foundations [...] AFA works to strengthen families, to protect families from government intrusion, and to preserve the dignity of marriage as the conjugal union of a husband and wife." (America Family Association 2011) The AFA saw California's Proposition 8 as an extremely important

issue for the state and the nation and as such the organization donated substantial funds to the campaign, published several articles and produced radio programs about the issue (America Family Association 2011).

The National Organization for Marriage (NOM) was the largest single donor to the Proposition 8 campaign giving 1.8 million dollars in 2008. While the Mormon Church is said to be responsible for 71% of the money donated, they did not donate money as a religious organization rather their congregants donated individually (California Secretary of State 2011; The Daily Princetonian November 19, 2008). The National Organization for Marriage (NOM) is a nonprofit organization with a mission to protect marriage and the faith communities that sustain it. It was founded in 2007 in response to the “growing need for an organized opposition to same-sex marriage in state legislatures, NOM serves as a national resource for marriage-related initiatives at the state and local level” (National Organization for Marriage 2011). NOM claimed to be the much-needed national organization to unite local, state-based pro-family organizations. According to their website, “NOM works to develop political messaging, build its national grassroots email database of voters, and provide political intelligence and donor infrastructure on the state level, with a focus on developing new strategies for increasing influence in the Northeast and West Coast, where marriage is most under threat” (National Organization for Marriage 2011). As part of its focus on the West Coast, NOM was a prominent force in the 2008 Proposition 8 campaign. They produced and distributed advertisements, which gained national media attention, organized protest rallies, offered political and campaign strategies to Protect Marriage, and informed California voters through various documents and pamphlets, and national interviews and media appearances. NOM’s

money and support stopped in 2009/2010 as they did not support the *Perry v. Schwarzenegger* trial, stating that they feared that the Yes on 8 campaign would not be successful (California Secretary of State 2011). Still, their influence was very much felt during the 2008 Proposition 8 campaigns as the organization was largely responsible for the national (and international) attention that Proposition 8 received. Moreover, despite their lack of direct involvement, NOM organized protest rallies, and provided briefs during the *Perry v. Schwarzenegger* hearings.

Last, the Mormon Church was a major player in the initiation and passage of Proposition 8. Although Mormons only account for 2% of California's population, they were responsible for raising 22 million dollars, much of which came in the last weeks of the campaign<sup>51</sup> (Galle 2009). Some reports claim that the Mormon Church was instrumental in putting Proposition 8 on the November 2008 ballot and that they had planned to do so for nearly a decade. There is also speculation that NOM was largely funded and supported by the Mormon Church (Cowen 2010; New York Times June 18, 2010). These claims cannot be verified, not least because the Mormon Church was extremely secretive about its political involvement and financial support of Proposition 8. Nevertheless, its documents offered detailed explanations regarding their stance on homosexuality, marriage, the proper role of the state and equal rights. That coupled with their undeniable financial influence justifies their inclusion in this study.

These four organizations represent the national and major California based 'pro-family,' anti-same-sex marriage organizations that were involved in Proposition 8. All the organizations have established networks connecting to social conservatives in California.

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<sup>51</sup> Much of the money is said to come from Mormons residing outside of California, most predominantly from Mormons in Utah and Nevada (Galle 2009).

### **3.2. Organizations in Opposition to Proposition 8**

Before, during and after the passage of Proposition 8 various mainstream LGB organizations emerged in support of the ‘No’ campaign. I have identified six of the most prominent organizations on this side of the fight including: Equality California, the Los Angeles Gay and Lesbian Center, Join the Impact, Courage Campaign, the National Gay and Lesbian Task Force (NGLTF), and the American Foundation for Equal Rights (AFER).

The first three organizations, Equality California, the Los Angeles Gay and Lesbian Center and Join the Impact were California based, focusing solely on issues of concern for the LGBTQ citizens and communities in the state. Equality California was founded in 1998 to fight for legal protections and rights on a state and federal level for gay, lesbian, bisexual and transgender Californians. To do so, Equality California “sponsors legislation and coordinates efforts to ensure its passage, lobbies legislators and other policy makers, builds coalitions, develops community strength and empowers individuals and other organizations to engage in the political process.” (Equality California 2011) Equality California was the organizational plaintiff in the 2008 lawsuit, filed in the California Supreme Court, by the National Center for Lesbian Rights (NCLR), the American Civil Liberties Union (ACLU), Lambda Legal and several law firms challenging California’s marriage laws that excluded same-sex couples in the *Re. Marriage* case. Equality California touted itself as the leading organization in the ‘No on

Proposition 8' battle, in part because it raised 14 million dollars for the campaign, 11 million dollars more than any other organization (Equality California 2011).

The Los Angeles Gay and Lesbian Center was founded in 1969 when its founders began providing various services to the Los Angeles gay and lesbian community. With its 450 employees and 3000 volunteers, the organization focused on four main areas of service: health; social services and housing; culture and education; and leadership and advocacy (Los Angeles Gay and Lesbian Center 2011). Specifically relating to Proposition 8, the L.A. Gay and Lesbian Center played a significant role in communicating with voters in the 2008 campaign as part of its *Vote for Equality* program, which “develops and implements innovative direct voter contact strategies to increase support for LGBT rights and reduce anti-LGBT prejudice” (Los Angeles Gay and Lesbian Center Leadership Lab 2011). After the passage of Proposition 8, the L.A. Gay and Lesbian Center, along with the Courage Campaign, Equality California and the NGLTF, recruited, trained and supervised volunteers for the door knocking campaign - the *Breakthrough Conversations Project*. The center also sponsored *The Prop 8 Report*, which analyzed why and how Proposition 8 passed in 2008, and suggested strategies for future same-sex marriage fights.

Join the Impact was created in the days following the passage of Proposition 8 in November 2008. Join the Impact defined itself as a grassroots organization pursuing the goal of equality for gay and lesbian citizens through education, outreach and protest. Among their accomplishments, Join the Impact coordinated protests against Proposition 8, and similar propositions in other states, in three hundred cities inside and outside the United States on November 15, 2008. Although Join the Impact challenged its opponents,

the founders of the organization were adamant that they did not want to demonize, blame or attack opponents of same-sex marriage or close lines of communication and extinguish any possibility for understanding and compromise (Join the Impact 2009). As can already be seen, these two organizations were interested in legal protections, formal equality and rights for gay and lesbian Californians. Further, both were interested in dialoguing and compromising with oppositional and undecided voters.

The next two main organizations, the Courage Campaign and the National Gay and Lesbian Task Force took similar stances, arguing that extending marriage rights to homosexuals would not compromise the sacred, moral and healthy nature of marriage. The Courage Campaign was an online organization that networked left-leaning grassroots organizations and individuals around issues including education policy, health care, taxation, and most relevant to this study, gay and lesbian rights and protections. Courage Campaign was comprised of over 700, 000 members. These members were mobilized under the “Courage Campaign Equality Program” which organized volunteers in each state county, and sent volunteers door-knocking in order to speak, one-on-one to Californians in an attempt to open dialogue, put a ‘human face’ to the same-sex marriage struggle, and convince opponents and undecided voters that Proposition 8 sought to deny ‘normal,’ ‘average’ citizens access to the rights currently associated with marriage (Courage Campaign 2009).

Of the six organizations, the National Gay and Lesbian Task Force (NGLTF) was the oldest, founded in 1974. According to Warner and Vaid, while the NGLTF was founded as a small grassroots organization, it evolved to become one of three national

leaders in the same-sex marriage fight (along with the Human Rights Campaign<sup>52</sup> and Lambda Legal Defense Fund) (Warner 1999; Vaid 1995). The NGLFT was a major player in California's mainstream LGB political communities, was one of its national headquarters in Los Angeles, took a special interest in California's Proposition 8, and is therefore the only national campaign studied here.

The American Foundation for Equal Rights (AFER) was founded in 2009 to support and sponsor the plaintiffs, Kristin Perry and Sandra Stier, and Paul Katami and Jeffrey Zarrillo, in their suit challenging the validity of Proposition 8. The couples thus initiated the *Perry v. Schwarzenegger* case. The AFER claims to be non-partisan, citing their success in building a bi-partisan legal team headed by attorneys Theodore B. Olson and David Boies. Moreover, AFER's advisory board was co-chaired by Robert A. Levy, chairman of the Cato Institute, and John Podesta, Chair and Counselor of the Center for American Progress<sup>53</sup>. As The New York Times reported, the AFER represented a new breed of political organizing and fundraising:

This emerging group of donors is not quite like any other fund-raising network that has supported gay-related issues over the past 40 years. They come from Hollywood, yes, but also from Wall Street and Washington and the corporate

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<sup>52</sup> While the HRC is a powerful national organization that campaigns for same-sex marriage, their focus tends to be national and they are not usually directly involved in state-based legislation: they have spent large sums of money trying to repeal the Defense of Marriage Act; their only office is their national headquarters is in Washington D.C.; and they send out "field" groups to work with existing local organizations for particular projects. While they did fight publically against Proposition 8 by making public statements on their website and by donating \$3.4 million to the 'No On Prop 8' campaign, they were not a substantial hands-on organization in the Proposition 8 campaigns. Even gay conservative Andrew Sullivan lambasted the HRC for their lack of financial commitment to the California campaign (Sullivan November 17, 2008). Most important, however, is the fact that the HRC (along with the Gay & Lesbian Alliance Against Defamation, American Civil Liberties Union, and National Center for Lesbian Rights) actually protested the initiation of the *Perry v. Schwarzenegger* trial, arguing that the trial would inevitably end in favor of proponents of Proposition 8 at the Supreme court level and that the failure of the Supreme Court hearings would only further legitimize DOMA and bolster individual states' efforts to enact constitutional bans of same-sex marriage.

<sup>53</sup> The Cato Institute is an American libertarian think tank founded by Charles Koch, among others. The Center for American Progress is a 'liberal' and 'progressive' education, research and public policy focused advocacy group.

world; there are Republicans as well as Democrats; and perhaps most strikingly, longtime gay organizers said, there has been an influx of contributions from straight donors unlike anything they have seen before. (New York Times March 23, 2012)

This alliance between gay and straight actors was epitomized in the legal team of Olson and Boies who were brought in to “secure a victory at the United States Supreme Court that restored marriage equality to our nation’s most populous state.” (American Foundation for Equal Rights 2012) In addition to sponsoring the *Perry v. Schwarzenegger* case, the AFER continued to fight for same-sex marriage through *Bostic v. Rainey*, the federal constitutional challenge to Virginia’s Marriage Amendment. Thus the AFER were important players in this case because of their role as sole sponsor of the *Perry v. Schwarzenegger* case, their unique structure and fundraising strategies, and their continued involvement in same-sex marriage cases across the United States.

I have chosen these six organizations, as they were the most influential organizations in the ‘No on Prop 8’ campaign. Equality California was a highly powerful and well-established California based organization, raised the most money for the campaign and was definitely a leader in setting agendas and strategy for the general fight against the proposition. Join the Impact and the Courage Campaign represented the grassroots element of the movement opposing Proposition 8. The Courage Campaign was a leader in mobilizing individual activists to get involved with the campaign. While Join the Impact were not involved in the initial fight between July and November 2008, they amassed a considerable number of followers after the proposition was passed, but they then lost momentum by 2010. The L.A. Gay and Lesbian Center, represented a long-standing LGBTQ institution in the state, and played a significant role in door-to-door canvassing and engaging voters. The AFER was the sole sponsor of the *Perry v.*

*Schwarzenegger* case, thus representing the mainstream LGB side through the courts. Finally, NGLTF was nationally based, heavily institutionalized and carried a formidable history in American gay and lesbian politics. Thus among these six organizations there is a balance of grassroots and institutionalized activism.

#### **4. Triangulation of Methods**

I have identified Proposition 8 as an influential case study based on the aforementioned six factors, which amount to Proposition 8 playing a significant role in shaping: same-sex marriage discourses; the relationship between mainstream LGB and social conservative movements; the possibilities of marriage; and the relationship between sexuality, family, marriage and citizenship in California and across the United States.

As explained in the previous section, I have selected ten organizations that were involved in the Proposition 8 fight, and that ultimately played a significant role in producing and reproducing discourses relating to same-sex marriage. To analyze the discourses of these ten organizations my dissertation will use a triangulation of methods: public communications of ten organizations; elite interviews with the leaders of four of the mainstream LGB organizations; and the transcripts, court briefs and decisions emerging from the federal case of *Perry v. Schwarzenegger* (later *Perry v. Brown* (2012), and then *Hollingsworth et. al. v. Perry et. al.* (2013)).

##### **4.1. Discourse Analysis**

For each source of data, I have conducted a discourse analysis. Wood and Kroger offer a definition of discourse analysis: “It attempts to identify deep structures of textual data like narrative semiotics but doesn’t need a full story. Beyond this, discourse analysis

works with different texts, investigating their interrelationships” (Wood and Kroger 2000). Discourse analysis thus requires a close examination of multiple texts’ ‘deeper meanings’ in relation to other comparable texts and always in the context to their shared historical social environment (Phillips and Hardy 2002).

Theories of discourse analysis hold that discourse, be it text, spoken or otherwise, is not merely a combination of words, but a power-laden form of social construction and action. Phillips and Hardy say that discourse analysis is in part influenced by Foucault’s work on the disciplinary effects of discourse and the relationship between power and knowledge (Phillips and Hardy 2002, 21). They further explain that discourse analysis “focus[es] more explicitly on the dynamics of power, knowledge, and ideology that surround discursive processes.” (Phillips and Hardy 2002, 20) Van Dijk adds that discourse analysis focuses on the ways in which discourses enact, confirm, legitimate, reproduce or challenge relations of power in society. And as such, discourse analysis seeks to know what texts, speech, and other verbal interaction or communicative events play a role in these reproductions of power relations (Van Dijk 1993, 250). Fairclough and Wodak summarize the main tenets of discourse analysis as follows: it holds that power relations are discursive; it holds that discourse constitutes society and culture; it holds that discourse analysis is interpretative and explanatory; it interprets discourse as a form of social action; and it addresses social problems (1997).

Phillips and Hardy also point to Foucault’s influence and state that discourse analysis is used to unmask the “privileges inherent in particular discourses and emphasizes its constraining effects.” (Phillips and Hardy 2002, 21) These constraining effects of discourse function through the production and reproduction of particular

subjects and thus forms of inclusion, exclusion and resistance. Dominant groups or institutions use talk and text to reproduce, legitimize and produce subjects in hierarchal positions in society. Discourse focuses on “how [discourse] privileges some actors at the expense of others and how broad changes in the discourse result in different constellations of advantage and disadvantage, particularly in the Foucaultian tradition.” (Phillips and Hardy 2002, 25) In this dissertation, discourse casts light on how different discourses of same-sex marriage legitimize particular normal sexual subjects to the exclusion of others, thereby producing advantages and disadvantages between citizens based on their sexuality, family form and marriage status.

#### **4.2. Public Communications and Documents**

The first leg in my triangulation strategy involves a longitudinal discourse analysis of the public communications and documents of the ten organizations documented above. I collected materials dated from May 01, 2008 when the California Supreme Court ruled that restricting marriage to heterosexual couples was unconstitutional in *Re Marriage Cases*, until July 31, 2013, one month after the Supreme Court struck down Proposition 8.

I define public communications and documents as any of the organizations’ pertinent documents that have been made public. For this study, I collected and analyzed the following public documents: websites; blog entries (of the founders and/or leaders of the organizations); flyers; newsletters; press releases; open letters; public emails<sup>54</sup>;

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<sup>54</sup> In the fall of 2008, I attempted to subscribe to the email list of the ten organizations. Several of the organizations did not have email subscription lists, therefore I was only able to subscribe to the emails of the following organizations: Join the Impact, the Courage Campaign, Equality California, and the National Organization for Marriage. Overall, there were problems with the consistency of the emails of the organizations, for example, some organizations sent one email a week, some sent several dozen emails in the 3 years. As well, I started collecting the emails the week after Proposition 8 passed (as that is when I decided to focus on the case for my dissertation work) so I do not have emails from the beginning of the

published reports papers or documents; and campaign advertisements, documentaries and videos<sup>55</sup>. I selected documents for content based on two main criteria for content. First, I selected documents that contained general information about the organizations themselves, such as mission statements, ‘about us’ sections, histories, and constitutions. These documents were useful because they addressed the major tenets of the organizations, and they explained why and how the organizations were involved with Proposition 8. Second, I selected documents that directly addressed Proposition 8. To this end, I required that the documents explicitly mention Proposition 8 and/or same-sex marriage (gay marriage or marriage equality) in California. In total, I analyzed 692 documents: 288 from the social conservative organizations, and 404 from the mainstream LGB organizations.

I used the qualitative analysis computer program *Dedoose*<sup>56</sup> to code and sort the documents. With this data, I compared and analyzed the organizations’ materials to identify their tenets, or arguments. Through this analysis I discerned the kinds of discourses that were mobilized by social conservative anti-same-sex marriage activists, and gay and lesbian same-sex marriage activists. To do so, when analyzing these documents, I employed a five-step process:

1. *Getting to know the data:* I did a general survey of all the documents as I collected them, paying specific attention to recurring terms, oppositions,

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campaigns in May of 2008. Finally, as stated, I was only able to subscribe to the lists of four of the ten organizations. Therefore, while the emails comprise an incomplete and uneven set of materials, they are nonetheless revealing and bolster my discourse analysis of the organizations.

<sup>55</sup> Often the organizations would post news or media articles in which their organization or members of their organizations were mentioned and/or interviewed regarding Proposition 8. I did not include these materials in my analysis because the organizations cannot control the messaging or discourses of the media. My project did not seek to engage in a media analysis of the organizations, but rather sought to analyze the discourses that were being produced by the organizations themselves.

<sup>56</sup> *Dedoose* is an online mixed methods data analysis software program that enabled me to qualitatively code, categorize and sort the organizations’ documents.

themes and arguments.

2. *Identifying Themes*: On the second pass, I identified recurring themes that were related to my research questions. Specifically, I looked for themes related to the organizations' conceptions of sexuality, the role of marriage and the family in society, the role of the state in citizens' private lives, the model citizen, the deviant citizen, and their definition of social justice. The organizations rarely used the term "social justice," therefore I looked for terms like equality, justice, fairness, rights and benefits to identify and then discern if and how the different organizations understood same-sex marriage as an appropriate route to social justice.
3. *Identifying the discursive strategies that are deployed*: I looked for when and how connections are made between sexuality, sexual conduct and family form, and citizenship rights and privileges, the role of the state and political/social equality. Specifically, I looked at the dividing practices of the discourse (Dean 2007): whether different subjects' sexualities and sexual conduct are argued to deserve different state and social treatment. Doing so enabled me to identify how these different discourses regulate and produce particular sexual subjects.
4. *Looking for contradictions and resistances*: I looked for contradictions in the language or arguments of the organizations in order to expose potential discrepancies, divisions or resistances within each side of the debate. Exposed resistances may indicate that the groups are wavering in their politics and potentially moving toward compromise with the other side, or are moving to

further extremes in the same-sex marriage debate. At the same time, while all discourses, and ideologies, carry internal contradictions, resistances may also indicate that the discourse has abandoned its original or foundational tenets and thus contradictions and resistances are an indication of the evolutionary nature and trajectory of the discourse.

5. *Situating the analysis in the broader discursive context:* I concluded the discourse analysis by comparing the discourse that I have identified and classified, to my theoretical framework, making changes to the latter where necessary.

### **4.3. Elite Interviews**

The second leg in my triangulation strategy is comprised of eight elite interviews that I conducted in the fall of 2011 with the leaders and key players in four of the mainstream LGB organizations, these include: Rick Jacobs, Mike Bonin and Adam Bink of the Courage Campaign; Andrea Shorter of Equality California; David Fleischer and Laura Gardiner of the L.A. Gay and Lesbian Center; and Trystan Reese and Moof Mayeda of the National Gay and Lesbian Task Force (NGLTF). I was unable to interview any members of Join the Impact or the AFER. Join the Impact was a grassroots organization that formed shortly after the passage of Proposition 8 in 2008. Join the Impact was a loose coalition of activists and community organizers, and the majority of their activity was coordinated and occurred online. As such, it was difficult to locate and communicate with any of their leaders, despite my efforts to do so. The AFER was the sole sponsor of the federal constitutional challenge to Proposition 8. Despite multiple attempts, I was unable to interview AFER members. Still, the discourses of the AFER are

discussed in the preceding two Chapters, and are a major focus of the following Chapter, which focuses on the Proposition 8 court trials. I was also unable to secure interviews with any elites in any of the social conservative “Yes on 8” organizations. Although I did not receive an explanation, much less a response, from any of the “Yes on 8” organizations, I suspect that these organizations are reluctant to speak to researchers, and would offer little additional information other than that which was publically available. Accordingly, I conducted and analyzed the elite interviews as a separate ‘within case study’, which offers an in depth analysis of the rationales of mainstream LGB leaders.

After I gained ethics approval, in the fall of 2011 I interviewed the above listed elites and key players. I conducted initial interviews with the available leaders, and I used the snowball<sup>57</sup> technique to gain more contacts and interviews with other key informants in each organization. I travelled to California (Los Angeles and San Francisco) for my field research. Doing so enabled me to access documents for my ‘public document discourse analysis’ and to conduct in-person interviews. I also conducted several interviews over *Skype*.

The interviews were semi-structured with open-ended questions. During conversations I used a ‘snowballing’ technique: I asked additional questions as they emerged during the talks or on the basis of my increasing knowledge of the context (Aberbach and Rockman 2002). I structured the interviews this way in order to give the interview subjects as much flexibility as they needed to expand on opinions and ideas, to offer new information or unforeseen explanations and opinions, and to provide me with rich detailed answers for proper discourse analysis.

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<sup>57</sup> Through the snowball technique I used my existing study subjects to identify, recruit and interview key players among their acquaintances.

I had two main goals in conducting these interviews. First, I used these elite interviews to compare the different organizations' understandings of the four elements of my dissertation questions, including their understanding of sexuality, family and marriage, and rights, citizenship, and social justice. Second, campaigns for and against Proposition 8 were highly competitive and as such these organizations may have had to curtail their most extreme values, beliefs and goals to appeal to more moderate voters and to gain support, money and votes. With regard to the mainstream LGB organizations, an examination of the organizations' public documents presented their official arguments but the interviews revealed discrepancies and conflict between the mainstream LGB organizations, and dissent within the mainstream LGB organizations. For example, as is discussed in Chapter Six, there was disagreement between the organizations about the shift in discourse away from rights and equality, and toward normality and love. Thus I conducted these interviews with the goal of gaining a richer and more nuanced understanding of how the different discourses were used based on their utility for the organizations' political strategies and ends.

Specifically, I asked the leaders of the organizations similar semi-structured open-ended interview questions based on the following themes: the nature of their organizations' membership; their organizations' political goals (including and beyond same-sex marriage); their organizations' reasons for prioritizing same-sex marriage; the shortfalls and/or problems with the prioritization of same-sex marriage; whether or not same-sex marriage excludes and/or does not help some LGBTQ Californians; their organizations' understanding of sexuality (be it an identity, orientation, biologically determined, constructed or other); their organizations' understanding of the role of the

family and marriage in society; their organizations' understanding of the state's role in citizens' private lives; their organizations' idea of the model citizen; their organizations' definition of social justice and/or political/social equality; and their organizations' perception of and relationship with the anti-same-sex marriage organizations.

#### **4.4. Court Trials**

For the third leg in my triangulation strategy, I analyzed the briefs, transcripts and decisions from the three trials – *Perry v. Schwarzenegger* (2010), *Perry v. Brown* (2012), and *Hollingsworth et. al. v. Perry et. al.* (2013). As with the public communications, I used the *Dedoose* qualitative analysis computer program, and followed the five aforementioned steps of discourses analysis.

I have included the *Perry v. Schwarzenegger* case and trials as my third method for three main reasons. First, six of the ten organizations were involved in the trials as they offered briefs in support of either the plaintiffs or defendants including Equality California, the Courage Campaign, the National Gay and Lesbian Task Force, and the National Organization for Marriage. As well, the organizations AFER and Protect Marriage played key roles in the trial. The AFER sponsored the plaintiffs and their lawyers through the three trials. Protect Marriage were the original proponents of the proposition, and stepped in as the interveners for the defense once the state of California refused to defend the proposition. As such, the trials offered a continuation of the discourse analysis of the ten major organizations' same-sex marriage discourses.

Second, I analyzed the cases in order to discern how the discourses that were deployed during the Proposition 8 campaigns from 2008-2013 were filtered through, and were changed by the court system. Accordingly, I compared and contrasted the

arguments used in the legal setting and those used in civil society among the mainstream LGB and social conservative organizations. According to Bernstein, the legal system generally constrains and limits progressive social change within the confines of heteronormativity:

The political ‘bargains’ made by activists in fighting for these laws circumvents rather than embraces the challenge to heteronormativity, this leaving dominant norms intact. In the long run, incremental legal change may provide the space for more lesbians and gay men to come out, which could challenge heteronormativity. But the likelihood of legal change is determined by the ability of lesbian and gay activists to frame issues in such a fashion that dominant norms are no longer threatened as well as by the type of state action required. (Bernstein 2001, 420)

American gay and lesbian activists have a history of bargaining with the state in order to gain legal change and that bargaining occurs on the terms and conditions, and with the language of the state. Ettelbrick says that these terms and conditions are presented as sustaining the norm.

The law looks to the insiders as the norm, regardless of how flawed or unjust their institutions, and requires that those seeking the law’s equal protection situate themselves in a similar posture to those who are already protected. In arguing for the right to legal marriage, lesbian and gay men would be forced to claim that we are just like heterosexual couples, have the same goals and purposes, and vow to structure our lives similarly. The law provides no room to argue that we are different but are nonetheless entitled to equal protection. (Ettelbrick 2004, 259)

Eskridge adds that the law itself is a conformist discourse but that there is room for incremental change within marriage and common law (Eskridge 2000). With these opinions in mind, my analysis of the court hearings sought to determine whether same-sex marriage advocates were making progressive changes in family and marriage law or whether they were reinforcing existing legal norms by using social conservative and heteronormative discourses in order to gain inclusion.

Third, as stated, the trials have concluded the Proposition 8 case by legalizing same-sex marriage in California, and the trials are anticipated to influence the discourses and outcomes of similar trials in other states. Thus the success of same-sex marriage in *Perry v. Schwarzenegger* may influence other same-sex marriage campaigns to rely heavily on the courts, and, to continue to depend on the heteronormal discourses and incremental change of the legal system. While I argue that same-sex marriage is a heteronormal and exclusionary goal of the LGBTQ movement, the entrenchment of same-sex marriage within the legal system further narrows which voices, experiences, and needs of LGBTQ people are legitimized and addressed. Analyzing the case discourses will give insight into exactly which voices, experiences and needs are legitimized to the exclusion of others.

## **5. Summary of the Triangulation of Methods**

Through these three modes of discourse analysis I have approached the California same-sex marriage fight from three important angles. First, analysis of the public communications has enabled me to define, categorize and analyze the major tenets, arguments and discourses of the ten influential organizations involved in the campaigns and trials. Second, the elite interviews gave me more insight into their justifications for the political strategies that were deployed by each organization and side, looking specifically at whether and why either side is more flexible to adjusting their arguments to conform with the political and institutional setting. Third, because this case has been taken to the federal court level, it is important to analyze how engaging with the legal system has changed or curtailed the arguments made by each side with regard to the need for same-sex marriage in California and the United States. Ultimately, with this

triangulation of methods, I have been able to define the current state of the discursive relationship between social conservative and mainstream LGB organizations in California, and to understand and analyze each side's understanding of sexuality, family form, citizenship, and social justice in relation to state-sanctioned marriage. The following five Chapters undertake the discourse analysis of the ten organizations, and as such the Chapters are organized according to my triangulation of methods. Chapters Four and Five analyze the public communications of the social conservative, and mainstream LGB organizations. Chapter Six provides a case study of the interviews that I conducted with the leaders of the mainstream LGB organizations. Chapters Seven and Eight address the three trials of the *Perry v. Schwarzenegger* case.

## **Chapter Four: Discourses in the 2008-2013 Proposition 8 Campaigns: Yes on 8**

### **1. Introduction**

This and the next chapter analyze the public documents of the ten organizations that I have classified as key players in the Proposition 8 fight from 2008-2013. The six prominent mainstream gay and lesbians organizations on the ‘No’ campaign include Equality California, Join the Impact, Courage Campaign, the Los Angeles Gay and Lesbian Center, the National Gay and Lesbian Task Force (NGLTF), and the American Foundation for Equal Rights (AFER). The four prominent organizations on the ‘Yes’ campaign include the Mormon Church, Protect Marriage: Yes on Prop 8, the American Family Association (AFA) and the National Organization for Marriage (NOM). As outlined in the previous chapter, the public documents include websites; blog entries (of the founders and/or leaders of the organizations); flyers; newsletters; press releases; open letters; public emails; published reports papers or documents; and campaign advertisements, documentaries and videos.

The 2008 campaign over Proposition 8 lasted six months (May 2008 – November 2008), leaving scarce time for either side to construct and deploy coherent, consistent and effective discursive arguments. Yet over the five years between the initiation of the proposition in 2008 and the Supreme Court’s decision in 2013, distinct and significant discourses emerged from both sides of the debate.

Through my analysis I have identified four main discourses which demonstrate how each side defined: the importance of marriage; normal sexualities; the ideal citizens; the proper role of the state in citizens' familial and sexual lives; and, to a lesser extent, social justice<sup>58</sup>. The four discourses that guide my discussion are: 1) culture war; 2) children and education; 3) rights and equality; 4) love and marriage. The culture war, and children and education discourses were initiated by the social conservative organizations, while the rights and equality, and love and marriage discourses were initiated by the mainstream LGB organizations. Accordingly, I address the social conservative discourse in this chapter, and the mainstream LGB discourses in the next chapter. This is not to say, however, that each side only addressed and reproduced their own discourses. Rather, the opposite occurred as both sides attempted, with varying degrees of success, to respond to their opponent's discourses. As such, in both Chapters, I approach the discourses relationally as a conversation between opposing sides, in order to better compare when and how the discourses resisted and/or reproduced each other.

As I contend, the first discourse of the culture war was taken up by organizations on both sides of the fight. While the organizations claimed that same-sex marriage has been a manifestation of the cultural divide between the two sides, I show that the organizations on both sides were invested in a heteronormal citizenship regime, which places marriage in a fundamentally important position in society, and demands state regulation of sexuality and family form.

In this regard, the mainstream LGB organizations attempted to demonstrate their commitment and reverence for the institution of marriage, and thus the heteronormal

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<sup>58</sup> Chapters Six, Seven and Eight which analyze the elite interviews, and the Proposition 8 court trials, offer a more detailed synopsis of each side's approach to social justice.

citizenship regime, using several discourses, which are each addressed and analyzed in this chapter and the next chapter: the legalization of same-sex marriage is the pinnacle achievement in LGBT rights history; same-sex marriage is an appropriate avenue for accessing equality, justice, liberty, democracy, human dignity and ultimately equal citizenship; and certain homosexual citizens can assimilate to the heteronormative criteria for inclusion into the institution of marriage<sup>59</sup>.

The social conservative organizations attempted to fight a culture war, and protect the heteronormal citizenship regime, by arguing that marriage is fundamentally important to society because of its heterosexual form and functions. Accordingly, they argued that the state should protect heterosexual marriage to ensure that certain cultural and Christian values, and gendered and sexual roles and responsibilities were passed on and reproduced through future citizens – children. Over the course of the Proposition 8 campaigns, these organizations argued that homosexuals are both physically and morally unable to bear and raise proper future citizens and thus should not be able to marry.

In addition to focusing on the reproductive function of marriage, the social conservative organizations also produced discourses pertaining to children, same-sex marriage and education. They argued that the legalization of same-sex marriage would publically legitimize same-sex marriage and homosexuality, and would require schools to teach students that homosexuality is normal and acceptable. Faced with this attack on the heterosexual family and marriage, and future citizens, the social conservative organizations argued that the state should protect and promote traditional marriage by banning same-sex marriage. This Chapter proceeds in three parts, which correspond to

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<sup>59</sup> I discuss the discourses of rights and normality in detail in the next Chapter, paying particular attention to analyzing how the organizations define these discourses in relation to same-sex marriage, and to assessing the repercussions of such attachments between these discourses and marriage.

three different discursive strategies including, culture war, marriage and reproduction, and marriage and education.

## **2. Culture Wars and the Importance of Marriage in American Society**

The organizations on both sides of the Proposition 8 battle maintained that they have been engaged in a culture war. The fight over same-sex marriage has been cast as more than a policy issue: same-sex marriage has been presented as the embodiment of each side's ideologies and political agendas, and ultimately their oppositional 'cultures.' Same-sex marriage has been used to produce and propagate the differences between social conservative and mainstream LGB cultures and political programs. Yet despite their insistence that they are engaged in a culture war, I argue that the two sides have held a reverence for state-sanctioned marriage, which operates according to a heteronormal citizenship regime.

While the mainstream LGB organizations claimed that the legalization of same-sex marriage would be a moment of progress in terms of rights, and equal citizenship, the social conservative organizations warned that the legalization of same-sex marriage would lead to the destruction and decay of American culture. Of the social conservative organizations studied, the American Family Association (AFA) referred to the "culture war" most often, which seems fitting given that the AFA describes itself as being "on the frontlines of America's culture war" (American Family Association July 2013a). For the AFA, America's culture war was to be fought on moral and religious terrains. The status of same-sex marriage was a primary indicator of whether or not the United States will "plunge into moral decay" (American Family Association February 2012). In 2011,

national polls indicated that the majority of Americans supported same-sex marriage (New York Times April 20, 2011). In reaction to these polls, one member of the AFA, Elijah Friedeman, wrote an article titled “The majority of Americans say homosexuality should be encouraged by society,” in which he argued that the increasing acceptance of same-sex marriage, by the public and various governments, would lead to the promotion of homosexuality, and ultimately to “moral decay” in American society (American Family Association June 2011). It was argued that through the legalization of same-sex marriage, traditional marriage – and all of its attendant morality, values, roles and functions – would be threatened. Thus the issue becomes a marker for a way of life that is threatened - a way of life that will not be available to future generations.

Not surprisingly, the AFA cast the “homosexual movement” as being the primary opponent in its cultural fight against moral decay. The AFA portrayed the ‘homosexual movement’ as coherent, and well organized and aggressive in its tactics, as it sought to “force its agenda on our sentiments in schools, government, business and workplaces through law, public policy and media. Our strong opposition is a reaction to the homosexual movement's aggressive strategies.” (American Family Association July 2013b) Thus according to the AFA, the ‘homosexual movement’ had a coherent plan to systemically promote same-sex marriage – through law, public policy and media – in order to shift American popular opinion, morality and culture. As is detailed later in this Chapter, the other organizations fighting against same-sex marriage in California likewise cast same-sex marriage supporters, and gay rights organizations, as threatening American culture and morality through various means including public policy and laws, school curriculum, and popular culture.

In the face of the threat of same-sex marriage, the National Organization for Marriage (NOM) asked its supporters: “Are you willing to do what it takes to protect a culture of marriage and religious liberty for your children and grandchildren?” (National Organization for Marriage December 2010a) NOM’s use of the term “culture of marriage” is notable because marriage was presented as more than an institution with accompanying rights. The legal relationship between two individuals extends far beyond the regulation of the household. Even though the form, functions and rules of marriage have changed since the founding of the United States, by defining marriage as a culture, marriage was understood to be traditional and sacred.

While each of the social conservative organizations examined in this project emphasized the fundamental importance of the traditional family and marriage, below are three informative examples that demonstrate how these arguments were presented and discussed:

Protect Marriage: “Pre-dating any form of government, marriage has been regarded over the ages and across cultures as the fundamental unit of society.” (Protect Marriage July 2013a)

The National Organization for Marriage: “We tend to forget that marriage predates government. Throughout history, diverse cultures and faiths have upheld marriage as the ideal. It is the fundamental building block of all human civilization. Marriage has public purposes that transcend its private purposes.” (National Organization for Marriage June 2013)

The American Family Association: “The homosexual movement's promotion of same-sex marriage undermines the God-ordained institution of marriage and family which is the foundation of all societies.” (American Family Association 2013b)

Much of the discussion about the fundamental nature of the family was presented in terms of the foundational, natural, sacred, pre-governmental, and universal existence of marriage. This characterization of marriage as timeless and universal stands in contrast to

the assertion that marriage is a culture because cultures change based on time and place. Still, despite historical, anthropological and sociological studies that disprove the universality of this traditional, heterosexual form of kinship, the social conservative organizations stated, without support beyond their interpretation of their biblical texts, that marriage, and the traditional heterosexual family, should be protected and promoted because of its temporal and geographical universality, along with its sacred status.

Moreover, marriage has been understood to be both the reproducer and protector of broader American traditions defined by particular Christian religious and moral principles; sex-, sexual- and race-based hierarchies; and strict roles and responsibilities for citizens. As discussed in earlier chapters, social conservatives hold that the traditional heterosexual family, complete with father, mother and children, is the most foundational human relationship in society. Marriage, at least theoretically, assures permanence and influence of the relationship in society, the containment of sexuality, and the reproduction and rearing of children. Thus marriage, as a state-run institution, has been seen as a means to encourage, strengthen and protect the traditional family as a fundamental unit in society, and to thereby assure that a specific way of living is reproduced. The Mormon Church stated:

We call upon responsible citizens and officers of government everywhere to promote those measures designed to maintain and strengthen the family as the fundamental unit of society. (Protect Marriage 2010)

The people of the United States – acting either directly or through their elected representatives – have recognized the crucial role that traditional marriage has played and must continue to play in American society if children and families are to be protected and moral values propagated. (Mormon Church August 2008)

Also lauding the importance of marriage, the American Family Association asserted that marriage laws maintain the ‘health’ of families, children and the nation:

The disastrous results of 40 years of liberalized divorce laws show how monumentally important marriage laws are to the health of marriages, children, and the nation. (American Family Association August 2010a)

Thus according to these two organizations, marriage has been fundamentally important for the strength and health of society, civilization and the nation. By calling their supporters and the state to protect the culture and institution of marriage against moral decay, the social conservative organizations were actually asking its supporters and the state to see marriage as a vessel for the reproduction of a particular and necessarily dominant culture.

Protect Marriage made a similar plea to protect American culture, for the reproduction of a particular civilization, by defending traditional marriage:

As American jurisprudence has long recognized, marriage is the foundation of family and society, without which there would be neither civilization nor progress. Today, Californians and others must continue to protect and preserve traditional marriage to sustain American culture as we know it. (Protect Marriage July 2013a)

Protect Marriage, like the mainstream LGB organizations, also used the discourse of progress in relation to the role marriage plays in American society and culture. Like the mainstream LGB organizations, these social conservative organizations presented two possibilities for the future of American culture: either same-sex marriage would be legalized and consequently American heterosexual culture and morality would decay; or same-sex marriage would be banned and consequently American heterosexual culture would be able to progress and gain strength within the United States.

The remainder of this Chapter focuses on the social conservative organizations' efforts to protect their culture through marriage and education policies. In the next section, I survey and analyze the social conservative discourses, which emphasize the

reproductive function of marriage, and the mainstream LGB organizations' response to the social conservative assertions that homosexuals are both physically and morally incapable of reproducing the desired culture.

### **3. The Reproduction of Marriage Culture through Normal Future Citizens**

The social conservative organizations' appeal to the reproduction of future citizens was a major focus of their Proposition 8 campaigns between 2008 and 2013. On October 6<sup>th</sup>, 2008, one month before the vote, the anti-same-sex marriage coalition "Yes on 8" aired the television advertisement "It's Already Happened," which was commonly called "The Princess" advertisement. The Princess advertisement featured a young girl telling her mom that at school: "I learned how a prince married a prince and I can marry a princess!" The Princess advertisement was a significant moment in the 2008 campaigns, garnering unmatched media momentum and voter support for the anti-same-sex marriage position. In his 2010 report "The Prop 8 Report: What defeat in California can teach us about winning future ballot measures on same-sex marriage," David Fleischer, an affiliate of the L.A. Gay and Lesbian Centre, determined that the Princess advertisement was a turning point in the campaigns:

The most effective decision made by either campaign—the one with the biggest impact on the outcome—was Yes on 8's decision to appeal to anti-gay prejudice by dishonestly alleging danger to kids. Its most broadcasted ad, "Princes," and most of its other ads charged that schools would expose kids to inappropriate information about gay people. The Yes on 8 ads changed votes on Prop 8 even though they only peripherally concerned marriage. (Fleischer 2010, 11)

As Fleischer stated, it is notable that the Princess advertisement, and other social conservative advertisements discussed here, focused attention on children, procreation and education rather than on marriage itself. This tactic followed a long history – preceding even Anita Bryant's famous 'Save the Children' anti-homosexual crusades – of

social conservatives propagating discourses that cast homosexuals as dangerous predators of children. While these discourses functioned successfully, in part, because of their affective power, they were also significant because they regulated sexualities (of children and adults), delineated who is best suited to reproduce and raise future citizens, and reinforced the form and functions of the traditional heterosexual family as being unique and vital to the reproduction and strength of the culture/nation/civilization.

In this section I examine the nature and implications of discourses of the reproduction of culture through future citizens. Particularly, I analyze how the social conservatives asserted that homosexual couples were incapable (both biologically and morally) of reproducing the desired culture and future citizens, and how the mainstream LGB organizations reacted to these social conservative discourses by adopting and/or rejecting them.

### **3.1. On Homosexuals' Inability to Reproduce Normal, Moral Future Citizens**

Social conservatism posits that marriage is a personal, cultural, religious, reproductive and contractual relationship based on the notion that two citizens with the same cultural and religious values and morals should marry. Through marriage, they become bound by law, by cultural and religious obligation, by the task of reproducing, and by personal attachment and care (emotional, economic and health) for all members of the marital family. In theory, parents, who are endowed with the values, morals and roles of the desired culture, will raise children - future citizens - with the same cultural values, morals and roles. Thus according to social conservatism the rules governing who can enter into lawful marriage have far-reaching implications for the reproduction, strength and sustainability of citizens and cultures.

Some of the social conservative organizations involved in Proposition 8 argued that the primary function of marriage is procreation for the sake of the reproduction of their culture. *In The History of Sexuality: Volume I* Foucault states that the “socialization of procreative behavior” is a mechanism of power/knowledge centering on sex, which he describes accordingly:

A socialization of procreative behavior: an economic socialization via all the incitements and restrictions, the ‘social’ and fiscal measures brought to bear on the fertility of couples; a political socialization achieved through the ‘responsibilization’ of couples with regard to the social body as a whole (which had to be limited or on the contrary reinvigorated), and a medical socialization carried out by attributing a pathogenic value – for the individual and the species – to birth control practices. (Foucault 1978, 104-5)

Foucault asserts that sexuality is regulated, in part, as particular people are encouraged, by political bodies/forces, to procreate for the sake of the social whole, as opposed to their own ends. As such, sex, which is a private act, is rendered a public duty to the whole.

The social conservative organizations held that the unique form of heterosexual marriage – two ‘opposite-sexed’ partners – functioned by containing sexuality through chastity and monogamy, and then channeling sexuality toward procreation. For these organizations, marriage was by definition based on chastity before marriage and monogamy within marriage. Citing religious doctrine, the Mormon Church stated:

We believe the standard of morality is clearly defined and applies to all of God’s children. The Church teaches chastity before marriage and complete fidelity within a marriage. Marriage is also defined by God as the union of a man and woman, and we are not at liberty to change that definition. (Mormon Church July 2006)

Likewise, the National Organization for Marriage (NOM) quoted its former President and current board member, Maggie Gallagher, in an email to its supporters:

Fidelity, [Maggie Gallagher] establishes, is a key marital norm. [Gallagher] then lays out the detailed evidence that sexual fidelity is not very common in gay male unions, and then she does something I've never seen anyone do before. It's vintage Maggie. [Gallagher] asks a question nobody else asks: "Does sexual fidelity play the same role in same-sex unions?" The same, in other words, as it does for marriages? For husbands and wives, sexual fidelity points to all the goods of marriage: it protects our children, it protects the unity of the family, it points to marital satisfaction and it is a key ingredient in marital permanence. The norm of fidelity makes sense. Adultery is a violation of the essence of marriage, and tears at the fabric that holds it, and civilization, together. (National Organization for Marriage June 7, 2012)

Fidelity creates family unity, stability for children, and permanence in the relationship. Any violation of this sexual commitment was a threat to the strength of a marriage, which was ultimately a threat to the culture/civilization. While these statements on chastity, fidelity and monogamy were by no means new revelations of social conservatism, the connections they drew between marriage, heterosexuality and procreation were important because of what they revealed about the organizations' understanding of normal sex and sexuality, and the ideal citizen in relation to homosexuality.

Protect Marriage also promoted monogamy and fidelity through marriage, adding that same-sex couples are incapable of adhering to either of these values: "Same-sex marriage would likely corrode marital norms of permanence, monogamy, and fidelity." (Protect Marriage July 2013a) Both Protect Marriage and NOM cast homosexual men as naturally promiscuous, and therefore incapable of forming permanent, monogamous relationships. Again quoting Gallagher, NOM stated:

"Sexual infidelity doesn't work very well for opposite-sex unions because male sexual jealousy is a powerful disruptive force, because women tend to fall in love with ongoing sex partners, and of course because children regularly result," Maggie writes. "Men in same-sex relationships, by contrast, frequently find sexual novelty with outside partners helps them sustain their core domestic affection." Men cannot tolerate the idea of another man being with their wife. Gay men do not have this same problem. "This alone," Maggie writes, "is a powerful signal that in fact same-sex and opposite-sex relationships are dramatically

different kinds of sexual unions." (National Organization for Marriage June 7, 2012)

For Gallagher and NOM fidelity is maintained through heterosexual marriage because men and women's differing sexual and emotional characteristics are complimentary. Homosexual men are naturally promiscuous like their heterosexual counterparts; as such their relationships lack the possession and jealousy that are said to necessarily engender heterosexual marriages. Interestingly, such accounts failed to address whether two homosexual women have the same gendered tendency toward 'falling in love' with their sexual partners, making them well suited for the permanence and monogamy of marriage.

Mainstream LGB organizations rarely responded directly to social conservative assertions that gay men were by nature more promiscuous and thus unsuited for marriage. Some conservative gay activists, such as Andrew Sullivan, have tried to argue that marriage will condition homosexual men into fidelity, but this line of reasoning did not surface in the Proposition 8 debates. The only direct response from a mainstream LGB organization came from the American Foundation for Equal Rights (AFER). The AFER criticized a video from NOM in which NOM claimed, among other things, "same-sex marriage merely validates sex partners":

It takes a lot of nerve to make such an offensive statement. NOM's talking about families here. They're dismissing loving, committed couples as "mere sex partners," which goes beyond civil debate and enters the realm of invasive personal attack. It's unacceptable. (American Foundation for Equal Rights October 2012)

In their video, NOM stated that the legalization of same-sex marriage actually would validate or normalize homosexual sexual relations. Using the term 'sex partners' reinforced the claim that homosexual men were over-sexualized and non-committal as they engage in relationships merely for sexual gratification. The AFER countered by

claiming that homosexuals were in fact capable of engaging in loving and committed relationships. Mainstream LGB organizations tended to combat these negative characterizations of homosexuality by claiming that homosexuals can replicate the heteronormal ideal of fidelity and commitment, and are therefore suited to and deserving of marriage rights and protections.

Social conservative organizations, specifically Protect Marriage and NOM, also argued that homosexuals were incapable of engaging in monogamous, permanent marriage-type relationships, because they lacked the ability to selflessly engage in procreative sexual relationships. Marriage primarily existed for procreation, they argued, and procreation assured that marital partners' sexual urges were regulated and channeled toward moral ends.

Here's the way that marriage protects children: it regulates sex. The only way men and women attracted to the opposite sex can reasonably hope to protect their children by making sure they are united in one family with the man and woman who made them--is to FIRST enter a faithful, sexually exclusive, permanent sexual union. (National Organization for Marriage December 2010b)

Similarly, Protect Marriage also drew connections between channeling sex and sexuality toward procreative sexual relations, and containing sexuality within the marriage.

At the heart of this case are two competing conceptions of marriage. The traditional conception—which has prevailed throughout recorded history in virtually all societies—holds that marriage is by its nature a gendered institution. Its central purpose—its *raison d'être*—is to channel potentially procreative sexual relationships into enduring, stable unions for the sake of responsibly producing and raising the next generation. (Protect Marriage March 2013)

Later NOM added:

Marriage is society's best way to ensure the well-being of children (as I've argued at length in this space). State recognition of marriage protects children by encouraging men and women to commit to each other — and to take responsibility for their children. (National Organization for Marriage June 2013)

Protect Marriage also stated:

But more profoundly, same-sex marriage would further undercut the idea that procreation is intrinsically connected to marriage. It would undermine the idea that children need both a mother and a father, further weakening the societal norm that men should take responsibility for the children they beget. (Protect Marriage July 2013a)

If the primary goal of sexual relations is procreation, then we can extrapolate that chastity before marriage assures that procreation occurs only within the marital relationship, and fidelity within marriage assures that spouses are held responsible only for the offspring they create. Thus according to social conservatives, marriage regulated sexuality by delegitimizing non-procreative sexual relations, and marriage contained sexuality by holding both sexual partners responsible for their offspring, and thus bound to each other.

In what may seem like a challenge to the social conservative narrative that homosexuals cannot procreate and are therefore undeserving of exclusive marriage rights, the LGB organization AFER attempted to argue that certain homosexuals could fulfill the primary function of marriage. Again challenging a video by NOM the AFER argued:

It's not surprising that NOM gets their terminology so wrong, because their definition of marriage defies reality. Here's what NOM thinks marriage is: "Natural marriage creates children." No, sex creates children. There's a difference between sex and marriage. You don't have to be married to have children. And you don't have to have sex to be a parent. (American Foundation for Equal Rights October 2012)

Here the AFER attempted to sever the tie between marriage and procreation, arguing that procreation was not, in reality, contained within marriage. During the 2008-2013 campaigns, the mainstream LGB organizations seldom directly addressed the procreative capabilities of homosexual couples. Little attention was paid to homosexuals' abilities to 'produce' children, either through artificial means, procreation, past or current relationships, or adoption. Instead, as is examined in the next Chapter, the mainstream

LGB organizations focused on promoting that homosexuals were capable of being committed, loving, and monogamous couples, and were capable of raising healthy, moral children.

### **3.2. Homosexuals as Too Selfish to Take Responsibility for Future Citizens**

NOM and Protect Marriage continued by arguing that selflessness is required to engage in procreative sex and then take responsibility for one's offspring.

In their minds, marriage is only about adult relationships, with children as optional, for sure, and sometimes with permanence and fidelity as optional as well. Since marriage is already just about adults, they can't understand what the fuss is all about. Why not just include same sex couples in this more or less pointless vestigial social institution called marriage? They can't understand why the legal system doesn't catch up with the image of marriage they are already carrying around in their heads. They don't see that by continually defining marriage down, we are making marriage less and less able to perform its intended and necessary social function of attaching mothers and fathers to their children and to each other. And they don't seem to see that having a functional next generation is in everyone's interest. (National Organization for Marriage December 2010c)

NOM stated that homosexuals' inability to naturally procreate rendered them selfish sexual beings, incapable of tempering their sexual urges for the sake the needs of children and of society. Protect Marriage added that same-sex marriage activists were trying to fundamentally transform marriage from a social institution to one that existed for the 'often-fleeting desires of adults.'

The one social institution that centers on the needs of children rather than the often-fleeting desires of adults ought not be steamrolled by activists who are trying to use the United States Supreme Court to circumvent the will of the people and write the final chapter on the definition of marriage. (Protect Marriage June 2013)

These organizations intensified the connection between marriage and procreation by arguing that the primary function of marriage is not only procreation but also to fulfill children's needs over those of the adults in the family unit.

These arguments were based on a social conservative heteronormal citizenship regime, which holds that individuals should sacrifice their own needs and desires for the sake of community strength and unity. As the Mormon Church has stated, the government should take a vital interest in protecting heterosexual marriage, through every possible legal protection, in order to assure that children, or future citizens, would be birthed in the proper form of marriage, and would be raised properly:

When a man and a woman marry with the intention of forming a new family, their success in that endeavor depends on their willingness to renounce the single-minded pursuit of self-fulfillment and to sacrifice their time and means to the nurturing and rearing of their children. Marriage is fundamentally an unselfish act: legally protected because only a male and female together can create new life, and because the rearing of children requires a life-long commitment, which marriage is intended to provide. Societal recognition of same-sex marriage cannot be justified simply on the grounds that it provides self-fulfillment to its partners, for it is not the purpose of government to provide legal protection to every possible way in which individuals may pursue fulfillment. By definition, all same-sex unions are infertile, and two individuals of the same gender, whatever their affections, can never form a marriage devoted to raising their own mutual offspring. (Mormon Church August 2008)

Homosexuals were therefore incompatible with this social conservative heteronormal citizenship regime because they could not channel their sexuality toward unselfish ends, or procreate on their own, rendering them unable to contribute, in the most fundamental way, to the maintenance and strength of society. This reasoning ignored the fact that homosexuals could procreate through, for example, heterosexual sex or artificial insemination. Still for the Mormon Church, the government should not protect such selfish sexual relationships.

As outlined in Chapter Two, this call for governmental protections of particular sexual relationships evokes Foucault's descriptions of biopower in which states facilitate the reproduction of particular populations (Foucault 1997, 25-46). In this vein, Gallagher,

again representing NOM, argued that marriage was a public institution, regulated by laws, because of its procreative function:

The relationship between marriage and responsible procreation explains most of its key features under the civil law. Strip marriage of this public purpose, and it becomes, literally, unintelligible as a public, civil institution. (National Organization for Marriage December 2010b)

In reaction to the argument that some heterosexual married couples could not or choose not to procreate, Protect Marriage argued:

While it is true that some opposite-sex couples cannot, or choose not to, have children; throughout history, societies have chosen to forego the ultimately futile attempt to police fertility and childbearing intentions and have relied instead on the commonsense presumption that marital relationships between men and women are, in general, capable of procreation. (Protect Marriage July 2013a)

NOM and Protect Marriage furthered this argument by explaining that the state should actually have little interest in the private sexual lives of its citizens unless they were engaging in potentially procreative sexual relations.

While the government has little interest in two consenting adults who share a deep bond, it has a critical interest in a union that is capable of producing children. Just as government protects other fundamental concepts of ordered liberty, it has necessarily protected marriage to ensure that it exists to conceive and nurture healthy children that will sustain civilization. (Protect Marriage July 2013a)

By this account it does seem like the social conservative organizations asked the state to only concern itself with heterosexual sexual relations that were potentially procreative, as NOM further argued:

It is not unconstitutional for the government to treat different things differently. Whatever one thinks about homosexual relationships, they are not the same as the male/female relationship in their potential for creating children, which is why we have laws encouraging marriage in the first place. (National Organization for Marriage December 2012)

According to NOM, there were fundamental differences between heterosexual and homosexual sexual relations, and accordingly, the state should treat these relationships,

and the people who compose them, differently. Protect Marriage argued that the state should actually protect and promote heterosexual marriage because of its unique reproductive capabilities.

California has a vital interest in responsible procreation and childrearing. Because only relationships between men and women can produce children, and children are most likely to thrive when raised by the father and mother who brought them into this world, opposite-sex relationships have the potential to further—or harm—this vital interest in a way that other types of relationships do not. Therefore, government has distinguished opposite-sex couples and steered procreative unions into marriage. (Protect Marriage July 2013a)

These organizations tried to argue that the state's preoccupation with potentially procreative sexual relations means that non-procreative sexual relations would be free of government intervention and regulation, while heterosexual relations would continue to be actively promoted and protected by the government. Yet as Foucault argues, regulation of sexualities operates through exclusions as well as through inclusion. According to these social conservative definitions of marriage, with the banning of same-sex marriage, homosexual sex would always occur outside of marriage relationships. Thus homosexual sex would remain immoral at least as long as same-sex marriage remains illegal. Here marriage was actually being used as a tool to legitimize particular sexual relations while chastising and punishing other immoral or abnormal sexual relations. To encourage particular kinds of sexual relations, marriage has been promoted as necessarily exclusive, and rights and benefits have been offered to those who fulfill the desired functions of the institutions.

### **3.3. Future Citizens' Rights to a Mother and Father**

Several of the social conservative organizations called for further state intervention into the sexual lives of citizens by claiming not only that children, as future

citizens, are best raised with a mother and a father, but also that children have a 'right' to a mother and a father. Much of the discussion of the connection between marriage and children focused on children in terms of their future potential as adults and as citizens. Marriage assures that children are taught and practice the desired morals, values and traditions, which, in the case of the Mormon Church, are religious in nature:

Strong families serve as the fundamental institution for transmitting to future generations the moral strengths, traditions, and values that sustain civilization. (Mormon Church August 2008)

Beyond these very general pleas for the promotion of Christian religious values, emphasis was also placed on how marriage teaches children to be responsible adults.

Marriage is not primarily a contract between individuals to ratify their affections and provide for mutual obligations. Rather, marriage and family are vital instruments for rearing children and teaching them to become responsible adults. (Mormon Church August 2008)

Likewise the National Organization for Marriage pointed to the connection between the sustainment of society and the rearing of responsible adults.

Federal laws encourage men and women to marry and have children because society has a profound interest in ensuring that children are born (to continue society) and then raised by their parents to become responsible adults. (National Organization for Marriage December 2012)

Here language is often vague, leaving one to speculate whether they were referring to the future adults' responsibility to procreate future generations, and/or to care for and support their families.

In comparison, several organizations referred explicitly to marriage's function of producing future citizens. As might be expected, the Mormon Church embedded their religious values into the criteria for raising a proper future citizen who would contribute to their community's wellbeing:

[Children] learn to keep the commandments of God and to be good citizens. Such homes bless children and their communities. (Mormon Church 2013)

Also leaning on religious justification, Protect Marriage spoke of the need to raise proper, law-abiding, citizens who follow religious doctrine.

Parents have a sacred duty to rear their children in love and righteousness, to provide for their physical and spiritual needs, to teach them to love and serve one another, to observe the commandments of God and to be law-abiding citizens wherever they live. Husbands and wives—mothers and fathers—will be held accountable before God for the discharge of these obligations. (Protect Marriage 2010)

According to Protect Marriage, parents were held responsible, by God, for bearing and raising children, taking care of their physical and spiritual needs, and teaching them to abide by religious and state law.

Conservative organizations often evoked the need to raise children and future citizens with the proper values and morals, asserting that, by definition, homosexuals are intrinsically incapable of living according to these values and morals and incapable of passing on proper gender morals, values, roles and responsibilities to their children. Gender had a particularly important role to play in this set of assertions, because the gender of the individuals in the couple was presented as the main differentiator between homosexual and heterosexual partnerships. True to social conservatism, several organizations purported that men and women were complementary and necessarily performed different roles in the family and society.

Traditional marriage provides a solid and well-established social identity to children. It increases the likelihood that they will be able to form a clear gender identity, with sexuality closely linked to both love and procreation. By contrast, the legalization of same-sex marriage likely will erode the social identity, gender development, and moral character of children. Is it really wise for society to pursue such a radical experiment without taking into account its long-term consequences for children? (Mormon Church August 2008)

[...]

Strong, stable families, headed by a father and mother, are the anchors of civilized society. When marriage is undermined by gender confusion and by distortions of its God-given meaning, the rising generation of children and youth will find it increasingly difficult to develop their natural identity as a man or a woman. Some will find it more difficult to engage in wholesome courtships, form stable marriages, and raise yet another generation imbued with moral strength and purpose. (Mormon Church August 2008)

In both of these statements, the Mormon Church argued that a man and woman were both needed in a marriage in order to raise their children so that each child learned and performs the proper gender roles and responsibilities. Any deviation from this ideal model would harm the child through the distortion of their identity and position in society, and would harm society as citizens are incapable of engaging in heterosexual, procreative relationships with an ‘opposite-sex’ partner<sup>60</sup>. Without directly demonizing homosexuals, these social conservative organizations managed to allude to the immorality and abnormality, and ultimately the damaging effects of having homosexual parents. The social conservative organizations were enforcing the biological differences between men and women, while also arguing that gender roles and responsibilities must be taught. This tension between nature and nurture was also manifest in the social conservative organizations’ assertion that homosexuality could be taught, especially to youth.

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<sup>60</sup> During the Proposition 8 court cases, much attention was paid to alleged social, psychological, and religious needs for children to have both a mother and a father. As is addressed in Chapters Seven and Eight, experts in psychology and religious theory were called by both sides to attest these claims. During the Proposition 8 campaigns, the social conservative organizations also asserted that “Research has shown that placing children in homosexual households deliberately deprives children of either a mother or father and that children thrive and do best when being raised by their biological mother and father.” (American Family Association March 2013) The AFER offers an example of the mainstream LGB reaction to such arguments: “During the 2010 Prop. 8 trial, the Proponents inevitably tried to make the argument that the central purpose of marriage is procreation, and that the optimal environment for children in is with a mother and a father. Their claims ignored research on gay parenting, and the reality of many straight married couples who either choose not to have kids or can’t, in addition to children being raised by single or divorced parents.” (American Foundation for Equal Rights August 2012) Still, the court cases offer a richer discussion of the actual, research based, psychological and social harm that same-sex marriage inflicts on children, and as such I address the content and implications of the experts’ arguments that were put forward.

To further enforce the argument that children need to have a mother and a father, several of the social conservative organizations used rights discourse, stating that children ‘deserve,’ are ‘entitled to,’ or have a ‘right to’ a mother and a father. The National Organization of Marriage (NOM) was one of the most prominent mobilizers of this type of discourse. The discourse of children’s rights to a mother and father was a central focus of the organization’s 2013 demonstration at the Supreme Court.

More than 10,000 pro-marriage citizens from across the country and from every walk of life marched and rallied today peacefully in our nation's capital, rallying at the National Mall and marching to the Supreme Court with two simple messages: "Respect Our Votes!" and "Kids Deserve a Mom and a Dad!" (National Organization for Marriage March 2013)

Brian Brown, President of NOM said, "A diverse crowd of more than 10,000 marched today to show that those who protect marriage are on the right side of history. The Supreme Court has no right to redefine marriage and roll back the efforts of Americans to protect marriage as the union of one man and one woman, the only social arrangement that gives children the mother and father they deserve." (National Organization for Marriage March 27, 2013)

NOM specifically iterated that children have a ‘right’ to a mother and father.

This is our time... our time to send the message more loudly and more clearly than ever before — that the American people will stand up and defend marriage as the union of one man and one woman because they know that children have a right to a mother and a father. (National Organization for Marriage March 20, 2013)

Finally, NOM compared the rights of children to the democratic rights of voters:

This is an opportunity we simply can't miss, a chance to show like never before that the American people stand for *marriage* — stand for the *rights of children* to experience the love of both a mother and a father — stand for the *rights of voters* not to have marriage redefined against their will by out of control legislatures and activist judges. (National Organization for Marriage March 5, 2013)

The Mormon Church used more distinctly rights-based language by framing the discourse in terms of entitlement:

We, the First Presidency and the Council of the Twelve Apostles of The Church of Jesus Christ of Latter-day Saints, solemnly proclaim that marriage between a man and a woman is ordained of God and that the family is central to the Creator's plan for the eternal destiny of His children . . . The family is ordained of God. Marriage between man and woman is essential to His eternal plan. Children are entitled to birth within the bonds of matrimony, and to be reared by a father and a mother who honor marital vows with complete fidelity. (Mormon Church August 2008)

The Church's teachings and position on this moral issue are unequivocal. Marriage between a man and a woman is ordained of God, and the formation of families is central to the Creator's plan for His children. Children are entitled to be born within this bond of marriage. (Mormon Church June 2008)

The language of entitlement implies that children held a particular position in society for which they were entitled to particular benefits, protections and gender socialization. NOM quoted San Francisco Archbishop Cordileone, the "godfather of Proposition 8" who argued that the right of a child to have a mother and a father superseded certain citizens' demands for marriage equality, and an end to discrimination on the basis of sexuality:

"The marriage debate is not about equality under the law, but, rather, the very meaning of marriage. Marriage is the only institution that unites children with their mothers and fathers. Protecting this understanding of marriage is not discrimination, nor is it some kind of pronouncement on how adults live out their intimate relationships; it is standing for the common good." Then he went on to say something I don't hear very often: our love of equality should demand that we support marriage, which represents "the equal right of all children to grow up knowing and being loved by their mother and father." (National Organization for Marriage January 2013)

Further enforcing the notion that children's rights took precedence over homosexuals' rights, Brian Brown, NOM founder and president, compared the rights of children to a mother and a father to the civil rights movement.

In an interview I gave to NBC News recently, I told them point blank: "Same-sex marriage is not a civil right. To try and compare in any way the attempt to redefine marriage with the Civil Rights movement is simply false. I think that the president's forgetting about the most important organization affected by this and

their civil rights, and that's children having the civil right to have both a mom and a dad." (National Organization for Marriage January 2013)

As stated in Chapter Two, along with the comparisons of the same-sex marriage fight with *Loving v. Virginia*, same-sex marriage campaigns also debated whether the fight for same-sex marriage was analogous to the civil rights movement. Brown was using the civil rights movement as a marker of serious and important claims to rights in order to make the case that children's rights were as important as the civil rights movement while homosexuals' rights were frivolous in comparison to the two.

The use of rights discourse in relation to children is significant for several reasons. First, in these debates about raising children, attention shifted from same-sex marriage, and the claims of homosexuals, and to the needs of children. As discussed, sexuality and family form were regulated through these discourses, yet the discourses did not directly mention sexuality, homosexuality, homosexuals and/or same-sex marriage. Instead, the genders of the parents were discussed frequently thereby evoking the abnormalities of the heterosexual relationship. By continuously enforcing the moral, healthy, and normal nature of the male/female two-parent marriage, these discourses successfully cast homosexuality, and other non-heterosexual family forms, as other and as less than, and as unworthy of state protections, rights and benefits.

Second, these organizations redefined the stakes of the marriage debate by creating a hierarchy of rights: either homosexuals were given same-sex marriage rights, or children's rights to a mother and father were upheld. Consequently homosexuals' "right to marriage" is given a lower priority. Of course children do not have a formal, legal right to a mother and a father, though there are custody, adoption, and child support laws that are premised on the heteronormal model. Still, the affective power of evoking

the needs of children was proven to be quite formidable. Here the child was cast as an innocent bystander with the potential to be a heterosexual, reproducing, contributing member of society. The homosexual, on the other hand, already failed as a proper citizen – because of his/her inability to reproduce moral, healthy, productive citizens, among other things – and accordingly, it was argued that the future citizen should be given rights at the expense of the failed citizen.

Third, prioritizing the rights of children to a father and a mother augmented the role and status of the heterosexual family in society. In various national and international contexts, children's rights actually include rights to education, basic health care, potable water, food, and freedom from abuse, neglect and exploitation. Social conservative discourse of children's rights did not rely on such liberal discourses of state intervention to assure a minimum standard of living for children. Rather, this brand of privatized children's rights discourse implied that a mother and a father, the heterosexual family unit, is the only right that needs to be afforded to children because the family can and should fulfill all of the needs of the child including, we can assume, their basic needs as well as their spiritual, moral and gendered needs. The heterosexual family is thus reaffirmed as the base unit of society and the producer of the desired population and culture.

The discourses of rights, justice and entitlement were the terrain of mainstream LGB organizations in the Proposition 8 case and in other same-sex marriage fights in the United States. The next chapter focuses on the mainstream LGB organizations' assertions that the legalization of same-sex marriage was an appropriate avenue for the allocation of

certain rights and protections, and for the attainment of equal citizenship<sup>61</sup>. Ultimately, therefore, the use of rights discourses by the social conservative organizations in relation to children was detrimental to the mainstream LGB organizations' fight because the mainstream LGB organizations ceded the discursive terrain of sexuality, rights and children to the social conservative organizations. As the social conservatives argued, homosexuals' tendency toward promiscuity and non-committed relationships, their inability to physically reproduce offspring, and their failure to replicate proper gender roles, are three of many signifiers of their general immorality, their disregard for social values, roles and responsibilities, and their failure as citizens.

#### **4. Same-sex Marriage, Education and Future Citizens**

If same-sex marriage were to be legalized, it was warned, homosexuals would also be able to harness the power of public education to legitimize, promote and reproduce their lifestyles and sexualities among future citizens. As with marriage, public education is an institution through which culture is taught, despite governmental insistence that public schools teach universal and neutral values devoid of cultural values. Historically, the traditional heterosexual marriage has been presented, in schools as in broader society, as the normal, universal and proper family form. Accordingly, an interesting relationship has developed between the institutions of public education, and families and marriage: while the family is the primary institution through which cultures are produced and reproduced, public schools are an important institution for

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<sup>61</sup> As is also discussed in the next Chapter, the social conservative organizations used rights discourse throughout the campaigns and trials, most prominently in regard to the voting and democratic rights of citizens in the context of the Proposition 8 referendum and subsequent court challenges.

disseminating culture, including the culture of the family<sup>62</sup>. As such, social conservatives took an interest in regulating which cultures should be reproduced in public education.

#### **4.1. Using Public Schools to Promote Heterosexual Marriage Culture, Not Homosexual Sexuality**

Typically, the social conservatives' interests lie in trying to defend religious teachings in public schools – especially the social conservative issues of prayers in schools, abstinence-only education and creationism. However, for the American Family Association and others, the legalization of same-sex marriage could open the door to other domestic policy changes, specifically education policy.

There are huge implications for domestic policy, for education policy (what views of human sexuality will be taught to schoolchildren, for instance), for tax policy, and for military policy (gays in the military, for instance) depending upon how society resolves this issue. (American Family Association August 2010b)

We oppose the efforts of the homosexual movement to force its agenda on our sentiments in schools, government, business and workplaces through law, public policy and media. Our strong opposition is a reaction to the homosexual movement's aggressive strategies. (American Family Association 2013b)

Likewise, Protect Marriage argued that the legalization of same-sex marriage would create a domino effect on other social policies.

In November 2008, California voters achieved an important victory by passing Prop 8. However, same-sex marriage activists continued to attack traditional marriage through legislation, our local school districts and other means. In order to stand against these threats, the ProtectMarriage.com Action Fund was established in 2009. (Protect Marriage July 2013b)

Same-sex marriage was thus positioned as the edge of the wedge of the gay agenda that would transform the military, work, education, and tax policies. Once same-sex marriage

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<sup>62</sup> Churches are of course an important institution through which culture is reproduced and traditional families are supported, but public schools hold a different position in society as they are publicly funded, and as all future citizens are required to receive some form of formal education, the majority of which is publicly administered.

was legalized, they argued, the gay movement would be able to better influence media, law and public policy toward the ends of gay Americans.

In their advertising campaigns specifically, the social conservative organizations shifted attention away from same-sex marriage itself, and instead argued that same-sex marriage was dangerous because of its potential impacts on children and public education. According to David Fleischer's report for the L.A. Gay and Lesbian Center, this discursive strategy was the 'Yes on 8' campaigns most successful argument, and it was not adequately challenged by the 'No on 8' campaign before the November 2008 vote.

Almost three-quarters of the net movement toward the ban was among parents with kids under 18 living at home. Approximately 500,000 of them moved away from us. The lesson of the Yes on 8 campaign: when parents hear that their kids are in danger, even if it's a lie some of them believe it—particularly when the lie largely goes unanswered. (Fleischer 2010, 11)

Fleischer further explained that the focus on public education, and the attendant message that children are in danger, was the main argument propagated on the social conservatives' television advertisement campaigns: "All of its six widely broadcasted ads reinforced the same message." (Fleischer 2010, 74)

Most powerful and successful among these was the 'Princess' advertisement, as previously discussed. This advertisement contained many of the arguments and themes that have comprised the social conservatives' discourses of the wellbeing of children: once same-sex marriage was legalized, the state would require teachers to teach that same-sex marriage is acceptable; homosexuality would be normalized through public education, and consequently children may become confused about their own sexuality; and parents would have no right to object to, or control, what their children were taught.

As with the Princess advertisement, several organizations warned that the legalization of same-sex marriage would force teachers to teach that same-sex marriage was equal to heterosexual marriage. The American Family Association:

Prop 8 protects our children from being taught in public schools that “same-sex marriage” is the same as traditional marriage. State law may require teachers to instruct children as young as kindergarteners about marriage. (Education Code § 51890) If Prop 8 is not passed, teachers could be required to teach young children there is no difference between gay marriage and traditional marriage. Same-sex marriage is an issue for parents to discuss with their children according to their own values and beliefs. (Protect Marriage July 2013c)

The Mormon Church warned that children would be taught that traditional marriage was equivalent to the relationship between ‘any two adults.’

When the state says that same-sex unions are equivalent to heterosexual marriages, the curriculum of public schools will have to support this claim. Beginning with elementary school, children will be taught that marriage can be defined as a relation between any two adults and that consensual sexual relations are morally neutral. Classroom instruction on sex education in secondary schools can be expected to equate homosexual intimacy with heterosexual relations. (Mormon Church August 2008)

The domain of heteronormativity and privilege would thus be threatened as it was opened up to homosexual couples.

As well, the Mormon Church asserted that the legalization and normalization of same-sex marriage would lead to young children being taught about homosexual sexual relations. This line of reasoning was replicated in two other prominent advertisements. The first such advertisement opened by showing a newspaper, and a cup of coffee. It featured a conversation between a woman and a man.

Woman: “Honey, have you read this article about Proposition 8?”

Man: “Prop 8. Which one is that?”

Woman: “It’s the one that will protect traditional marriage.”

Man: “Oh ya. What’s the deal with that?”

Woman: “Well let’s see here it says ‘Unless Proposition 8 passes, children will be taught about same-sex marriage in public schools.’”

Man: "Really? I didn't know that."

Woman: "And not only that, it's going to require that sex education classes include talking about well, you know, gay and lesbian relationships."

Man: "Whoa Whoa too much information. Look, I am all for being tolerant but isn't that going too far?"

Woman: "Ya I think so and I think you're going to get to answer the kids' questions when they come home from school that day."

Man: "Thanks a lot."

Woman: "No, seriously. I think this kind of stuff needs to be talked about at home not as part of the public school curriculum."

Man: "No wonder both the Obama and McCain campaign support traditional marriage."

[A picture of several teenaged children is shown.]

Narrator: "Over nine million Californians won't be voting this November. Shouldn't the needs of California's kids be considered? Vote 'yes' on 8." (Mormon Church August 2008)

The second advertisement took place in a classroom. A male teacher walked in and began talking to a female teacher:

Male teacher: "I can't teach this."

Female teacher: "Don't be irrational Terry. That new health curriculum represents millions of dollars of tax payer money."

Male teacher: "No matter how you spin it Joan, children don't come from same-sex relationships."

Female teacher: "I don't like this anymore than you do but we're going to have to teach that marriage is not just about having children."

Male teacher: "Fine. Look, love whatever you want, whom ever you want, just don't call it marriage and confuse a kid with a social dynamic that they can't possibly understand."

Female teacher: "Our hands are tied here Terry."

Male teacher: "I became a teacher to mold the child, not mess him up."

Female teacher: "You're preaching to the choir."

Male teacher: "Joan, kids don't get divorce, let alone gay attraction."

Female teacher: "I hear you."

Male teacher: "The definition of marriage doesn't need to be changed. Marriage has never denied gay couples the rights to live as they choose."

Female teacher: "You've been here for 19 years Terry. Are you sure you want to take a stand on this hill?"

[A phone rings twice.]

Male teacher: "Do I have a choice?"

[Phone rings again and female teacher picks it up. Their conversation stops.]

Narrator: "Proposition 8 defines marriage as only between a man and a woman. Gay couples lose none of their rights and privileges. Vote 'yes' on Proposition 8." (Protect Marriage October 2008)

These two advertisements stirred fear by focusing more on homosexual sexual relations than on same-sex marriage. In the second advertisement, multiple euphemisms appealed to anti-homosexual sentiment, and were used to allude to the abnormality of homosexual sexual relations. These arguments were premised on the belief that homosexuality was primarily about sexual relations, as opposed to reproductive, family building relationships, and that homosexuality was taught and learned, as opposed to being biologically or developmentally determined. Such arguments were used for decades to produce and instill fear that homosexuals, especially male homosexuals, are predatory and seeking to lure people, particularly young people, into homosexuality.

While this brand of fear mongering has been challenged by LGB organizations since the birth of the homophile movement in the 1950s, there remained substantial affective power in this discourse. This discourse, however also has shifted over the past sixty years. In both advertisements the speakers asserted that they are not against homosexuals, but are against the acts of homosexuality. While voters were becoming increasingly tolerant of homosexuals and consequently same-sex marriage, the tolerance did not extend to the acceptance of homosexual sexuality and sex. These social conservative advertisements thus capitalized on this fault line in tolerance by evoking thoughts of salacious, abnormal and dangerous homosexual sex in contrast to innocent, pre-sexual, and malleable future citizens.

#### **4.2. The Mainstream LGBs' Failure to Address the Education Discourses**

The 'No on 8' campaign only released one advertisement that directly addressed the accusations that same-sex marriage would lead to public schools being forced to teach children about homosexuality. The response, however, came sixteen days after the

Princess advertisement was first aired. In such a short campaign, sixteen days was a long period of time. As Fleischer proposed, the delay in direct response may have been because the ‘No on 8’ campaign was unprepared for the children and education argument, the campaign may not have had enough money to produce and air a rebuttal, and the campaign chose instead to focus its advertisements on other discourses such as rights and equality. Yet same-sex marriage campaigns in other states, such as Massachusetts, had already faced this line of discourse, therefore Californian organizations should have been aware that such arguments would surface in the Proposition 8 battles. Fleischer said that the most likely reason why the ‘No on 8’ campaign failed to properly respond to the children and education discourses was because, like their predecessors, they misjudged the power of the children and education discourses, and they thought it would be more effective to avoid the topic than to give it legitimacy by addressing it (Fleischer 2010, 73).

The ‘No on 8’ campaign responded with the ‘O’Connell’ advertisement from October 22<sup>nd</sup> to 30<sup>th</sup>, which featured State Superintendent of Schools, Jack O’Connell, debunking the ‘Yes on 8’ campaigns’ claims about the passage of Proposition 8 leading to same-sex marriage and homosexuality being taught in California schools.

Narrator: “Have you seen the TV ads for Prop 8? They’re absolutely not true, says California Superintendent of Schools.”

Superintendent of Schools, Jack O’Connell: “Prop 8 has nothing to do with schools or kids. Our schools aren’t required to teach anything about marriage, and using kids to lie about that is shameful.”

Narrator: “That’s why California teachers and every major newspaper say ‘no’ on Prop 8. Because regardless how you feel about marriage, it’s wrong to eliminate fundamental rights. No on 8 – unfair and wrong.” (Los Angeles Gay and Lesbian Center October 2008a)

Similarly, a flyer, released in 2008 by the ‘No on 8’ campaign, sought to dispel the social

conservative organizations' claims:

Prop 8 has nothing to do with education – this is just a scare tactic.  
Nothing in our state education laws requires children to be taught anything about marriage.  
Local school districts set policy about health and family curriculum, and all parents have the absolute right to opt out of any classes that they oppose on religious or moral grounds. (Fleischer 2010, 426)

Notably, the O'Connell advertisement and the flyer did not open the debate about whether it was desirable or detrimental to teach children about diverse families, and different sexualities. Instead the O'Connell advertisement used an expert witness to deny the assertion that same-sex marriage, and marriage in general, were taught in the California school curriculum, while the flyer reaffirmed the rights of the parents to control the content of their children's learning, effectively ceding this discursive ground to the social conservative side.

Several Proposition 8 organizations were aware of the power of the children and education discourses and the Princess advertisement in particular, and proposed strategies for addressing such discourses. Months after the Proposition passed, the LA Gay and Lesbian Center interviewed Fleischer in order to discern how same-sex marriage advocates could effectively respond to children and education-focused discourses. The interview, which was featured in the Centre's monthly newsletter *The Vanguard* in November of 2010, laid out several possible concerns and responses for Proposition 8 canvassers and activists:

Concern: Could learning this stuff make my child gay or lesbian? Response: Ads in which doctors or other credible experts explain that sexual orientation doesn't change when children learn that gay people exist.

Concern: Would kids see sexually explicit materials at school? Response: of course not. Schools care about using only age-appropriate materials.

Concern: I don't want to answer uncomfortable questions. Response: Kids go to their parents with all kinds of questions, including questions about LGBT people; marriage equality isn't going to change that. (Los Angeles Gay and Lesbian Center November 2010)

These suggested responses did address the nature of sexuality, specifically whether sexuality can be taught, and whether children's sexuality can be changed. To these ends, canvassers and activists were told to assert that sexuality was not taught and learned. It can be assumed that these responses were suggested in order to ease parents' fears that homosexuals were predatory and/or seeking to convert children to homosexuality. Ultimately, however, those engaged in fighting for same-sex marriage, were told to assure fellow citizens that sexuality, and homosexuality in particular, was static and containable. The mainstream LGB organizations were not seeking to open a discussion about the nature of homosexuality (its potential fluidity or evolution), and they were certainly not asking to expand society's understanding of sexualities beyond heterosexuality and homosexuality. Rather, effort was expended trying to convince voters that same-sex marriage would not challenge, expand or disrupt society's understandings and teachings of sexuality, and it would not threaten their future citizens.

## **5. Conclusion**

The discourse analysis of the public documents of the ten organizations demonstrated that over the course of the five-year battle of Proposition 8, the social conservative organizations constructed the issue as a battle over how the legalization of same-sex marriage would affect the culture of marriage and future citizens. The social conservative organizations set the terms of the discussion as they cast same-sex marriage as a threat to American morality, society, nation and civilization. They argued that

marriage necessarily excludes homosexuals in order to assure that the proper morals, roles and responsibilities, and future citizens were reproduced and protected.

The discourses of children, education and marriage successfully created a turning point in the 2008 campaigns. Regarding future citizens, as the carriers of culture, the anti-same-sex marriage organizations built on longstanding anti-homosexual fears that homosexuals were immoral, immature, and promiscuous, they were unable to replicate proper gender roles, and they were unable to replicate the ideal family model. Ultimately, homosexuals failed as citizens because they could not reproduce future citizens who have been reared with Christian culture, and its values and morals. The state, therefore, should not legalize same-sex marriage because the status, rights and benefits that come with marriage would legitimize homosexuality, and facilitate the reproduction of homosexual 'culture.' This argument was reinforced through the social conservative organizations' assertion of a hierarchy of rights, which held that children's rights to a mother and a father trump homosexuals' rights to marriage. In setting up this antagonism between children and homosexuals, the social conservative organizations gained ground in rights discourses, which have been the territory of mainstream LGB organizations.

While the mainstream LGB organizations engaged with this social conservative discourse, the engagement largely took place on the social conservative organizations' terms. When the social conservatives attempted to ignite voters' fears by warning that homosexuality and homosexual sex would be taught in schools, the mainstream LGB organizations effectively agreed that homosexuality, and in fact all sexuality, was too salacious and therefore it should not be discussed with or taught to America's future

citizens. The mainstream LGBs could have used this moment to reframe the debate and to encourage open and honest discussions of sexuality in the public sphere, as gay liberationists and queer activists have encouraged. Instead the pro-same-sex marriage organizations assured voters that sexuality is a private matter that would not encroach into the public sphere. This, despite the fact that the public institutions of marriage and education have long been the battlegrounds of cultural reproduction and sexual regulation. As I argue in the next chapter, the pro-same-sex marriage organizations focused on proving that homosexuals were upstanding and normal citizens who deserved the heteronormal marriage rights, protections and benefits, and equal citizenship, despite their sexuality.

## **Chapter Five: Discourses in the 2008-2013 Proposition 8 Campaigns: No on 8**

### **1. Introduction**

This Chapter deals with four of the themes of the public documents of the mainstream LGB organizations of Proposition 8: 1) the importance of same-sex marriage in LGBT history; 2) the social benefits of same-sex marriage; 3) the instrumental and rights-based benefits of same-sex marriage; 4) the normalization of homosexual couples through discourses of love. For the first six months of the campaign, Californian same-sex marriage organizations relied heavily on instrumental, progressive and liberal language including dignity and respect, rights, discrimination, protection, equality, and justice and fairness. Throughout the 2008 Proposition 8 fight, anti-Proposition 8 organizations learned that these rights discourses did not resonate with voters (Fleischer 2010). After Proposition 8 passed in November 2008, and once the *Perry v. Schwarzenegger* challenge to the proposition was launched in 2010, organizations supporting same-sex marriage developed a more coherent and focused discursive framework. Specifically, same-sex marriage organizations, and their members, began to adopt heteronormal social conservative discourses and strategies by employing the affective power of family and specifically love, as opposed to the legalistic arguments of rights and equality. Thus the discourse of love and marriage was produced and deployed by the mainstream LGB organizations to humanize and normalize the LGB citizens who stood to benefit from the legalization of same-sex marriage.

Proposition 8 was unique because the impulse to prove the normality of homosexuals simultaneously overshadows and veils the rights, equality, and justice arguments. As I detail in the second section of this chapter, discussions of rights,

equality, justice and dignity were presented superficially: the majority of the organizations relied on these discourses while rarely enumerating the rights that are administered through marriage, and seldom making the case for why these rights should be administered through marriage. This kind of superficial argumentation is of course the nature of such political campaigns<sup>63</sup>.

In the second half of this Chapter, I argue that the shift to love and marriage discourses did not replace the goal of attaining rights and protections through marriage. Rather, the love and marriage discourses were used in order to establish that homosexuals were normal citizens, were able to form marriage-like relationships, and were thus worthy of attaining the rights, protections and equal citizenship that are administered through the private institution of marriage. I problematize these normalizing and assimilating discourses for two main reasons: the discourses legitimized and bolstered the regulation of sexuality and family form through marriage; and the discourses created new exclusions, and thus denied social justice, to those who could not assimilate to the new, heteronormative, same-sex marriage.

## **2. The Importance of Same-sex Marriage in LGBT History**

While the social conservative organizations framed the same-sex marriage fight as a culture war, the same-sex marriage supporters named and defined their opposition in others ways: being either for or against equality, freedom and justice; and/or being either on the ‘right side’ or ‘wrong side’ of history. Each of these arguments demonstrated the mainstream LGB organizations’ reverence for the institution of marriage. This characterization of a ‘right side’ and ‘wrong side’ was a revisionist interpretation of

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<sup>63</sup> In the next chapter I explore these discourses as political strategy, finding that elite organizers recognized that voters were not receptive to engaging in debates about the specific rights that are allocated through marriage.

American history, invoking an equality motif based on the notion that the United States has been on a steady trajectory of citizen inclusion and affording those citizens with rights and protections, and equal citizenship. Despite the fact that this portrayal of American history was simplistic, idealistic and inaccurate, the mainstream LGB organizations used it to argue that the legalization of same-sex marriage, and the corresponding acceptance of certain homosexual citizens, was the most important next step in this march toward equal citizenship for all citizens. In a public statement Rick Jacobs, founder and chair of the Courage Campaign, responded to a brief in which President Obama stated that his administration does not support Proposition 8:

We applaud President Obama for standing-up for millions of Californians who simply want to marry the person they love. The two Supreme Court cases this summer will be a watershed moment for equality and President Obama has put his Administration squarely on the right side of history. Last November, voters from Maine to Washington stood up for equality. Now it's time for the Supreme Court to catch up with the American public. Discrimination and hatred have no place in a country founded on the principles of liberty, justice and equality. (Courage Campaign February 2013)

According to Jacobs, President Obama's support of same-sex marriage was an indication that the Obama Administration was on the 'right side of history.' This 'right side of history' has been defined by the acceptance of ever more citizens, who 'simply want to love their partners,' and the allocation of the founding American principles of equality, liberty and justice to these citizens.

The Los Angeles Gay and Lesbian Center (L.A. Gay & Lesbian Center) set the terms of the debate as a struggle for historic equality and justice, against the 'bigoted,' 'extremist' opponents to same-sex marriage. The L.A. Gay & Lesbian Center described this fight in a public response to the June 2013 Supreme Court decision in *Hollingsworth et al. v. Perry et al.*:

As California becomes the 13th state (along with Washington, D.C) where same-sex couples can marry, we celebrate a monumental and historic victory for justice and equality, and a rejection of the bigoted, divisive politics that took this freedom from us 56 months ago. (Los Angeles Gay and Lesbian Center June 2013a)

Likewise, in 2008 at the beginning of the fight against Proposition 8, the L.A. Gay & Lesbian Center, stated:

Defeating Prop 8 will spell the beginning of the end for extremist efforts to deny LGBT people our rightful place in society. On the other hand, passage could set back our quest for full equality for a generation. That is a risk we cannot take. (Los Angeles Gay and Lesbian Center October 2008b)

The L.A. Gay & Lesbian Center constructed only two possibilities for the LGB equal citizenship project: either same-sex marriage was legalized and certain LGB citizens took their “rightful place in society;” or same-sex marriage was banned in the state and the historical progression of equality for certain LGB citizens was stalled for a generation.

Thus the mainstream LGB organizations positioned the legalization of same-sex marriage as being a critical moment in American LGBT history. Throughout the Proposition 8 campaigns, LGB organizations referenced past events, challenges and victories in order to create solidarity within the community, to motivate supporters, and to reinforce the importance of Proposition 8, and same-sex marriage. While the issue of same-sex marriage was prioritized within the mainstream LGB movement in the mid 1990s, many same-sex marriage organizations presented past LGBT movements’ events as being the prologue to same-sex marriage, despite the fact that the majority of the named achievements were fought with no reference to, desire for, or anticipation of the eventual legalization of same-sex marriage.

The 1969 Stonewall riots are said to have galvanized America’s modern LGBT movement, and as such they hold much historical, political and affective power among

LGBT communities. Several of the organizations compared the Stonewall riots to the fight for same-sex marriage, claiming that the two events marked moments of community building, political action, and the further achievement of equality and liberty. The L.A. Gay & Lesbian Center stated “thousands of people have attended rallies, sparking actions across the county. With the energy around this effort, the fight is emerging as this generation’s Stonewall” (Los Angeles Gay and Lesbian Center December 2008). Members of Join the Impact called the fight for same-sex marriage “Stonewall 2.0” (Join the Impact November 2008a). Rea Carey, Executive Director of the National Gay and Lesbian Task Force (NGLTF) said in her 2009 *State of the Movement* address:

Let us recall that our movement for liberation and equality has created much change since the police brutality in New York and other cities gave rise to the Stonewall riots, the activism of black and Latino gay men, and the birth of the modern LGBT movement. If we do not come together again to fight another day, we can’t win our full equality. (National Gay and Lesbian Task Force January 2009)

Referring to the police brutality during the Stonewall riots, Carey appropriated and redefined the Stonewall story as a fight for equality. Ironically, the Stonewall riots and ensuing liberation movement championed liberation over equality while same-sex marriage championed equality over liberation. Still, these same-sex marriage organizations presented the Stonewall riots as the first step toward same-sex marriage:

The generation that fought for us in 1969 deserves our gratitude and respect. This is a generation of amazing people who fought for our ability to hold hands in the street, to speak out against hate, to dance to our own “thumpa thump,” witness television shows with a queer cast, and come together in the streets celebrating for an entire month! This is the generation that opened the doors for us to even have a conversation about gay marriage, and this is the generation that deserves our help and our voices now. (Join the Impact November 2008b)

Here past generations were cast as rioting at Stonewall so that future generations could, among other things, fight for same-sex marriage.

Cleve Jones, one of Harvey Milk's friends and fellow activists, spoke on behalf of the Courage Campaign on several occasions in support of Proposition 8. Referencing another key moment in American LGBT history, Harvey Milk's activism and political career, Jones made the case for donations to the Courage Campaign:

I know if Harvey was here, he'd be proud of the work we've done -- but he'd also remind us of just how much more there is to do. That's why I am making a \$100 contribution to the Courage Campaign Institute in Harvey Milk's honor. (Courage Campaign December 31, 2010)

It is impossible to determine whether Harvey Milk would have supported same-sex marriage. To my knowledge, he never spoke of the issue publicly. Moreover, it is known that he was a liberationist, seeking to challenge social norms instead of asking for social acceptance. Still, his iconic status in LGBTQ history was harnessed in support of same-sex marriage in California. Jones then placed Proposition 8 in the context of forty years of LGBT history, and specifically its contribution to the "equality movement":

I've been in this fight for 40 years. From helping to elect my friend Harvey Milk, to creating the AIDS Quilt, to the National Equality March, I've seen a lot, but I've never seen a year like this one. From DADT Repeal, to the defeat of Proposition 8 and DOMA in Federal Court, 2010 has been a year of historic milestones for the equality movement. (Courage Campaign December 31, 2010)

In her 2009 *State of the Movement* address, NGLTF Executive Director Rae Carey also placed Proposition 8 and the same-sex marriage fight in a broader historical context:

This historic moment plays to our strengths. After all, our community built an entire infrastructure of service and support for people with HIV when our own president did not have the decency to speak the syndrome's name. Our community overturned sodomy laws in a nation that possesses an intense fear of sexuality. And our community put gender identity legislation and family protections on the political map. We have much to offer this country. So, now it is our time to contribute again — to express moral leadership and creative fortitude. It is our time to hold steady as we are attacked at the ballot box and on the streets. To hold steady as we share our talents and ideas and are pushed back. To hold steady as we assert how we create family. (National Gay and Lesbian Task Force January 2009)

The AIDS Quilt, the National Equality March, and the repeals of DADT, DOMA and Proposition 8 could all be categorized as “equality seeking” actions as they sought to integrate ‘deviant’ LGB citizens, be they HIV/AIDS-positive, workers, military personal, and/or couples seeking marriage. Yet the last forty years of LGBTQ social and political organizing cannot be reduced to these “equality seeking” actions, much less characterized as one equality-seeking movement. For example, the radical community building that took place at the onset of the HIV/AIDS crisis occurred predominantly to ensure the survival of people who had experienced ostracization from society and from the mainstream LGB movement because of their race, class, gender and/or sexuality<sup>64</sup>. The radical alternative care communities were built not to seek inclusion in mainstream society but to challenge and surmount the mainstream LGB movement’s attempted assimilation into society (Brandt 1988).

These references to different critical moments in American LGBT history produce multiple effects: forty years of LGBTQ social and political history was re-interpreted to reduce the movement to these equality-seeking efforts and victories; same-sex marriage, as manifest through Proposition 8, became legitimized as the final and universal goal of LGBTQ political and social organizing in the United States; same-sex marriage was singled out as the only route to rights and protections, and equal citizenship for LGBTQ citizens; and the mainstream LGB organizations’ reverence for and commitment to the

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<sup>64</sup> Since its emergence in the 1980s, HIV/AIDS has disproportionately affected and led to the death of people living in poverty (because they have had limited access to medical care and medication, and social supports and care) (Snider et. al. 2014); people with “abnormal” sexualities and genders (because of their experiences with discrimination in employment and housing, their consequent lack of access to medical care and medication, and social supports and care, and their rejection from supports systems based on families of origin) (Brandt 1998); and people of colour (because of their experiences with discrimination in employment and housing, over-representation in the criminal justice system, and their consequent lack of access to affordable medical care and medication, and social supports and care) (Geary 2014).

culture of marriage, and the heteronormal citizenship regime is demonstrated. Thus both sides agreed that there will be different outcomes for American society if same-sex marriage is legalized: ranging from moral decay to a denial of equal citizenship; and from the stalling of American progressive rights history to the end of social conservative culture. I argue, however, that they both reproduced the same kind of culture of marriage, and thus a similar heteronormal citizenship regime, as both sides held a common investment in and support for the institution of marriage as fundamental in American history, society and governance.

### **3. Normal Citizens Deserving of Rights**

Before I detail and analyze the shift from rights discourses to love discourses, it is important to place these discourses in their historical context within the mainstream LGB movement. Beginning in the 1990s same-sex marriage advocates pointed to the unjust and unequal social and political realities facing LGB Americans. They further argued that the denial of the status and title of marriage exacerbated inequality and injustice by relegating same-sex couples to second-class citizenship status, perpetuating the notion that homosexuality and homosexuals were inferior (Richardson 2005). In terms of legal strategy, same-sex marriage advocates and their lawyers argued that marriage served as an ideal solution for the social and political inequalities that engendered homosexual life, and that homosexuals were capable of assimilating to normal standards of sexuality and family form. Ultimately, these discourses of assimilation, injustice and inequality, and the instrumental benefits of marriage did not sway many state courts throughout the 1990s (D'Emilio 2007; Lucas 2007). Moreover, the current American liberal rights model is flawed, in part, because the burden of proof rests with oppressed marginalized groups to

prove they do experience discrimination, neglect and/or violence at the hands of the state and/or fellow citizens, and that they are worthy of rights, which will theoretically mitigate future oppression. Still, the rights, equality and justice discourses engendered same-sex marriage advocates' strategies throughout the 2000s.

### **3.1. Social Benefits: Marriage as the Route to Social Acceptance and Status**

With specific regard to the Proposition 8 campaigns, I argue that the mainstream LGB organizations made the case for rights, equality, justice, and dignity discourses by arguing that homosexuals can assimilate to the ideal citizens, by way of replicating the heteronormal marriage form and function. The mainstream LGB organizations attempted to make the case that homosexuals are normal, upstanding citizens who deserve respect and dignity.

We represent two loving and committed couples. In many ways, our clients' relationships are indistinguishable from our own: They have lives and homes together, they are raising children, they have jobs, they pay bills, they run errands. They experience together many of the joys and sorrows and laughter of life as a family in America. (American Foundation for Equal Rights March 2013a)

According to these mainstream LGB organizations, homosexuals were already assimilating to the heteronormative family model. By legalizing same-sex marriage, they argued, the state would be legitimizing and normalizing homosexuality, or at least homosexuality that fits into a marriage, and as such the state would be elevating homosexuals to the status, dignity and respect, that comes with marriage. As stated in Chapter Two, Michael calls these "social-benefit" rationales, which have been used by equality seeking groups and are defined as "the social benefit couples derive from the removal of the perceived second-class status of civil-unions and the comfort couples gain in having access to a title for their relationship that is unambiguous and recognizable."

(Michael 2003, 1442-3) Hunt adds that same-sex marriage is important precisely because of the social acceptance that it symbolizes and fosters (Hunt 2005). In response to the news that the 9th Circuit Court of Appeals had lifted its stay on an injunction to stop enforcing Proposition 8, L.A. Gay and Lesbian Center CEO Lorri L. Jean issued the following statement:

By lifting the stay on Judge Walker's ruling so quickly, the 9th Circuit Court of Appeals has given us an incredible gift. Every day we've waited since the Supreme Court issued its opinion is another day we've suffered the indignity of delayed justice and each day has meant real harm to same-sex couples who want to marry. But no longer. (Los Angeles Gay and Lesbian Center June 2013b)

Speaking of the 'indignity of delayed justice' and 'real harm,' marriage was accepted as an appropriate designation for who was and was not worthy of respect and dignity in American society. The American Foundation of Equal Rights (AFER) distributed a public statement by its legal team of Ted Olson and David Boies, the lawyers representing the fight against same-sex marriage in each of the court trials, in which they emphasized the function of same-sex marriage was to deliver dignity and respect, and status to homosexual citizens:

California has locked them out of the institution of marriage because they are gay. As the official voter guide expressly stated in 2008, Proposition 8 was enacted to communicate, with the force of law, that gay and lesbian relationships are not "okay." This sent the unmistakable message that such relationships are unworthy of the respect, dignity and status that society accords to marriages—a status even our opponents describe as "indispensable to the integrity of the individual." (American Foundation for Equal Rights March 2013a)

Here Olson and Boies, and the AFER, found common ground with the social conservative opposition as they agreed that a particular brand of dignity, respect and status should be administered through marriage. Equality California made similar connections:

For too long, thousands of California couples and their families have suffered harm by being denied a chance to make the same commitment in marriage that other loving couples treasure,” said Equality California Board President Clarissa Filgioun. “Today’s ruling has moved us one step closer to righting this wrong and restoring the freedom to marry in California, providing same-sex couples and their families with the dignity and security that is the fundamental birthright of every American. (Equality California February 2012)

The harm and indignity that was caused by exclusions from marriage could only be remedied through the inclusion of certain individuals into the institution of marriage. Protesting the practice of doling out status, dignity and respect on the basis of family form, was not seen as a remedy here.

### **3.2. Instrumental Benefits: Marriage and Rights, Marriage as a Right**

Michael argues that social-benefits rationales such as dignity and respect, and rights-based rationales have been used in various combinations by same-sex marriage advocates since the 1990s (Michael 2003). Dignity and respect are said to come with the status of marriage, yet dignity and respect are not tangible or measurable, and they are not guaranteed by the state or its marriage contract. Conversely, rights and benefits are instrumental, measurable and guaranteed through the marriage contract.

Surprisingly, the mainstream LGB organizations rarely enumerated the rights, or even types of rights, that would be gained by homosexual couples through the legalization of same-sex marriage. As stated in Chapter Two, it has been claimed by same-sex marriage advocates since the 1990s that there are up to 1,138 federal rights that marriage conveys (Hunt 2005). Sunstein and Thaler divide these rights into six categories: tax benefits; exclusive entitlements; ownership benefits; inheritance and death entitlements; surrogate decision-making rights; and evidentiary privileges in federal courts (Sunstein and Thaler 2008).

There have been a few exceptions in which the mainstream LGB organizations, such as the NGLTF, did speak of the large number of rights that are attached to marriage:

Lesbian, gay, bisexual and transgender (LGBT) families deserve the same respect, recognition and protection as all other families. Family recognition and the many rights and protections it provides is essential to the well-being of our families. Same-sex couples, even those legally recognized by their states, are denied the 1,138 federal benefits available to or required of married opposite-sex couples. The denial of those benefits hurts our families. (National Gay and Lesbian Task Force July 2013)

This statement from the NGLTF demonstrated how rights were often mentioned without explanation about the specific types of rights that have been in jeopardy with the passage of Proposition 8. Join the Impact gave slightly more detail about which rights were at stake:

Light Up the Night for Equal Rights gives us the chance to educate the nation about the supposed “special” rights we are fighting for: The right to keep a job regardless of sexual orientation, the right to fight for our country, the right to host our partner of years for US citizenship, the right to see our spouse in the hospital, the right to inherit the property of our spouse when they pass, the right to marriage, and so much more... We will make these basic human rights known on December 20th, and over and over again. (Join the Impact December 2008a)

Join the Impact’s discussion of the addition of sexual orientation to Equal Employment Opportunity Commission, the right for homosexuals to disclose their sexuality in the military, and the legalizations of same-sex marriage. Regarding the latter, Join the Impact highlighted hospital visitation, and inheritance rights as important to the LGB community.

While remaining vague on the specific rights that were administered through marriage, the same-sex marriage advocates argued that marriage itself was equality, and a right in itself. Accordingly, many of the mainstream LGB organizations relied on the

vague discourse of “the right to marriage,” “marriage is a right,” or “marriage is a fundamental right,” as is seen in these two organizations’ public documents:

AFER: AFER was founded on the belief that there had [to be] a way to protect the fundamental freedoms of gay and lesbian Americans. One that would not be beholden to the whim of public opinion or political ideology. One that would stand the test of time. Never before had gay and lesbian America sought the fundamental right to marry in federal court. But the time had come. (American Foundation for Equal Rights July 2013)

NGLTF: Californians will vote Nov. 4 on Proposition 8, an initiative aimed at eliminating the fundamental right of same-sex couples to marry. (National Gay and Lesbian Task Force October 2008)

In the previous Chapter, I discussed how both the social conservative organizations held marriage as fundamentally important to their respective culture and history. This line of discourse was different from the assertions that marriage is a fundamental right that should be afforded to homosexuals. In Chapter Seven, I address how the Ninth Circuit and Supreme courts addressed whether the fundamental right to marriage extended to two adults of the same sex<sup>65</sup>. While the marriage rights and marriage as a right discourses

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<sup>65</sup> After Proposition 8 passed, and the struggle moved to the courts, the mainstream LGB organizations and the social conservative organizations focused much attention on the democratic validity of the proposition itself. That is to say, they debated whether it was democratic to put same-sex marriage rights on a state ballot to be determined by popular vote. Predictably, the mainstream LGB organizations argued that the proposition effectively asked citizens to vote on whether a marginalized population should have particular rights. The mainstream LGB organizations argued that the Proposition defied fundamental democratic rights as it gave the majority the ability to take rights away from a marginalized group. Conversely, the social conservative organizations argued that their democratic rights were being violated each time a judge ruled that Proposition 8 should be invalidated. They further argued that the ‘gay elite’ - here comprised of homosexual or homosexual-friendly judges, the liberal media, celebrities and affluent homosexual lawyers and politicians – were influencing the outcome of the court trials to favour same-sex marriage. While this discursive debate was prominent in all of the organizations’ public documents, it does not fit into my analysis for several reasons. First, while engaging in these debates, the organizations rarely discussed the criteria for citizenship. Rather, they broadly argued that the state should protect all Americans from such a majority vote on their rights, or that the majority of Americans’ democratic votes were being violated by the courts’ decisions to overturn the proposition. As such, this discursive battle offered little in terms of discerning either side’s ideal citizen. Second, the court trials themselves focused on whether Proposition 8 is democratically sound. While the Ninth District Court ultimately ruled that Proposition 8 violated the constitution on both the due process and equal protection Clauses of the Fourteenth

were prominent, as they have been since the beginning of the same-sex marriage campaigns in the United States, these discourses offered little in terms of substantive content that can be discursively analyzed. By failing to make a more complicated case for why rights were important in and of themselves, and for why they should be administered through marriage, the mainstream LGB organizations did not challenge state practices of allocating rights through family form. Instead, they expended their energy making the case that particular members of the LGBTQ community could assimilate to the sexualized citizenship criteria of the state.

### **3.2.1. Marriage Equality**

Compared to their rights discourse, the mainstream LGB organizations' equality discourse offered more substantive content for discerning how they define the ideal citizen. In the 2000s, advocates increasingly used the term "marriage equality" as opposed to same-sex marriage or gay marriage (Ettelbrick 2004). By framing the issue as "marriage equality" it was hoped that more voters and politicians would sympathize with the cause because 'equality' is easier to digest than 'same-sex.' It also was hoped that moderate voters would respond well to the liberal democratic language of equality, justice and rights, and that these 'rational' and 'logical' arguments could surmount the affective power of the discourses of tradition, religion and family values (Third Way 2011). Yet the focus on equality did trouble or disrupt the fundamentally unequal - patriarchal, racist, colonial and heteronormal - nature of marriage. In fact, the mainstream LGB organizations maintained that their acceptance into the institution would not disrupt the integrity, value or form of the institution.

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Amendment since it proposed the removal of rights from one class of people without cause. The court cases thus offer more material for analysis and as such, I will analyze this discursive debate in Chapters Seven and Eight.

The equality discourse is more informative and important for my analysis than the rights discourse because the equality discourse was premised on a comparison between homosexual and heterosexual citizens, and their sexualities and family forms. In some cases, the comparison to heterosexual couples was not immediately apparent, as the language was sometimes ambiguous, as was seen in the following statements:

We need to remain a united front until every one of us is afforded the same protections under the law that 90% of our citizens enjoy. (Join the Impact December 2008a)

It is now time we work with our nation to help them see who we are: citizens of the USA who deserve equal protections under the law! (Join the Impact November 2008c)

Still, heterosexual citizens, and the heteronormal family form were held as the ideal to which homosexuals should assimilate in order to have equal access to the rights of marriage. In a statement by Rea Carey, the Executive Director National Gay and Lesbian Task Force, the comparison to the heteronormal ideal was more apparent:

This ruling marks a victory for loving, committed couples who want nothing more than the same rights and security as other families. From the start, this has been about basic fairness [...] The tide is turning nationwide in favor of marriage equality, but our work is far from over. Today's ruling is just a beginning step in what will likely be a long process, yet we are confident that fairness will prevail. (National Gay and Lesbian Task Force August 2010)

In arguing for equality Carey made the case that homosexual couples were similar to the heteronormal ideal, here defined by love and commitment. As the next section argues, this strategy of demonstrating that homosexuals could be in loving, committed relationships was a response to the social conservative representation of homosexuals as being incapable of this kind of commitment, which was evidence of the relationship between the two sides. Three years after Carey's statement, the NGLTF continued to

make this connection between equality and the ability for homosexuals to replicate the heteronormal family.

Same-sex couples simply want to be treated fairly, and to be able to provide for and protect our families, just as everyone else does. Yet Prop. 8 and DOMA make this impossible. Loving committed couples, who have been together for decades, who have stood by each other in sickness and in health, are being treated as strangers in the eyes of their own government. This is unconscionable, and as lower courts have deemed, unconstitutional. (National Gay and Lesbian Task Force March 2013)

Implicit in this equality discourse was the notion that homosexuals were not inferior to heterosexuals, but rather that homosexuals were very similar to heterosexuals, and as such they should be treated equally under the law. These statements from the NGLTF and Join the Impact enumerated several qualities of the heteronormal family that homosexual couples replicate including love, lifelong commitment, and dependence (in times of sickness). Despite these commonalities with the heteronormal ideal, according to the NGLTF, homosexual couples were “treated as strangers in the eyes of their own government,” implying that the state needed to validate and legitimize their relationship through marriage.

As discussed in the previous Chapter, the social conservative organizations gained important ground in the discursive debate about same-sex marriage and rights, as they argued that children’s’ rights to a married mother and father trumped homosexuals’ desire to marry. The Mormon Church, which was the campaign’s most formidable opponent to same-sex marriage, was most vocal on this matter, taking care to appear as though they were tolerant of homosexuals but against the allocation of marriage status and rights to homosexuals. The Mormon Church’s tolerance for homosexuals resembled the Roman Catholic “love the sin, hate the sinner” doctrine.

We can express genuine love and friendship for the homosexual family member or friend without accepting the practice of homosexuality or any re-definition of marriage. (Mormon Church August 2008)

The Mormon Church argued that homosexuals should have many of the rights that come with marriage, as long as the traditional definition of marriage and the rights of the Church were not violated:

The Church does not object to rights for same-sex couples regarding hospitalization and medical care, fair housing and employment rights, or probate rights, so long as these do not infringe on the integrity of the traditional family or the constitutional rights of churches. (Mormon Church November 2008)

It seems counterintuitive that the Mormon Church would agree that homosexual couples should have access to some rights, overall the social conservative organizations, particularly the Mormon Church, focused on protecting the traditional definition of marriage to the exclusion of homosexual couples, even if that meant conceding a few rights to homosexuals. Thus the Mormon Church was making concessions to their opponents. These concessionary rights, however, were attached to homosexuals being in a couple. Therefore the Mormon Church still required assimilation to the normative form of marriage but sought to deny homosexuals the title or status that marriage administers.

#### **4. Love and Marriage**

Based on my discourse analysis of the public documents of the five mainstream LGB organizations, I contend that at the beginning of their campaigns, opponents of Proposition 8 argued that homosexual citizens deserved the same formal rights as their heterosexual counterparts. Yet throughout their campaign, these organizations shifted their discourse away from rights and equality, and instead began focusing on notions of family form and sexual normality. In order to demonstrate that they deserved inclusion into marriage, and all of the accompanying rights, the organizations focused on

demonstrating homosexuals' ability to replicate the heteronormal family form and sexuality by invoking discourses of love. Thus it was not reproduction or gender difference that defined marriage and normative family but love, which opened space for the exclusion of sexualities and relationships that were not based on committed, long-term, monogamous relationships.

My analysis of the mainstream LGB organizations shows that the No on 8 discourses were responses to social conservative constructions of the genders, gender roles and sexualities of marriage participants; the proper family form ('opposite-sex,' two-parent, monogamous, single-generation); the proper function of the family (to reproduce normal children, act as self-sufficient units); and the purpose, impetus and nature of the relationship between the marriage participants. Moreover, all of these elements of marriage were conflated with each other and were therefore mutually reinforcing. That is to say, for example, that the connection between marriage and reproduction was premised on particular notions about the natural, religious and loving foundations of marriage. Within this model, discourses of love were used to make reference to and evoke all of the elements of marriage. Love and marriage were deeply connected, at least discursively, as marriage was seen both as the epitome of a loving relationship, and as a public declaration and legitimization of a couple's love.

Love discourses were one example among many of how same-sex marriage advocates shifted their discourse to demonstrate that homosexuals and same-sex couples were normal, or could assimilate, and were therefore deserving of inclusion into the institution of marriage. However, as I argue, the mainstream LGB organizations framed

their normalizing discourses primarily in terms of love. John D’Emilio points to the discursive power of love as he recounts:

I have seen evidence of how attaching gays and lesbians to love, the emotion most closely associated with marriage, loosens the grip of homophobia on heterosexuals and creates bonds of sympathy and identification across lines of sexual orientation. (D’Emilio 2007, 41-2)

The discourse of love is more than just shorthand for marriage because of its affective power. As I discuss in this section, the majority of the mainstream LGB organizations involved in Proposition 8 attempted to harness the affective power of love by making personal and emotional pleas about the love of homosexual couples.

Discourses of love were used to exemplify that homosexual couples can replicate particular kinds of valued relationships, and by extension particular normalized sexualities. Equality California Board President Clarissa Filgioun said in a 2012 statement:

Americans of all backgrounds, including the President of the United States, are coming to understand that same-sex couples want the freedom to marry for the same reason as other loving, committed couples -- to make a lifetime commitment in front of friends and family and have the security of marriage that allows couples and families to care for one another. (Equality California June 2012)

Here homosexual Americans were compared to the heterosexual norm. The NGLTF used the same rhetorical tactic, claiming that all such couples shared a “common humanity,” which was defined here by love:

The court’s ruling affirms what millions of people all across the country already know — loving, committed same-sex couples and their families should be able to share in the celebration and responsibilities of marriage. People from every background and every circumstance get this; they understand because being able to marry the one you love and care for your family are shared values that strike at the very core of who we are as a people. Denying loving couples and their families something so fundamental is to deny our common humanity. (National Gay and Lesbian Task Force February 2012)

Thus, these mainstream LGB organizations employed the discourse of love to make affective appeals, to humanize homosexuals through an appeal to universal love, and to prove the normality of homosexual couples and their families in relation to the heterosexual norm. The discourse of love had the effect of diverting attention away from the instrumental benefits of marriage such as health care and pension plan sharing.

#### **4.1. Changing Hearts, Changing Minds and Legalizing Love**

In order to sway public opinion, and convince voters that homosexual couples were normal and worthy of same-sex marriage rights, the mainstream LGB organizations undertook various campaigns targeted at “changing hearts and changing minds” of Californian voters. The L.A. Gay and Lesbian Center and the Courage Campaign both used the phrase “change hearts and minds” throughout their campaigns:

We began to do the hard work of talking one-on-one with voters in neighborhoods where we lost Prop 8 by landslide margins, determined to find out why people vote against LGBT rights and what we could do to change their minds. In the four years since, Vote for Equality has grown into a large, sustained, year-round volunteer-based voter research program. (Los Angeles Gay and Lesbian Center July 2013)

That's why we're raising money to do our part in this case: changing hearts and minds so a larger majority of Americans support marriage equality, and showing how important marriage equality is to same-sex couples. (Courage Campaign 2012)

Earlier in the Proposition 8 campaigns, and in the American same-sex marriage fight in general, same-sex marriage supporters focused on making intellectual arguments about rights, justice, equality and fairness: appealing to voters’ minds. The discourse of rights, however, did not resonate well with voters. According to David Fleischer’s report, the social conservatives’ affective discourses of family values, and children’s education were more effective at changing voters’ minds on Proposition 8 (Fleischer 2010). Increasingly

throughout the Proposition 8 fight, the mainstream LGB organizations began to see voters' hearts as the route to changing voters' minds. It was clear that the mainstream LGB organizations were, in part, emulating the social conservative tactic to appeal to voters' emotions.

At the same time, same-sex marriage activists in the Proposition 8 and DOMA fights began rallying around the phrase "legalize love." The phrase gained increasing momentum during the Proposition 8 and DOMA trials. A private corporation, *FCKH8.com*, was formed after the passage of Proposition 8 (hence the "Fuck H8" slogan), and began making paraphernalia and videos featuring the "legalize love" phrase (FCKH8.com 2013). While none of the mainstream LGB organizations studied here officially took credit for or adopted the "legalize love" rallying cry, there were several instances in which members used the phrase to make their case. Rick Jacobs, founder and chair of the Courage Campaign stated, in response to the Supreme Court's 2013 decision on Proposition 8:

Love should not be legislated or litigated. We hope today's rulings settle this issue once and for all as we celebrate loving couples marrying in California and across the country in the coming weeks, months and years. (Courage Campaign June 2013)

In another document speaking to the same event, the Courage Campaign also stated:

We'll never forget Wednesday June 26, 2013, the day love became legal. We celebrated, rallied, partied and photographed friends and allies all over the state as we laughed, cried, hugged, kissed, cheered and even proposed. Today, Team Courage is getting back to work, focused on winning immigration reform for all Americans, full equality in 37 more states and passing repeal of the rest of DOMA. The fight continues. (Courage Campaign June 28, 2013)

This call for the legalization of love, and the attendant erasing of sexuality, was misplaced since historically certain sexual acts, as opposed to different forms of love,

have been criminalized through anti-sodomy laws. Moreover, this reliance on discourses of love is particularly odd given that love was not a condition or prerequisite for entering into a marriage contract with the state. While there was an assumption that the relationship was based on love, the law did not require love for the two individuals to enter the marriage contract. Rather, the state required that the two individuals were of a certain age, were not related in particular ways, were not married to other individuals, were not under duress, and had the mental capacity to agree to the contract. Moreover, the call to “legalize love” was a misnomer as the mainstream LGB organizations were only addressing a specific kind of love, and sexuality. Therefore, even with the “legalization of love” certain forms of “love” – family forms, sexual relationships, sexual acts and sexualities – would remain illegal. Thus the call to “legalize love” could be seen as the culmination of the “changing hearts, changing minds” strategy because both of the arguments blurred the lines between love, sexuality and marriage, and obscured what is truly on trial. These activists were, in fact, asking the state to legalize same-sex marriage and therefore legitimize *their* sexualities. Yet discussing sexuality, specifically homosexuality, may have alienated voters. Therefore the organizations relied on the discourse of love to soften the demand, hopefully making it more digestible to their fellow citizens.

#### **4.2. Let’s Make This Personal: Telling Stories of Love**

To make their affective case, the mainstream LGB organizations pursued several tactics including personal one-on-one conversations and door-knocking canvassing, and video campaigns. Both of these strategies are analyzed here. Before proceeding with this analysis, it is important to note that both of the tactics relied on telling the personal

stories of Californian homosexual couples who either wanted to be married, or were married (during the few months in which it was legalized in 2008). Equality California, for example, pursued a campaign to humanize the 18,000 same-sex couples that were married before the passage of Proposition 8.

We also will ensure that Californians really get to know the 18,000 same-sex couples whose marriages are recognized by the state, as well as their family members, friends and loved ones. The truth of their lives belies the misconceptions our opponents propagate. As these families simply live their lives, they will demonstrate to all Californians that same-sex couples want to be civilly married because they have the same hopes, dreams, concerns and sense of responsibility as any other family. (Equality California 2009, 15)

Equality California sought to demonstrate that the homosexual couples that were married before Proposition 8 were normal and harmless. These homosexual couples shared the same traits as their heterosexual counterparts, including the “hopes, dreams, concerns and sense of responsibility as any other family.”

Outside of the two one-on-one conversations and video campaigns, the majority of the organizations also shared the personal stories of homosexual couples who were affected by Proposition 8, through emails to their followers and articles on their websites. The following story, which has been regularly told, concerned Del Martin and Phyllis Lyon, who were the founders of the influential, assimilationist lesbian organization the Daughters of Bilitis in 1955, and who were the first homosexual couple to be married in San Francisco in 2008. The NGLFT and the AFER have both recounted Martin and Lyon’s story:

As thousands of couples joyously celebrated their weddings across the state of California, we could feel the power of our love. In particular, the picture of Del Martin and Phyllis Lyon being married by San Francisco Mayor Gavin Newsom after 55 years of faithful partnership brings tears to the eyes. This scene was replicated nearly 18,000 times between June and November. (National Gay and Lesbian Task Force December 2008)

In 2008, exactly two years prior, Del Martin and Phyllis Lyon became the first gay couple to legally marry in San Francisco after over 55 years together. They were among an estimated 18,000 couples to marry in California before voters narrowly passed Proposition 8. For Del and Phyllis, their wedding was the culmination of a lifetime fighting for equality. As the co-founders of the first lesbian organization in the nation, and among the first members of the first LGBT Democratic Club, the two women are trailblazers in LGBT history. Sadly, wedded bliss did not last long. Two months after they married, Del passed away. Reflecting on their time together, Phyllis said: “Ever since I met Del 55 years ago, I could never imagine a day would come when she wouldn’t be by my side. I am so lucky to have known her, loved her and been her partner in all things [...] I also never imagined there would be a day that we would actually be able to get married. I am devastated, but I take some solace in knowing we were able to enjoy the ultimate rite of love and commitment before she passed.” (American Foundation for Equal Rights July 2012)

Martin and Lyon were used often to connect the different eras of America’s LGBTQ movement, from 1950s assimilation to same-sex marriage. Here their story was also used to represent the 18,000 loving, committed couples who were able to marry in 2008, and those who wished to marry in the face of Proposition 8. Martin and Lyon’s story was an exceptional example of the mainstream LGB organizations’ affective tactics.

The AFER also told the story of the two couples, Kris Perry and Sandy Stier, and Paul Katami and Jeff Zarrillo who were the plaintiffs in *Hollingsworth et al. v. Perry et al.*

At its heart, marriage is about the vow two people make—to support each other through good times and bad, in sickness and in health. Couples like our plaintiffs, Kris Perry & Sandy Stier and Paul Katami & Jeff Zarrillo, are ready to make that promise—and it’s our job to make sure everyone knows why marriage is so important—including the Supreme Court Justices. Kris and Sandy have been together for over 13 years. Together, they have raised four boys—the youngest are now making their college plans. They’ve experienced the challenges and struggles every family faces. Paul and Jeff have been together for over 12 years and have always seen marriage as the first step to starting a family. They want what their parents have—a long lasting commitment to each other. We are at the cusp of ensuring couples like Kris & Sandy and Jeff & Paul have the full rights, protections and dignity they are guaranteed under the U.S. Constitution. (American Foundation for Equal Rights March 2013b)

This quote exemplified several discursive strategies. First, the plaintiffs were humanized through the telling of their personal stories of love, commitment, children, and personal struggles. Second, they were normalized in comparison to heterosexual couples in terms of their normal family challenges and struggles, and their loving commitment to each other. Third, following the “change hearts and change minds” dictum, the AFER first depicted the couples as human, normal and loving, and then argued that the couples deserved rights, protections and dignity. In sum, this quote clearly demonstrated how the discourse of love, and the sharing of personal stories were used by mainstream LGB organizations to illustrate the couples’ normality and their worthiness of marriage rights and privileges.

The organizations showcased homosexual couples’ personal stories of love, as well as commitment. It is beyond the scope of this discourse analysis to determine whether this emphasis on commitment was a conscious reaction to the social conservative organizations’ claims that homosexuals, especially homosexual men, were naturally promiscuous and therefore unsuited to create and care for a family. Still, the mainstream LGB organizations’ focus on commitment was a remarkable development, especially in relation to the liberationist gay and lesbian movement’s call for sexual freedom. In the previous quote, the AFER made sure to mention that the plaintiffs Kris and Sandy were together for 13 years, while Jeff and Paul were together for 12 years. Likewise, the Courage Campaign told the story of Ed and Darence of Palm Springs, a couple who were together for 40 years. According to the Courage Campaign “Ed suffers from advancing Alzheimer's. The California Supreme Court and now the 9th Circuit have decided to make Ed and Darence wait at least 9 more months before they might enjoy the

fundamental right to marry. By then, it might not matter anymore.” (Courage Campaign March 23, 2010) When presenting the personal stories of homosexual couples, the length of their relationship was often mentioned, in part to help legitimize their relationship and make the case that homosexuals were capable of having committed, loving and de-sexualized relationships. Here, as with the story of Martin and Lyon, commitment, the longevity of the relationship, and the elderly state of the couple were presented as evidence of love, and the urgent and desperate need for a swift resolution of Proposition 8.

### **4.3. Door Knocking and One-on-One Conversations**

To harness and disseminate the affective power of these personal stories of love and commitment, several of the mainstream LGB organizations engaged in the campaign tactics of one-on-one conversations and door-knocking. While the one-on-one conversation tactic was to be more casual than the door-knocking campaigns, both strategies were premised on humanizing and normalizing homosexuals. Several of the organizations undertook their own conversation and door-knocking campaigns. In addition, over the course of the five-year fight against Proposition 8, the *Breakthrough Conversations Project* was developed and supported by the Courage Campaign, the L.A. Gay and Lesbian Center, Equality California, and the NGLTF.

The *Breakthrough Conversations Project* recruited, trained and supported volunteers through the process of having five to ten conversations with people in their lives. The introduction to the program welcomed volunteers accordingly:

Welcome to the Breakthrough Conversation Project! We are so happy that you will be joining us for this exciting coalition campaign to change hearts and minds in California! As a Breakthrough Volunteer, you will be part of a coalition of

hundreds of people across California who are pledging to talk to people in their lives about LGBT issues. (Breakthrough Conversations July 2013)

John O'Connor, the Executive Director of Equality California, reported that the *Breakthrough Conversations Project* experienced success<sup>66</sup> because of its reliance on the personal connection between people involved in the conversation:

The poll also showed that talking to friends and family about the importance of marriage is a powerful tool for moving opinion. Those who have had a conversation with someone they know personally about why marriage for same-sex couples is important favor marriage by 73 to 26 percent; those who haven't had a personal conversation about it favor marriage by 45 to 41 percent, a net increase in support of 43 percent [...] The simple act of having a conversation with a person directly impacted makes such a huge difference in humanizing our community and building support for equality (Equality California June 2013)

The personal connection has enabled the volunteer to humanize homosexual couples who are seeking marriage rights.

The push to humanize homosexual couples through personal conversations about love were seen also in the one-on-one and door-knocking campaigns of several of the other mainstream LGB organizations. The L.A. Gay and Lesbian Center started its own campaign to get its followers to engage people in personal conversations, focusing on the “personal implications of their positions on LGBT rights.”

Making it Personal. Alongside the statewide Breakthrough Conversations coalition, we're pushing our persuasion conversations about LGBT equality to the next frontier by learning how to talk to people we already know and care about. Since early 2012, we've had over 150 powerful conversations with family and friends about the personal implications of their positions on LGBT rights, and

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<sup>66</sup> In terms of the effectiveness of the Breakthrough Conversations, the *Breakthrough Conversation Project* reported: “We've found the Breakthrough Conversations are effective in moving our friends and family to become more supportive of us and of LGBT issues. For example, volunteers reported that 71% of family and friends who were judged to be unsupportive or neutral about them as a LGBT person before the conversation became more supportive of them as an LGBT person by the end of the conversation. Likewise, 84% of family and friends who were judged to be unsupportive or neutral about of LGBT people in general before the conversation became more supportive of LGBT people in general by the end of the conversation.” (Breakthrough Conversations July 2013)

continue to learn more and get better at tackling these tough conversations each day. (Los Angeles Gay and Lesbian Center July 2013)

Similarly, Join the Impact initiated a campaign in which they asked their supporters to engage ten people, be they family, friends, acquaintances or strangers, in conversation about the need for same-sex marriage and the implications of its denial.

10 Conversations could change the world. Over the next 10 months, Join the Impact will continue to encourage each and everyone of you to have 10 respectful and heartfelt conversations about equality. You won't change the mind of every person out there, but you'll touch the minds and hopefully hearts of all. (Join the Impact December 2008b)

Through these conversations, the homosexuals' relation to the voter was emphasized: homosexuals were first siblings, parents, children, friends, co-worker and neighbours, and as a result their sexuality became secondary. Join the Impact argued that initiating these conversations would be effective as the conversation would be brought down to a personal and intimate level, ultimately detaching individual homosexuals from the stereotypical and demonized characterization that was promoted by social conservative organizations (Join the Impact November 15, 2008).

To similar ends, the Courage Campaign's primary form of protest and mobilization against Proposition 8 was to dispatch volunteers into their communities to knock on their neighbours' doors and engage them in conversation about issues, concerns, truths and lies surrounding same-sex marriage. The Courage Campaign used this strategy of resistance, they explain, in order to demonstrate the 'human face' of homosexuals and homosexuality. They hoped that in doing so opponents and undecided voters would realize that homosexuals were not abnormal or scary but rather that they were neighbors, co-workers, and fellow citizens who wanted to protect and provide for their children and partners (Courage Campaign 2009a).

#### 4.4. “Not Just Those Gays in San Francisco”

These attempts to demonstrate the ‘normality’ of homosexuality and homosexuals were accompanied by a subtle call to distance the same-sex marriage movement from extreme, overt and scandalous expressions of homosexuality, often called the “San Francisco homosexuals.” In their document, *Winning Marriage Back: Report and Analysis* Equality California argued:

We also make sure there are stories in the local newspaper and on television about couples who live locally who are married, or who want to marry. Voters see that marriage equality is not just those gays in San Francisco, but the couple that lives down the street in Bakersfield, or the daughter of their close friends, or the parents of their kid’s school friend. (Equality California 2009, 15)

Join the Impact similarly pleaded:

We beg to be given a right that requires responsibility and commitment, yet we, as one strong community, have not proven to this nation that we deserve to be taken seriously! The gay pride parade has become a great party, but it has lost the memory of Stonewall and therefore given the nation another reason to cast us aside as irresponsible. It’s time we come together for debate, for public recognition, and for love! (Join the Impact November 10, 2008)

Although these mainstream same-sex marriage advocates did not thoroughly define the San Francisco homosexuals, beyond their participation in gay pride parades, their allusion to the San Francisco gays was no doubt meant to conjure common signifiers, including: promiscuity, drug-taking, parade performing, leather wearing, sadomasochism, irresponsibility, childishness, selfishness and diseased individuals. These abnormal and ‘deviant’ queers stood in opposition to the loving and committed, and safe and tolerable homosexual couples from diverse communities throughout California. As planned, more distance was created between the normalizing LGBs and the abnormal queers than existed between the normalizing LGBs and the normal heterosexuals.

Thus these same-sex marriage advocates found a common enemy with Christian religious and social conservatives: the abnormal, un-assimilable homosexual. As Foucault and Butler argue, these populations are portrayed as being un-assimilable and are thus delegitimized (Foucault 2003; Butler 2002). Mainstream gay activists essentially pushed the San Francisco gays outside of the inclusive realm of the normal, legitimate and acceptable, in order to bring the loving, committed, tax paying, child rearing homosexuals into the realm of legitimacy and privilege. As Fraser argues, social injustice occurs when a particular group of citizens are not permitted to participate in the political process or have equal access to economic and social benefits (Fraser 2005, 77-8). Instead of questioning the logic of inclusions and exclusions, the strategies of these Californian gay and lesbian organizations enabled injustice to occur against citizens who could not or would not marry.

#### **4.5. Affective Video Campaigns: Fidelity and 13 Love Stories**

In addition to the personal conversations and door-to-door canvassing, several of the mainstream LGB organizations launched video campaigns that were released on their respective websites, and circulated through YouTube, other social media, and television outlets. The mainstream LGB organizations' commercials gained little traction, as has been discussed (Fleischer 2010). Still, the Courage Campaign produced several video series in support of the same-sex marriage effort in California. Here I focus on two of the video series, *Fidelity: Don't Divorce Us* and *13 Love Stories*, which were significant for their depiction of homosexual couples, and their use of the love discourse. Through their video campaigns, the Courage Campaign presented specific kinds of homosexual couples who fit the form and function of the heteronormal marriage ideal.

The video series *Fidelity: Don't Divorce Us* was created in February 2009 by the Courage Campaign but it was promoted by Join the Impact as well. "Fidelity," was a collection of pictures of some of the 18,000 couples, and their families and friends that were married in California before Proposition 8. The couples and their families were photographed holding signs saying "Please Don't Divorce Us," "Please Don't Divorce Our Friends and Family," "Please Don't Divorce my Moms," "Don't Divorce Love" and so on. In addition, pictures were presented featuring the marriage ceremonies of gay couples. Many of the marriage ceremonies mimicked traditional heterosexual marriages. Both Christian and Jewish traditions were showcased. As with "13 Love Stories," emphasis was placed on affect as couples were shown with their children and extended families. Finally, some of the pictures in the video cited the commitment and longevity of relationships as proof of their legitimacy. In some cases, captions read, for example, "been together for 18 years, married July 07, 2008." (Courage Campaign 2009b) Thus these videos presented Californian gay couples as loving, monogamous, two-parent, and child rearing; propagating the way in which gay couples could assume the form and functions of normal marriages.

The series "13 Love Stories" was created in January 2009 after Proposition 8 had passed. It was comprised of documentaries on the love stories of 13 homosexual couples. The couples told the story of how they met, why they love each other, how their families were structured, and why they wanted the right to marry. Unfortunately, I could not locate one of the thirteen videos in this series. Of the twelve videos analyzed, five featured female couples, six featured male couples, and one featured a self-defined queer couple consisting of a woman and a transgender man. The participants were of various

racess, including black, Asian and Hispanic, although the majority of the participants were white. Jewish and Christian religions were featured and discussed. These couples were presented in their homes, and often surrounded by their children and/or their friends and extended families. There was no denying the attempt to create affect through these videos. Several themes were dominant in this video series including children and reproduction, love and family, rights and equality, and discrimination. The first two themes – children and reproduction, love and family – were most consistently discussed in the twelve videos, and were most pertinent to my analysis in this section.

First, nine of the twelve couples had children, and the children were featured extensively in the nine video testimonials. Despite their efforts, this video series did not gain the public attention of the *Princess* advertisement; perhaps due to the fact that Proposition 8's popular momentum had temporarily dissipated when these videos were released in early 2009. While failing to mention education or the homosexual indoctrination of children, these video testimonies certainly addressed the social conservatives' child discourses.

[Our children] are loved unconditionally, they know that. (Courage Campaign 2009d)

You just fall in love with [our daughter], and there's nothing in the world you won't do for your child. And so every thing shifts. Love is bigger. Fear is bigger because you're responsible for this child. Being a family makes our bonds stronger. You look at your partner and see him being a father and the love grows, the respect grows [...] You see a side of the person that you love that you haven't seen before. (Courage Campaign 2009c)

Several of the couples discussed social conservative assertions directly, saying:

I think the idea that same-sex couples are unfit parents is ridiculous. We are family. The evidence is that you can raise happy, healthy children. (Courage Campaign 2009d)

When we became parents, at first my mom was apprehensive. She thought it was unfair to bring children, who had no say, into a situation where they could be teased or ridiculed because they had gay parents. But once we had the boys, I think she saw that there was so much love and so many advantages that Glen and I provided as a loving couple, in the context of a loving family, that she realized it was worth it. (Courage Campaign 2009j)

To these ends, several of the couples also directly addressed their sexuality and their ability to raise children. While one lesbian mother said that her sexuality had no bearing on her ability to mother, another gay father said that his experiences with the HIV/AIDS epidemic actually prepared him and his partner for parenting.

I don't think of myself as the lesbian mother. I think of myself as a mother, with my children, my wife. (Courage Campaign 2009d)

We survived the AIDS epidemic [...] We feel like survivors. And for many gay men, that really taught us that we could nurture people and we could have a family. That really was the impetus for us to say, 'yes we can do this.'" (Courage Campaign 2009k)

The latter testimony may seem to counter the mainstream organizations' attempts to deemphasize homosexuals and heterosexuals differences. However, it must be remembered that the same-sex marriage movement was started, in part, by homosexual men who emerged from the HIV/AIDS epidemic confronted with the effects of having no legal rights after the death of their partners. Overall, the focus on children, and family, was an obvious attempt to counter social conservative arguments about homosexuals' natural propensity for promiscuity and immorality, selfishness and irresponsibility, and their inability to birth and properly raise children.

We have children, we're giving birth to them naturally, we're adopting them, we're surrogating them. We're just like them in terms of parents. (Courage Campaign 2009k)

These excerpts from the *13 Love Stories* argued that homosexuals were in fact moral and responsible citizens, were committed to each other and their children, and were able to procure and to raise proper future citizens.

The second major message presented in these videos was that these couples' families were as normal, and their loves as authentic and meaningful as that of heterosexuals. The videos' participants used several terms to describe their family's normality including "human," and "regular." It was hoped that if Californian voters had been able to learn about their true, normal, character Proposition 8 may not have passed, and homosexuals would have remained accepted by society.

Prop 8 made us cry, made our hearts feel very sad. And I wasn't angry, I was hurt and I was disappointed cause all I think is needed is that people get an opportunity to talk to people like me and Sonia. People could see who we really are, then they would not have voted. They just would have said, "these are two human people, they work hard, they take care of their family, they take care of their friends. They're just regular people. (Courage Campaign 2009g)

We are who we are and we don't consider ourselves different just because, you know, we are two men living together with a child. We are parents [...] Hopefully when people see that they can say, "Yes, it's ok." (Courage Campaign 2009c)

One thing I want people to know is that we live a normal life. We put our pants on every morning, we go to school, we go to work, we take our kids to the babysitter, and we pay our bills. And I believe that people in America need to be educated on what we do. I believe that's why Prop 8 passed – because people were uneducated about what gay people do. (Courage Campaign 2009i)

In order to demonstrate that they are "normal," "regular," "human," and "ok" some of the couples focused on a neoliberal representation of normal familial form, roles and responsibilities that they hold in common with heterosexual couples: homosexuals worked hard, paid bills, took care of their families, and raised children. Homosexual, bisexual, polyamorous, queer and transgender citizens, partners and co-parents who

were not economically self-sufficient, who were on benefits, and/or who had dependence structures outside the heteronormal family were not represented in this normality.

The sex lives of the couples were seldom mentioned, beyond one couple describing how they “got busy.” Love was being used in some cases to erase acts of sex and sexuality. As Warner states, mainstream LGB same-sex marriage advocates have, through many means, desexualized sexuality politics (Warner 1999). In their efforts to present a more acceptable, and ‘softened,’ message, mainstream LGB advocates almost eradicated the notion of sex and sexuality from discourses about same-sex marriage; they did not present pictures or videos that sexualize LGB people, they consciously did not mention any sexual acts, and they certainly did not speak in terms of sexual liberation. Instead, efforts were made to chastise and deny the argument that homosexuals were promiscuous and sexually ‘deviant.’

We’re not some scary, sexually deviant, octopus type monsters coming to destroy your family. We’re our own damn family living our own damn lives [...] It’s an act of revolution every day to be who we are in the midst of a country that would vote to take away our rights. (Courage Campaign 2009c)

I think people are still under the impression that homosexuals think about sex 24-hours a day. I can’t think of the last time we had sex. But that’s not the issue. We are people who deserve to live and love as we choose. (Courage Campaign 2009f)

According to these two testimonies, homosexuals are not “sexually deviant,” “monstrous” or even fixated on sex. While these two testimonials appeared to be challenging social conservative discourses about the homosexuals’ sexual deviance and promiscuity, they were actually giving credence to the notion that particular kinds of sexuality were monstrous, and that promiscuity was an abnormal and undesirable quality in a citizen. To further detach homosexuality from promiscuity and sexuality, several of these testimonials shifted the discourse to focus on commitment and love:

We just want to say that we love each other very much and we hope we stay together forever. And we hope that you find someone and you stay together forever. (Courage Campaign 2009g)

The majority of the featured couples highlighted the length of their relationship, as if to prove that the relationship is legitimate and deserving of the marriage title.

While the couples told their stories of how they met, how their relationship functions and why they want to get married, love was central.

Our love is no different than the average person. We believe in love and support, and treating people the way we would like to be treated, which is fairly. We're dysfunctional, we have our problems, she'll get on my nerves [...] but we love each other. (Courage Campaign 2009g)

When I think about people who don't believe we should have families or that we should be married, I don't believe those people understand love. Because love doesn't stop at the boundaries of heterosexuality, you know, love encompasses all of us. (Courage Campaign 2009c)

When I saw and heard the Yes on 8 people, I thought they don't know me, they don't know my family. There's no way there could be something wrong with this much love. (Courage Campaign 2009h)

People need to understand that love is love and there can't be anything wrong with that. (Courage Campaign 2009h)

These excerpts about love were all characterized by anger and a desire to prove that homosexual love is "average," and not wrong.

The testimonial of the couple with one woman and one transgender man posed an interesting diversion from the other videos. The video opened with the transgender man saying "We're madly madly in love." The couple proceeded to discuss how "love really doesn't know any boundaries," and they wanted to show that transgender people can experience love and marriage (Courage Campaign 2009e).

One of my mom's biggest fears when I came out to her is that I'd never find someone to love me, and have a family. And I am happy, really really happy to be able to show her that's not true. (Courage Campaign 2009e)

The underlying argument is that transgender people were not monstrous but rather they were lovable: “And I want every trans person out there to know that they can be madly in love” (Courage Campaign 2009e). Love was an emotion of acceptance and inclusion. And one’s ability to be loved indicates that they were normal, and worthy of inclusion into society. This couple’s story demonstrated the future potential uses of the discourse of love to humanize and normalize other LGBTQ citizens. The LGB and queer movements had, by virtue of sexuality, been focused on the relationships between people: the gay liberation movement focused on sexual liberation, and the mainstream LGB movement was focusing on marriage and family. While the liberationist and mainstream movements differed in terms of their goals and tactics, they both challenged state and society’s regulation of citizens’ personal, sexual and familial lives. Conversely, the transgender movement was not founded to challenge the regulation of personal relationships, but to challenge the regulation of gender. Thus the application of love discourses to transgender politics produced different effects: it implied that transgender people were worthy of love regardless of their gender expression.

The mainstream LGB movement has been arguing that homosexual love itself is normal and equal to heterosexual love. While the mainstream LGB discourses certainly implied that homosexuals were worthy of love (and are thus normal) the focus remained on the comparison between heterosexual and homosexual relationships. Homosexual citizens’ equality was therefore bound to their relationship status: they could only attain equality through their sexual, familial and/or loving relationship to one other person. This is where the liberationists and mainstream activists diverged. The gay liberationists argued for sexual freedom in order to end regulation on the basis of sexual relationships.

The mainstream LGB activists asked for equality through their relationships, thus reinforcing the regulation of personal relationships.

To these ends, this queer and transgender couple offered another divergence in the *13 Love Stories* narrative<sup>67</sup>. The couple was actually able to marry in California regardless of whether same-sex marriage was legalized because the man in the couple had legally transitioned before their wedding, meaning that they were able to marry as a heterosexual couple. This occurrence demonstrates same-sex marriage's limitations for the LGBTQ community: the lack of same-sex marriage did not mean that all members of the LGBTQ community could not marry, conversely the legalization of same-sex marriage did not mean that all LGBTQ people would be able to marry. LGBTQ people who did not want to marry, or who could marry already, would not stand to experience equality, much less social justice – in terms of rights, protections, freedom and representation - through the legalization of same-sex marriage alone. At the same time, however, this couple also demonstrated that transgender citizens subscribed to the heteronormal and social conservative family model, indicating that such shifts in political organizing and goals are not limited to LGB citizens within the LGBTQ community.

## **5. Conclusion**

Same-sex marriage advocates have historically argued that same-sex marriage is a matter of citizens' inclusion, rights and equality. This discourse remained prominent throughout the Proposition 8 battle. Opponents of Proposition 8 argued that homosexual citizens deserve the same formal rights as their heterosexual counterparts. Yet, as I have

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<sup>67</sup> I could not discern how the decision was made to include the transgender couple in the video series. I think they were included to demonstrate 'diverse' support for same-sex marriage within the mainstream LGBT community. In the next chapter I discuss the exclusion of transgender people from the same-sex marriage campaign in terms of prioritizing, strategizing and fighting for the issue.

argued, throughout their campaigns, these organizations shifted their discourse away from rights and equality, and instead began focusing on notions of family form and sexual normality. Using discourses of love, commitment and marriage, the mainstream LGB organizations worked to demonstrate that homosexuals deserve marriage rights and privileges, and equal citizenship because they can replicate the heteronormal family ideal.

The heteronormal ideal of love and marriage is premised on several criteria: social position (gender, gender expression, income, race, and ability), their sexuality (monogamous, vanilla, intra-generational etc.), and their family form (monogamous, procreative, single-family etc.). The homonormal, those who are the most privileged within the LGBTQ communities because of their social position, sexuality and family form can be included within the institution of marriage, without fundamentally disrupting the institution itself. The trope, however, was that heterosexual marriages were also a site of violence, deceit and failures of romantic love, which homosexual couples were capable of replicating. The model of heterosexual marriage, therefore, was an idealization that was rarely realized by heterosexuals, or homosexuals.

Moreover, with the granting of same-sex marriage, the already privileged LGB Americans gained rights but social justice was further denied to those who could not assimilate. Queer sexualities and sexual relations, namely the San Francisco gays, were pushed further into the margins in order to demonstrate and represent the normality of particular kinds of love, which were non-threatening: non-sexualized love between two cisgender people of the same generation. Ultimately, using love discourses obscured, and at the same time, exacerbated the unequal distribution of rights, and social justice within LGBTQ communities.

Using the discourse of love and commitment, the mainstream LGB organizations merely asked for full equality in relation to heterosexual married citizens. The next chapter engages in a discourse analysis of elite interviews with leaders of the mainstream LGB organizations. In particular, the Chapter looks at whether the mainstream LGB organizations' discourses were developed for political strategy, and/or the discourses are an indication of the ever exclusive and heteronormal nature of LGB politics in California.

## **Chapter Six: Elite Interviews ‘Within Case Study’**

### **1. Introduction**

This Chapter is a ‘within case study’ comparison of the elite interviews that were conducted with leaders and key players of four of the six mainstream LGB organizations on the ‘No’ campaign in the fall of 2011. This ‘within case study’ offers analysis of the rationales and insights of the mainstream LGB leaders. The Chapter focuses on the eight interviews that I conducted with four of the mainstream LGB organizations, which include: Rick Jacobs, Mike Bonin and Adam Bink of the Courage Campaign; Andrea Shorter of Equality California; David Fleischer and Laura Gardiner of the L.A. Gay and Lesbian Center; and Trystan Reese and Moof Mayeda of the National Gay and Lesbian Task Force (NGLTF). Chapter Three offered an overview of the ideologies, structures and specific roles each of these organizations played in the Proposition 8 battle, and an explanation for why I interviewed four of the ten organizations in this study<sup>68</sup>.

Based on these interviews, this Chapter disrupts and challenges the major discursive strategies and claims of the mainstream LGB organizations paying particular attention to how their discourses have conditioned and altered the possibilities for social justice for LGBTQ Californians. As stated in Chapter Two, I define social justice as a political program that seeks to mediate economic, social and political inequalities by accounting for the many oppressions (including but not limited to patriarchy, racism, heteronormativity and capitalism) that condition economic, social and political life. Social justice is founded on the premise that individuals must be included in the political process, and allotted the platform and resources to articulate their experiences, needs and

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<sup>68</sup> The six prominent mainstream gay and lesbians organizations on the ‘No’ campaign include Equality California, Join the Impact, Courage Campaign, the Los Angeles Gay and Lesbian Center, the National Gay and Lesbian Task Force (NGLTF), and the American Foundation for Equal Rights (AFER).

goals so that the marginalized can effect political change, and challenge the many systems of oppression. I consider the discursive shift from rights/equality to love/marriage, and second, I analyze the implications of this shift.

## **2. Considering the Mainstream LGB Organizations' Discursive Strategies**

### **2.1. Philosophical vs. Personal and Values-Based Discourses**

Several of the interviewees discussed their organizations' attempts to shift their discursive strategies throughout the Proposition 8 battles from rights and equality discourses to normality and love discourses. Mike Bonin, a Senior Advisor for the Courage Campaign from 2008-2010, pointed to the shift in discourses among the organizations working against Proposition 8: “[Equality California and the Courage Campaign] seemed to agree, I would say by late spring/summer of 2009, that personal stories, personal narrative, value-based conversations was the way to go. And you saw that emerge in the different States where marriage equality was won.” (Bonin 2011)

As Bonin stated, while the attainment of equality through marriage was the goal of these organizations, the means to marriage equality changed in the summer of 2009, one year after Proposition 8 was created. In explaining this development, the interviewees used different rationales to describe this shift in discourse including philosophical arguments vs. personal arguments, rights based arguments vs. values based arguments, and moral arguments vs. fact based arguments. Each of these different types of arguments reflected the division between the rights and equality, and normality and love discourses, wherein the rights/equality discourses were seen as philosophical and fact based, while the normality/love discourses were seen as personal, values based and moral.

Bonin argued that the shift in discourse is best understood as philosophical vs. personal tension:

I think that the contrast is between the philosophical and the personal. You can sit with someone and you can argue with them about the principal of equality, the merit of a human being treated differently, as an abstract theoretical thing. It's another thing entirely to hear a woman named Stella talk about her daughter Teresa and Teresa's fiancé Melissa, and how Stella initially struggled with their relationship and how she saw how much the two of them loved each other, and she saw how much the two of them strengthened each other and she saw how much the two of them supported each other, and how she learned to love Melissa as much as Teresa and how proud she was to see the two of them get engaged, and how eager she was to send out wedding invitation for Teresa and Melissa to her friends who were older Chinese immigrants. (Bonin 2011)

Here Bonin reasoned that philosophical discussions about rights and equality are too abstract and theoretical. "A lot of people, those who engage directly and those who are more distant observers felt that the campaign against Prop-8 was not run very well, that it argued the case for gay marriage, for keeping gay marriage on theoretical or philosophical grounds." (Bonin 2011)

Likewise, Laura Gardiner, who was a Field Organizer for the L.A. Gay and Lesbian Center's Proposition 8 campaign, described the philosophical discourses of rights and equality as "lofty" and "theoretical."

But one of the main things that we train on is really focusing on voters' real lived experiences, so personal experiences, meaning not vague, not talking about lofty theoretical concepts like equality or like civil rights. It's not that those aren't important, it's just that they're important to us and effective for us, but that's not something that's effective for persuading voters who don't see things the way we do. (Gardiner 2011)

Gardiner explained that during the 2008 campaign against Proposition 8, before the shift in discourse, the mainstream LGB organizations' workers and volunteers were given specific talking points with which they were supposed to engage and sway voters. The talking points focused exclusively on rights and equality because such discourses were

seen as neutral and inoffensive. As such, campaign workers and volunteers were instructed to avoid focusing on homosexuality, gay people or even gay marriage, and instead to focus on rights and equality generally.

I definitely think that was the strategy for the entire campaign. I mean, thinking about the ads that they were showing throughout the whole campaign, it was always you don't want to take someone's rights away, because at the time marriage was legal. And so emphasizing that people don't want to take rights away, kind of using language that anybody, regardless of how they feel about marriage, that was the whole phrase; like regardless of how you feel about – how did that go; regardless of how you feel about marriage or gay people, I don't even – no, I don't even know if they said the words gay people, but it was you don't want to vote to take someone's rights away. That was the kind of idea, if that makes sense at all. (Gardiner 2011)

Our messaging was very specifically about being about equal rights, everything being – like before it was called Prop-8 it was called Equality for All. So we stayed in very general, vague terms in talking about it, so you know, don't you support civil rights and equality, don't you want people to have the same rights as you do. It was not something that had, like it was not anything that they trained us to be very personal about but instead it was just something that was supposed to be very like who doesn't support equality, who doesn't support civil rights; like you know, that would be the best way to get our folks in. (Gardiner 2011)

As Gardiner described, several of the mainstream LGB organizations realized that their reliance on the discourses of rights and equality was ineffective.

Trystan Reese, a Field Manager for Proposition 8 for the National Gay and Lesbian Task Force (NGLTF), argued that while LGBT activists and organizations have used the rights and equality discourses since the 1980s, the discourses were actually detrimental to the same-sex marriage cause in the Proposition 8 campaigns.

I'm sure you know the sort of 80s and 90s argument about marriage was like, 'There are 1,173 rights and responsibilities for the straight couple that I can't get, and I deserve rights and they're discriminating against me'. Actually, those are pretty much the worst things you could possibly say if you want to persuade someone to be with you. (Reese 2011)

Reese explained that the rights and equality, and discrimination discourses were detrimental, in part, because of the negative history that is attached to rights-seeking movements. More specifically, as Reese stated, white voters were particularly unreceptive to the rights, equality and discrimination arguments because, one can assume, the discourses evoked feelings of anger and defensiveness. Specifically, Reese reasoned that white voters would feel defensive over their own privilege, and would therefore be unwilling to discuss marginalized citizens' lack of rights and status.

I think it's because those are all idea things; the idea things about the rights and responsibilities, and then the anger things. So when you say like, 'I'm being discriminated against' it turns out people hear that as, 'You're discriminating, you're discriminating against me'. I think too, especially considering America's pretty horrific past around discrimination, I think especially white Americans have a lot of red flags that go up. When they hear discrimination I think there are just doors that just shut in their minds, and too in their hearts because no one wants to be accused of being discriminatory; they just don't. (Reese 2011)

Thus despite the claim that rights and equality discourses were going to be effective because they are neutral and inoffensive, Reese argued that the discourses were actually ineffective because of the negative affect they produced. Similarly, Gardiner stated that the rights and equality discourse were ineffective because they were negative and 'depressing.'

[The talking points] weren't very personal; they were very much about equality. And they were just that, they were talking points. It wasn't like the attempt of engaging in much of a conversation, it was really in the hopes that maybe if we say a couple of things, that will make the difference for them [...] "Oh I'm sorry to hear that. We believe that regardless of how you feel about marriage for gay and lesbian couples, it's wrong to vote on people's fundamental rights and freedoms". I'm looking at that right now. It's really depressing. (Gardiner 2011)

The rights and equality talking points were depressing, according to Gardiner, because they removed, hid and neglected the personal, human and relatable elements of the same-sex marriage fight.

Based on the observed failure of the philosophical rights and equality discourses, Bonin stated that the campaigns overhauled their voter strategy and began focusing on making personal, emotional and relatable pleas for same-sex marriage by having their LGBT and allied volunteers share personal stories about love, family and the desire for marriage. The shift in discourse also was framed as moving from rights and fact<sup>69</sup> based arguments to value and moral based arguments. Bonin characterized the shift in discourse as a victory of value-based arguments over fact-based arguments. He defined value-based arguments as personal and emotional.

It's also very true, and you can find studies in social science that there's tons of campaign experience that would give you real life experience, that people are generally not persuaded by facts and figures. People are more likely to be moved into a persuadable position, particularly on a values-based issue like same-sex marriage, by human connections, by hearing from a friend or a neighbour or a family member they know, who could communicate 'why this issue matters to me, why approving Prop-8 will hurt me personally, why it will cause harm to me and others I know and love.' (Bonin 2011)

The conflict between rights and facts against value and morals, has long been used to differentiate liberal and social conservative ideologies and political strategies. In contemporary American politics, rights and facts have been the discursive terrain of liberals, while values and morals have been the discursive terrain of social conservatives. This rejection of fact-based arguments by several of the mainstream LGB organizations is significant because of the practice of using sociological facts to prove that an identity groups experience discrimination, violence and neglect, and that these groups are therefore justified in making rights and protections claims on the state. Abandoning fact-based arguments has placed the mainstream LGB groups in a precarious situation, wherein they are rejecting certain avenues for claims making. As we will see, however, in

the following chapters, the facts-based arguments were used during the court trials of Proposition 8 as the plaintiffs attempted to demonstrate that LGBT Americans experience discrimination as a group.

Particularly since the surge of the New Right movement in the 1970s, social conservatives have successfully harnessed the discursive power of values and morality to sway and motivate voters on issues ranging from abortion to same-sex marriage. Reese of the NGLTF acknowledged that the shift to values and morality based discourses is an adoption of social conservatives' political strategies.

It's an ongoing thing that I think that you'll continue to see - progressive versus conservative, that conservative talk about feelings and morals and progressive talk about facts and ideas. Queerness, marriage, children, none of that is up here [pointing to head], all of that's in your heart, it's sort of visceral. But we sort of figured out how to talk about it in that way. (Reese 2011)

Bonin also acknowledged the desire to focus on the value-based arguments, which he defines as "very simple American," even religious values, including love, family and commitment.

But when people talk about real stories, people can feel the love; they can feel the actual human emotion as opposed to sort of the intellectual construct in their head, and that helps move them to action. So the values that people communicate are very simple American, some would say spiritual or religious values. They're about love, they're about family, they're about trust and they're about commitment. (Bonin 2011)

Love, family and commitment are American, spiritual, religious values, according to Bonin, and they also form the basis for social conservative ideology. Thus by evoking these discourses of love and marriage, the mainstream LGB organizations contributed to the project of mainstreaming and universalizing social conservative family values as American values. More problematic still, the mainstream LGB organizations adopted and reproduced social conservative discourses of an idealized heteronormal family; even

though the social conservative ideal family remains elusive to many heterosexual citizens.

Further, this shift in discourse changed the limits for claims making for broader movements. Bonin pointed to his organization's efforts to drastically change the nature and strategies of LGBT activism in California, and the broader American progressive social movement.

And so the idea behind Camp Courage was to elevate the value of individual voices and to underscore the importance of personal narrative and of values-based conversation and not arguing over facts and figures and statistics and trying to out quote someone in Bible verses or theological references. And it had a number of different effects. One is people felt very empowered to be able to tell their own stories. They felt engaged [...] Two, it sort of became sort of a mantra for what the emerging conventional wisdom became in the LGBT community in terms of how to wage the next campaign and how to battle for LGBT civil rights.

[...]

The equally important imperative behind the camps was to, it was no small thing, it was to try to more or less change the nature of LGBT activism in California, make it more grassroots, make it based more upon personal values and personal conversations and at the same time to also help bring the LGBT community and LGBT civil rights struggles into the fabric of a broader progressive movement for social change. (Bonin 2011)

Several of the mainstream LGB organizations began to operate according to the belief that the personal and love discourses would be more effective in persuading voters to support same-sex marriage. While the strategy to shift in discursive strategy was contested by members of the different organizations, the personal discourses of love and family limit the kinds of grievances, and claims making that are acceptable both within the LGBTQ movement, and according to non-LGBTQ voters. Within the LGBTQ community, discourses about love and family, as opposed to sex and sexuality, were reinforced. In conversation with non-LGBTQ voters, homosexuality and grievances on

the basis of one's sexuality were reduced to a value-based discussion of love and marriage. The next two sections analyze the consequences of this narrowing discourse.

## **2.2. Normalizing and Humanizing Homosexuals through Personal Stories**

The personal and love discourses were thought to be more effective, in part, because they humanized certain homosexuals, and normalized certain homosexuals' relationships, making them fit for marriage. David Fleischer of the L.A. Gay and Lesbian Center acknowledged the normalizing nature of marriage stating: "The possibility that marriage is a brilliant choice of an issue, is definitely the combination of that and the fact that nothing in our society is seen as more normal than marriage." (Fleischer 2011) Thus marriage requires assimilation and normalization on the part of those who wish to enter the institution, and at the same time, homosexual citizens' pursuit of entry into the institution of marriage demonstrates their desire and ability to assimilate to the criteria of marriage, and of inclusion in mainstream society in general. This normalization and assimilation of certain citizens limited and narrowed who is represented within the LGBTQ movement, who speaks, and whose needs are heard, acknowledged and accounted for; only those who can assimilate to the heteronormal criteria for marriage stand to be recognized as worthy of rights.

This humanization and normalization occurs in relation to heteronormal standards of sexuality, and family form. In this regard, Fleisher said:

Gay people are not better than straight people and we're not worse than straight people, and we're not identical to straight people, but our similarities seem much, much greater than the differences. We are more like everybody else than we are different. And to me... so when I say that, yes, I do think we should portray ourselves as decent, honest, and remarkably, in the aggregate, more similar to than different from everybody else. I really think we're part of society. Not some really odd species of space fungus that landed here and you know... not some incredible genetic mistake that preys on other people; I just don't think that's who

we are. It seems to me we're in a certain sense, incredibly ordinary. But human... but I think the human species is pretty extraordinary, so in that sense we're extraordinary, and we make these wonderful contributions to society and we build these wonderful worlds of our own. I just think we ought to try to give people a glimpse of the reality of our lived lives, and allow that to be part of voters actual lived experience. That's what I really think we need to do. (Fleischer 2011)

While stating that homosexuals and heterosexuals are not exactly the same, Fleischer said that they are similar in particular ways, including being decent and honest, and that those similarities demonstrate that certain homosexuals are “incredibly ordinary,” “part of society,” “human.” According to Fleischer, all of these characteristics mark certain homosexuals as being fit for and worthy of marriage. Marriage is then reinforced as the arbitrator of sexual and familial normality and abnormality.

Rick Jacobs, the Founder and Chair of the Courage Campaign, and Reese of the NGLTF both stated that the social conservative organizations were successful in demonizing and othering homosexual citizens. Reese pointed to the Yes on 8's commercials, which harnessed and intensified voters' fear of homosexuality.

You know, you have to think that we're up against decades of homophobia and transphobia, and that's like a bruise. You don't have to touch it very hard for people to recoil and to feel that sting. So their commercials are really effective because they just have to touch that spot and people go, 'I knew they were disgusting. I knew it, I knew it, I knew it. I'd forgotten for a second but now I remember'. And our commercials can't possibly help them unpack all of those decades of things that they've learned about queer people, which is why those face to face conversations are so important. (Reese 2011)

For Reese, the mainstream LGB organizations could not combat the affective power of their oppositions' campaign videos because they were based on longstanding stereotypes, and demonization of homosexuals. Likewise, Jacobs said that the Yes on 8 organizations were successful because they reproduced long-standing fears about homosexuals.

That was so clear that the Prop Eight proponents had already said we're not anti-gay we're just pro marriage, and you know it's fine people can be gay or

whatever, well that's not true, but it came out in the court, that their whole campaign was built on fear, and on creating otherness, and I think those are both by the way vehemently anti-American. (Jacobs 2011)

Jacobs argued that it is anti-American to other citizens based on their identities. We can assume that his argument is based on the belief that the United States is progressing on a trajectory of political and social inclusion of all citizens regardless of their sex, sexuality, race or religion. It is therefore anti-American to exclude citizens because of their real or perceived differences and abnormalities. Yet the mainstream LGB organizations did not combat the act of othering in itself by, for example, calling into question the act of othering any citizen on the grounds of their sexuality or gender identity/expression. Rather, the mainstream organizations worked to negate and dispel the othering by arguing that certain homosexuals are worthy of inclusion into one of society's institutions. As a result, those who do not fit the criteria for same-sex marriage were excluded, and othered, by the mainstream LGB organizations that attempted to normalize certain homosexuals for the purposes of marriage.

To humanize homosexuals and demonstrate their normality Fleischer, Reese and Bonin reasoned that the pro-same-sex marriage organizations need to show the "real life" of homosexuals. The mainstream LGB organizations sought to harness the grassroots power of its supporters by getting campaigners to engage in personal, one-on-one conversations with voters. This strategy was based on bring political issues down to the most interpersonal level. Homosexuals' personal stories of love, commitment, family and children were shared through one-on-one conversations, door-knocking, and video campaigns. Doing so enabled the organizations, through their campaigners, to humanize

homosexuals by evoking commonalities and “emotional touchstones” in different communities.

Part of what we felt worked because it was part of the way we had learned and been trained on the Obama campaign was that it was very important on a number of levels for people to tell their personal stories, speak from their own experience, in their own voice and in their own vernacular to people in their own communities. And that meant a number of different things, that the way you might talk about marriage equality if you are a gay man who lives in east Los Angeles would be different than the way I might talk about it as a gay guy who lives on the west side of Los Angeles, that there are different traditions, there are different faith experiences, there are different emotional touchstones in different communities. (Bonin 2011)

This political strategy was based on creating an affective connection between the voter and their fellow homosexual citizen based on their commonly held reverence for family, love and marriage. It was hoped that in so doing the negative portrayals, assumptions, and stereotypes about homosexuals would be dispelled, and voters would accept certain homosexuals as worthy of inclusion into marriage. Bonin agreed with Fleischer’s assessment of the power of sharing personal stories with voters.

When people hear those stories it, for those who have sort of a demonized view of LGBT folks, it softens them a bit. So those who are on the fence and sort of kind of agree with the idea of equality but ‘why do we have to call it marriage, why can’t we just call it domestic partnership’; for them to see and hear the relationship in real and genuine terms, it moves them differently. (Bonin 2011)

The personal stories of love and family have focused on the similarities between homosexual and heterosexual relationships and render certain homosexuals relatable to non-homosexual citizens, voters, and/or decision makers. Ultimately this strategy eroded equality and rights discourses as the mainstream LGB organizations did not argue that the rights are immutably theirs because they are human, but instead endorsed the social conservative and neoliberal requirement that certain citizens demonstrate their normality and humanness in order to attain rights.

### **2.3. Love as Strategy**

Bonin discussed the shift in discourses from rights/equality to love/family, which he stated came in the spring and summer of 2009 when his organization and the other dominant Californian same-sex marriage organizations agreed that the values-based arguments of love, commitment, family and marriage should frame the same-sex marriage battle (Bonin 2011).

The new love/marriage discourse was based on a political strategy that sought to demonstrate homosexuals' ability to replicate the idealized heteronormal family form and sexuality. To these ends, the mainstream LGB organizations have neglected to question the idealized, mythical heteronormal family, which is varying and intermittently experienced by a minority of heterosexuals and LGBTQ people. In order to make claims of normality, several of the mainstream LGB organizations drew direct comparisons between homosexuals and heterosexuals, going as far as to argue that love, and the desire to be in a committed loving relationship, are universal truths shared by homosexuals and heterosexuals alike.

Well, they're so basic. In other words, I think the similarities are that a very large percentage of us fall in love with other people. In fact it's possibly universal, and when we're lucky enough to fall in love, many – not all, but many of us – wish to partner with one other person and at the time that that partnership begins, many – not all, but many... most, I think of us – hope that it'll last a lifetime. And those are very profound similarities. (Fleischer 2011)

Fleischer continued that same-sex marriage advocates needed to enforce the “simple truth” that marriage, for homosexuals and heterosexuals, is about loving, lifelong partnerships:

And so this very simple basic truth, which is that gay people fall in love and when we do, we frequently seek a lifelong partnership that looks a heck of a lot like what straight people wish for with their marriages. That really simple idea. It

sounds so simple, but maybe it sounds simple-minded for me to think that that's what we need to communicate. But I can assure you, that's the idea we are not communicating, have not yet communicated and when we do communicate it, it actually feels like a big, new piece of information. (Fleischer 2011)

At the time of the interview in 2011, Fleischer held that the "No on 8" campaigns were not yet successfully propagating the message that heterosexuals and homosexuals were similar in their desire for love and marriage.

At the same time, however, Bonin of the Courage Campaign argued that his program was successful precisely because it focused on personal stories of love. The Courage Campaign represented the grassroots element of the movement: mobilizing individual activists to get involved with the campaign. These members were mobilized under the "Courage Campaign Equality Program," co-founded by Bonin, which organized volunteers in each state county, and sent volunteers to go door-knocking in order to speak, one-on-one to Californians in an attempt to open dialogue, put a 'human face' to the same-sex marriage struggle, and convince opponents and undecided voters that Proposition 8 seeks to deny 'normal,' 'average' citizens access to the rights currently associated with marriage (Courage Campaign 2009a). Bonin argued that Camp Courage and the Equality Program were founded to tap into the affective power of telling personal stories of love:

But when people talk about real stories, people can feel the love; they can feel the actual human emotion as opposed to sort of the intellectual construct in their head, and that helps move them to action [...] They're about love, they're about family, they're about trust and they're about commitment. (Bonin 2011)

The Courage Campaign hoped that opponents and undecided voters would realize that homosexuals are not abnormal or scary but rather that they are neighbours, co-workers,

and fellow citizens that want to love, protect and provide for their children and partners (Courage Campaign 2009a).

Adding to this analysis, the interviews revealed that the mainstream LGB organizations instructed their campaigners to discuss love and marriage with voters by focusing on the voters' experiences, opinions and feelings about love and marriage. Gardiner from the L.A. Gay and Lesbian Center discussed this strategy. When asked whether the strategy was meant to demonstrate the similarities between homosexuals and heterosexuals, she answered:

I think that's a good way of putting it. I mean I know in our conversations one of the things we say is, while there are some differences, that gay and lesbian people are more similar than different to straight people. And that kind of is the goal that everyone can wrap their heads around and agree with together. (Gardiner 2011)

Reese of the NGLTF expanded on the type of questions that the campaigners would use to engage voters and their sentiments about love and marriage.

So one of the things that we did say - you know, we really encourage people to have two-way conversation. So it was like, 'Have you heard about Prop 8, we're going to be voting on it? Do you know how you're going to vote?' And then if they said, 'Well, I think I'm going to vote yes' we would really just say, 'I'd love to hear more about why' and then to open them up to have a conversation. 'So, are you married? Why did you decide to get married? I'd love to tell you a little bit about why I'd like to get married. I'm straight but my brother's gay and I would love to tell you about why he wants to get married and what that would mean for me'. (Reese 2011)

Gardiner further explained:

And so, in order for them to get to the point where they can see things the way we do, we instead really want to get to know the voter more. And it's a conversation that involves learning more about them from 'Are you married?' Like 'How long have you been married?' 'Why did you get married?' 'Do you know any gay people?' 'How do you know them?' 'Are you close to them?' Like 'Are they in a relationship?' Because the more information we can know about where they're coming from the more we'll be able to understand how it is that they ended up having the assumption that they did, how it is - like certain experiences that influenced the stereotypes that they have of gay people, or why they assume that

all gay men are disgusting, or whatever the negative stereotype or assumption they're going into this might be that leads them to think that gay people are in some way either inferior or just not deserving of the same things. (Gardiner 2011)

It was hoped that in evoking the voters' feelings and opinions about marriage, the conversation would be focus on the commonalities between homosexuals and heterosexuals, and as a result, attention would be diverted from the elements of homosexuality that are deemed as different, abnormal and other.

While Fleischer and Bonin argued that same-sex marriage discourses need to be almost exclusively about personal stories of love, not everyone who has been engaged in the campaigns agrees. Andrea Shorter, who was the Deputy Director of Marriage for Equality California (the self-appointed leader of the Californian same-sex marriage fight), held that the focus on love has obscured the relative and important political issues, she states:

So you know that's another thing that the movement has to do a much better job at is having a plan or having strategies to combat the radical religious right. That is priority number one because there's a lot of distractions around marriage equality, 'it's about love man, it's about acceptance, it's about ...' okay great it's all about those things but from where I stand it is a political battle. That's right and we missed a lot of those cues. We were too busy trying to sell love and you know those things people want to hear about it while in the meantime they're using marriage equality in my opinion as a Trojan horse to drive its way through our constitution, our state's constitution saying we're plucking out some of your civil rights. (Shorter 2011)

Shorter pointed to the danger in adopting social conservative discourses and political priorities. Proposition 8 is a Trojan horse, according to Shorter, because the Yes on 8 campaign framed the issue as a matter of defending marriage, when in fact the supporters of the proposition were seeking to retract same-sex couples' rights to marry. Moreover, Shorter argued that this prioritization of discourses of love actually leaves room for social conservatives to set the terms of the debate in relation to equality and rights; discursive

turf that had once predominantly belonged to mainstream LGB advocates<sup>70</sup>. Theorist Michael Warner echoes Shorter, saying:

I would argue that any politics based on such a sentimental rhetoric of privacy is not only a false idealization of love and coupling; it is an increasingly powerful way of distracting citizens from the real, conflicted, and unequal conditions governing their lives. (Warner 1999, 100)

Shorter and Warner both highlight the risks of adopting discourses of love: the false idealization of heteronormal marriage goes unchallenged; and the inequalities and injustices of the current system were obscured and could worsen. Particular kinds of non-normalized citizens were not represented by the mainstream LGB organizations as they focused on love and family. Even within the same-sex marriage fight, experiences, needs and grievances that did not replicate these discourses of love and family, were ignored, silenced and even denied.

#### **2.4. Negating Sex(uality)**

While potentially ceding the terrain of rights and equality, the focus on love and marriage - particularly the love and marriage of the heterosexual voters - drew attention away from the sexuality and sexual acts of the homosexual citizens who were fighting to be included into the institution of marriage. As a result, these discourses produced an ever-narrowing depiction of citizens, diversity among citizens and defining/uniting

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<sup>70</sup> As was discussed in the last Chapter, the social conservative organizations began using rights language in relation to the rights of children to have a mother and a father, and in relation to the rights of voters who oppose same-sex marriage. Regarding the rights of children, the social conservative organizations argued that children, as future citizens, should have a right to a mother and a father, as opposed to two homosexual parents, and that children's rights to a mother and a father supersede the rights of homosexuals to marry. The interviews offered little in terms explaining why the mainstream LGB organizations failed to properly address the children/education/reproduction discourses. "And it was something like 18 days before the No On 8 campaign released the rebuttal to that. And for me I'm like if they pull the... basically they're going to pull the "teach gay sex in schools thing" every time, why didn't we have a commercial in the can ready to go when that hit. We were ready because we had the money. We out-fundraised them." (Reese 2011) They also offered little insight as to how the discourse could be challenged, or shifted to argue for a more robust discussion of sexuality in public education. Based on the lack of discussion of children and education in the interviews, I leave discussion of the children/education/reproduction discourses to the previous Chapters and to the next Chapter, which focuses on the legal fight around Proposition 8.

features with which LGBTQ citizens have historically made political claims. As quoted earlier in this chapter, Gardner from the L.A. Gay and Lesbian Center stated that the mainstream LGB organizations focused on love and marriage in order to challenge and dispel the negative stereotypes that were commonly associated with homosexuals and homosexuality. By evoking the love and marriage discourses, mainstream LGB organizations hoped that voters would focus on what certain homosexual and heterosexual citizens hold in common, and how closely each can approximate the elevated heteronormal family form.

To also divert attention from the negative assumptions about homosexuality, several of the interviewees stated that the mainstream LGB organizations avoided using the words gay, homosexual, or same-sex marriage, and avoided discussing or showing homosexual people or couples in their one-on-one conversations and/or video campaigns, thus passively supporting discrimination against homosexuals. As Reese of the NGLTF stated:

None of the commercials had gay people in them; none of them because we found time and time and time again the worst thing you can do to persuade someone who is on the fence is to show them a gay person. (Reese 2011)

Likewise Gardiner of the L.A. Gay and Lesbian Center added:

So you know the only place they say 'gay' is if they say gay marriage, which in itself is an accomplishment. A lot of these campaigns until recently never even used the word 'gay'. But just the language in general is very impersonal. It's just very like lofty terms that the goal was that everyone would hopefully agree with, like being treated fairly and stuff. That was Prop-8. (Gardiner 2011)

Fleischer elaborated on this point:

You know, the pro-LGBT side use the word gay in the most minimal way possible. I mean, it literally is used one time in one ad... I think, because it's used in the Boron's ad and there's not... there's a photo of the gay person, not an actual gay person. The photo is glimpsed very briefly on screen, and then I'd

have to go back and listen to the O'Connell ad, to see whether he uses the word 'gay', because at one point I thought he had and then... If he does, it's briefly and not in a positive way, but I think actually I have to go back and look in the ad, but I don't think he uses the word 'gay' at all. And so we... yeah, we avoid using it, and we avoid using it in a way that would suggest anything positive about it, right. If you're using it one time and you're rushing past it as fast as possible, you're not really conveying anything positive about it... kind of embarrassed by it. (Fleischer 2011)

The O'Connell advertisement, which was the mainstream LGB organizations' biggest response to the Princess advertisement, did not use the terms gay or homosexual, or even gay marriage or same-sex marriage. Instead, the advertisement referred to "marriage" and "fundamental rights" as euphemisms for same-sex marriage. As Fleischer explained, the mainstream LGB organizations initially avoided using the word gay in order to focus the debate on citizens' rights, or lack thereof, as opposed to their sexuality.

What I would say is that we avoid using the word 'gay' because we actually don't want this to be a vote on gay people, because we know gay people are stigmatised. So we're trying to appeal this on broad concept of how we should treat all people... which is really not what's being voted on and doesn't fool anybody, and in case it had any chance of fooling anybody, the other side, if they run a campaign, makes it very clear that actually this is about gay people. (Fleischer 2011)

As such, the O'Connell advertisement exemplifies the discourses that were used during the initial campaign from May – November 2008, which focused on supposedly neutral and inoffensive language of rights and equality, and removed homosexuality and same-sex marriage from the discussion.

This shift in discourse runs counter to the foundations and history of both the assimilationist and liberationist LGB movements in the United States. Until the 2000s, even the assimilationist movement was grounded in their members' shared identities as homosexuals. The "Pride" movement, after all, is based on publically acknowledging and celebrating homosexuality, as is exemplified in the rallying call "I'm here, I'm queer, get

used to it!” Admittedly, the discourses surrounding Pride events have also shifted toward assimilationism in the 2000s. In this context, the mainstream LBG organizations’ suppression of homosexuality is not only indicative of a detachment from the historical roots of LGB activism, it is also a moment of tearing apart the commonalities that create cohesion and solidarity within the movement. This occurs through attempts to distance same-sex marriage from deviant, abnormal sexualities as it obscures and denies any difference between certain homosexuals and heterosexuals.

The mainstream organizations did receive some backlash and criticism for choosing not to use the terms homosexual or same-sex marriage in their initial campaigns, as Bonin of the Courage Campaign explained:

People also felt in the Prop-8 campaign that it seemed to be shying away from or dancing around the idea of gays and lesbians. And so people really wanted to be able to talk their stories and not some script handed down by the political consultants in some other city that they never met. (Bonin 2011)

Accordingly, as Gardiner stated, several of the mainstream LGB organizations did attempt to bring the conversation back to acknowledging homosexuals.

Like I mean we don’t use the word homosexual but we use gay and transgender. And we definitely advocate for being as honest about who we are and up front. So all of our canvassers we train to come out of the door to share a personal story. It’s one of the important parts of our persuasion conversation, to make them more personal. And actually using the word gay multiple times is something – you know in our script we have gay and transgender. We definitely aren’t trying to hide it in any way. (Gardiner 2011)

Gardiner explained that the term homosexual is not widely used in California’s LGB communities because of its negative and clinical associations (Gardiner 2011). Still, discussions of homosexuality and homosexuals were to be mitigated through personal stories of love and family. By only mentioning gay in relation to stories of love, family

and marriage, it was hoped that voters' would be less inclined to think of the negative, abnormal and deviant elements of homosexuality.

To these ends, as Gardiner and Bonin recounted, focusing on love, family and marriage, and by extension on the similarities between homosexual and heterosexual, would hopefully overshadow and even replace voters' association of homosexuals with sex, and deviant sex at that.

I think the similarities are often related to the root of what our relationships are. So it's like it's not that – well I think people, oftentimes voters have the habit of when they think about gay people their minds automatically go into a sexual place. And so our goal is to let them see that gay people – and like this is only one example of myriads of ways voters make assumptions about gay people, but letting them see that our relationships are actually more similar than different to theirs. Like sure whatever happens in the bedroom might be a little bit different, but that like the love that we feel is the same and the protection that we want for family is the same. And the more we can provide actual specific examples of those things the more we will be able to have a lot more lasting impact with the voter. (Gardiner 2011)

Well I don't know that we specifically encourage people to talk about sexuality because, as I said, the values we're talking about are about love and about family and commitment, and it's not really about sex [...] I mean [the advertisements] didn't show gay people together. They didn't show gay families. (Bonin 2011)

Notions of love were increasingly used to simultaneously invoke specific notions of normal marital relationships, while erasing the sex and sexuality of the implicated subjects. Gay conservatives such as Andrew Sullivan and Bruce Bawer claim that the erasure of sexuality is a necessary and positive outcome of the legalization of same-sex marriage. The institution of marriage, they argue, will serve to civilize and regulate homosexuals according to the heterosexual values of monogamy, life-long commitment, and private dependence (Josephson 2005; Bell and Binnie 2000).

Conversely, Fleisher argued that the same-sex marriage campaign should have discussed homosexuality and used the word 'gay' in order to address, head on, the cultural association of homosexuality with deviant sex.

The actual lived experience of straight people is, now that the vast majority of them know somebody gay, and they're actually aware that the gay people they know are not constantly engaged in sex. Usually their experience of them is in a non-sexual environment. So I think in fact this conflating gay people with sex, and then the American cultural view of sex as dirty, dangerous and problematic... you know, that's not really not people's actual lived experience of either of those things. It's the heavy lift on our part to help people notice their actual lived experience and the ways in which it contradicts that sort of... you know, abstract... I would say conventional thinking, but it's not even thinking. I guess I would say cultural programming. But we aren't going to be able to deal with that by not using the word 'gay'. In fact, we lose our ability to deal with it if we don't use the word 'gay.' (Fleischer 2011)

Fleischer furthered that discussing homosexuality and sex could actually serve to demonstrate that there are more similarities than differences between heterosexual and homosexual sex.

It's true that when you use the word 'gay', people think that's sex, because they don't know anything else about us. Richard Goldstein – I don't know if I've mentioned this quote to you – he's a writer from the Village Voice. Richard Goldstein made the observation that a lot of straight people think well, a lot of allies make the argument that the gay people and straight people are basically the same except for sex. His argument is the opposite: that the only thing that gay people and straight people have in common is sex. You can have a long discussion about this, but you know, most sexual acts are not uniquely heterosexual or homosexual. The second most common form of birth control practice by heterosexuals is anal intercourse, right. It's something that gay people and straight people both seem to do a lot of. So it's ironic that the differences in sexual practice are elevated to this point where they seem to be, in popular understanding of gay people, the totality. But you know, that's not people's actual lived experience. (Fleischer 2011)

By discussing the similarities between homosexual and heterosexual sex, Fleisher hoped that homosexual sex would be demystified and normalized, and that ultimately the discursive power of homosexual sex would be undermined. This is to say that it was

hoped that homosexual sex would no longer have the power to galvanize voters into voting against homosexual citizens, once homosexual sex is normalized.

However, as discussed in the previous Chapters, this strategy of negating the sex and sexuality of homosexuals was a reaction and capitulation to social conservative organizations' success in demonizing homosexuals and their sexual practices. Rather than seeking to expand voters' and society's understanding of sexuality beyond the heteronormative ideal, Fleischer's solution, and the mainstream LGB organizations' general strategy of obscuring homosexuals' sexuality and sex, negated the differences that exist outside heteronormativity, thereby shoring up the power of the heteronormative model. Moreover, this strategy also negated the diversity of LGBTQ citizens, and the myriad of experiences, problems, and needs that are based on sexual difference. This silencing of sexuality has obscured the ever-present relationship between sexuality and social justice in terms of how rights and equality are denied and restricted on the basis of sexuality and family form. The next section focuses on the implications of this normalizing discursive strategy, arguing that the mainstream LGB organizations' attempts to deny difference exacerbated and produced exclusions within the LGBTQ community.

### **3. The Implications of the Discursive Shift for the Mainstream LGB Movement and LGBTQ Citizens**

#### **3.1. The Implications of Prioritizing Marriage**

Before analyzing the exclusions that are caused both through the campaign for same-sex marriage, and through the legalization of same-sex marriage, it is important to interrogate why the different mainstream LGB organizations prioritized same-sex

marriage as the most effective avenue toward equal citizenship. Specifically, throughout this section, I look at who prioritized same-sex marriage, why they prioritized it, who is being left out of the conversation, and who is affected, both positively and negatively, by the prioritization of same-sex marriage. These interviews shed light on how the campaign for and legalization of same-sex marriage constrained and limited which LGBTQ citizens were given space to make claims, and whose claims are prioritized.

Bonin of the Courage Campaign stated that marriage is the “most important battle” for LGB Californians (Bonin 2011).

I mean in California we're very lucky. Most of the other battles that States still have yet to fight about employment discrimination or housing discrimination, even domestic partnership stuff, have long been fought and settled here in California. We have a number of battles with something maybe coming up on the State ballot next year over education. (Bonin 2011)

Bonin argued that marriage was a priority because other LGB battles were already fought and won in the state. He also stated, however, that marriage necessarily took precedence over issues such as education reform (to incorporate LGBTQ issues and history), and that marriage was important enough on its own to remain a priority, despite the existence of comprehensive domestic partnership policy in the state.

For many of those interviewed, marriage specifically was a top priority because it was seen as the most effective means to other ends, including social acceptance and equality, as Fleischer described:

For some period of time leading up till now and for some period of time going into the future, marriage is going to be one of the biggest issues – maybe the biggest issue – where we end up really having a social, you know, negotiation over whether LGBT people are going to be accepted into society or not. I think people care enormously about that. They're also a group of people who care enormously about marriage, but I think there's an even bigger group of people who care about the bigger issue of equality and for them, you know, it turns out

it's marriage, but you know, we're going to have to calculate the ballot measures here, the Fair Education Act, in November 2012. (Fleisher 2011)

Marriage was thus the gateway to social acceptance, and then to equality. It was hoped that the inclusion of certain homosexuals into the institution of marriage would both reaffirm that society is growing to accept certain homosexuals, and enable homosexual citizens to use the social power of marriage to gain further social acceptance. Bonin discussed both of these benefits:

I think having married same-sex couples in California, having the two guys who are next to you at the AYSO soccer game where you're with your kid, rooting for their kid and introducing each other as 'This is my husband', I think that just has such a ripple effect in how it changes things, that it makes the subsequent battles easier. It's just such a, it's a tremendous, it's sort of a visibility multiplier almost, and it just has tremendous cultural consequences. (Bonin 2011)

Marriage had the power to normalize. For example, the moniker of "husband" and "wife" erased difference, unlike the terms "boyfriend" or "girlfriend," which tend to be seen as lesser than marriage, or the terms "partner" or "life partner," which tend to be associated with homosexual relationships. When citizens were named husbands or wives, they were elevated to a new social status because their difference was erased and replaced with a socially accepted and respected title.

At the same time, social acceptance functioned through marriage in bigger and more complicated ways than the titles of husband and wife. For several of the interviewees, marriage represented American society's acceptance of homosexuality. Reese and Bink attested that same-sex marriage is a litmus test for how society felt about homosexuality and homosexuals.

I think [marriage] was [...] a flashpoint? I think that it's representational of a whole other bigger thing that just happens to be funneled into this one thing. I think that's what it was. I think it became a standard, a representative, a litmus

test for homophobia, period. They were not voting about marriage; they were voting on how they feel about gay people. (Reese 2011)

I think it's because, you know if you look at, I guess call it the history, people were gay, lesbian, or bisexual have always been fighting to be treated as equals, and I naturally saw a marriage as a natural extension of that. You see it in the military, employment and housing and you know all these different things where people wouldn't be allowed to use a bank because they're gay, they're homos. And marriage I think is the natural extension of that, it's really, but it's even more, it's asking other folks to see your feelings as okay. (Bink 2011)

The last two sentences of each of these statements are key. Both argued that marriage was more than policies, or laws such as Don't Ask Don't Tell or Non-Discrimination Acts. Marriage was about social validation, as opposed to mere acceptance or tolerance, of certain homosexual citizens' "feelings." Non-discrimination efforts were based on a tolerance of particular identities and differences; those identities and differences that the state deems both sufficiently persecuted, and worthy of protection. Non-discrimination laws do require the state to acknowledge certain identities as worthy of protection but they are also based on mediating difference so that citizens can participate in society. Non-discrimination acts are reactionary, based on tolerance, and offering negative rights, while marriage is proactive, based on affirmation, and offering positive rights. Moreover, marriage does not merely protect against discrimination, it offers legitimacy and validation, and rights and benefits, to homosexuals' "feelings," relationships, sexualities and/or lifestyles, in so far as they approximate the heteronormal ideal.

Jacobs built on the latter point as he discussed the benefits that are allocated through marriage, arguing that elements of American society encouraged, if not promoted, marriage as a necessary avenue for accessing certain rights and protections, and ultimately "full access to society."

Well it's about allowing full access to society, I think, I mean look our American civil society has made some fundamental decisions, one of them is that marriage is a societal good and therefore it has created legislation and regulation that encourages marriage, that's fact, all these 1100 mentions of marriage in federal statute that people refer to, tax code that you referred to, all of those things are designed to encourage marriage. (Jacobs 2011)

Here Jacobs did not question the heteronormal citizenship regime practice of allocating rights through marriage. He did not question why homosexual citizens have to assimilate to the terms of marriage in order to have access to certain rights and protection, which is ultimately a shallow and limiting avenue for social justice. Rather he maintained that marriage is a fundamental institution in American society and law, and that consequently it needs to be extended to certain homosexual citizens.

Bonin added to this discussion, arguing that same-sex marriage has been an important, and strategic goal, because it is a conservative institution.

What I think is fundamental and revolutionary of what's happening in the battle for LGBT civil rights is that the cornerstones of sort of conservative American values, marriage and the military are the two places where the LGBT community has been fighting very strongly and far more successfully than I would have imagined in my 20s in the '80s for civil rights. And there had been for generations this perception among not just conservatives but among sort of mainstream middle America that being gay or lesbian was dirty or deviant or all about or nothing about anything but sex. And these battles over what are generally perceived to be conservative institutions, or the right to be part of the bedrock military establishment or the traditional family is transforming how gays and lesbians are perceived. And that's sort of cascading into getting more acceptance. (Bonin 2011)

For Bonin, homosexuals should have fought for same-sex marriage not necessarily to change the institution, but rather to harness the power of the conservative traditional family and institution of marriage towards the ends of challenging the cultural belief that homosexuals are dirty, deviant and fixated on sex, thereby normalizing certain

homosexuals. Conversely, Jacobs saw the conservative nature of the institution as impeding the LGBTQ and heterosexual communities' support of same-sex marriage.

I think it's not just the gay and lesbian community that it leaves out, I think that the emphasis on marriage leaves out a lot of people. It leaves out people in the heterosexual world who are not that committed to the idea of marriage as a working institution and don't think that it should be forced on people, and all of a sudden. I mean all of a sudden, the formally fringe typically lefty, in people's minds, LGBT, or L&G community is racing after this traditional institution, that it formally, not only couldn't have it, largely reject it, so it's a kind of, I am not saying it's a big proportion of those people, but there are some, I have run into them frankly. I have run into funders, straight funders, [...] they're not interested in the marriage thing because it's not, I don't believe that that's the holy grail. (Jacobs 2011)

Jacobs stated that he encountered heterosexual and allied citizens who did not prioritize marriage because they either believed that the terms of marriage should not be extended to include homosexuals, or that marriage is a flawed institution that should be challenged rather than bolstered through expanded inclusions. He also noted that a small proportion of "lefty" LGBT citizens did not support the same-sex marriage fight because they were critical of the institution of marriage. While Jacobs acknowledged that there are those in the LGBTQ and allied communities that were against marriage as a priority, these voices were marginalized in the fight for same-sex marriage. The LGBTQ community and movement became defined by the prioritization of same-sex marriage. Moreover, this narrowing and limiting of debate to the singular goal of same-sex marriage actually bolstered the social conservative institution. Neither Jacobs nor Bonin denied or attempted to challenge the conservative and traditional nature of the institution. Instead, Bonin, Jacobs and the majority of the mainstream LGB organizations discussed thus far in this Chapter agreed that the institution should be harnessed to the ends of

desexualizing, normalizing, and rendering acceptable certain people within the LGBT communities.

### **3.2. The Exacerbation and Production of Exclusions**

In this section I examine the implications of prioritization of marriage in terms of who was left out, silenced, and pushed out through the fight for and legalization of same-sex marriage. I argue that the fight for and legalization of same-sex marriage, actually exacerbated existing exclusions based on gender and race, and created new exclusions based on sexuality and family form within the LGBTQ community.

Before discussing how same-sex marriage creates new exclusions on the basis of sexuality and family form, it is important to discuss how the fight for same-sex marriage exacerbated existing exclusions in the LGBTQ community. I discuss two populations or identity groups who have been historically excluded from the LGB community despite their ‘deviant’ sexualities: transgender people and African American LGBTQ people<sup>71</sup>. There are other groups and populations whose exclusion has been exacerbated through the same-sex marriage fight, including lower-income people and religious (especially Muslim) people, and LGBTQ people with non-mainstream political ideologies (especially those who identify as radical, queer and/or anarchist). As an exception, Bonin did say that the economic downturn may have been a higher priority for some LGBTQ Californians:

I would say that the vast majority [of Californian LGBT people] are behind [same-sex marriage]. I don't know that I'd say that the vast majority would identify it as their number one priority. I think there's significant difference in

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<sup>71</sup> Some of the most visible and transformative transgender activists have been women of colour, including RuPaul, Laverne Cox, and Janet Mock. Laverne Cox and Janet Mock advocated for issues far beyond same-sex marriage including violence against transgender people, LGBTQ poverty and homelessness, prison reform and/or abolition, hate crime laws, transgender visibility in popular media, and public education addressing transgender issues (Mock 2014; Law 2011).

that based on culture and race and generation and class; I think there's significant differences. Particularly at a time of recession, there's a lot of people who say I'd rather see our time and attention focused on fixing the economy or on economic inequality. (Bonin 2011)

Despite his mentioning of the economy, Bonin, and the other interviewees, did not connect why same-sex marriage will create economic divisions in the LGBTQ community, not the least those denied from tax breaks, insurance sharing and property sharing.

Beginning with the exclusion of transgender people, I turn to Trystan Reese who was a self-identified transgender man. During his experiences as a Field Manager for the NGLTF, Reese observed that few transgender people, and even fewer transgender people of colour, participated in the Proposition 8 campaign.

All these thousands of people - it was basically me and like four other people and they were all trans men, and five out of the six of us were white. So that's when I started thinking, 'Oh, we're leaving some people out.' (Reese 2011)

Based on the lack of transgender volunteers, Reese proposed that the problem is that the campaigns did not actively engage with or support the inclusion of transgender people, and people of colour.

They need people that's doing those process things, having those discussions, building up leaders, building up POC leaders, building up trans leaders, supporting each other, keeping local organisations going, moving, doing on the ground, direct services. (Reese 2011)

Reese added that because of this lack of engagement with transgender people and people of colour, the organizations failed to adopt values, goals and a "world view" that represented these historically excluded members of the LGBTQ community.

And you need to develop and disseminate a shared world view or a message - what do you want? What do we stand for? What can we agree upon? So I think campaigns are only going to lift up a certain part of our community, but the idea

should be that these other things lift up other parts and that we're all working together in council. (Reese 2011)

Jacobs also cited the lack of transgender people in the same-sex marriage campaigns, arguing that same-sex marriage, and the fight to repeal Don't Ask Don't Tell, were issues that have not appealed to transgender people, or other marginalized people within the LGBTQ community.

I think it leaves out people in our community, I think it leaves out transgender people, it doesn't deal with transgender people at all, and I suspect in some ways could be kind of isolating, further isolating for transgender people. I think for gay and lesbian people for whom marriage is not important it bypassed them, whether it leaves them out or not I don't know, I also think that the most significant that has happened, two most significant things that have happened, in recent time, probably the last 15 years, in the LGBT movement, are the passage of Prop Eight and the defeat of the don't ask don't tell, the repeal of don't ask don't tell, I think those are two huge things. (Jacobs 2011)

During the interviews I did ask each interviewee if and why they think same-sex marriage may not benefit all members of California's LGBTQ community. Beyond their hypothesis about why transgender people in particular did not feel welcome or represented in the Proposition 8 campaigns, Reese and Jacobs offered little information about why same-sex marriage did not appeal to transgender people as a top priority.

Same-sex marriage does not offer immediate benefits to transgender people as it does to cisgendered homosexual people: many transgender activists and organizations argued that issues such as universal healthcare, affordable and assured housing, non-discrimination acts, and prison reform were issues of higher priority among transgender citizens (Spade and Willse 2010). In the previous section of this Chapter I highlighted some of the issues that the interviewees also stated have been priorities for LGBT Californians outside or beyond same-sex marriage, however, even among these issues none of them specifically accounted for or attempted to address transgender citizens'

particular experiences and needs. As Spade argues, same-sex marriage is one among many issues – such as the inclusion of sexual orientation into the Non-Discrimination Act and the fight against Don't Ask Don't Tell – in which the mainstream LGB movement asked for the support of transgender citizens in exchange for promising that the mainstream LGB movement would come back to help transgender people once the LGB fight has been won. Spade points out that such promises have never been fulfilled, and that instead the marginalized members of the LGBTQ community have been left to fend for themselves once the more privileged within the community ascended into ever more exclusive and privileged institutions and positions (Spade 2009).

Historically and contemporarily, people of colour have been excluded from and marginalized within America's mainstream LGBT movement (Lorde 2007; Jordan 2002). This marginalization and exclusion was demonstrated during and after the November 2008 Proposition 8 vote when African American voters were blamed for being a key factor in the passage of the proposition. A study by the NGLTF has shown that race ranked fifth out of the top seven<sup>72</sup> demographic indicators that influenced Californians' vote on Proposition 8 (Egan and Sherrill 2009). Still, placing the blame on African Americans demonstrated the racism and racial divisions that have existed within California's LGBTQ community. Andrea Shorter, who, as noted above was the Deputy Director of Marriage for Equality California, and an African American woman, discussed this racist knee-jerk reaction in the LGBT community:

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<sup>72</sup> A report on Proposition 8 by the NGLTF assessed seven demographic indicators: party identification, ideology, religiosity, age, race, gender, and knowledge of gays/lesbians. Of the seven indicators studied, race placed fifth in terms of impacting voter support or opposition to same-sex marriage. Party identification, ideology, religiosity, and age, in that order, had the highest impacts on voters' position on same-sex marriage (Egan and Sherrill 2009).

I went out and said whoa, whoa wait a minute let's look at [...] what this means, you know what are the real messages here, what's the real narrative here to get people to kind of calm down. I think it is to turn us against each other, it's divisive, it makes for good you know drama and narrative. That's not necessarily true. Now I'm not saying that all black folks love every idea about same-sex marriage, I'm not saying that at all but black people are no more homophobic or no more white way to vote yes on it than any other group. In the end it's still high in their domain but it's certainly nowhere near 70%. I think black people were on 57% yes on Prop 8. And so race really wasn't so much about ... the major coalition it was an issue of religion which I'll come back to in a second, that's my second point. Asian Pacific Islander folks I think they're about 53%, the Hispanic population around 59-60% and yeah that's religiosity and Catholic, it's important for Prop 8. (Shorter 2011)

Immediately following the victory of Proposition 8, Shorter worked to temper the accusations made against African American voters by pointing to religion as being a more important factor in determining citizens' support for same-sex marriage. She stated that religious belief is an explanation for why some African Americans did not support marriage, and why some LGBT African Americans were hesitant or unable to support same-sex marriage.

To avoid such divisions in California's LGBT community in future endeavors, Shorter argued that the LGBT movement historically has been isolated from other progressive movements, and as such it needed to work to build solidarity between other progressive movements that are also fighting for equality and justice.

So then you're in this campaign now and some campaigns that may have been neglected in terms of relationship building, stronger relationship building over the years sort of revealed themselves and because it's a community that in large part our history as a movement, as a civil rights movement has really made us in many respects exiles. We're in exodus. We had to do a lot of shit on our own. So look at the AIDS crises. (Shorter 2011)

[...]

So the question then becomes [...] are we a civil rights movement that is inclusive and is derivative or built on other civil rights movements and if we are then we have to behave in that way, we have to work together, we have to work in a coalition of effort, we have to support. We have to have each other's backs [...] So it's the having each other's backs and building those coalition strategies that

not only enable a stronger movement for the LGBT movement but a stronger progressive movement all around. (Shorter 2011)

While Reese stated that the LGBT community needed to work to include transgender people and people of colour into all ranks and decision making positions in the different organizations, Shorter argued that coalition building outside of the LGBT movement would actually engage people who have been marginalized and underrepresented within the LGBT movement. Shorter continued with this argument:

Now someone can say, “oh my god, that sounds like a long way to go just to get married”. Well yeah we want to get married, I’m not absolutely personally looking to marry by the way but it’s more than that. It’s what is our role in the broader progressive movement and I think that that is one of the first critical lesson of Proposition 8. While we had coalitional support I don’t know that it was really leveraged in a way that it could have been. There’s coalitional work, working in partnership and then sometimes there’s just window dressing, it’s cosmetic. (Shorter 2011)

To build true, long-lasting and meaningful solidarity and coalitions, Shorter warned against seeking relationships with LGBTQ and heterosexual African American communities and voters just to win singular issues such as same-sex marriage.

It’s not enough to say “oh yeah, yeah, yeah we’ve got black folks on board ...” pull out some literature when you’re not doing the deeper work and working with them and drawing upon their expertise saying okay how do we reach out you in a way that makes sense and is respectful and engaging with the different parts of the African American community who knows something is going on. But it can’t be also just for the singular purpose though so that we can get married. (Shorter 2011)

Coalition building would not work if one group first sets the priorities, and then attempts to gain support for their cause from an external, excluded and/or marginalized group. This strategy negated and silenced the needs of the excluded and marginalized group, and instead attempted to universalize the priorities of those who were in a position to

designate the priorities of the group. Fleischer admitted that same-sex marriage was prioritized by a small, sub-set of the LGBTQ community:

You're always going to find diversity of opinion on anything. But I would say there's a very broad consensus that's grown over time that marriage is an important and worthwhile goal in and of itself for our community. But I think you could... there's a broad spectrum of how important it feels personally to different people. There's some people who feel like this is, you know, the defining issue of their lives and the defining issue of what a just society is all about, and then there are people who feel like this is very important, but one of many important issues, and then there are some people who would say it's you know, relatively speaking, not even necessarily the most compelling. The other thing is, it's a gamut. It's a little bit tricky, because it really depends who you think our constituency is; in other words, just by LGBT people, you're referring to the relatively small part of our community that participates in LGBT community institutions that are non-social. (Fleischer 2011)

Such strategy overlooked the fact that the designated priorities did not fulfill the specific experiences and needs of different populations within the LGBTQ communities and the broader progressive movement. Thus the mainstream LGB organizations had difficulty building coalitions with both transgender people and LGBTQ people of colour because same-sex marriage was prioritized by a minority of relatively privileged members of the LGBTQ community, who did not consult with the marginalized members of their communities. As a result, and as Shorter and Reese argued, the fight for same-sex marriage has exacerbated historical divisions within the LGBTQ community.

### **3.3. The Production of New Exclusions**

The normalization of particular heteronormative sexualities and family forms through same-sex marriage created new divisions, exclusions and hierarchies among LGBTQ people. Throughout the 20<sup>th</sup> century, LGBTQ communities across the United States were largely defined by their embracing and celebration of diverse sexualities and sexual relationships. Among the liberationists, sexual freedom was emphasized as they

sought to challenge their society's rigid standards for and regulations of sexuality and sexual relationships. It was not until the 1980s and 1990s that select LGB people and organizations began to fight for the recognition and protection of certain kinds of relationships within the LGBTQ community. As a result of this push for same-sex marriage rights, hierarchies were created within the LGBTQ community on the basis of sexuality and family form.

Several of the interviewees acknowledged that there were members of the LGBTQ community who did not prioritize same-sex marriage. Gardiner of the L.A. Gay and Lesbian Center:

I know that there are people within the LGBT community who don't see the fight for same-sex marriage as being their fight, and there are various reasons for that. And I don't want to try and speak for them because they have their own reasons. (Gardner 2011)

Fleisher of the L.A. Gay and Lesbian Center:

Marriage is actually going to be important only to a subset of our community as a practical matter. You know, not everybody's going to want to get married, so I don't think it will bring an end to LGBT activism in any way. I think we'll find some other focus. I don't know what it will turn out to be. (Fleischer 2011)

While Gardner stated that it is a minority of LGBT people who did not support same-sex marriage, Fleischer acknowledged that same-sex marriage only stood to benefit a "subset" of LGBT people.

The majority of the interviewees saw same-sex marriage as a top priority not only because it would practically benefit certain LGB people, but also because it would produce broader cultural change and social acceptance of homosexuality. Throughout the interviews, a few of the interviewees acknowledged that particular LGBTQ people did not stand to benefit from same-sex marriage, however the majority of the interviewees

had difficulty imagining how same-sex marriage could create new hierarchies and exclusions within California's LGBTQ community. When asked questions about new exclusions, two of the interviewees framed the debate as a matter of choice. Gardiner of the L.A. Gay and Lesbian Center:

I have never met anybody particularly who is LGBT and doesn't support same-sex marriage, but I know that it exists. [...] You know I don't care whether or not you want to get married. You don't need to want to get married. I don't know if I want to get married. It doesn't mean I don't see the importance behind making it so that gay and lesbian couples in relationships and not just saying that other relationships can. (Gardiner 2011)

Bonin of the Courage Campaign:

In the same way, I think it's important for everybody to figure out and strive for what it is they want and need. Just because, as I said, just because gays can serve in the military doesn't mean that people necessarily have to, nor does it mean they should want to. And the same is true of marriage equality. I have a number of straight friends who have never chosen to get married. Some of them are happily living single and probably will their entire lives. Some of them are living together with their opposite-sex partner that they love a lot but they've chosen to do the marriage route for whatever reason. And I don't see why folks in our community can't do the same. There are plenty of alternative lifestyle heterosexuals in the country and I'm sure that people can continue to be as alternative or as different as they choose to be. (Bonin 2011)

Bonin framed same-sex marriage as opening up the choices how for LGBT people define their relationships. He furthered that opening up particular relationship choices would not impede other LGBTQ people from continuing to live "alternative" or "different" lifestyles.

I think there is somewhat of a yearning among some of the LGBT community. Like honestly, I kind of identify [...] that we're sort of losing the power and the joy and the mystique of the alternative lifestyle. And part of what was fun and exciting about being gay, particularly in the '70s and '80s, was that we were free of those traditional restrictions. And so I get that and part of me identifies with it. You know I'm sort from a bit of a cusp generation I guess. But ultimately this is a battle for freedom and for equality and that's about choice. Everybody should have the same range of choices, and just because Tom or Sally decides that they want to serve in the military doesn't mean that Rick or Mary have to. They're

free to continue to not marry; they're free to continue to not serve in the military. And I think while it may not elevate and exalt the alternative lifestyle the same things were in the '70s, I think the dignity of all of us is elevated and we all have more choice and more equality. (Bonin 2011)

The framing of same-sex marriage as an opening of choices was actually a really small crack. It only created, still limited, choice for those who could assimilate enough to fit the heteronormal ideal. The legalization of same-sex marriage reinforced restrictions in terms of the form of relationships that should have access to the rights and protections that are administered through marriage. Thus same-sex marriage did not produce freedom and equality through choice but actually produced further regulation within a limited field of choice. The assertion that "everybody should have the same range of choices" did not account for those who were unable or unwilling to marry and who, as a result, were not made more free or equal because they could not access the choice of same-sex marriage.

Thus the choice of same-sex marriage also created new hierarchies as particular kinds of relationships within the LGBTQ community were elevated through access to particular rights and benefits, and through growing social acceptance. Bink of the Courage Campaign recognized that same-sex marriage would not fulfill the needs of all LGB Californians:

There are people who don't want to marry, and who will never want to marry and that's fine. That's why here in DC, we push so hard for the ability for straight relationships, like two sisters as well as gay couples to have civil unions if you want one. People have this idea that marriage means this and that. In Rhode Island they're considering marriage and if you replace civil unions with marriage and you don't offer them at all, you know a lot of people including myself oppose that because it leaves people out because you can't have those same protections unless you get married and they don't want to get married, and they shouldn't get forced to get married. (Bink 2011)

Here Bink argued for an expansion of civil unions to include other types of relationships of dependence such as siblings, friends, and extended family. That way, he said, marriage

would not be the only route to particular rights and protections. Still, he maintained that same-sex marriage should be a priority for California's LGB community, and should remain a viable choice for homosexual couples who want to marry.

Shorter, also of the Courage Campaign, extended her criticism farther than Bink, as she argued that the fight for and prioritization of same-sex marriage exposed and exacerbated divisions within California's LGBTQ community.

[This is] not to say that eventually other forces or other folks didn't come to support but there was definitely that sense of and in reality it's sort of isolation [during the AIDS crisis]. Some of it certainly was through external force, some of it was internal. So when you are a movement or when you are a community or however you want to describe this phenomenon of being gay, openly gay in America and being part of the community, if you really think about it in many respects while there's some popular culture integration so to speak, in several respects we tend to be somewhat isolated. (Shorter 2011)

Several of the LGB organizations fought for same-sex marriage because of its potential to effect social acceptance of homosexuals. Shorter approached this promise of acceptance with trepidation, reasoning that crises, such as the HIV/AIDS epidemic, revealed the degree to which marginalized people are actually accepted by mainstream society. Same-sex marriage, then, may have appeared to be a moment of acceptance and inclusion, and of broadening of choice and equality. Shorter warned, however, that this moment masked and obscured the divisions and isolation that remain a reality for LGBTQ people in California.

#### **4. Conclusion**

Based on interviews with elite members of four of the mainstream LGB organizations, this Chapter argues that the prioritization of same-sex marriage has significantly narrowed the possibilities for seeking and building social justice for California's LGBTQ citizens. The narrowing of possibilities occurred in several ways.

The prioritization of same-sex marriage had the effect of both limiting how LGBTQ grievances were understood and articulated. According to the mainstream LGB organizations, LGBT citizens were primarily concerned with being accepted by into broader society and marriage was argued to be the best route to this acceptance. Taking the route of marriage required assimilation to the criteria of belonging, which operate according to a social conservative heteronormal citizenship regime.

By removing homosexuality from the discussion, homosexual citizens were presented only as citizens who wish to get married, making them as similar as possible to the ideal heterosexual citizen. The elevation of citizens who fit the criteria for marriage produced a shallow and limiting definition of citizenship, ultimately denying both the commonality and diversity of experiences and needs among people who were marginalized and regulated precisely because of their sexuality. Those who could not assimilate to such criteria were silenced and ignored by the LGBTQ community, and by non-LGBTQ citizens and ultimately the state. Those who prioritized same-sex marriage, such as the elites interviewed here, absolved the state, and society, from having to be concerned and accountable for the experiences and needs of those for whom marriage will not solve their economic, social and political problems.

Taken together, this political battle has narrowed the futures of LGBTQ movements, and created winners and losers within California's LGBTQ community. The exclusions that have been produced and exacerbated through the fight for and legalization of same-sex marriage has changed several key elements of the LGBTQ movement including who is taken as a member of the LGBTQ community, who is represented, and

who is understood to be acceptable citizens, worthy of representation and acknowledgement, of social acceptance, and of state sanctioned rights and status.

## Chapter Seven: Proposition 8's Sexuality and Rights Discourses Filtered through the Courts

### 1. Introduction

This Chapter provides a discourse analysis of the three major cases *Perry v. Schwarzenegger* (later *Perry v. Brown* (2012), and *Hollingsworth et. al. v. Perry et. al.* (2013)) against Proposition 8<sup>73</sup>. I analyze the briefs, transcripts and decisions from the three sets of proceedings in this case in order to discern how the discourses that were deployed during the Proposition 8 campaigns from 2008-2013 were filtered through, and were changed by the court system. The *Perry v. Schwarzenegger* case was influential on marriage debates and policies across the United States because of the exceptional nature and circumstances of Proposition 8 (as detailed in Chapter Three), and because the proposition was struck down by the Supreme Court. As such, the discourses that developed throughout the judicial proceedings are important in understanding both the trajectory and outcome of Proposition 8, and the current state of same-sex marriage policy across the country.

The grassroots and national campaigns for same-sex marriage were reshaped by legal precedent. The discourses of the mainstream LGB and social conservative organizations necessarily conformed to the requirements of the law, moreover, as discussed in Chapter Three, Berstein, Ettlbrick and Eskridge all argue that the courts

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<sup>73</sup> In 2010 Judge Walker ruled in the *Perry v. Schwarzenegger* case that Proposition 8 violated the due process and equal protection clauses of the Fourteenth Amendment because there was no rational basis for denying same-sex couples marriage licenses. On February 7, 2012, a three-judge panel on the Ninth Circuit Court of Appeals upheld the decision, appealed as *Perry v. Brown*. In July of 2013, the official proponents of Proposition 8, ProtectMarriage.com, appealed the case, now *Hollingsworth et. al. v. Perry et. al.*, to the U.S. Supreme Court. On June 26, 2013, the Court held that the proponents who intervened to defend Proposition 8 after the state of California declined to do so did not have legal standing under Article III of the U.S. Constitution. Therefore, Judge Walker's ruling was upheld as the final decision in the case and same-sex marriage was legalized, again, in June of 2013. The details and decisions of all of California's marriage cases are laid out in Chapter 3.

tend to require LGBTQ activists to conform to the heteronormal standards of the court in order to attain any change. As a result, change through the court tends to be incremental, based on bargaining and concessions often to the exclusion of diverse and/or radical voices (Ettelbrick 2004; Bernstein 2001; Eskridge 2000). In terms of social justice, the court tends to acknowledge only those citizens whose voices, experiences and needs fit the predetermined parameters of the legal system. In this regard, as I detail below, the plaintiffs and defendants debated whether homosexuals were a suspect class of citizens who were in need of state rights and protections in the form of same-sex marriage<sup>74</sup>. Through these debates, both sides evoked discourses that defined the nature of sexuality, the existence of discrimination on the basis of sexuality, and the criteria for citizenship rights and protections. In this case, I argue that a particularly narrow and exclusionary depiction of sexuality, family and discrimination was presented, and as a result, social justice was denied to citizens who did not fit the heteronormative criteria of the court.

That said, as I discuss in the next chapter, the defendants and the plaintiffs also veered beyond these strict debates about whether homosexuals could be defined as a suspect class, inciting a debate about whether procreation or love is the most important function of marriage. In both Chapters, I trace the commonalities and discrepancies between the arguments of the defendants and the plaintiffs as well as the social conservative and mainstream LGB organizations' discourses.

It is also pertinent to review the legal discourses because many of the 2008-2013 campaign organizations played key roles throughout the proceedings. In 2009 the American Foundation for Equal Rights (AFER) filed suit in the U.S. District Court

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<sup>74</sup> For the sake of clarity and consistency, I refer to the plaintiffs as those who are against Proposition 8 and for legalization of same-sex marriage, and the defendants as those who are for Proposition 8 and against the legalization of same-sex marriage.

for the Northern District of California to challenge the validity of Proposition 8 on behalf of two same-sex couples Kristin Perry and Sandra Stier, and Paul Katami and Jeffrey Zarrillo, thus initiating the *Perry v. Schwarzenegger* case. After California's then newly elected attorney general and governor refused to represent and defend the proposition, the official proponents of the proposition, ProtectMarriage.com, stepped in as interveners to represent and defend the proposition against the plaintiffs' charges. In addition, many of the organizations that were involved in the Proposition 8 campaigns - including Equality California, the Courage Campaign, the National Gay and Lesbian Task Force, and the National Organization for Marriage – submitted briefs for the trial and subsequent proceedings. The major question guiding this analysis then, is to what extent were the organizations' discourses reproduced and reshaped or rejected in the court process.

In order to make their case that same-sex marriage should be legalized, the plaintiffs had to satisfy the court that: (1) the suspect class in question was defined and distinguished by an immutable characteristic that was beyond the group members' control, and that it had "no relation to ability to perform or contribute to society;" (2) the suspect class in question suffered a history of discrimination; and (3) the suspect class was a minority and/or experiencing political powerlessness (Brief for Appellees 2010, 59). Accordingly, the plaintiffs argued that sexuality, and specifically homosexuality, qualified as a suspect class because homosexuality was immutable, beyond the control of homosexuals, and did not inhibit their ability to contribute to society. The plaintiffs further argued that homosexuals were a marginalized group who had a long history of discrimination and were experiencing powerlessness. These criteria were based on the liberal rights model, which holds that the state should protect definable classes of

citizens, by allocating specific rights and protections, should it be proven that their shared characteristic is immutable and that they experience significant discrimination on the basis of their characteristic. If the members of the group were able to change their characteristics, the argument follows, individuals could and should change their characteristics to avoid discrimination instead of depending on the state for rights and protections. The plaintiffs held that same-sex marriage, replete with its specific rights and protections, should be legalized in order to alleviate the discrimination, inequality and exclusion that were experienced by this suspect class.

While each side raised many issues surrounding the legalization of same-sex marriage<sup>75</sup>, this chapter is framed according to the three criteria around which the plaintiffs and defendants debated the need and suitability of same-sex marriage as an avenue to alleviating discrimination against homosexuals. These three criteria revealed how each side determined whether citizen groups were definable, experienced discrimination, and were worthy of particular rights and protections; ultimately showing how each side defined the elements of the citizenship regime – the criteria for citizenship, the role of the state and the nature of social justice. This chapter takes up the discourses that were employed throughout the campaigns in order to discern whether mainstream LGB and social conservative discourses were deployed in the trials; whether the plaintiffs and defendants deployed these discourses in new and important ways; and whether ultimately each side reproduced the citizenship regimes of their respective corresponding campaign organizations. Broadly, the plaintiffs argued that Proposition 8 was established

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<sup>75</sup> Beyond the issues discussed in this Chapter, the plaintiffs and defendants debated several other matters: which parties are qualified to represent the case; religious freedom and free speech; the validity of the democratic vote on minority citizens' rights; the comparability between domestic partnerships and marriage; and the economic benefits of marriage for Californian businesses, and the state and municipal governments.

to deny same-sex couples the same rights, protections and privileges that are afforded to heterosexual couples. To these ends, the plaintiffs deployed discourses of citizenship, equality, discrimination, rights, inclusion, status, love, commitment and family. In opposition, the defendants argued that marriage was a traditional status-bearing institution that should be reserved for heterosexual couples because of their unique ability to reproduce and raise future citizens.

Specifically, I look at how both sides defined sexuality in order to make the case that homosexuals are or are not an identifiable suspect class who are in need of the rights and protections of marriage. The plaintiffs sought to demonstrate that homosexuals comprise a coherent, definable, and immutable group in order to make the case that the group experiences particular kinds of discrimination, and that they are worthy of rights and protections from the state. The defendants sought to demonstrate that sexuality is actually complex and amorphous, and as such homosexuals cannot be defined as a coherent suspect class. I argue that the plaintiffs' efforts to demonstrate the coherence of the suspect class, and the common experiences of discrimination actually produced an exclusionary definition of sexuality, and a limited understanding of the causes of and the potential solutions to the discrimination of LGBTQ Californians. The plaintiffs presented a limited definition of homosexuality because they defined sexuality in accordance with the heteronormal criteria for belonging to the institution of marriage, as opposed to seeking to define homosexuality and then assessing whether homosexuality is compatible with the institution of marriage. Ultimately, this means that the plaintiffs' efforts to make the case for particular homosexuals' inclusion into the institution of marriage was not a project to end discrimination and gain rights for all non-heterosexuals who face

discrimination. Rather it was a project to redraw the lines of inclusion, thus exclusion in relation to marriage.

## **2. Defining a Suspect Class and Sexualities**

In order to make their cases for and against whether sexuality should be classified as a suspect class, both sides used different theories and common understandings of the immutability of sexuality, in accordance with their respective ends. For both sides, the immutability of sexualities was determined by whether one's sexuality was innate or a matter of choice, and therefore whether it was changeable. As stated in Chapter Two, this relationship between immutability and sexuality is based on certain modern Western understandings of sexuality. Moreover, this debate is based on the Western understanding that there are strict, definable, and coherent sexual identity categories: male or female, heterosexual or homosexual. As I discuss, both sides addressed bisexuality and queer sexualities as potential exceptions to these binaries. Interestingly, the defendants attempted to use bisexuality and queer sexualities to prove that sexuality was not an immutable identity category because these outliers demonstrated the fluid nature of sexuality. Conversely, the plaintiffs tried to downplay the prevalence and importance of bisexuality and queer sexualities, claiming that despite the existence of these 'deviant' sexualities, homosexuality remained a coherent and consistent identity category.

Before discussing how the strict identity categories of homosexual and heterosexual were defended in relation to the more "fluid" sexualities, this section first looks at how each side attempted to define sexuality. Throughout the trials, the defendants relied on modern Western understandings of sexualities and argued that homosexuality is innate, natural, unchanging, and it was therefore a definable, coherent,

and legitimate identity category. Ted Olson, one of the lawyers representing the plaintiffs at the 2010 *Perry v. Schwarzenegger* trial, presented this definition of sexuality in his opening remarks:

Mr. Olson: And this is -- this proposition excludes gay men and lesbians from the institution of marriage, even though that sexual orientation to which you referred, like race, sex, and ethnicity, is a fundamental aspect of their identity that they did not choose for themselves. And, as the California Supreme Court found, is highly resistant to change. (Transcripts Volume-1 2010, 41)

Here Olson compared sexuality to other identity categories, including race, sex and ethnicity, making the case that sexuality was also an unchangeable identity, which deserves state acknowledgement and protection. This, despite the fact that race and ethnicity have been changeable categories in American law, and that race and ethnicity, like gender and sexuality, are thought to be socially constructed identities.

The defendants pushed against a certain modern Western understanding of sexuality and argued that homosexuality was not innate, unchanging or immutable. In fact, they argued that homosexuality and bisexuality were fluid, and change over time, and that homosexuality and bisexuality were therefore a matter of choice rather than biological determination. The implications of embracing a voluntaristic definition was that the state did not need to account for or mediate any discrimination, or inequality that was in effect a matter of choice. The defendants' arguments were well summarized in their 2009 brief for the 2010 *Perry v. Schwarzenegger* trial:

First, Proponents will demonstrate that, far from being immutable, sexual orientation is a complex and amorphous phenomenon that defies consistent and uniform definition. Proponents will further demonstrate that however it is defined, sexual orientation can shift over time and does so for a significant number of people. And while its nature and determinants are not fully understood, it is plain that sexual orientation is not "determined solely by accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality). The evidence at trial will show

that many people freely choose their sexual orientation. (Defendant-Intervenors' Trial Memorandum 2009, 4-6)

The defendants' assertions that sexual orientation is complex, amorphous, inconsistent and variable seem like a more radical, and even queer understanding of sexuality. As stated in Chapter Two, queer theory challenges normative and strict sexuality categories, arguing that sexuality is complex, fluid and amorphous. Throughout this section, I pull apart and analyze when there seem to be moments of agreement between queer theory and the defendants' arguments. Ultimately, however, I argue that while the two sides argued that sexuality could be complex and amorphous, the two sides approached sexuality in seemingly contradictory ways because they were both shaped by the necessities of legal argument.

### **2.1. Born this Way: Sexuality as Biologically Determined**

There are several ways in which the immutability debate was framed during the court trials: whether sexuality is biologically determined, a social construction and/or a choice, and whether sexuality is easily categorizable, multiple or manifests on a spectrum. Regarding the former debate, the plaintiffs evoked the "born this way" discourse to assert that homosexuality was biologically determined. 'Born this way' reasoning argues that there is a gay gene (or a gay brain or body) that causes homosexuality, and makes homosexuals and heterosexuals biologically different. In his examination of Paul Katami, one of the four plaintiffs in the *Perry v. Schwarzenegger* case, lawyer David Boies focused on the plaintiffs' understanding of their own sexuality.

Paul Katami: And I'm a proud man. I'm proud to be gay. I'm a natural-born gay. I love Jeff more than myself. And being excluded in that way is so incredibly harmful to me. I can't speak as an expert. I can speak as a human being that's lived it.

Mr. Boies: Now, you say you were a natural-born gay. Does that mean you've

always been gay?

Paul Katami: As long as I can remember, yes. (Transcripts Volume-1 2010, 91)

Kristin Perry, another of the four plaintiffs in the case, was also asked whether she understands her sexuality to be determined biologically, before birth.

Mr. Olson: Do you feel that you were born with those feelings, with that kind of sexual orientation?

Kristin Perry: Yes, I do.

Mr. Olson: Do you feel it could change in the future? Do you have a sense that it might somehow change?

Kristin Perry: I'm 45 years old. I don't think so. (Transcripts Volume-1 2010, 140-141)

The argument that homosexuals were “born this way” emerged in the 1980s. Support for the argument fluctuated within LGBTQ communities over the past thirty years. Recently, however, “born this way” became a popular mantra among the broader American mainstream LGB movement, spurred on in part by musician Lady Gaga. The assertion that homosexuals (and by extension all people) were born with their particular sexuality produced several implications for social and political understandings of sexuality and the goals and strategies of the LGBTQ movement. First, it implied that sexuality was pre-determined by biological forces, therefore it was immutable, and unchanging. Second, being “born this way” was used to make the case that homosexuals could not be held responsible for their sexuality and therefore should not be expected to change their sexuality in order to avoid social and/or political discrimination or exclusion. Third, as will be discussed throughout this section, “born this way” naturalized the binary, and confined and reduced the LGB movement, and by association the transgender and queer movement, to being a collective of people who were united by a biologically determined characteristic. Here the historical, political, cultural and social elements of the LGBTQ movement were ignored and erased. It became difficult to name and challenge how

broader social and political forces regulated and conditioned citizens' sexualities when sexuality was seen as a binary and wholly naturally determined. It thus follows that the goal of seeking social and political change in relation to the regulation of sexualities was replaced with the individualized project of seeking protection for individuals' immutable characteristics. Once the biologically determined characteristic was accounted for by society and government, the mainstream LGB movement would no longer have a *raison d'être*.

Accordingly, throughout the proceedings the "born this way," biological determination discourse was also presented as standing in opposition to the notion that sexuality is socially constructed. This debate was best seen in the examination of the *Perry v. Schwarzenegger* plaintiffs' expert Gregory M. Herek, who was a professor of psychology at the University of California, Davis. His testimony addressed the psychological and psychiatric understanding of sexual orientation, whether an individual's sexual orientation could be changed, and the stigma and prejudice in Proposition 8. Herek was asked, by the "No on 8" lawyers, to begin by defining sexual orientation:

Mr. Dettmer: Now, turning to your opinions, Dr. Herek, can you describe for the Court, what is sexual orientation?

Gregory M. Herek: Sexual orientation is a term that we use to describe an enduring sexual, romantic, or intensely affectional attraction to men, to women, or to both men and women. It's also used to refer to an identity or a sense of self that is based on one's enduring patterns of attraction. And it's also sometimes used to describe an enduring pattern of behavior. So, sexual behaviors with men, with women, or with both men and women.

Mr. Dettmer: You've described three different aspects of that definition. Can you give examples of how those aspects are used in different context?

Gregory M. Herek: Well, researchers use them in different contexts depending upon their focus in a particular research study. So, for example, in public health research, it's often the case that the focus is on, say, sexually-transmitted diseases or other aspects of sexual behavior. So in that context, sexual orientation is often

defined in operational terms, according to patterns of sexual behavior. In other areas we might be interested in looking at, for example, the effects of discrimination on people who are lesbian, gay, or bisexual. In that context, we would probably focus on identity, on terms that people use to identify themselves in terms of their sexual orientation. So it really varies, somewhat, depending upon the research context. (Transcripts Volume-9 2010, 2025-7)

Here Herek defined sexual orientation in several ways: sexual orientation was sexual and romantic, it was about attraction, it was relational; sexual orientation was defined by enduring patterns of attraction and behavior; and sexual orientation was also an identity. Drawing the connection between sexual orientation and identity was a key argument that I address shortly.

Conversely, therefore, the defendants challenged the notion that sexuality was biologically determined in order to weaken the plaintiffs' claim that they were a group of people that were to be deemed equal under the law.

Heightened scrutiny is also reserved for groups defined by "an immutable characteristic determined solely by the accident of birth." (Ruth Bader Ginsburg, J.) ("[T]he 'immutable characteristic' notion, as it appears in Supreme Court decisions, is tightly-cabined. It does not mean, broadly, something done that cannot be undone. Instead, it is a trait determined solely by accident of birth."). But according to the American Psychiatric Association, "there are no replicated scientific studies supporting any specific biological etiology for homosexuality." (Defendant Intervenors Appellants' Opening Brief 2010, 73-4)

Picking up on this complex definition of sexuality, the defendants sought to further complicate Herek's definition of sexual orientation by asking both whether there is a known origin or cause of sexual orientation, and whether sexual orientation is a social construction. First, on the origins and causes of sexual orientation:

Mr. Nielson: I would like to turn to the development and origins of sexual orientation. Now, because the term "homosexuality" encompasses many distinct phenomenon, attempting to identify the origins of homosexuality and, more broadly, sexual orientation is a different task, correct?

Gregory M. Herek: What I have said in my expert report and elsewhere is that there are many different theories about the origins of sexual orientation in general;

not just homosexuality, but also heterosexuality. And there really is no consensus on what the origins are of a person's sexual orientation. (Transcripts Volume-9 2010, 2264)

[...]

Mr. Nielson: It seems likely that a wide variety of biological, psychological, social and cultural variables that contribute to sexual orientation will eventually be identified, with different individuals arriving at their adult orientation in different ways, correct?

Gregory M. Herek: That's my speculation. And I believe it's accurate, but it is my speculation. (Transcripts Volume-9 2010, 2266)

The defendants argued that because sexuality is a complicated social phenomenon, it is a difficult task to discern the origins of homosexuality and sexual orientations in general. As the defendants asserted, sexual orientation is determined by a variety of biological, psychological, social and cultural variables, and Herek agreed.

The defendants inquired further into the importance of the social and cultural variables, here asking whether sexual orientation is socially constructed:

Mr. Nielson: Do you believe that the position that they describe as social constructionism, do you believe that is an unreasonable position?

Gregory M. Herek: Well, you know, I think that they've -- I realize they were doing this in a very summary fashion. But, in a way, this is a -- this is a statement of social constructionism that I think escapes or avoids some of the nuance to the constructionist view. To say that the social constructionists would suggest that there's nothing, quote, real about sexual orientation except as society's construction of it is really to minimize the importance of that construction. When social constructionists are talking about this, I think, for most of them -- and, of course, there are many different schools within that philosophical camp, but I think, generally, when they are talking about this they are referring to the cultural level. They are talking about the construction of these concepts at the cultural level, in the same way that we have cultural constructions of race and ethnicity and social class. All of those are constructed socially. But -- and so, in a sense, you can say there's nothing real about them in that these are not things that might be argued to exist in nature except for society's creation of them. But to say there's no such thing as class or race or ethnicity or sexual orientation is to, I think, minimize the importance of that. And, again, the social constructionists are really speaking at that broad cultural level. They are not saying -- or, I would say, at least most of them are not saying that this is a process of the individual's construction of sexual orientation. Rather, they are talking about the way in which the culture essentially defines how people view reality. (Transcripts Volume-9 2010, 2176-7)

[...]

Mr. Nielson: All right. And it goes on to say that: "Not surprisingly, social constructionists generally reject the possibility of biological factors in sexual orientation." Do you believe that the -- you said that for social constructionists it's the same thing as race or ethnicity. Do you think social constructionists would deny the possibility of the biological factors in race or ethnicity?

Gregory M. Herek: Well, I think that most social constructionists would say for all of these things, including sexuality, that culture builds on the raw material. So -- and I'm, you know, trying to characterize this very broad, complicated philosophical point of view. But I would say that social constructionists would say race is an entirely constructed category; although, it is based on some physical characteristics. But the definition of which races are which, which ones are separate from each other, what type of skin coloring or what type of ancestry involves a person being of a particular race, all of those things are socially constructed. And I think they would say a similar thing about sexual orientation. Again, it doesn't mean that that individual personally constructs her or his racial identity or her or his sexual orientation in the sense of just making it up and it has no reality and it could change tomorrow. But I think that's -- that's more consistent with what the social constructionists would argue. (Transcripts Volume-9 2010, 2177-8)

Herek attempted to differentiate between a simplistic and more nuanced view of the social constructivist understanding of sexuality. Again asserting the complexity of sexuality, Herek argued that it is more accurate to understand the social constructivist argument in terms of the social meaning and definitions that are attached to sexuality. He did not deny a natural or biological component of sexuality, but rather he pointed to the importance of acknowledging that there are social and cultural definitions and meanings that determine society's understanding and treatment of sexualities. Still, the defendants pushed further on the relationship between social construction and biological determination, asking:

Mr. Nielson: And are you aware of any replicated scientific studies that do support a specific biological etiology for homosexuality?

Gregory M. Herek: Well, I -- I have a sense that there might be some, but I -- this is not something that I prepared for in terms of coming today. But as I said, I would certainly agree with the statement that we don't know what the origins are of sexual orientation. (Transcripts Volume-9 2010, 2296)

It is a curious partnership between the defendants, representing socially conservative organizations, and social constructivist theory. Social conservatism, after all, rests on many foundational claims such as the universality of the heterosexual family and gender. Queer theorists and activists have used social construction theory to point to the ways in which the categories and meanings of sexuality are produced in accordance with heteronormativity. The defendants' reference to social constructivist theory is not an endorsement for the theory (and certainly not of the queer perspective or agenda), but rather they used the theory to opportunistically destabilize and challenge the plaintiffs' assertion that sexuality is a biologically determined and immutable characteristic.

## **2.2. Sexuality as a Matter of Choice**

The plaintiffs' argument furthered that because homosexuality is biologically determined, individuals do not have control over their sexual thoughts, impulses or identity. The plaintiffs also called on the expert opinion of Herek to answer whether people can choose their sexuality or choose to change their sexuality.

Mr. Dettmer: Do people choose their sexual orientation?

Gregory M. Herek: Well, I've conducted research that -- in which I found that the vast majority of lesbians and gay men, and most bisexuals as well, when asked if they feel that they -- how much choice they've had in their sexual orientation, about being gay or lesbian or bisexual, say that they have experienced no choice or very little choice about that. (Transcripts Volume-9 2010, 2032)

[...]

Gregory M. Herek: And what you see there is that, among the gay men, 87 percent said they experienced no choice or only a little choice about their sexual orientation, compared to 13 percent who said they felt they had some choice, a fair amount of choice, or a lot of choice. Among lesbians, it was 70 percent who said no choice or very little. Among bisexual men, it was 59 percent who said no choice or a little. And among bisexual women, it was 45 percent. (Transcripts Volume-9 2010, 2055-6)

[...]

Mr. Dettmer: Do you have any sense, based on your research, of what heterosexual men and women do believe about their sexual orientation?

Gregory M. Herek: Well, I think it would be a reasonable hypothesis to say that,

probably, most heterosexual men and women, if they were asked the question and if they thought about it, would probably report that they similarly don't experience -- they don't feel that they made a choice to be heterosexual. But that's a hypothesis. I don't have data that would show that. (Transcripts Volume-9 2010, 2057)

While conceding that a small percentage of people studied believed that their sexuality was a matter of choice, Herek maintained that even though sexual orientation was socially constructed, it was not seen as a choice for the vast majority of people, and therefore sexuality should be understood, generally, as being beyond the control of individuals.

The plaintiffs argued that the notion that sexuality, specifically homosexuality, was a choice was based on prejudice stereotypes that homosexual males preyed on children, seeking to convert them to homosexuality. To explain the connection between choice and homosexuals as predators and pedophiles the plaintiffs' brought in the expert witness George Chauncey, who is a professor of gay and lesbian history at Yale University.

George Chauncey: I think it's pretty consistent with the messaging in earlier campaigns. Certainly, again, the persistent theme that homosexuality is a choice; that children who are exposed to homosexuals, to gay marriage, but really to homosexuals in any form, are likely to become homosexuals. So a deep fear about the instability of children's sexuality. The association of homosexuality with disease. The claim that Aids, associating Aids exclusively with homosexuality without thinking about the widespread heterosexual transmission of Aids in Africa and in the United States. And I think you sort of have a pretty clear sense here of one of the themes that ran through all the referenda campaigns beginning in 1977 with Anita Bryant's campaign that to pass an anti-discrimination measure or measure that in some way granted equality to and recognition of gay people would legitimize them and that we should oppose this, this rhetoric as claimed, just because we don't in any sense want to legitimize homosexuality and gay life as a legitimate equal part of our society, and that marriage is one of those powerful symbols of that for them. So it's premised on a notion of equality and strong hostility towards homosexuality. (Transcripts Volume-3 2010, 104)  
[...]

George Chauncey: I think there is the implication here that the very exposure to the idea of homosexuality in gay people somehow threatens the children, threatens their sexual identity, as if that's a choice; that this is something, again, that's being imposed on them. Historically gay rights have often been depicted in that way, assuming the very fact that gay people are asking to be recognized and to have their relationships recognized even by marriage is seen as an imposition on other people rather than simply an extension of fundamental civil rights to those people. (Transcripts Volume-3 2010, 531)

In these two statements, Chauncey argued that the social conservative assertion that homosexuality was a choice was premised both on the stereotype that homosexuals sought to convert children to homosexuality, and on the notion that once society approved of homosexuality (for example through rights ordinances or same-sex marriage), vulnerable, and misguided people may choose to become homosexuals. As discussed in Chapter Four, these arguments were prominent during the 2008-2012 Proposition 8 campaigns as the social conservative organizations warned voters that homosexuals wanted the legalization of same-sex marriage, in part, to legitimize homosexuality in society, to convert more people into a homosexual lifestyle, to challenge the strength of the nuclear family, and to drastically redefine the culture of marriage that engenders American society. The defendants did not reference or support these arguments throughout the trial. In fact, as is discussed in more detail later in this chapter, the defendants made sure not to demonize or discriminate against homosexuals using these arguments. Doing so would have reaffirmed the plaintiffs' argument that homosexuals experience discrimination in society, and that Proposition 8 was established to discriminate against homosexuals.

The defendants attempted to make the case that homosexuals' sexuality could change over time, meaning that homosexuals' interests, affection and engagement with members of the same-sex may change or fluctuate throughout their lives.

The empirical evidence leaves no doubt that homosexual orientation can shift over time and in fact does so for a significant number of individuals. Indeed, the University of Chicago study found that only 20 percent of men and 10 percent of women who have had any same-sex intimate partners since age 18 have had only same-sex intimate partners since that age. (Defendant Intervenors Appellants' Opening Brief 2010, 73-4)

Here again the defendants were attempting to trouble the plaintiffs' fixed understandings, categories and identities of sexuality. In response to this argument, during the Supreme Court case, the "No on 8" side argued that regardless of whether an individual's sexuality changed over the course of their lives, the individual was not in control of the changes in their sexuality.

Even if sexual orientation could shift over time for some individuals, as Proponents, without the benefit of evidence, argued below, that would not affect this Court's immutability analysis. [...] As the Government has explained, "[s]exual orientation... is fundamental to one's identity, and gay and lesbian individuals should not be required to abandon it to gain access to fundamental rights guaranteed to all people." [...] Moreover, even if a minority of gay men and lesbians may report that their sexuality experienced changes over their lifetime, that does not establish that they *chose*, or could choose, to make such a change. [...] Nor would evidence of change in the sexual orientation of a *small minority* of gay men and lesbians justify denying the protection of heightened scrutiny to the *vast majority* of gay men and lesbians who are "consistent in self-identification, behavior, and attraction throughout their adult lives." (Brief for Respondents 2012, 32-3)

In both of the above statements, the plaintiffs asserted that even if a minority of the LGBTQ population experienced or understood their sexuality to be capable of change and malleable according to their choice, sexuality was biologically determined and unchanging. Accordingly, a portion of the LGBTQ community, and arguably the entire population, was not represented in the plaintiffs' definition of sexual orientation and identity.

To further solidify their assertion that sexuality is not an individual choice, the plaintiffs focused on the ineffectiveness of conversion therapies. Conversion therapies are

defined as therapies or treatments that aim to change the sexual orientation of an individual, most predominantly from homosexual or bisexual to heterosexual. Historically and contemporarily, conversion therapies have been administered by psychologists and psychiatrists, as well as by religious and/or spiritual practitioners<sup>76</sup> (Victor 2014). Some social conservative activists and politicians claimed that homosexual people can learn to overcome their homosexuality through conversion therapy, which often includes religious devotion and prayer. The plaintiffs asked Herek about the American Psychological Association's opinion on conversion therapy:

Mr. Dettmer: And, just for the record, could you read the -- the two operative resolutions there, that are on the screen?

Gregory M. Herek: (As read) "Be it further resolved that, the American Psychological Association reaffirms its position that homosexuality per se is not a mental disorder, and opposes portrayals of sexual minority youths and adults as mentally ill due to their sexual orientation." "Be it further resolved that, the American Psychological Association concludes that there is insufficient evidence to support the use of psychological interventions to change sexual orientation."

Mr. Dettmer: Now, are these conclusions consistent with your own opinions?

Gregory M. Herek: Uhm, yes. (Transcripts Volume-9 2010, 2038)

By demonstrating that conversion therapy was ineffective, the plaintiffs sought to show first that sexual orientation was not chosen by an individual, and second that sexual orientation cannot be changed through social intervention. To further this point, the plaintiffs called on Ryan Kendall, an individual who had undergone and failed conversion therapy, and who was now a Log Cabin Republican (Transcripts Volume-7 2010, 1515).

Mr. Flynn: Did you try to become heterosexual during those therapy sessions?

Ryan Kendall: No, I didn't think it was possible.

Mr. Flynn: Why not?

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<sup>76</sup> "In September 2012, the California legislature passed Senate Bill 1172, which prohibits licensed psychotherapists from engaging in 'sexual orientation change efforts' (SOCE) with minor patients." (Victor 2014, 1534)

Ryan Kendall: I knew I was gay just like I knew I'm short and I'm half Hispanic. And I just never thought that those facts would change. (Transcripts Volume-7 2010, 1510)

[...]

Ryan Kendall: I don't recall a lot of what was said during those sessions. I recall Nicolosi saying that, you know, "Homosexuality is incompatible with what God wants for you, and your parents want you to change," and that this is a bad thing.

Mr. Flynn: Were you given any advice on how you would be able to suppress your homosexuality, in these therapy sessions?

Ryan Kendall: I remember it as a general admonishment, but not a specific technique, no. (Transcripts Volume-7 2010, 1512)

[...]

Ryan Kendall: During this whole thing, my life had kind of fallen apart. I didn't have the world that I grew up in; my faith, which was very important to me; my family, which was even more important. Everything had just kind of stopped. And I just couldn't take any more. And I realized, at one point, that if I didn't stop going I wasn't going to survive. (Transcripts Volume-7 2010, 1513)

Kendall's description of the effect of conversion therapy on his life underscores the plaintiffs' argument that sexuality is not a choice, adding that any attempts to change one's sexuality are detrimental to one's overall wellbeing. The defendants' cross-examination of Kendall tried to make the point that Kendall's conversion therapy was not successful because he did not want to change his sexual orientation (Transcripts Volume-7 2010, 1523).

In the appeal against the Federal District Court's decision in the *Perry v. Schwarzenegger* case, the plaintiffs argued that people could not change their sexual orientation in accordance with state policy or to avoid discrimination at the hands of the state or their fellow citizens.

A person's sexual orientation is not a species of conduct that may readily be adjusted to conform to the government's changing priorities; the court below, based on ample expert analysis, found that a gay man or lesbian cannot simply choose to be attracted to the opposite sex and thereby avoid the sting of Proposition 8, to say nothing of the other acts of discrimination and violence frequently directed at gay and lesbian persons. (Brief for Appellees 2010, 3)

[...]

Sexual orientation is "fundamental to one's identity," and gay and lesbian

individuals “should not be required to abandon” it to gain access to fundamental rights guaranteed to all people... Proponents do not even mention Hernandez-Montiel in their brief. Consistent with Hernandez-Montiel, the district court here found that “[i]ndividuals do not generally choose their sexual orientation” and that “[n]o credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation.” (Brief for Appellees 2010, 61-3)

The implication, of course, is that if sexuality were a choice, the state could justifiably ask individuals to modify their behavior in order to avoid discrimination, oppression or abuse, and/or in order to gain access to particular rights. No additional state protection would be needed, and moreover laws such as the banning of same-sex marriage, would not be a matter of state discrimination. As discussed in Chapter Six, this line of reasoning assumes that there is little assimilation or change needed for certain homosexuals to be accepted into the institution of marriage. Otherwise, the argument could be made that through marriage, the state was requiring citizens to assimilate their sexuality according to the state’s definition of normal sexuality and family form.

### **2.3. Sexuality as Complex and Amorphous**

To challenge the plaintiffs’ attempt to normalize homosexuality, the defendants put forward several arguments about how and why sexualities, and specifically ‘deviant’ sexualities, do not comprise an immutable, definable or legitimate class. The defendants’ characterization of ‘deviant’ sexualities are stated in their 2010 Appeal Brief for the Ninth District Court:

For the question whether gays and lesbians satisfy the requirements for suspect-class status is not a close one. As an initial matter, homosexuality is a complex and amorphous phenomenon that defies consistent and uniform definition. As well-respected researchers have concluded, “[t]here is currently no scientific or popular consensus on the exact constellation of experiences that definitively ‘qualify’ an individual as lesbian, gay, or bisexual.” (Defendant Intervenors Appellants’ Opening Brief 2010, 71-2)

The defendants attempted to reinforce the bond between homosexuality and other ‘deviant’ sexualities by arguing that all non-heterosexual sexualities are illegitimate, amorphous, ever changing and unnatural. Here I focus on three of their assertions: that ‘deviant’ sexualities operated on a spectrum or continuum, as opposed to a strict binary between homosexual and heterosexual; that women’s ‘deviant’ sexualities were actually more fluid than men’s ‘deviant’ sexualities; and that bisexual and queer sexualities challenged the binary division between homosexuality and heterosexuality. The defendants also put forward several other challenges to the immutability and classification of homosexuality: that people did not identify as LGB but instead just had sex with people of the same-sex; that people’s sexuality changed over time, place and culture; that people used different terms, categories and identities to define their sexualities; that people’s sexuality and gender identity was of varying importance to them; and that some people used homosexual identities for primarily political reasons (such as lesbian activists). All of these arguments sought to destabilize the claim that homosexuals should have equal protection under the law.

First, we turn to the debate about whether homosexuality was a distinct identity, or a point on a continuum of ‘deviant’ sexualities. Drawing on the expertise of Chauncey, the plaintiffs agreed that sexuality was complex, consisting of desires, behaviors and identities, but maintained that the categories of homosexuality and heterosexuality were the primary sexual identity categories in the United States.

George Chauncey: It's contested as most issues in history are, but a broad sense that the two categories of hetero and homosexual emerged and became primary organizing categories of state regulation and personal identity beginning in the late nineteenth century. (Transcripts Volume-3 2010, 531-2)

According to Chauncey, since the 19<sup>th</sup> century, the homosexual/heterosexual divide was a primary category of individuals' self-understanding, community building, and state regulation. The defendants challenged this assertion by arguing that there were actually more than two categories of sexuality, including, among others, bisexuality.

Mr. Nielson: And in the United States today, human sexuality has been popularly understood in terms of the dichotomy between two types of people: those who are attracted to their same gender, homosexuals, and those who are attracted to the other gender, heterosexuals, correct?

Gregory M. Herek: Well, I would say that the dichotomy has yielded to something of a trichotomy, in that bisexuals are now much more widely recognized, really, just in the last few decades, than was the case before that. (Transcripts Volume-9 2010, 2078-9)

[...]

Mr. Nielson: Such labels, referring back to heterosexuality, bisexuality, and homosexuality, represent an oversimplification, correct?

Gregory M. Herek: Well, they can in some cases, yes. (Transcripts Volume-9 2010, 2068)

[...]

Mr. Nielson: Would you agree with the statement that the heterosexual-bisexual-homosexuality trichotomy creates three ideal types that, depending on the individual, corresponds more or less to actual experience and behavior? (Transcripts Volume-9 2010, 2080)

[...]

Gregory M. Herek: By saying "ideal type," I didn't want you to think that I was somehow saying this is how it should be, or this is the ideal we should strive for. But, rather, these are -- there's a sort of clean, clear distinction between all individuals according to this dichotomy or trichotomy. And that's what's meant by "ideal type." (Transcripts Volume-9 2010, 2080)

While the defendants' reference to a trichotomy of sexualities may indicate that the defendants were more open or amenable to a pluralistic understanding of sexuality, the defendants actually presented many different theories on the nature of 'deviant' sexualities in order to challenge the category of homosexuality. We see this lack of allegiance to any one theory as the different theories they presented to challenge the plaintiffs' assertions about sexuality were, at times, incongruent. For example, in addition to referencing the trichotomy of heterosexuality, homosexuality and bisexuality, the

defendants also argued that sexuality could be understood as existing on a spectrum or continuum. The notion that sexuality could exist on a spectrum negated the notion that sexuality could be categorized into three types.

Mr. Nielson: And although it's often discussed in terms of three categories, sexual orientation ranges along a continuum from exclusively heterosexual to exclusively homosexual, correct?

Gregory M. Herek: Well, this is a way of thinking about sexual orientation or, rather, sexuality, that goes back at least to the days of Alfred Kinsey, in which he talked about a continuum, ranging from exclusively homosexual in behaviors or attractions, to exclusively heterosexual in behaviors and attractions. And, so, it's generally assumed that that continuum exists; although, in practice, we generally refer to three distinct groups: Homosexuals, heterosexual, and bisexuals.

Mr. Nielson: All right. But do you believe that sexual orientation ranges along a continuum, from exclusively heterosexual to exclusively homosexual?

Gregory M. Herek: Well, I believe that can be a very useful way of thinking about sexual orientation, yes. (Transcripts Volume-9 2010, 2064-2065)

Based on Herek's testimony, the plaintiffs concluded, in their appeal brief to the Ninth District Court, that sexuality was not a tenable suspect classification for citizens.

The evidence presented in this case also establishes that classifying a person based on their sexual orientation is ineffectual. This is because sexual orientation ranges along a continuum from exclusively heterosexual to exclusively homosexual. According to the Plaintiff's expert witness, Professor Gregory Herek, a person's sexual orientation is found somewhere along that continuum. (E.R. Vol. II, pp. 232-33.) The concept of sexual orientation is complex, variable and, therefore, difficult to define. (E.R. Vol. II, pp. 237-38.) Other experts agree. (E.R. Vol. IV, p. 839) ("Opposite-sex attraction is located on one end and same-sex attraction on the other. This model suggests that sexual orientation is not static and may vary throughout the course of a lifetime"). (Movant-Appellants' Opening Brief 2010, 48-9)

The defendants' attempts to challenge the strict identity categories of homosexual and heterosexual were met with plaintiffs asking Herek to clarify his belief in a continuum of sexualities.

Mr. Dettmer: You mentioned a couple times that there is a continuum -- that the concept of a continuum is a useful way to think about sexual orientation? Why do you say that?

Gregory M. Herek: Well, because the concept of the continuum alerts us to the

fact that we have to be careful about those categories; that there are, in fact, these instances of individuals who don't fit neatly into the category of heterosexual or gay or lesbian. And this is where Kinsey's work was useful, I think, in sensitizing us to the idea that people would have varying levels of sexual attraction and experience toward men or toward women and not to simply think in black and white terms. And I think that gets us closer to reality, so that's very useful. (Transcripts Volume-9 2010, 2311-2)

Following this exchange, the plaintiffs asked whether this theory of a continuum of sexuality changes Herek's opinion that sexuality is not a choice. Herek answered that the continuum theory does not imply or show that sexuality is a choice.

Second, the defendants also challenged the strict categorization and immutability of homosexuality by arguing that women's sexuality was fluid and amorphous, compared to their male counterparts.

Yet another expert presented by the Plaintiffs, Letitia Anne Peplau, has written that "[s]cholars from many disciplines have noted that women's sexuality tends to be fluid, malleable, shaped by life experiences, and capable of change over time. Female sexual development is a potentially continuous, lifelong process in which multiple changes in sexual orientation are possible." (E.R. Vol. 3, p. 753.) These relevant testimony and studies demonstrate that it is impossible to define a class of persons based on sexual orientation because no obvious, immutable or distinguishing characteristic defines the group, let alone the four plaintiffs in this case. At best, it would appear that there are innumerable methods to classify persons based on their sexual preferences and it is unlikely that the results would be the same from one method to another. (Movant-Appellants' Opening Brief 2010, 48-9)

Again, it may appear as though the defendants were arguing for a more complex understanding of sexuality, here integrating gender as variable in understanding human sexuality. However, this was another attempt to expose weaknesses in the plaintiffs' assertions that homosexuality was a strict identity category. Letitia Anne Peplau's assessment of the development of female sexuality did offer a more nuanced understanding of sexuality that did pose a threat to the plaintiffs' argument. Still, the defendants' focus on women's sexuality seemed to be based on several stereotypes

regarding lesbian sexuality, namely that it was a phase, an experiment and/or a reaction to a traumatic experience (be it abuse, divorce or rejection from a man). Regardless of the motivating reasons for each side's focus on women's sexuality as fluid, the plaintiffs effectively limited their own ability to discuss sexuality in a nuanced way, or to admit that human sexuality was complex, changing and conditioned by a host of intersectionalities including, but not limited to, sex and gender.

Third, queer sexualities were cited as challenging the strict categories of homosexual, heterosexual and bisexual. That said, there were few mentions of queer sexualities during the proceedings by either the plaintiffs or the defendants. Attention was paid to non-heterosexualities such as bisexuality and polygamy (though not polyamory), but the only substantive discussion of queer sexualities came during the defendants' cross-examination of Herek.

Mr. Nielson: Now, defining oneself personally and socially as "gay" or "lesbian," or more recently "queer," provides entry to alternative communities that have developed in the United States and elsewhere, correct?

Gregory M. Herek: Yes. (Transcripts Volume-9 2010, 2081)

Interestingly, both the defendants and Herek seemed to be dismissing queer sexualities as a sexual identity used predominantly by youth.

Mr. Nielson: Okay. Thank you. Now, the -- now, the world in which today's sexual minority youth come to understand their sexual orientation is vastly different from that of previous generations, correct?

Gregory M. Herek: I would say that the world is vastly different from previous generations in all sorts of respects. (Transcripts Volume-9 2010, 2075)

[...]

Mr. Nielson: Indeed, not all manifestations of same-sex sexuality among contemporary youth are adequately accounted for by the labels "gay," "lesbian" and "bisexual," and the identities associated with them, correct?

Gregory M. Herek: Well, for example, among youth, we see an embracing of the term "queer." And people will use that as a self-descriptor. And that, of course, was a label of derision that was frequently used against a person who was perceived to be homosexual. Younger people have embraced that term, and use it

now as an identity label. So that's an instance where a term like "gay," "lesbian" or "bisexual" may not be so applicable if an individual self-identifies as "queer." Mr. Nielson: So do you agree with the statement that not all manifestations of same-sex sexuality among contemporary youth are adequately accounted for by the labels "gay," "lesbian," and "bisexual"? Gregory M. Herek: I believe I wrote that statement, yes. (Transcripts Volume-9 2010, 2075-6)

The association of queer sexualities with youth seems like a tactic to undermine the validity of queer sexualities (and theory and politics) by implying that queer sexualities are temporarily taken on by experimental youth, or a phase that could fade with time. Queer theory and politics were birthed, however, in the early to mid 1980s, meaning that the youth and young adults who were affiliated with queer sexualities and politics would be in their 40s and 50s currently. Linking queer theory with youth nevertheless associated the entire LGBTQ movement with youthful, radical, experiential queer politics. In so doing it also painted over the conflict between mainstream and queer movements. This is one reason why the plaintiffs did not mention or acknowledge queer theory and politics, let alone queer critiques of state-sanctioned marriage.

Instead, by way of response to the defendants' arguments about the complexity and immutability of 'deviant' sexualities, the plaintiffs cited legal precedent in which courts ruled that sexuality was immutable.

Proponents argue that the classification of citizens based on their sexual orientation cannot be deemed suspect for equal protection purposes because sexual orientation is not "immutable" and constitutes "a complex and amorphous phenomenon that defies consistent and uniform definition." Prop. Br. 71-74. Proponents' argument is both factually and legally flawed. Ten years ago, this Court recognized that "[s]exual orientation and sexual identity are immutable," and that "[h]omosexuality is as deeply ingrained as heterosexuality." *Hernandez-Montiel v. INS*. (Brief for Appellees 2010, 61-3)

The plaintiffs seemed cautious about engaging with theories that challenge their strict categorizations of sexuality. In the above statement, the plaintiffs effectively dismissed

any assertion of the complexity of sexuality, choosing instead to reinforce their argument that sexuality is biologically determined and beyond individual choice. In so doing, the plaintiffs have also reinforced strict sexuality categories based on a binary of homosexual and heterosexuals. While these two categories are presented by the plaintiffs as the two prominent possibilities for sexualities, through their fight for same-sex marriage, the plaintiffs actually reinforced a division between heteronormal and non-heteronormal sexualities, arguing that certain homosexuals are more normal than others.

In contrast, the defendants' understanding of sexuality was contradictory and inconsistent because they reference many different theories; that sexuality exists as a trichotomy, or on a spectrum or continuum, or is beyond categorization. The defendants threw many theories of sexuality at the court in order to challenge homosexuality as a suspect class, and hoping that one would stick. Ultimately, however, the defendants had a clear understanding of sexuality in which procreative heterosexuality was the most natural, normal, good and useful category of sexuality, and all non-heterosexual sexualities were inferior deviations from the norm.

In his 2010 decision, Judge Walker of the 2010 Federal District Court agreed with many of the plaintiffs' assertions about the nature, and immutability of homosexuality.

Sexual orientation is commonly discussed as a characteristic of the individual. Sexual orientation is fundamental to a person's identity and is a distinguishing characteristic that defines gays and lesbians as a discrete group. (Walker 2010, 72)

He agreed that sexual orientation referred to sexual, affectionate and romantic desires that were consistently expressed and/or acted upon during an individual's adult life. He thus refuted the defendants' attempts to challenge the immutability of sexuality as an identity: "Proponents' assertion that sexual orientation cannot be defined is contrary to the weight

of the evidence” (Walker 2010, 72). Regarding an individual’s ability to change their sexual orientation Walker again agreed with the plaintiffs, stating:

Individuals do not generally choose their sexual orientation. No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation. (Walker 2010, 74)

Moreover, he concluded that the state of California had “no interest in asking gays and lesbians to change their sexual orientation or in reducing the number of gays and lesbians in California” (Walker 2010, 76).

#### **2.4. On whether Homosexuals Can Contribute to Society**

In order to satisfy the court that homosexuality was a suspect class, the plaintiffs also had to demonstrate that homosexuality bore “no relation to ability to perform or contribute to society,” and yet they have suffered discrimination on the basis of their sexuality (Brief for Appellees 2010, 59).

Indeed, the undisputed fact that gay men and lesbians have been subjected to a history of discrimination based on a trait that bears no relationship to their ability to contribute to society is sufficient, in and of itself, to render classifications based on sexual orientation “suspect” (or, at the very least, quasi-suspect) and to give rise to heightened scrutiny. (Brief in Opposition 2012, 28)

The plaintiffs brought in medical and psychiatric expert witnesses, such as Gregory Herek, to testify that sexuality was not an illness or mental disorder therefore it did not impede homosexuals’ ability to contribute to society (Plaintiffs' and Plaintiff-Intervenor's Trial Memorandum 2009, 11-13).

Gregory Herek: There's no inherent relationship between a person's sexual orientation and their ability to be productive and contributing members of society, to be happy, to lead a fulfilling life. (Transcripts Volume-9 2010, 2028)

The plaintiffs defined “productive and contributive members” of society in several ways through their assertions that homosexuals were good workers, tax payers, community

members, and that they were able to form loving and long term, procreative relationships and families.

These experts will testify that the [...] capacity to enter into a loving and long-term committed relationship or to have and raise children does not depend on sexual orientation. (Plaintiffs' and Plaintiff-Intervenor's Trial Memorandum 2009, 11-13)

The defendants' main response to this reasoning was as follows:

Finally, to the extent the relationship between sexual orientation and an individual's ability to contribute to society bears on the proper level of scrutiny under the Equal Protection Clause, this factor cuts sharply against heightened scrutiny here. For while sexual orientation may not affect individuals' ability to contribute to society as a general matter, there is one critical exception: because they lack the natural procreative capacity of opposite-sex relations, same-sex relationships do not pose the unique benefits and challenges to society that follow from the natural procreative capacity of heterosexual relationships. Because it is precisely these benefits and challenges that the institution of marriage is primarily designed to address, it follows that Proposition 8 should be subject only to rational-basis review under the Equal Protection Clause. (Defendant-Intervenors' Trial Memorandum 2009, 4-6)

As will be discussed in the next Chapter, the defendants argued that homosexuals were actually incapable of fulfilling the primary function of marriage because they cannot naturally or spontaneously procreate. Therefore homosexuals were unable contribute to society in the most fundamental, and important way. While the discussion of homosexuals' ability to contribute to society was relatively limited, it did offer a snapshot of the larger debates that were being waged between the two sides: whether or not homosexuals were able to form heteronormal love-based and procreative marriage-like relationships.

### **3. Proposition 8 in the Context of Discrimination, Stigma and Exclusion**

As the last section demonstrated, each side took significant interest in establishing a definition or theory of sexuality. Such attention was paid because in this case the

allocation of rights was contingent on being able to define a coherent suspect class. According to the second criteria of the suspect class, the case needed to be made that homosexuals were both an identifiable group, and that they deserved rights and equality, specifically those administered through marriage. The plaintiffs had to demonstrate that homosexuals, as a group, had historically and contemporarily been subject to discrimination, inequality and exclusion; that this history and contemporary state of discrimination had rendered homosexuals relatively powerless in American society and politics; and that the banning of same-sex marriage was a continuation of this history of discrimination, inequality and exclusion.

In this section, I cursorily engage with the first two of these themes because Chapters Four, Five and Six addressed these themes of discrimination, and inequality in detail, and because the arguments that were presented in the court trials did not differ substantially from the arguments that were made in the primary documents or the interviews. I engage with the third theme - that same-sex marriage is a continuation of a history of discrimination against homosexual Americans – in order to discuss and analyze why and how same-sex marriage was presented as the solution to discrimination, and to analyze the repercussions of placing marriage as the best, or only, solution to the discrimination and exclusion of certain homosexuals. Ultimately, I argue that there was a disconnect between the history of discrimination against LGBTQ people in the United States, and the prescription of marriage as the most appropriate solution to this state of discrimination, inequality and exclusion. I argue that marriage did not account for the complex ways in which LGBTQ people experience oppression and exclusions, and that marriage, and this campaign for same-sex marriage, actually undermined any social

justice project as it created new exclusions on the basis of citizens' abilities to fulfill the heteronormative criteria for inclusion in marriage.

### **3.1. A History and the Current State of Discrimination**

The plaintiffs argued that homosexuals were a definable group in society with an indisputable history of pervasive discrimination against them. They furthered that gay men and lesbians were victim to discrimination in both the public and private realms in the forms of violence and discrimination from fellow citizens, and discriminatory laws and policies from various governments.

This undisputed history of public and private discrimination has been recognized by numerous courts. See, e.g., *Lawrence*, 539 U.S. at 571 (“for centuries there have been powerful voices to condemn homosexual conduct as immoral”); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 434 (Conn. 2008) (“gay persons historically have been, and continue to be, the target of purposeful and pernicious discrimination due solely to their sexual orientation”). And the evidence at trial confirms, beyond question, that gay men and lesbians have faced and continue to face severe discrimination based on naked prejudice and unfounded stereotypes. (Brief for Appellees 2010, 61-2)

The plaintiffs' expert witness, George Chauncey, was brought primarily to attest to the history of discrimination against homosexual Americans.

George Chauncey: Well, most broadly, I guess, my reading of the historical record is that lesbians and gay men have experienced widespread and acute discrimination from both public and private authorities over the course of the 20th century. And that has continuing legacies and effects. This has been manifested in the criminalization of sexual intimacy and association; the discrimination in public accommodations, in employment; censorship of images about gay people and speech by gay activists; stereotyping and demonization of lesbians and gay men. And that all this has been drawn on and reinforced sustained patterns of prejudice and hostility. (Transcripts Volume-2 2010, 361)

Chauncey expanded on the types of discrimination that homosexual Americans experienced including: criminalization of sexual activity; discrimination in housing and employment; censorship of homosexual speech and cultural materials; and the

demonization of homosexuality and homosexuals. He continued by stating that homosexuals were categorized as deviant, abnormal, and mentally ill by several institutions including governments, churches, and general medicine, and psychological and psychiatric bodies (Transcripts Volume-2 2010, 395). Chauncey recounted that the gay liberation movement emerged in the 1970s in response to this discrimination to fight for dignity and anti-discrimination policies for homosexual Americans (Transcripts Volume-2 2010, 413).

The plaintiffs further showed that homosexual Americans continued to experience discrimination in the areas of job and housing discrimination, as well through the perpetuation of negative stereotypes, and homophobic violence and hate crimes. The plaintiffs' expert witness Gary Segura, a professor of political science at Stanford University, affirmed "There is simply no other person in society who endures the likelihood of being harmed as a consequence of their identity than a gay man or lesbian." (Transcripts Volume-7 2010, 1570-1) Based on the court trial testimony, Judge Walker concluded in his 2010 Federal District Court decision that "gays and lesbians have been victims of a long history of discrimination" (Walker 2010, 96); and that "stereotypes and misinformation have resulted in social and legal disadvantages for gays and lesbians" (Walker 2010, 103).

The defendants responded that the plaintiffs overstated the severity and prevalence of discrimination against homosexual Americans. The defendants explained there were no laws in California that directly discriminated against gay men and lesbians; arguing further Proposition 8 did not discriminate against homosexual Californians. Moreover, the defendants stated that homosexuals were currently experiencing historic

high levels of social acceptance in the forms of popular culture, news media, and political representation, publically-funded HIV/AIDS research and support, employment protection at many municipal levels, and growing support among various religious denominations (Transcripts Volume-3 2010). Taken together, all of these social and political realities demonstrated that homosexuals no longer experience censorship, policing or discrimination, as they once had (Defendant-Intervenors' Trial Memorandum 2009, 4-6), and that they therefore did not need new or extra rights and protections in the form of same-sex marriage.

### **3.2. The Powerlessness of Homosexuals**

In addition to arguing that homosexuals continue to face discrimination at the hands of both society and the state, the court also required that it be demonstrated that homosexuals, as a group of people, were relatively powerless in general society as well as politically. Accordingly, the plaintiffs relied primarily on the expert testimony of Gary Segura, who defined political power thusly:

Gary Segura: For me, political power is the ability of an individual or group, through mustering their own resources, to achieve and secure their interests in the political system, and to do so relying primarily on their -- on themselves. That is, there has to be an exercise whereby their resources bring about the change that they're hoping to accomplish. (Transcripts Volume-7 2010, 1536)

Based on theories of pluralism, Segura argued that homosexuals remained powerless in American society and politics because the system has been dominated by the heterosexual majority.

Mr. Boutros: How does this concept of pluralism relate to the opinions you are giving here today regarding the power or powerlessness of gay men and lesbians in the United States?

Gary Segura: I think that, by any measure, gays and lesbians would have to be understood as a minority faction, in Madison's terms. That is, people who accept the -- the normativity, if it were, of heterosexuality, have held power essentially

forever. So it is difficult, with the resources that they have, for gays and lesbians to press their cause in the political system. They -- they just simply don't have the numbers and the resources to be effective advocates in a lot of political arenas. (Transcripts Volume-7 2010, 1537-8)

Homosexuals lacked the resources, political connections, and public support that were required to challenge the heterosexual majority, and as such, homosexuals were politically powerless throughout American history.

Given this lack of power, Segura furthered that homosexual Americans were not able to influence political laws and policies, much less create or administer substantial political and social change.

Gary Segura: My opinion is that when we take together the moments of legislative victory, the moments of legislative defeat, the presence of ballot initiatives, the absence of statutory or constitutional protection, the presence of statutory or constitutional disadvantage, and a host of circumstances, including small numbers, public hostility, hostility of elected officials, and a clearly well-integrated, nationally prominent, organized opposition, I conclude that gays and lesbians lack the sufficient power necessary to protect themselves in the political system. (Transcripts Volume-7 2010, 1646)

As a result of this powerlessness in the political arena, Segura cited several gaps in American federal rights protections including the lack of a federal-level anti-discrimination protection for housing and employment, the only then recent passage of hate crimes legislation that protects sexual orientation and gender identity<sup>77</sup>, and the continued existence of DOMA and Don't Ask, Don't Tell (Transcripts Volume-7 2010, 1546-7).

As stated in the previous section, the defendants largely avoided challenging the claims that homosexuals historically experienced discrimination. However, the

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<sup>77</sup> In 2009, President Obama signed the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, which expanded existing United States federal hate crime law to apply to crimes motivated by a victim's actual or perceived gender, sexual orientation, gender identity, or disability.

defendants did dispute the claims that homosexuals currently experienced discrimination and powerlessness. The defendants called on Kenneth Miller, an associate professor of government at Claremont McKenna College, to attest to the current state of homosexuals' political powerlessness. Miller defined political power as being multi-faceted: "It has a lot of different factors that can contribute to power, and I would just list a few of them. One would be, certainly, money; access to lawmakers; the size and cohesion of a group; the ability to attract allies and form coalitions; and the ability to persuade" (Transcripts Volume-10 2010, 2437). According to this definition, the plaintiffs argued that homosexuals actually sat in a position of power, relative to their population size.

Proponents will demonstrate that, far from being politically powerless, gays and lesbians have substantial political power. This political power manifests itself in numerous ways, including the ability to force lawmakers to take positions and actions against their preferences, the ability to achieve legislative and regulatory victories, the existence of powerful and reliable political allies of the LGBT community (including leading professional organizations, labor unions, the Democratic party, the elite media, traditional civil rights organizations, Hollywood, and numerous politicians), and the ability to attract the attention of lawmakers. Indeed, with the exception of extending the denomination of marriage to same-sex relationships, virtually every policy supported by the gay and lesbian lobby in California has been enacted into California law. (Defendant-Intervenors' Trial Memorandum 2009, 4-6)

In addition to their connections with the Democratic Party, Miller stated that homosexuals in California gained the support of the Attorney General, Secretary of State, and State Treasurer, among other high-ranking officials. California's homosexuals also garnered wider support and power through their alliances with organized labour, professional medical associations, and legal organizations/associations. The plaintiffs relied on common assumptions about the influence of homosexuals in elite media and popular culture, arguing that homosexuals had disproportionate levels of power and

influence in Hollywood, with celebrities and with major newspapers and television news networks (Transcripts Volume-10 2010, 2249-68).

In terms of their economic influence and power, Miller stated, “The evidence suggests that major corporations are becomingly increasingly allied with the LGBT rights movement.” (Transcripts Volume-10 2010, 2442-3) The Proposition 8 campaign itself demonstrated the economic power of homosexual Californians, according to Miller, as homosexuals raised \$43 million to oppose the proposition (Transcripts Volume-10 2010, 2438). The plaintiffs’ witness Segura countered these claims by arguing that the popular perception that homosexuals are affluent is misguided because there was a significant proportion of LGBTQ people who were lower income and were not able to disclose their sexuality for fear of losing their jobs or suffering discrimination and violence. As such, “The public has a [...] misinformed estimation of the socioeconomic status of gays and lesbians. And I think they have a misperception of the quality of life or the level of societal treatment of gays and lesbians. Not every gay man is Will from Will and Grace” (Transcripts Volume-7 2010, 1576).

The defendants thus argued that homosexual Americans, and Californians specifically, do not face significant discrimination on the basis of their sexuality, and they have disproportionate levels of social, cultural, political and economic power.

The Plaintiffs, and the classification to which they affiliate, are not politically powerless. Rather, the gay and lesbian community is one of the most influential and powerful interest groups in existence today. This fact forecloses this Court from concluding that sexual orientation is a “suspect” classification. (Movant-Appellants’ Opening Brief 2010, 49-51)

In fact, being the most “influential and powerful” interest group means that homosexuals were not a suspect class, and they did not need new or extra rights in the form of same-sex marriage.

While the plaintiffs made a compelling case for the many different ways in which LGBT people experience discrimination and powerlessness, including censorship, criminalization, poverty, violence, and exclusion, they argued that the discrimination would be remedied through legalization of same-sex marriage. In the next three sections I analyze how the plaintiffs made the case that same-sex marriage was the best solution to these variant and complex experiences of discrimination.

### **3.3. Proposition 8 as Furthering Discrimination, Stigma and Exclusion**

Before analyzing the plaintiffs’ case for same-sex marriage, it is important to look at the plaintiffs’ argument that Proposition 8, the banning of same-sex couples from the institution of marriage, was itself an act of discrimination, stigma and exclusion. In their brief for the Supreme Court case, the plaintiffs stated:

Eliminating the final discriminatory feature of California’s marriage law—its prohibition on marriage by individuals of the same sex—thus would not require the recognition of a new right, but would instead afford gay men and lesbians access to the fundamental right to marry guaranteed to all persons. (Brief for Respondents 2012, 14)

Proposition 8 represents the last remaining barrier to inclusion in California’s marriage law.

To further this argument, the plaintiffs asserted that Proposition 8 is a form of “structural stigma,” which expert witness Ilan Meyer argued characteristically had “the mechanisms that maintain and enact stigma. So those refer -- by the word "structural" we mean to more solid structures in society, societal institutions such as, of course, the law

being an important one, and any other institution that is essential in our society.” (Perry Transcripts Volume-4 2010, 819-20) He then explained that structural stigma existed where laws blocked certain citizens’ access to institutions and resources, and to goals they wished to attain.

Ilan Meyer: [Proposition 8] imposes by the fact that it denies them access to the institution of marriage. As I said, people in our society have goals that are cherished by all people. Again, that's part of social convention, that we all grow up raised to think that there are certain things that we want to achieve in life. And, in this case, this Proposition 8, in fact, says that if you are gay or lesbian, you cannot achieve this particular goal. (Transcripts Volume-4 2010, 826)

The exclusion of homosexual couples from marriage was an example of structural stigma as a group of people was barred from having access to certain normative institutions, resources and goals (Transcripts Volume-4 2010, 819-20).

Thus the plaintiffs argued that Proposition 8 produced structural stigma of a group on the basis of sex and sexual orientation. In terms of discriminating on the basis of sex, the plaintiffs stated:

Prop. 8 Discriminates Against Gay And Lesbian Individuals On The Basis Of Their Sex. Prop. 8 also violates the Equal Protection Clause because it unconstitutionally discriminates on the basis of sex. Prop. 8 prohibits a man from marrying a person that a woman would be free to marry, and vice-versa. (Plaintiffs' and Plaintiff-Intervenor's Trial Memorandum 2009, 15)

To this, the defendants replied that Proposition 8 did not discriminate on the basis of sex because men and women were equally free to marry partners of the ‘opposite-sex.’

Because the traditional definition of marriage as the union of a man and a woman does not treat men and women differently, every federal court, and nearly every state court to address the issue has determined that this definition does not discriminate on the basis of sex. Nor is there any credible evidence that the traditional opposite-sex definition of marriage functions to maintain male (or female) supremacy or improper stereotypes. Further, Plaintiffs’ sex-discrimination claim improperly conflates discrimination on the basis of sex with discrimination on the basis of sexual orientation. For all of these reasons,

Proposition 8 is not subject to heightened scrutiny on this ground. (Defendant-Intervenors' Trial Memorandum 2009, 6)

The plaintiffs countered that it was unreasonable for a state to expect homosexual people to marry people of the 'opposite-sex' in order to have access to marriage and all of its rights, status and protections. Ultimately, Walker's ruling on the subject affirmed the plaintiffs' reasoning and claim that Proposition 8 is discriminatory on the basis of sex, as well as on the basis of sexual orientation.

Plaintiffs challenge Proposition 8 as violating the Equal Protection Clause because Proposition 8 discriminates both on the basis of sex and on the basis of sexual orientation. Sexual orientation discrimination can take the form of sex discrimination. Here, for example, Perry is prohibited from marrying Stier, a woman, because Perry is a woman. If Perry were a man, Proposition 8 would not prohibit the marriage. Thus, Proposition 8 operates to restrict Perry's choice of marital partner because of her sex. (Walker 2010, 119-121)

[...]

Proposition 8 targets gays and lesbians in a manner specific to their sexual orientation and, because of their relationship to one another, Proposition 8 targets them specifically due to sex. Having considered the evidence, the relationship between sex and sexual orientation and the fact that Proposition 8 eliminates a right only a gay man or a lesbian would exercise, the court determines that plaintiffs' equal protection claim is based on sexual orientation, but this claim is equivalent to a claim of discrimination based on sex. (Walker 2010, 119-121)

While this debate about sex discrimination was significant during the trials, the content of the debate, which, as stated, focused on the absurdity of requiring homosexuals to marry people of the 'opposite-sex,' offered little in terms of understanding and analyzing the plaintiffs' definition of sexuality and claims to discrimination.

In terms of discrimination on the basis of sexuality, the plaintiffs stated that marriage not only excluded a class of people from an important institution, but that the exclusion rendered this class distinct, other and inferior.

Prop. 8 repealed the constitutional protection against "discrimination based on sexual orientation," and put gay and lesbian individuals "in a solitary class" with

respect to marriage. (Plaintiffs' and Plaintiff-Intervenor's Trial Memorandum 2009, 2)

What Prop 8 does is label gay and lesbian persons as different, inferior, unequal and disfavored. It says to them, your relationship is not the same. And it's less approved than those enjoyed by opposite-sex couples. It stigmatizes gays and lesbians. It classifies them as outcasts. It causes needless and unrelenting pain and isolation and humiliation. (Transcripts Volume-1 2010, 45)

Herek agreed with this assessment of the effects of Proposition 8, explaining:

[Proposition 8] differentiates people in same-sex relationships from - from those in heterosexual relationships. (Transcripts Volume-9 2010, 2054)

Thus it was argued that Proposition 8 created two classes of citizens: heterosexuals who could marry and homosexuals who could not marry. It could be argued that these divisions existed prior to Proposition 8, before same-sex marriage was initially legalized in California in 2008. Yet Proposition 8 is unique, the Plaintiffs maintained, because it redrew and reinforced the lines of exclusion and retracted certain rights from homosexuals.

Proposition 8 was initiated to retract rights on the basis of sexuality, even though, as the plaintiffs stated, homosexuals wanted to have access to the institution of marriage for the exactly the same reasons as heterosexuals: to commit to the one they love; to have children; to experience stability and support, and to ultimately partake in the most important relationship in their lives, and in society.

Mr. Olson: What we're talking about here is allowing individuals who have the same impulses, the same drives, the same desires as all of the rest of us, to have a relationship in harmony, stability, and to form a family and a neighborhood, all of those things that the Supreme Court talked about. And, now, tell me how it helps the rest of the citizens of California to keep them out of the club. It doesn't. (Transcripts Volume-13 2010, 3099)

Prop. 8 plainly denies gay and lesbian individuals access to a civil institution, marriage, that the State makes available to virtually all others. Lesbians and gay men are indisputably similarly situated to heterosexual individuals because sexual

orientation is irrelevant to a person's desire to marry the person he or she loves. [...] (gay and lesbian persons "share the same interest in a committed and loving relationship as heterosexual persons and . . . the same interest in having a family and raising their children in a loving and supportive environment [...] As the evidence will show, regardless of a person's sexual orientation, marriage is "the most important relation in life" [...] and an "expression of emotional support and public commitment" (Turner, 482 U.S. at 95). And the right to marry does not depend on a person's procreative capacity. (Plaintiffs' and Plaintiff-Intervenor's Trial Memorandum 2009, 11)

Homosexuals' sexuality, therefore, did not impede their ability to fulfill the functions of marriage, and as such homosexuals should not have been excluded from "the club" of marriage. Olson's choice of words demonstrated that the plaintiffs understood marriage was an exclusionary and elitist institution, and were intentionally trying to join the club to the exclusion of others.

#### **3.4. Joining the Club: Problematizing Marriage as the Solution to Discrimination, Stigma and Exclusions**

In this section, I focus on the plaintiffs' reverence for the culture of marriage, and their belief that marriage was an appropriate institution through which the state should alleviate discrimination and inequality, by administering rights and protections, legitimizing certain relationships, and fostering social acceptance.

In terms of the social and political benefits that were doled out with marriage, the plaintiffs often referenced the many rights that are reserved for heterosexuals through marriage. It was claimed that there are up to 1,138 federal rights that marriage conveys (Hunt 2005). Throughout the trials, the plaintiffs made claims to the six different categories of rights that are administered through marriage: tax benefits; exclusive entitlements; ownership benefits; inheritance and death entitlements; surrogate decision-making rights; and evidentiary privileges in federal courts (Sunstein and Thaler 2008).

The defendants countered that these rights were all available through California's domestic partnership policies, and as such homosexuals did not need same-sex marriage in order to access these rights.

While they did emphasize the rights that were to be gained through the legalization of same-sex marriage, the plaintiffs also focused on the social benefits of marriage. Michael identifies "social-benefit" rationales as "the social benefit couples derive from the removal of the perceived second-class status of civil-unions and the comfort couples gain in having access to a title for their relationship that is unambiguous and recognizable" (Michael 2003, 1442-3). Marriage was replete with social benefits because it commanded a sacred, powerful and important position and role in American society.

As Proponents have admitted, "the word 'marriage' has a unique meaning," and "there is a significant symbolic disparity between domestic partnership and marriage." It is the designation of 'marriage' itself that expresses validation, by the state and the community, and that serves as a symbol, like a wedding ceremony or a wedding ring, of something profoundly important. (Appeal Decision 2012, 1612-3)

Ted Olson further defined the social meaning and importance of marriage accordingly:

The plaintiffs have said that marriage means to them freedom, pride. These are their words. Dignity. Belonging. Respect. Equality. Permanence. Acceptance. Security. Honor. Dedication. And a public commitment to the world. (Transcripts Volume-13 2010, 2975)

Marriage represented and promoted a myriad of American values ranging from freedom to equality to belonging. Based on these values, Olson stated that marriage was a building block of American family and community.

As the witnesses in this case will elaborate with respect to that point, the right to marriage itself, marriage is central to life in America. It promotes mental, physical, and emotional health, and the economic strength and stability of those

who enter into a marital union. It is the building block of family, neighborhood and community in our society. (Transcripts Volume-1 2010, 20)

Thus the plaintiffs fought for homosexuals to be accepted into this club of marriage, arguing that homosexual couples both represented these American values, and were worthy of the social and political benefits that accompanied acceptance into the institution.

The American promise—and dream—of equality surely means at a minimum that the government, before “drawing a line around” some segment of its citizenry and designating them unworthy of something as important and socially meaningful as the institution of marriage, must have a legitimate and factually tenable rationale for doing so. Proposition 8 fails even this most basic level of scrutiny. It advances no legitimate purpose. (Brief for Appellees 2010, 107)

By deeming worthy of marriage and then granting them rights and protections, the plaintiffs argued, the state legitimized citizens’ family forms and relationships.

Mr. Olson: The evidence will show from the plaintiffs, and from the experts that will be presented to this court, what it means to be married, what it means to have the state sanction your relationship, to give its official approval. Which is one of the reasons why Proposition 8 was passed, and one of the reasons why it's being defended so vigorously by the proponents of Proposition 8, because they want that status to remain special and reserved to opposite-sex couples, and to be denied to same-sex couples, because there is a judgment being made. And it's expressed by what California has done, that this is something different, separate, unequal, and less advantageous. (Transcripts Volume-1 2010, 23-4)

Mr. Olson: The evidence was overwhelming that this is a stigma. It's a government-imposed stigma. It's a government-imposed stigma placed in the constitution of the State of California. What could be a stronger signal to other citizens and to other people that they are not okay, these people are not normal? (Transcripts Volume-13 2010, 2997)

As the plaintiffs stated, proponents of Proposition 8 recognized the power of marriage and established the proposition in order to exclude homosexuals from experiencing the benefits of state and social approval of their relationships and family from. The plaintiffs and those supporting same-sex marriage, wanted to ensure that the worthy homosexuals,

whose relationships fit the heteronormal criteria for marriage, were afforded the legitimacy, and rights and benefits for which they are worthy and deserving.

While state exclusion produced stigma, state legitimization produced social benefits for the heteronormal marrying homosexuals. When examining the plaintiffs, Olson asked both Jeff Zarrillo and Kristin Perry how the legalization of same-sex marriage would effect how other people treated them.

Mr. Olson: Do you believe that if you were married, that would affect the way other people who don't know you deal with you?

Jeff Zarrillo: Sure.

Mr. Olson: Why?

Jeff Zarrillo: When someone is married, and whether it's an introduction with a stranger, whether it's someone noticing my ring, or something of that nature, it says to them these individuals are serious; these individuals are committed to one another; they have taken that step to be involved in a relationship that one hopes lasts the rest of their life. (Transcripts Volume-1 2010, 80-81)

Mr. Olson: Do you think it would matter in your neighborhood in your community that you would be able to say that you and Sandy were married? Would it cause people to treat you differently?

Kristin Perry: I think it would be an enormous relief to our friends who are married. Our straight heterosexual friends that are married almost view us in a way that -- I know they love us, but I think they feel sorry for us and I can't stand it. You know, many of them are either in their second marriage or their first marriage, but nevertheless, they have a word and they belong to this institution or this group. And I can think of a time recently when I went with Sandy happily to a football game at the high school where two of our kids go and we went up the bleachers and we were greeted with these smiling faces of other parents sitting there waiting for the game to start. And I was so acutely aware that I thought, they are all married and I'm not. (Transcripts Volume-1 2010, 156)

Both Zarrillo and Perry articulated wanting to be a part of the elevated club in society. Being part of the elevated club was seen as an affirmation that their homosexual relationships were normal, and were deserving of social status and respect, and rights and protections. In asking to be part of an elevated club in society, the plaintiffs were reinforcing hierarchies in family form, relationships and sexualities. Although they claim

to be seeking acceptance and equality for all homosexuals, they were not challenging the exclusionary hierarchies of state-sanctioned relationships. Instead, they were merely making the case that some homosexuals were good and worthy enough to reap all of the benefits of marriage, both in terms of social acceptance and state legitimization.

But this case is not about whether marriage should be abolished or diminished. Quite the contrary, Plaintiffs *agree* with Proponents that marriage is a unique, venerable, and essential institution. They simply want to be a part of it—to experience all the benefits the Court has described and the societal acceptance and approval that accompanies the status of being married.” (Brief for Respondents 2012, 3)

In so doing, the plaintiffs were incrementally moving the line of inclusion to encompass heteronormal homosexuals, but ultimately they were reinforcing the division and inequality between those who could marry and those who could not marry.

The plaintiffs’ reinforcement of divisions between married and non-married citizens, and their reverence for the power of marriage came together through their accusations against heterosexuals who fail the heteronormal marriage ideal. Instead of challenging the power of marriage to neglect, exclude and other certain citizens, the plaintiffs focused on questioning how the state can allow certain ‘deviant’ heterosexuals, who did not fulfill the heteronormal ideal - including “murders, child molesters, rapists, abusers, serial divorcers, and philanderers” - into the institution, while denying entry to good, upstanding, normal homosexuals.

Indeed, California law prohibits gay and lesbian individuals from marrying the person of their choice, even while it allows murders, child molesters, rapists, abusers, serial divorcers, and philanderers to marry. It even guarantees incarcerated inmates the right to marry. (Plaintiffs' and Plaintiff-Intervenor's Trial Memorandum 2009, 9-10)

Mr. Olson: In California, even convicted murderers and child abusers enjoy the freedom to marry. As the evidence clearly establishes, this discrimination has been placed in California's Constitution even though its victims, the victims of

this discrimination, are and always have been fully contributing members of our society. (Transcripts Volume-1 2010, 40)

The plaintiffs compared heteronormal homosexuals to abnormal heterosexuals, arguing that the normal, good, upstanding and contributing members of society deserved inclusion into this state institution, regardless of their sexuality. This line of reasoning negated the notion that some of the homosexual Californians who wanted to marry were themselves criminals, divorcees, philanderers and social deviants in a myriad of other ways. It also reinforced the notion that marriage should be reserved for particular people as citizens. Where once homosexuals all belonged to the abnormal, criminals, delinquents and moral deviants, in this case marriage was seen as a way to differentiate good homosexuals from other deviant members of society. This was a clear moment in which heteronormal homosexuals were seeking to distance themselves from their historic and contemporary association with the social deviance and abnormality, in order to avoid discrimination, exclusion and ostracization. Moreover, in their attempts to make the case that homosexuals can be defined as a coherent class, the plaintiffs overlooked and negated the diversity that exists among non-heterosexuals, the commonalities between heterosexual and homosexual 'deviants,' and the exclusionary, restrictive and regulatory nature of marriage on all citizens.

There was another way in which the plaintiffs reinforced the division between married and non-married citizens, while neglecting diversity and descent among the sexually 'deviant.' Through the prioritization of same-sex marriage, the plaintiffs avoided acknowledging that there are members of the LGBTQ community who did not support the legalization of same-sex marriage, or who did not see it as the best solution to problems of LGBTQ discrimination. As such, diverse voices and needs were silenced.

This omission, however, was raised by the defendants, who again used it to demonstrate that homosexuals did not comprise a uniform, coherent and cohesive class of citizens who were seeking the same form of state acknowledgement and protection.

Indeed, as Plaintiffs' experts themselves have found, even a sizeable proportion of gays and lesbian themselves oppose legalizing same-sex marriage. For some this may be based on the view that "[m]arriage 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." Paula Ettlbrick, *Since When Is Marriage a Path to Liberation* [...] For others, it may reflect recognition of marriage's traditional "procreative meaning," or respect for "other people's sacred traditions." Camille Paglia, *Connubial Personae 10 Percent*, May-June 1995. (Defendant Intervenors Appellants' Opening Brief 2010, 106)

As the defendants highlighted, there were criticisms of same-sex marriage from LGBTQ people and activists on the grounds, among many other reasons, that marriage ran counter to the goals of enabling the expression of distinct sexualities that do not replicate the heteronormal, and the free expression of many different forms of sexuality and sexual/romantic/friendship relationships. Marriage, it was argued, stifled both of these goals as it required assimilation to particular criteria for sexuality and family form.

In their cross-examination of George Chauncey, the defendants argued that same-sex marriage was only recently a priority for American LGB activists. Chauncey agreed adding the qualifier that same-sex marriage seemed unimaginable for LGB activists before the 1990s (Transcripts Volume-3 2010, 512-6).

In this section I'm describing the emergence of the debate over -- within the gay movement over marriage in the 1980s and early '90s, when it became more of an issue, again, and received extensive attention. And, certainly, some gay activists opposed the movement for marriage equality. And I'm beginning here to describe the sort of period in which the shift in sentiment occurred, in which the right to marry became a more widespread and deeply-held goal of many gay activists. (Transcripts Volume-3 2010, 512-6)

Chauncey thus stressed that while same-sex marriage was not always a priority among LGBTQ communities, currently it was a widespread and deeply-held goal among LGB activists. During their cross-examination of Helen Zia (a writer, journalist and activist) the defendants again brought up LGBTQ activists who did not support marriage.

Mr. Raum: Now, did you write that: "Asian American Queer activists do not all agree on what political stand to take towards same-sex marriage"?

Helen Zia: I believe I wrote something like that.

Mr. Raum: And in the same article, which is *Where the Queer Zone Meets the Asian Zone*, you said: "To some gay rights activists, fighting for same-sex marriage is too petty bushwa, too much about the nuclear family, cocooning, property rights, and all the bad patriarchal things that marriage stands for." You wrote that as well, did you not?

Helen Zia: I believe so.

Mr. Raum: Now, you've testified today regarding some of the benefits that you've experienced as a result of being permitted to marry in California, correct?

Helen Zia: That's right.

Mr. Raum: But you've also written that your civil marriage did not affect your critical view of marriage as a patriarchal institution. Do you recall that?

Helen Zia: Yes, something to that effect. (Transcripts Volume-5 2010, 1246-7)

In bringing up Zia's criticisms of same-sex marriage, the defendants sought to both discredit her testimony in support of same-sex marriage, and to destabilize and reveal weaknesses and dissent in the same-sex marriage movement. It was possible for the defendants to gain traction with this argument because the plaintiffs argued in such strict terms about the class of people they were representing (a naturally definable sexuality class), and the institution they saw as the remedy for their collective discrimination. Thus if members of this supposedly coherent and uniform class of citizens did not agree on the solution to their problems, then perhaps the solution should not be implemented.

In order to properly address the limitations of their arguments, the plaintiffs could have built their arguments with the understanding that sexuality was complex, that discrimination against LGBTQ people would not be wholly alleviated through same-sex

marriage, and that there was real and serious criticism of same-sex marriage by LGBTQ people. Framing their arguments thusly would have helped to frame the terms for how sexuality and LGBTQ discrimination and exclusion were understood, discussed and addressed in public forums. Instead, the plaintiffs responded accordingly:

Mr. Olson: Maybe lots of people don't want to get married, despite everything we've been saying about how wonderful it is. That is a choice, the Supreme Court has said. And Dr. Cott specifically said not everybody wants to get married. But it is important. And she said it's -- we don't even understand it if we can do it. It is the people that don't have the right that understand how harmful it is and how much it hurts. But if you wish to have a -- the State of California can have all kinds of relationships between persons. As you heard on the stand from the plaintiffs and the witnesses, the expert witnesses, that's a business deal. (Transcripts Volume-13 2010, 2997-8)

In this statement, options outside of marriage, be they domestic partnership, non-marriage, or a recognition of many kinds of family and intimate bonds, were dismissed as lesser than marriage, as a business deal. The plaintiffs entrenched themselves deeper in their commitment to marriage as they argued that while some LGBTQ people may not want to marry, the option to marry was important precisely because of the social and political meaning, and acceptance and status that marriage uniquely afforded its participants. Moreover, the plaintiffs stated that the denial of this special acceptance and status was harmful, yet they were ambivalent as to whether non-married citizens were harmed by their lack of acceptance and status, further impeding the realization of social justice for many LGBTQ Californians. All of this reinforced marriage as an important, assimilationist, exclusionary and hierarchal institution.

### 3.5. David Blankenhorn and the Importance of Marriage

The defendant's expert witness David Blankenhorn<sup>78</sup>, a prominent leader in the social conservative movement, was called to discuss why marriage was vitally important for American society. He argued that marriage was crucial for citizens' morality, economic stability, and reproduction and child rearing. Moreover, the decline of marriage, and the absence of fathers, led to a myriad of social ills ranging from criminality and drug addiction, to poverty, and poor mental and physical health (Transcripts Volume-11 2010). Throughout his testimony, Blankenhorn maintained that heterosexual couples retained the unique ability to have children naturally, and that marriage policies should continue to respect and promote this unique role of heterosexual couples. Same-sex marriage, therefore, would threaten the special, elevated meaning and status of marriage, and thus lessen heterosexuals' desire to join the club (Transcripts Volume-11 2010).

However, during the plaintiffs' cross-examination, apparent contradictions were revealed in Blankenhorn's testimony. While Blankenhorn maintained that he was against the legalization of same-sex marriage, he agreed that the legalization of same-sex marriage would lead to positive benefits for same-sex couples in terms of the access to rights, equality, dignity and fairness.

Mr. Boies: You will see that your writing there on the issue of same-sex marriage is this profound principle of equal dignity, the heart of the matter? "After all, part of the reason why the principle is so revolutionary is that it can grow and deepen

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<sup>78</sup> Blankenhorn was the founder and president of the Institute for American Values, a think tank that studied marriage in America, and was held as a national leader of the Fatherhood Movement. According to Fatherhood Movement co-founder Wade Horn, the fatherhood movement exists to reinvent and revitalize gendered identities. Horn has ascribed specific characteristics to each gender. In the fatherhood movement's 1999 Manifesto "A Call to Action," Horn enumerated three core beliefs of the fatherhood movement accordingly: "(1) responsible and committed fatherhood ought to be a norm of masculinity; (2) fathers are different from mothers in important ways; (3) the father-child bond is important to the healthy development of children." (Horn 1999, 8)

over time. Groups that had long been considered effectively outside its moral reach, African-Americans, women, people of certain colors or languages or religions, can over time and often as a result of great struggle, enter into its protective sphere." And then you get to the two sentences that I want to particularly direct your attention to. You say: "I believe that today the principle of equal human dignity must apply to gay and lesbian persons." Do you see that?

David Blankenhorn: Yes, sir.

Mr. Boies: And the "I" there is you, correct?

David Blankenhorn: That's correct.

Mr. Boies: And you say: "In that sense insofar as we are a nation founded on this principle, we would be more, emphasize more, American on the day we permitted same-sex marriage than we were on the day before." And you wrote those words, did you not, sir?

David Blankenhorn: I wrote those words.

Mr. Boies: And you believed them then, correct?

David Blankenhorn: That's correct.

Mr. Boies: And you believe them now, correct?

David Blankenhorn: That's correct. (Transcripts Volume-11 2010, 2804-6)

Blankenhorn's framing of marriage as an avenue toward acceptance, equality and dignity seemed to fall in line with the mainstream LGB discourses, which held that the legalization of same-marriage was the next step in realizing equality for all Americans. To these ends, Blankenhorn conceded "Gay marriage would extend a wide range of the natural and practical benefits of marriage to many lesbian and gay couples and their children." (Transcripts Volume-12 2010, 2849-50) Specifically, he stated that the political rights and economic benefits that are administered through marriage would benefit homosexuals. He also supported the assumption that the legalization of same-sex marriage could lead to a decline in anti-gay prejudice and hate crimes (Transcripts Volume-12 2010, 2850-1).

Mr. Boies: The seventh positive consequence which you agreed with was that: "Gay marriage would be a victory for the worthy ideas of tolerance and inclusion. It would likely decrease the number of those in society who tend to be viewed warily as "other" and increase the number who are accepted as part of "us." In that respect, gay marriage would be a victory for, and another key expansion of, the American idea." And I have read those correctly, have I not, sir?

David Blankenhorn: Yes, sir. (Transcripts Volume-12 2010, 2849-50)

Moreover, Blankenhorn lauded how the availability of same-sex marriage would attract more same-sex couples to enter committed relationships. Accordingly, he agreed with the following statements:

Same-sex marriage would likely contribute to more stability and to longer-lasting relationships for committed same-sex couples.

[...]

Same-sex marriage might lead to less sexual promiscuity among lesbians and (perhaps especially) gay men. (Transcripts Volume-12 2010, 2849-50)

Much like the promises of the mainstream LGB organizations studied in Chapters Three and Four, Blankenhorn and the plaintiffs characterized homosexuals as promiscuous and non-committal people who were in need of marriage in order to regulate and channel their sexuality toward other ends. Based on these concessions, the mainstream LGB organizations celebrated Blankenhorn's testimony as a victory for the same-sex marriage cause.

Yet I interpret Blankenhorn's testimony as an indication of his commitment to the institution of marriage, and his hope that the same-sex marriage debate would lead to a public discussion on the future of marriage in the United States.

Mr. Boies: And at the top of the page you write: "If adopting same-sex marriage was likely to be part of a larger societal shift leading to better marriages, less divorce and less unwed childbearing or, more modestly, if it seemed likely that adopting same-sex marriage would not significantly undermine efforts to renew our wider marriage culture, I am confident that most marriage advocates would favor its adoption. I know I would. But if adopting same-sex marriage is likely to impede that larger goal, I would be against it." And that's what you believe, correct, sir?

David Blankenhorn: Yes, sir. (Transcripts Volume-12 2010, 2840)

Blankenhorn further stated that the legalization of same-sex marriage would produce a "wide-ranging and potentially valuable national discussion of marriage's benefits, status and future" (Transcripts Volume-12 2010, 2852). Blankenhorn maintained, however, that

the debate about same-sex marriage would only be beneficial, and thus welcomed by him, if the ultimate outcome was that marriage culture would be reinvigorated and promoted in heterosexual communities.

In his assessment of Blankenhorn's testimony, Judge Walker dismissed Blankenhorn's claim to expertise in the subject, thereby discounted his testimony:

Blankenhorn stated he opposes marriage for same-sex couples because it will weaken the institution of marriage, despite his recognition that at least thirteen positive consequences would flow from state recognition of marriage for same-sex couples, including: (1) by increasing the number of married couples who might be interested in adoption and foster care, same-sex marriage might well lead to fewer children growing up in state institutions and more children growing up in loving adoptive and foster families; and (2) same-sex marriage would signify greater social acceptance of homosexual love and the worth and validity of same-sex intimate relationships. Blankenhorn's opinions are not supported by reliable evidence or methodology and Blankenhorn failed to consider evidence contrary to his view in presenting his testimony. The court therefore finds the opinions of Blankenhorn to be unreliable and entitled to essentially no weight. (Walker 2010, 46-9)

Following the *Perry v. Schwarzenegger* proceedings, Blankenhorn wrote an editorial for the New York Times in which he attempted to clarify his stance on same-sex marriage. He stated that during the proceedings he was against same-sex marriage because he believed that traditional marriage needed to maintain its unique and sacred status as a reproductive institution.

I had hoped that the gay marriage debate would be mostly about marriage's relationship to parenthood. But it hasn't been. Or perhaps it's fairer to say that I and others have made that argument, and that we have largely failed to persuade. In the mind of today's public, gay marriage is almost entirely about accepting lesbians and gay men as equal citizens. And to my deep regret, much of the opposition to gay marriage seems to stem, at least in part, from an underlying anti-gay animus. To me, a Southerner by birth whose formative moral experience was the civil rights movement, this fact is profoundly disturbing. (Blankenhorn 2012)

In the editorial, Blankenhorn stated that he then supported same-sex marriage because the debate surrounding the issue had been framed in terms of equality and rights. Contrary to some social conservative organizations, he argued that his commitment to the civil rights movement actually compelled him to support homosexual rights, if not same-sex marriage. He believed that these rights should not be denied to loving homosexual couples:

For me, the most important is the equal dignity of homosexual love. I don't believe that opposite-sex and same-sex relationships are the same, but I do believe, with growing numbers of Americans, that the time for denigrating or stigmatizing same-sex relationships is over. Whatever one's definition of marriage, legally recognizing gay and lesbian couples and their children is a victory for basic fairness. (Blankenhorn 2012)

Thus Blankenhorn supported same-sex marriage because the alternative was to appear as prejudice and discriminatory against homosexuals. His reverence for marriage took precedents once again as he said that he was not interested in engaging in a culture war but sought to build coalitions with homosexual Americans who support the institution of marriage.

As I look at what our society needs most today, I have no stomach for what we often too glibly call "culture wars." Especially on this issue, I'm more interested in conciliation than in further fighting. (Blankenhorn 2012)

Instead of fighting gay marriage, I'd like to help build new coalitions bringing together gays who want to strengthen marriage with straight people who want to do the same. For example, once we accept gay marriage, might we also agree that marrying before having children is a vital cultural value that all of us should do more to embrace? Can we agree that, for all lovers who want their love to last, marriage is preferable to cohabitation? Can we discuss whether both gays and straight people should think twice before denying children born through artificial reproductive technology the right to know and be known by their biological parents? (Blankenhorn 2012)

Still, Blankenhorn's acceptance of same-sex marriage is contingent on the hope that homosexual citizens would have to assimilate to the heteronormative principles of

marriage including commitment and monogamy, and responsible reproduction and child rearing. For Blankenhorn, the inclusion of homosexuals into the institution of marriage would actually bolster and strengthen marriage, as long as the newly included homosexuals did not fundamentally disrupt the confines, rules or functions of the institution.

#### **4. Conclusion**

In this chapter, I examined three of the main discourses that were produced during the Proposition 8 trials. To demonstrate the immutability of homosexuality the plaintiffs argued that sexuality was beyond personal choice, and that it did not impede their ability to contribute to society. Yet in their efforts, the plaintiffs actually established strict and exclusionary categories of sexuality, specifically ‘deviant’ sexualities. Driven by the goal of proving that homosexuals deserve same-sex marriage rights, the plaintiffs ended up defining homosexuality according to the heteronormal terms of marriage. Accordingly, they defined homosexuals being capable of forming loving, committed, monogamous relationships. This argument places homosexuality in comparison to heterosexuality, to the exclusion of any other type of sexuality (including bisexual, queer and polyamorous sexualities). Where once homosexuality stood in negative opposition to heterosexuality, the plaintiffs sought to normalize homosexuality for the purposes of marriage, resulting in the exclusion other deviant sexualities.

Both sides held a strong reverence for marriage as an important, distinct and exclusive institution. For the defendants, marriage was a sacred, traditional and heterosexual institution designed to preserve the heterosexual family and to reproduce a particular value-bearing population. For the plaintiffs, marriage was the most appropriate

solution to a particular suspect class' history of discrimination and current experiences of powerlessness. Marriage, after all, both demonstrated the state and society's acceptance of citizens, and their sexualities and family forms, and offered these select citizens certain benefits in the form of social status, and state rights and protections.

I have argued in these two sections that these attempts to legalize same-sex marriage were not undertaken purely or even primarily to alleviate discrimination against homosexual citizens. Rather, the legalization of same-sex marriage was pursued to ensure that heteronormal homosexual citizens have access to the benefits and protections, status and inclusion that come with marriage. The legalization of same-sex marriage was not about ending discrimination; it was about granting access to an elevated and exclusionary group in society. Thus the legalization of same-sex marriage was a project of redrawing the lines of exclusion, inequality and discrimination on the basis of heteronormal sexualities, as opposed to heterosexual sexualities. This desire to be part of the elevated group, as opposed to dismantling the many types of discrimination that are inflicted on the basis of sexuality, was seen most starkly in the plaintiffs' attempts to distance heteronormal homosexuals from 'deviant' heterosexuals as they argued that normal, upstanding homosexuals should be able to marry, especially if the more deviant "criminals, divorcées and child molesters" were allowed to marry. Here the plaintiffs reinforced the division between married and non-married citizens, attempting to position good homosexual citizens on the accepted side by making the case that bad heterosexual citizens should be excluded. This assessment also overlooked the ways in which legalizing same-sex marriage still excluded people in non-monogamous relationships, and those who could not marry.

While the plaintiffs set out to make the case that a suspect class of citizens have been discriminated against and excluded from society's most important institutions, throughout the trial the plaintiffs actually represented the experiences and ends of a select group of citizens. As such, the debate was centered on the exclusion of particular heteronormal beings, not the exclusion of all sexual 'deviants.' I have argued that the debate unfolded thusly because the plaintiffs defined sexuality to fit the ends of marriage, as opposed to seeking to open up marriage to include the many variations of sexuality.

## **Chapter Eight: Proposition 8's Normality and Love Discourses Filtered through the Courts**

### **1. Introduction**

As was discussed in the previous Chapter, both the plaintiffs and the defendants in the *Perry v. Schwarzenegger* proceedings paid much attention to whether same-sex marriage was an appropriate solution to the discrimination against homosexual citizens on the basis of sexuality. In this Chapter, I analyze how both sides also engaged in a debate about the primary function of marriage, procreation or love, and accordingly the premise of exclusion in Proposition 8.

Chapters Four, Five and Six detail the shift from equality and rights discourses to love and commitment discourses, arguing that the latter discourses were deployed by the mainstream LGB organizations in order to normalize homosexuals and prove that they were capable of being married, and worthy of the status, rights and benefits that accompany marriage. There was not a comparable dramatic shift in discourse over the course of the hearings. The shift toward the love and commitment discourses had occurred throughout 2009 when the *Perry v. Schwarzenegger* case was initiated, meaning that the shift was congealed in the courts. Love discourses characterized all three sets of hearings as the plaintiffs used love and commitment arguments in their opening briefs and arguments (Plaintiffs' and Plaintiff-Intervenor's Trial Memorandum 2009, 1).

Both the love and procreation discourses were veiled arguments about the type of people that should be accepted into the institution of marriage. I hold that the plaintiffs employed the love and commitment discourses for the same reasons that their counterparts, the mainstream LGB organizations, did: to veil the fact that they were not seeking to end discrimination on the basis of sexuality, but were actually seeking the

inclusion and acceptance of a particular group of heteronormal homosexual citizens. Comparatively, I hold that the defendants, like their social conservative organization counterparts, used procreation discourses to obscure the fact that they were seeking to maintain marriage as a heterosexual institution. The defendants evoked discourses of procreation in order to argue that marriage should be reserved for heterosexuals because (supposedly) only they can procreate naturally, and spontaneously.

In this Chapter I analyze each side's arguments about the primary purpose of marriage, be it love or procreation, and I argue that both sides were invested in protecting the institution of marriage through the exclusion of particular groups of people.

## **2. Marriage for Love**

While the love discourse grew in prominence over the course of the mainstream LGB organizations' campaigns, love discourses engendered the plaintiffs' arguments from the beginning of the *Perry v. Schwarzenegger* trial. In their opening brief the plaintiffs defined marriage in terms of love.

As gay and lesbian Californians, they alone are barred by Proposition 8 from marrying the person they love. (Plaintiffs' and Plaintiff-Intervenor's Trial Memorandum 2009, 1)

Consistently, love was cited as the purpose of marriage. This was seen in David Boies' examination of Paul Katami, one of the four plaintiffs.

Mr. Boies: Why did you want to get married?

Paul Katami: There are many reasons. I think the primary reason for me is because I have found someone that I love and that I know I can dedicate the rest of my life to. And when you find someone who is not only your best friend but your best advocate and supporter in life, it's a natural next step for me to want to be married to that person. (Transcripts Volume-1 2010, 88)

Here Proposition 8 and marriage were not framed in terms of sexual relationships and rights, rather they were framed in terms of love: Proposition 8 represented the denial,

exclusion and demeaning of love, and marriage represented the public acceptance, affirmation and legitimization of love.

Further, the plaintiffs often explained the connection between love and marriage through a discussion of the limitations of domestic partnerships. In his 2010 opening argument for the *Perry v. Schwarzenegger* trial, Ted Olson stated:

Mr. Olson: Well, I think the two are so closely interwoven, they cannot be extracted. Because what the state has done, has given a sanction to a formal relationship which is part of our culture and part of society. The state is labeling an individual relationship as something called a domestic partnership, which has nothing to do with love. And it has labeled a separate relationship, which the proponents have described in papers filed with this court, as a unique and special relationship reserved for opposite-sex couples. It means something to them. It means something to society. And it means something to the State of California. California has put people into categories. (Transcripts Volume-1 2010, 22-23)

[...]

Mr. Olson: The evidence will demonstrate that relegating gay men and lesbians to domestic partnerships is to inflict upon them badges of inferior that forever stigmatize their loving relationships as different, separate, unequal, and less worthy, something akin to a commercial venture. That's what a domestic partnership looks like, sounds like, feels like. Not a loving union. (Transcripts Volume-1 2010, 38)

A domestic partnership, according to Olson, was a contractual agreement between the state and two people. In comparison, marriage got its unique meaning through its relationship to love. For the plaintiffs, marriage was defined as the recognition of a love-based relationship. In these 2010 opening statements, Olson also argued that because marriage uniquely recognizes love-based relationships, granting same-sex couples domestic partnerships sent the message that their love, specifically, was not the same as heterosexual love.

According to the plaintiffs, homosexuals' love-based relationships were not distinguishable from heterosexual love-based relationships and as such the state should treat both relationships equally by affording both relationships the status, rights and

benefits that come with marriage. Judge Walker agreed with this argument, as he stated the following findings of fact in his 2010 decision:

Same-sex couples are identical to opposite-sex couples in the characteristics relevant to the ability to form successful marital unions. Like opposite-sex couples, same-sex couples have happy, satisfying relationships and form deep emotional bonds and strong commitments to their partners. Standardized measures of relationship satisfaction, relationship adjustment and love do not differ depending on whether a couple is same-sex or opposite-sex. (Walker 2010, 77)

Thus the plaintiffs had argued, to Walker's satisfaction, that certain homosexual couples were identical to heterosexual couples on the basis of love. Turning this time to Ted Olson's examination of Paul Katami's partner and co-plaintiff:

Mr. Olson: Now, today you are in a committed relationship with another gay man, correct?

Jeffrey Zarrillo: Yes, sir.

Mr. Olson: Tell me a little bit about that man.

Jeffrey Zarrillo: He's the love of my life. I love him probably more than I love myself. I would do anything for him. I would put his needs ahead of my own. I would be with him in sickness and in health, for richer, for poorer, death do us part, just like vows. I would do anything for him. And I want nothing more than to marry him.

Mr. Olson: How long have you been in this relationship?

Jeffrey Zarrillo: March will be nine years.

Mr. Olson: When you said you wanted nothing more than to marry him, why?

Jeffrey Zarrillo: The word "marriage" has a special meaning. It's why we're here today. If it wasn't so important, we wouldn't be here today. I want to be able to share the joy and the happiness that my parents felt, my brother felt, my friends, my co-workers, my neighbors, of having the opportunity to be married. It's the logical next step for us. (Transcripts Volume-1 2010, 79-80)

Love may seem like an ambiguous term, but as I argued in Chapters Five and Six, the mainstream LGB organizations used love to evoke very specific notions of normal and proper family form, function and sexuality.

The plaintiffs devoted much attention to making the case that certain homosexuals were capable of fulfilling the heteronormative ideal for marriage by engaging in long-lasting, monogamous, loving relationships.

Plaintiffs are gay and lesbian residents of California who are involved in long-term, committed relationships with, and desire to marry, individuals of the same sex to demonstrate publicly their commitment to one another and to obtain all the benefits that come with official recognition of their family relationships. Plaintiffs Perry and Stier are lesbian individuals who have been in a committed relationship for ten years, and Plaintiffs Katami and Zarrillo are gay individuals who have been in a committed relationship for eight years. Both couples are prohibited from marrying because of Prop. 8. (Plaintiffs' and Plaintiff-Intervenor's Trial Memorandum 2009, 2)

Similar to the mainstream LGB organizations' use of personal stories to humanize homosexuals, the plaintiffs used Perry and Stier, and Katami and Zarrillo as prime examples of the normality of homosexuals. Both couples were in loving relationships but importantly long-term relationships. And both couples were seeking little more than validation and legitimacy from their family and friends, and the rights and benefits that come with state-sanctioned marriage.

In addition to demonstrating the love and commitment of the four plaintiffs, several expert witnesses were called in to challenge stereotypes about the promiscuity of gay men, and to assure the state that homosexuals were capable of commitment and monogamy. To these ends, University of California psychology professor Letitia Anne Peplau confirmed that homosexuals were able to have happy, satisfying and stable relationships (Transcripts Volume-3 2010, 586-8). When cross-examined, Peplau stated that monogamy tends to be understood differently among gay men:

One of the ways in which gay men's relationships differ, on average -- some of them do; not all of them, by any means -- is that a higher percentage of gay men say that they do not value monogamy; it's not important in their relationship. They may have an agreement that their relationship does not need to be sexually

exclusive. And, correspondingly, somewhat more gay men than other groups report that they or their partner have had sex with someone else since their relationship began. So it's important to put it in that context, because we sometimes think of non-monogamy in terms of infidelity, a breach of faith. But if a couple has an agreement, an understanding, that sex with other people is acceptable, then acting on that agreement is not a breach of trust. And I think that's why researchers have found that whereas monogamy is correlated with relationship satisfaction for heterosexuals and lesbians - that is, having monogamy is associated with being in a happy relationship - for gay men there's no association between sexual exclusivity and the satisfaction of the relationship, because it's not one of the markers or the yardstick by which gay men are measuring their relationship. (Transcripts Volume-3 2010, 616-8)

While Peplau conceded that monogamy might be defined differently for gay men, she held that gay men were still capable of engaging in long-term, committed, satisfied marriage-like relationships. The plaintiffs did not address this concession in their examination of Peplau. Doing so would have opened the plaintiffs up to several inconvenient questions about their claims that sexuality is immutable. For example, Peplau's testimony leaves one to wonder whether gay men's different definition of monogamy is a product of biology, social conditioning and/or gay culture of the 20<sup>th</sup> century. If it were biologically determined then one could make the case that homosexual men were not biologically fit for heteronormative marriage. Such inconsistencies in the plaintiffs' case were important because they exposed the problems that were produced when one denies the complexity of human sexuality, the diversity of a marginalized population, and the futility of attempting to prescribe certain solutions to remedy the diverse experiences of discrimination of the population.

Lastly, the connection between love and marriage, and the narrowing of the terms of inclusion, was reinforced through the conflation of sexual orientation with love. While marriage was presented as a solution to discrimination on the basis of sexuality, the plaintiffs defined sexuality in terms of love on several occasions. Ted Olson's

examination of plaintiffs Kristin Perry and her partner Sandra Stier both demonstrated this conflation:

Mr. Olson: How would you describe your sexual orientation?

Kristin Perry: I am a lesbian.

Mr. Olson: And tell me what that means in your own words? What does it mean to be a lesbian?

Kristin Perry: Well, for me what it means is, I have always felt strong attraction and interest in women and formed really close relationships with women, and I have only ever fallen in love with women. And the happiest I feel is in my relationship with Sandy and -- because I'm in love with her. (Transcripts Volume-1 2010, 140)

Mr. Olson: How convinced are you that you are gay? You've lived with a husband. You said you loved him. Some people might say, Well, it's this and then it's that and it could be this again. Answer that.

Sandra Stier: Well, I'm convinced, because at 47 years old I have fallen in love one time and it's with Kris. And our love is - it's a blend of many things. It's physical attraction. It's romantic attraction. It's a strong commitment. It's intellectual bonding and emotional bonding. For me, it just isn't love. I really, quite frankly, don't know what that would be for adults. I don't know what else to say about it. (Transcripts Volume-1 2010, 167)

For the two plaintiffs, their sexual orientation was defined in terms of whom they love.

Therefore, the legalization of same-sex marriage became a matter not of sexual discrimination but of discrimination on the basis of love. There was the risk that adopting such discourses of love may undermine the plaintiffs' arguments about the biological and natural roots of sexual orientation. Love does not define a class of citizens, and love is not a stable category on which one can claim discrimination or inequality. During the trials, the defendants did not attack the plaintiffs' case by arguing that redefining love to include homosexuals would open the door to all other forms of love, including love of family members, pets or inanimate objects. Select members of the Proposition 8 social conservative organizations used the argument that same-sex marriage would force the state to acknowledge many other kinds of relationships. Yet in the campaigns and the

trials, much care was paid to ensuring that the social conservative opposition to same-sex marriage could not be deemed anti-homosexual or discriminatory.

Moreover, as I argued in Chapter Five in relation to the mainstream LGB organizations' push to "legalize love," love is not the criteria on which the state determined inclusion into the institution of marriage. This discourse of love was deployed because it desexualized and then normalized certain homosexual citizens so that they were more easily accepted by voters and into the institution of marriage. Perhaps the mainstream LGB organizations and the plaintiffs evoked discourses of love because they realized that marriage rights were not administered purely on the basis of sexuality, but rather on the basis of normative family form. Hence the mainstream LGB organizations and the plaintiffs alike emphasized the heteronormal characteristics of certain homosexual couples including commitment, monogamy, and as I discuss in the next section, procreation and child rearing. Same-sex marriage advocates, therefore, appealed to the heteronormal nature and parameters of the institution of marriage by discussing love at the expense of sexuality and sexual orientation.

### **3. Marriage for Procreation**

During the Supreme Court hearings, the plaintiffs chastised the defendants for denying the relationship between love and marriage. The plaintiffs furthered that instead of honouring the connection between love and marriage, the defendants had reduced the purpose of marriage to its utilitarian function of procreation.

Proponents accuse Plaintiffs (repeatedly) of "redefining marriage." But it is Proponents who have imagined (not from *any* of this Court's decisions) a cramped definition of marriage as a utilitarian incentive devised by and put into service by the State—society's way of channeling heterosexual potential parents into "responsible procreation." In their 65-page brief about marriage in California, Proponents do not even mention the word "love." They seem to have no

understanding of the privacy, liberty, and associational values that underlie this Court's recognition of marriage as a fundamental, personal right. Ignoring over a century of this Court's declarations regarding the emotional bonding, societal commitment, and cultural status expressed by the institution of marriage, Proponents actually go so far as to argue that, without the potential for procreation, marriage might not "even . . . exist[ ] at all" and "there would be no need of any institution concerned with sex." (Brief for Respondents 2013, 2)

As with the social conservative organizations working in the campaigns, the defendants did not deny the relationship between love and marriage. The defendants did, however, argue that the primary function of marriage was procreation, as opposed to love. In their opening brief for the Supreme Court hearings, the defendants stated:

For although same-sex couples (like various other relationships not recognized as marriages) may be similarly situated to opposite-sex couples with respect to love, commitment, fulfillment, and other such purposes of marriage, they are not so situated with respect to society's purpose of promoting responsible procreation and childrearing. (Reply Brief of Petitioners 2013, 9)

Thus while the *Perry v. Schwarzenegger* case was initiated on the grounds that Proposition 8 discriminated against a definable class of citizens on the basis of their sexuality, both sides of trial steered the focus away from discrimination on the basis of sexuality by focusing on the primary functions of marriage, be it love or procreation.

That said, the defendants did not ignore the accusation that Proposition 8 was discriminatory, maintaining that the proposition was initiated for a higher purpose than to target and exclude homosexual citizens: to maintain the traditional and special status of marriage as a uniquely procreative institution.

Californians of all races, creeds, and walks of life have opted to preserve the traditional definition of marriage not because they seek to dishonor gays and lesbians as a class, but because they believe that the traditional definition of marriage continues to meaningfully serve society's legitimate interests, and they cannot yet know how those interests will be affected by fundamentally redefining marriage. As President Obama recently recognized, millions of Americans "feel very strongly" about preserving the traditional definition of marriage not "from a mean-spirited perspective," but simply because they "care about families."

(Petition for a Writ of Certiorari 2012, 6-7)

The Purpose of Proposition 8 Is Not To “Dishonor” Gays and Lesbians. This charge makes sense only if marriage is itself nothing more than, as the panel majority would have it, an honorific bestowed by society on relationships it approves and withheld from relationships it disapproves. But support for the traditional definition of marriage is rooted precisely in resisting this reductive view of marriage in favor of one that maintains the inherent link between the institution and its traditional procreative purposes. And this traditional view of marriage has nothing to do with disapproval of gays and lesbians. (Petition for a Writ of Certiorari 2012, 37-8)

They argued that Proposition 8 was created to reinforce the status of marriage as primarily a procreative institution. To these ends, heterosexual couples were depicted as the only sexual relationship that can naturally procreate, as opposed to homosexual couples who were assumed to need some form of artificial aid to procreate. Thus Proposition 8, they argued, was not intentionally discriminatory against homosexuals, rather it reinforced the traditional and important functions of marriage. The fact that homosexuals cannot naturally fulfill the function of marriage did not mean that marriage discriminates against homosexuals.

Throughout the trials much attention was paid to the potential inconsistencies in the defendants’ argument that marriage should be reserved for heterosexuals because they are uniquely able to reproduce naturally. The plaintiffs took two main approaches to challenging this claim. The first approach attempted to enforce the normality of homosexuals and demonstrate their ability to fulfill this vital function of marriage: homosexuals could have children; many homosexuals had children; homosexuals were legally able to adopt and foster children in the state of California; and homosexuals were capable of raising normal, happy, healthy children<sup>79</sup>.

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<sup>79</sup> To demonstrate these arguments, the plaintiffs relied heavily on the testimony of Michael Lamb, professor and head of the Department of Social and Developmental Psychology at the University of

While the mainstream LGB organizations failed to adequately respond to the social conservative organizations' claims that homosexuals were incapable of raising normal future citizens, throughout the trials, the plaintiffs explicitly addressed the accusations.

Mr. Olson: The evidence in this case, from the experts, will demonstrate that gay and lesbian individuals are every bit as capable of being loving, caring and effective parents as heterosexuals. The quality of a parent is not measured by gender, but by the content of the heart. And two of our plaintiffs are raising four children. And they will discuss that relationship. And there is no doubt in my mind that it will demonstrate, that evidence will demonstrate, that passion that they have for their family and the raising of their children cannot be characterized as insufficient or inadequate or inferior in any way. (Transcripts Volume-1 2010, 42)

At trial, Plaintiffs will present evidence dismantling the unfounded notion that same-sex couples are worse parents than opposite-sex parents. That evidence will show that children of same-sex parents are as likely to be healthy and well adjusted as children raised in opposite-sex households. It also will show that children raised in same-sex households are not any more likely to be gay or lesbian than other children. Plaintiffs' experts will testify that there is no credible evidence suggesting any difference in the quality of the child-rearing environment in households led by same-sex couples than in households led by opposite-sex couples, and that the best interests of a child are equally served by being raised by same-sex parents. (Plaintiffs' and Plaintiff-Intervenor's Trial Memorandum 2009, 7)

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Cambridge, England. Regarding homosexuals' ability to raise normal, adjusted children, Lamb stated: "There was -- a substantial consensus has developed over the last 30 or 40 years of research documenting that the factors that affect children's development fall broadly into these three broad categories of factors that are summarized on your overhead. The first of those is the quality of the relationships that children have with their parents or the people looking after them. There is a large body of evidence showing that children are better adjusted when they have good, warm, close relationships with parents who are committed to caring for them and looking after them, and that children's development is conversely hindered when they don't benefit from such relationships with people offering such parental behavior. The second set of factors have to do with the relationships between the individuals who are raising the child. And, again, here we have a large number of studies showing that children's development is adversely affected when there is conflict between those individuals. And, on the other hand, that children benefit from being in a situation where those adults have harmonious relationships with one another. And the final set of factors have to do with the circumstances in which those children are being raised. Children, on average, do better when the -- they grow up in circumstances where there are adequate economic resources and where the children and the parents have adequate social and emotional supports." (Transcripts Volume-5 2010, 1010-1011) Regarding the assertion that homosexuals will raise homosexual citizens, Lamb stated: "Those studies have shown that there is no significant increase in the proportion of children who become gay or lesbian themselves when they are raised by gay or lesbian parents." (Transcripts Volume-5 2010, 1032)

Arguing that heterosexual and homosexual couples were identical with regards to child rearing, the plaintiffs cited many of the criteria for proper children rearing that were emphasized by the social conservative organizations and the defendants alike including long-term relationships, stability of relationships and household, financial self-sufficiency, and transmission of proper moral and values.

Accordingly, the plaintiffs argued that since homosexuals could have children and raise them properly they deserved the rights and protections for their families that marriage allocates.

Ironically, although Proponents argue that Proposition 8 is justified by “an interest in children,” Proposition 8’s most direct impact on children is to deny to the tens of thousands of children being raised by same-sex couples the stability and protective benefits that marriage indisputably would provide them. (Brief for Appellees 2010, 78)

Moreover, the plaintiffs, like the defendants and the social conservative organizations, that children’s’ rights should be prioritized over the rights of some adult citizens. They also agreed with Blankenhorn that marriage would enforce and ensure strength, stability and longevity to homosexuals’ marriages, which would ultimately benefit their children.

Proponents also cannot demonstrate that excluding same-sex couples from civil marriage would undermine the relationship parents have with their biological children. To the contrary, promoting marriage of same-sex couples will promote the best interests of the children of those couples, ensuring that they are raised in stable, married households. And California law already recognizes the equal parenting ability of same-sex couples by allowing such couples to adopt and foster parent and by applying parentage rules to same-sex partners as they are applied to opposite-sex partners. (Plaintiffs' and Plaintiff-Intervenor's Trial Memorandum 2009, 7)

All of these potential benefits for same-sex couples and their children were summarized in the plaintiff Jeff Zarrillo’s testimony:

Mr. Olson: Have you talked about having children, the two of you?  
Jeff Zarrillo: Yes.

Mr. Olson: Why haven't you had children?

Jeff Zarrillo: Paul and I believe that it's -- the important step in order to have children would be for us to be married. It would make it easier for -- for us, for our children, to explain our relationship, for our children to be able to explain our relationship. But, also, it would afford us additional protections for our child. And knowing that if we were going to enter into that type of family institution, that we want to make sure that we have all of the protections so that nothing could ever eradicate that nuclear family. (Transcripts Volume-1 2010, 82)

Zarrillo has thus reinforced the power and need for marriage: marriage was a prerequisite to having children. Enumerating the many benefits, both in terms of social acceptance and rights protections, that were only available through marriage, he believed that his “nuclear family” was normal and worthy of these status and protections. Accordingly, he held that his “nuclear family” would only gain strength, stability and longevity from inclusion into the institution of marriage, and would therefore be in the best position to raise future citizens.

Throughout the trials, the defendants did not reproduce the “protect the children” and children’s rights discourses of the campaign’s social conservative organizations. Instead, as the plaintiffs observed:

While [the defendants] no longer rely on the Protect Our Children argument they used during the campaign, they instead now principally contend that Proposition 8 is rationally related to the State’s interest in responsible procreation. (Brief for Respondents 2012, 15)

Mr. Olson: It is revealing, it seems to me, that the deinstitutionalization message is quite different from the thrust of the proponents' Yes on 8 election campaign. That, in the words they put into the hands of all California voters, focused heavily on: Protect our children from somehow learning that gay marriage is okay. Protect our children from learning that gay marriage is okay. Those are the words that the proponents put in the ballot -- in the voter information guide that was given to every voter. That was not a very subtle theme that there is something wrong, sinister or unusual about gays, that gays and their relationship are not okay, and decidedly not suitable for children, but that children might think it was okay if they learned about gays getting married like normal people. For obvious reasons, the "gays are not okay" message was largely abandoned during the trial in favor

of the procreation and deinstitutionalization themes. (Transcripts Volume-13 2010, 2964)

As Ted Olson stated, in tandem with arguing that Proposition 8 is not discriminatory, the defendants also did not imply that homosexuals are inferior, except in their ability to procreate naturally. Further, the defendants claimed that they did not wish to bar or impede homosexuals from having children.

The animating purpose of marriage is not to prevent gays and lesbians from forming families and raising children. Rather, it is to steer potentially procreative conduct into stable and enduring family units in order to increase the likelihood that children will be raised by the mothers and fathers who brought them into the world. (Brief of Petitioners 2013, 47)

The defendants avoided attacking homosexuals on the grounds that they prey on, recruit and/or influence children, as the social conservative organizations did, for three main reasons: such attacks would not have held weight in the trial; attacking and demonizing homosexuals would have delegitimized their argument that homosexuals did not experience substantial discrimination or powerlessness; and the defendants were intent on reframing Proposition 8 as an effort to strengthen the connection between marriage and procreation, as opposed to a mechanism to retract rights.

In terms of their second approach, the plaintiffs argued that not all heterosexual married couples could or did reproduce children, and the state did not require heterosexual couples to reproduce in order to be legally married. Based on this argument, the court asked the defendants whether the state should require heterosexual married couples to procreate, to which the defendants answered:

Is a state's regulation of the marital relationship, regulation of procreative sexual relationships irrational unless it insists on procreation? And, your Honor, by no means is it. It is enough if the state or the society seeks to attempt to ensure and to increase the likelihood -- really, that's what it boils down to, increase the likelihood -- that naturally procreative sexual relationships will take place in an

enduring and stable family environment for the sake of raising the children so that essentially the society itself, your Honor, doesn't have to step in and take upon its own shoulders the obligations to help in the raising of those children. And so society doesn't run the risk of all the negative social consequences that come from, say, unwed mothers raising children by themselves, and such as that. (Transcripts Volume-13 2010, 3031-5)

For the defendants, marriage should be restricted to heterosexual couples because of the potential benefits and risks of procreation.

That's what this question really boils down here, whether or not it can be said that for every legitimate purpose of marriage, are opposite-sex couples and same-sex couples indistinguishable, indistinguishable. And with all due respect to counsel and to the Respondents, that is not a hard question. If, in fact, it is true, as the people of California believe that it still is true, that the natural procreative capacity of opposite-sex couples continues to pose vitally important benefits and risks to society, and that's why marriage itself is the institution that society has always used to regulate those heterosexual, procreative - procreative relationships. (Transcript 2013, 67)

The defendants conceded that certain homosexuals and heterosexuals were similar in most respects relating to marriage except that there is a minimal risk that homosexuals will accidentally have children. Heterosexual couples, on the other hand, could technically have children naturally, and so marriage needs to be reserved for them in order to reward and encourage their procreative abilities, and to ensure that the products of their procreation would not become a burden of the state. Thus the defendants argued that the state was not interested in or able to force heterosexual married couples to procreate, but rather the state needed to account for the unique potential heterosexual couples have to procreate.

According to the defendants, and the social conservative organizations, marriage channeled heterosexual sexuality toward responsible procreation.

The institution of marriage is, and always has been, uniquely concerned with promoting and regulating naturally procreative relationships between men and

women to provide for the nurture and upbringing of the next generation. (Defendant-Intervenors' Trial Memorandum 2009, 1)

The National Organization for Marriage (NOM) provided a brief for the Supreme Court hearings in which they reiterated their belief that marriage functioned to channel sex and sexuality toward responsible procreation.

[Professor Carl Schneider] writes —the channeling function does not specifically require people to use these social institutions, although it may offer incentives and disincentives for their use. Primarily, rather, it is their very presence, the social currency they have, and the governmental support they receive which combine to make it seem reasonable and even natural for people to use them. Thus people can be said to be channeled into them. The norms that constitute the social institution are aspirational in nature. That means these normative models —are not and never were the descriptions of any universal empirical reality. They are nevertheless important for promoting the social ideal and lifting the empirical reality. The definition of marriage is one way the law of marriage helps further this civic purpose: our laws give a baseline definition of who is or is not married, providing a shared framework from which concepts such as out-of-wedlock pregnancies, or even adultery, can be understood. (Brief of Amici Curiae 2010, 6-7)

NOM contended that marriage should not be an obligation for heterosexual couples, yet at the same time marriage was a necessarily aspirational ideal institution because it offered many social, economic, and rights benefits to married citizens.

The defendants held that this ideal institution should be reserved for heterosexual couples not only because they have the potential for pregnancy but also because procreation served a higher social purpose to reproduce the desired population/race. Accordingly, the state should take an interest in regulating sexuality toward the ends of reproducing the desired population. In an exchange with Judge Walker, the defendants' lawyer, Cooper, explained this function of sexuality and marriage:

Mr. Cooper: From the standpoint of the state and the state's interests and society's interests, your Honor -- and this is exactly what the Maynard case was saying and what many, many cases have said in addition -- it is that this is an institution imbued with social meaning and social policy and the interests of the community. That's why the state has an interest in it. It may well be that individuals who get

married aren't doing it in order to benefit the community, although that is the ultimate result of it. But the question has to be: Well, why does the government regulate this relationship? Why is it different from a friendship --

The Court: That's a good question. Why does the state regulate it? Why doesn't it leave it entirely up to private contract?

Mr. Cooper: Your Honor, again, because the marital relationship is fundamental to the existence and survival of the race. Without the marital relationship, your Honor, society would come to an end. (Transcripts Volume-13 2010, 3031-5)

Thus following social conservatism marriage and procreation are means through which individuals can serve their community.

Importantly, the social conservative organizations and the defendants stated that they were pushing for the reproduction of the human race in general when in fact they see marriage as a means to assuring the reproduction of a particular kind of people, namely straight (white) Americans..

The features of California law identified by Plaintiffs are not inconsistent with the interests we have identified. For example, allowing all opposite-sex couples to marry furthers the interests we have identified by, inter alia, (1) promoting a stable framework for raising any children that may result if a couple who did not intend to have children has an accidental or intentional change of plans, (2) discouraging the fertile partner of a sterile spouse from engaging in irresponsible, potentially procreative activity with other individuals, and (3) reinforcing cultural norms that heterosexual relationships—which at least as a general matter are potentially procreative—should take place within the framework of marriage. Similarly, whatever other benefits California may provide to other types of relationships, by reserving the venerable designation of marriage to traditional opposite-sex unions alone, California uniquely promotes those relationships most likely to further the interests we have identified. (Defendant-Intervenors' Trial Memorandum 2009, 11-12)

While the defendants maintained that they were not discriminatory against homosexual couples, one cannot deny the elevated status they gave to heterosexual couples through their assertions that heterosexual marriage was the best institution for reproducing the desired population. Turning to Blankenhorn, the defendants sought to demonstrate that the state needed to use marriage to approve of and promote heterosexuality.

Mr. Cooper: Your Honor, it's going to show, and in the form of our expert, David Blankenhorn. He will testify that a broad consensus of leading scholars suggests that across history and cultures marriage is fundamentally a pro-child social institution anchored in socially approved sexual intercourse between a man and a woman. And the core need that marriage, he will testify, aims to meet is the child's need to be emotionally, morally, practically and legally affiliated with the woman and the man whose sexual union brought the child into the world. (Transcripts Volume-1 2010, 61)

Thus marriage was a tool through which the state could promote and protect heterosexual families. Moreover, the reservation of marriage for heterosexual couples ensured that children were raised by their natural mother and father, and that, according to Blankenhorn, they were raised to be good citizens.

Mr. Cooper: Mr. Blankenhorn, does the customary man-woman definition of marriage benefit only the child?

David Blankenhorn: Well, it certainly benefits the child. But it also benefits the mother and the father and society as a whole. The mother because it lessens the likelihood of her having to raise the child alone and isolated. The father because it connects him to his own child and to the mother of his child, connects him to the process of generativity in a way that would be unlikely for him to achieve any other way. And society as a whole because these are the family units that are most likely to produce good outcomes for children and, thus, be the kind of seedbeds from which come good citizens and people who are, you know, more likely to be, you know, positive contributors to society. (Transcripts Volume-11 2010, 2772)

As mentioned, Blankenhorn enumerated the many social ills that occurred when children were produced outside of the nuclear heterosexual family including poverty, crime, and drug involvement/addiction. The combination of these social ills typically led one to become economically dependent on the state. Therefore the state had an interest in promoting heterosexual marriage to temper the risks of procreation by holding mothers and fathers responsible for their children, which would ensure that children were raised with the proper morals, gender roles and responsibilities, and abilities to be future contributors to society. Nancy Cott, a witness for the plaintiffs, did not deny that the state was interested in regulating marriage because of its potential for self-sufficiency.

Nancy Cott: Still today, the purpose of the state in licensing and incentivizing marriage is to create stable households in which the adults who reside there and are committed to one another by their own consent will support one another as well as their dependents. The institution of marriage has always been at least as much about supporting adults as it has been about supporting minors, children, as the proponents tend to emphasize the child's side. (Transcripts Volume-2 2010, 221-2)

However, contrary to the defendants, Cott did state that homosexual couples were capable of fulfilling the self-sufficiency function of marriage. Still, ultimately the defendants claimed marriage was a means to reproducing the heterosexual family, as it was the most stable means to reproducing good, heterosexual future citizens.

Supposedly lacking the spontaneous potential for reproduction, homosexuals neither posed a threat to the state, nor offered any benefits to society, and accordingly marriage did not need to be extended to homosexuals. Thus the defendants' strategy of framing marriage as a procreative institution served to elevate heterosexuality to a social, political and economic position that was superior to all other non-heterosexual sexualities. The tension between homosexuals and heterosexuals' abilities to fulfill the functions of marriage was expressed as both sides pitted procreation against love as being the primary function and need for marriage.

#### **4. Love v. Procreation**

While the love and procreation discourses were prominent during the 2008-2013 campaigns, uniquely during the court proceedings the two discourses were presented as being oppositional to each other. The defendants were responsible for framing the debate as a battle between love and procreation.

Plaintiffs deny this historical account, deriding both the gendered definition and the intrinsically procreative purpose of marriage as "newly constructed" and "litigation-inspired." They offer a genderless conception of marriage that is essentially unconcerned with procreation: marriage is designed, they say, to

recognize and promote the “liberty, privacy, association... commitment,” and “love” of adult couples. (Reply Brief of Petitioners 2013, 1)

The defendants did not deny that love was an important component of marriage, however, they remained steadfast that marriage was primarily defined by procreation because procreation serves a higher purpose in the reproduction of the desired national population.

We have never disputed that marriage serves *additional* purposes, or that couples marry for love, commitment, emotional support, personal fulfillment, and a variety of other reasons. But these purposes cannot explain why marriage is “fundamental to our existence and survival,” *Loving*, 388 U.S. at 12, let alone why it has existed in every known society throughout history. (Reply Brief of Petitioners 2013, 8)

Although the plaintiffs did not actively pit love against procreation, they did respond to the defendants’ attempts to undermine love, to promote natural procreation, and to delegitimize same-sex marriage on the basis that homosexuals could not naturally procreate.

Proponents claim that California shares their procreative “understanding of marriage.” But, in California, “the constitutional right to marry never has been viewed as the sole preserve of individuals who are physically capable of having children.” Marriage Cases. Indeed, the California Supreme Court has held that an equally important purpose of marriage is “the promotion of the happiness of the parties by the society of each other,” *Baker v. Baker* (1859), and “that the right to marry is the right to enter into a relationship that is ‘the center of the personal affections that ennoble and enrich human life.’” Marriage Cases. (Brief for Appellees 2010, 45)

Citing legal precedent, the plaintiffs argued that the courts, and state of California, stated that marriage was defined in terms of an emotional, supportive, and important relationship between two people. Strategically, the plaintiffs did not deny the procreative function of marriage, as was discussed in the previous section, choosing instead to shore

up the procreative function of marriage by claiming that homosexuals were as capable of fulfilling this function as their heterosexual counterparts.

Beyond such general debates about whether the primary function of marriage is love or procreation, both sides framed the debate in two interesting and telling ways: first, whether marriage should fulfill the needs of adults or the needs of children; and second whether marriage exists to fulfill the needs of the individual, or the needs of society and the state. The following statement from the defendants exemplified these debates:

The State's definition of marriage helps shape the cultural understanding of what marriage is and what purposes it serves. Legally redefining marriage as —the union of any two persons, particularly through the blunt instrument of constitutional mandate, will weaken or sever the connection in the public square between marriage and procreation, elevating adult desires for love and commitment over the needs of children as the defining public purpose of marriage in law. (Brief of Amici Curiae 2010, 5-6)

According to the defendants, the plaintiffs were seeking to make marriage an adult-centered, love-based, private institution, as opposed to a child-centered, procreation-based public institution.

Mr. Cooper: The evidence is going to show, again, that the debate is whether or not this institution will remain a pro-child institution or in the words -- or whether the gradual transformation of marriage from a pro-child societal institution into a private relationship designed simply to provide adult couples with what the plaintiffs say is personal fulfillment. The question is, your Honor, is this institution designed for these pro-child reasons or is it to produce companionship and personal fulfillment and expression of love? Are those purposes themselves important enough to run risks to the accomplishment of the pro-child purposes? (Transcripts Volume-1 2010, 63)

Professor Norval Glenn, for example, believes that the traditional purposes of marriage—"regulation of sexual activity and the provision for offspring that may result from it"—has been weakened by the gradual "blurring of the distinction between marriage as an institution and mere close relationships," and fears that "acceptance of the arguments made by some advocates of same-sex marriage would bring this trend to its logical conclusion, namely, the definition of marriage as being for the benefit of those who enter into it rather than as an institution for the benefit of society, the community, or any social entity larger than the couple."

Norval D. Glenn, *The Struggle For Same-Sex Marriage*. (Defendant Intervenors Appellants' Opening Brief 2010, 99)

David Blankenhorn was the defendants' main witness charged with testifying to the many potentially detrimental consequences that would occur should marriage be rendered an adult-centered, love-based relationship. As discussed, Blankenhorn stated that marriage was currently being devalued in American society and this devaluation had led to a host of social ills. Specifically, Blankenhorn warned that marriage would be "deinstitutionalized" as it became increasingly adult-centered.

Mr. Cooper: Well, what impact, in your opinion, would redefining marriage to include same-sex couples have on marriage, in this deinstitutionalization process?  
David Blankenhorn: [...] My best judgment is that if we move toward a widespread adoption of same-sex marriage, I believe the effect will be to significantly further and in some respects culminate the process of deinstitutionalization of marriage. If you take an institution that for all of its long history has been understood to have defined public purposes, and through changing its definition you transfer it from the public -- you transfer it from a child-centered public institution to an adult-centered private institution, a question of private ordering among couples, you have in some ways, you know, completed -- that's a culminating trend toward the erasure of marriage's public defined contribution to society. And I think that it's likely that, you know, that -- as I say, this did not trigger the trend of deinstitutionalization. Deinstitutionalization has been with us now for a while. But it's a live issue, and there are many people who would like to reverse the trend. But I think the evidence is quite compelling that if we move to a widespread adoption of same-sex marriage, we will very significantly accelerate the process of deinstitutionalization. And the consequence of that will be to weaken the role of marriage, generally, in society. And the consequences of that will be felt by everyone in the society. (Transcripts Volume-11 2010, 2776-7)

David Blankenhorn: The concept of deinstitutionalization is when -- to speak briefly -- that institution weakens. That institution becomes frailer. Its rules become thinner or removed altogether, and, therefore, the rules that govern the institution become less comprehensible and clear and less -- therefore, less authoritative. And when its structures become less stable, less able to give robust shape to the institution, it's like a -- kind of a shrinking process. And as a result of deinstitutionalization. [...] The institution loses esteem in the society. It loses respect. It loses its sense of being held in high regard. And the institution becomes less and less able to carry out its contributions to the society. (Transcripts Volume-11 2010, 2773-4)

Blankenhorn was steadfast that there was a culture and institution of marriage that was under attack, and as such that marriage should, above all else, remain a public institution serving the needs of society, which include procreation, responsible child rearing, economic self-sufficiency and the reproduction of particular traditions, roles, values and morals.

Marriage as a “pro-child” institution served a public purpose, according to the defendants, as husbands and wives were committed to producing and being responsible for future citizens.

From this perspective, marriage would no longer be a social institution regulated by law in order to support important public objectives, but would rather be reduced to an emotionally laden ceremony which confers various legal benefits. As one family advocate has stated: “There are many problems with this vision of marriage and its relationship to law. It reduces marriage to a creature of the state. By emphasizing the rights of adults, it intrinsically devalues the interest of children and the community in marriage. By reducing marriage to an individual right, it undermines the very norms of commitment it rhetorically upholds. It logically calls into question the notion of family law itself. If the purpose of marriage and family law is to affirm neutrally the multiplicity of adult emotional choices, because individual declarations of intimacy are sacred matters in which the state has no right to interfere, then the question becomes: why do we have laws about marriage at all?” Maggie Gallagher, *Rites, Rights, and Social Institutions: Why and How Should the Law Support Marriage?* 18 Notre Dame J.L. Ethics & Pub. Pol’y 225, 231 (2004). (Brief of Amici Curiae 2010, 23-4)

Here the defendants quoted Maggie Gallagher, the former President of the National Organization for Marriage (NOM), who argued that without its procreative functions, marriage would not have a public purpose and there would therefore be no reason for the state to regulate marriage. The defendants and NOM furthered that the state would merely be regulating the private sexual lives of its citizens if marriage was not defined by the public purpose of procreation. It does seem odd that the defendants and NOM would be warning against the state regulation of sexuality. As I have argued, the defendants’

warnings against state regulation of sexuality were not based on an ideology of privacy, sexual freedom and acceptance of sexual diversity. Rather, the defendants put forward a very clear agenda of sexual regulation as they called for state protection and promotion of heterosexual, potentially procreative, sexual activity to the exclusion of all other sexualities. Thus the defendants were actually arguing that without its procreative purpose marriage would lose its ability to regulate citizens through the elevation of particular sexualities.

Comparatively, the plaintiffs' witness, Nancy Cott, testified that marriage was both a private and public institution.

Nancy Cott: It is a unique institution, of course, but one of the things that particularly characterizes it is the way it encompasses aspects that in other settings we think of as opposites, and the public nature of marriage is very much one of those; that is, marriage is both a public and a private institution. Most people who consider marrying think principally about the private matter. Have they found a partner they love? Do they want to join in this intimate relationship which is ideally last for life? It is also the foundation of the private realm of family creation, property transmission, and what we think of as the private, when we contrast it with the public. On the other hand, it is by its very definition a public institution that the state has authorized and uses to regulate the population and that the public -- in the state, through the state and the law dispenses certain benefits through. This public/private hybrid that marriage is, is unique and there are other seemingly contradictory or paradoxical characteristics to the institution that I stressed as the theme of my book. One quite related to its public aspects is the way that marriage has through our history had a very strong governance function at the same time that it is characterized by liberty. Marriage is only possible for individuals who can exercise the liberty, value of our citizens, and it has also been -- particularly in the 20th century -- the realm created by marriage, that private realm has been repeatedly reiterated as a -- as a realm of liberty for intimacy and free decision making by the parties in that private realm. (Transcripts Volume-1 2010, 188-189)

The state, therefore, had an interest in using marriage to regulate several elements of citizens' private lives beyond procreation including property sharing. Cott pointed to the many contradictions that exist because marriage was simultaneously a public and private

institution. Specifically, she argued that marriage was presented as a private realm of liberty, wherein one chose and engaged intimately with one's partner, and yet it was the state that carved out, protected and rewarded that private realm for its citizens. Citizens could gain this type of liberty but only according to the discretion of the state. Thus regardless of its procreative function, state-sanctioned marriage was an institution through which the state regulated the private intimate and sexual lives of its citizens.

According to the defendants, the ultimate consequence of this deinstitutionalization of marriage was a devaluing of marriage as a distinct and elevated institution, losing its ability to regulate citizens. In a brief supporting the defendants NOM explained that after the legalization of same-sex marriage the state would have no legitimate reason to provide the same benefits to many other kinds of private relationships.

If, as the district court suggests, marriage were to become an essentially private, intimate, emotional relationship created by two people to enhance their own personal well-being, it is wrong, discriminatory, and counterproductive for the state to favor certain kinds of intimate relations over others. Sisters can cohabit and commit, and so can best friends in nonromantic relationships. Three people can cohabit and commit, too. Why can't these people claim marriage as well? Once a key feature of marriage has been deconstructed, other historic features of marriage will become much harder to explain and defend, both in law and culture. In the absence of an alternative theory which would justify the recognition of same-sex couples over other intimate and dependent relationships, Plaintiffs' argument becomes not an argument for same-sex marriage, but an argument for the abolition of marriage as a legal status and the extension of its benefits to all intimate and dependent relations. (Brief of Amici Curiae 2010, 22)

The defendants claimed that the plaintiffs were actually seeking to destroy the institution of marriage by detaching it from its public purpose, which left the institution open to recognizing, accepting and legitimizing any adult relationship, among any number of people. The institution of marriage, they argued, was necessarily exclusionary, in order to

ensure that it remained the legitimate site of reproduction of a particular population and culture.

Despite the defendants' accusations, the plaintiffs maintained that they did not seek to destroy or fundamentally disrupt the institution of marriage. In fact, they argued that they were normal and able to fulfill the procreative functions of the institutions. Therefore the plaintiffs, like the mainstream LGB organizations, argued that they respect and value the institution of marriage, and respect that it was an exclusionary institution; they only wanted the terms of inclusion to be opened incrementally to include certain kinds of homosexuals.

## **5. Conclusion**

The plaintiffs' focus on love and normality obscured their claims that same-sex marriage would remedy discrimination against and powerlessness of LGBT Californians. Even with the legalization of same-sex marriage, marriage remained an institution that caused structural stigma and regulated the sexuality of heteronormal citizens as well as abnormal citizens. The defendants have sought to use marriage to divide and elevate heterosexuals to the exclusion of all others. The plaintiffs' reverence for marriage has caused them to make concessions, in part to appease the court, by asking only for the line of inclusion to be incrementally extended to include loving and potentially procreative heteronormal homosexual couples. Ultimately, the plaintiffs' discourses throughout the trials further narrowed an already limited social justice project: not only were the diverse voices, needs, and experiences of all LGBTQ Californians homogenized to fit the ends of marriage, but marriage was defined in terms of heteronormal notions of love and family.

## **Chapter Nine: Conclusion**

### **1. Significance and Contribution of the Research**

This dissertation has sought to answer the central question of why and how same-sex marriage became a pivot point in large debates about citizenship. Based on the discourse analysis of ten organizations involved in the Proposition 8 battle from 2008-2013 – including their campaigns, elite interviews and the transcripts of three court proceedings – I have argued that the fight for same-sex marriage in California significantly affected current and future relationships between sexualities, citizenship and social justice for LGBT and queer Americans. The fight for same-sex marriage significantly altered how sexualities were defined and regulated, and incorporated or excluded. This occurred through the mainstream LGB organizations' reinforcement of the relationship between sexualities and family form, and social and political inclusion and rights allocation and equal citizenship.

Queer theorist Michael Warner, whose work has been foundational to this project, has argued that queer politics and activism grew out of a collective desire to challenge the normative regulation of sexualities.

One of the reasons why so many people have started using the word 'queer' is that it is a way of saying 'We're not pathological, but don't think for that reason that we want to be normal.' People who are defined by a variant set of norms commit a kind of social suicide when they begin to measure the worth of their relations and their way of life by the yardstick of normalcy. The history of the movement should have taught us to ask: whose norm? (Warner 1999, 59)

Central to this endeavor, Warner states, is to question who is establishing the norms to which marginalized communities are compelled to aspire, and to be aware of the repercussions of seeking to assimilate to others' norms. Accordingly, my dissertation has identified and analyzed the norms to which the mainstream LGB organizations were

appealing, and the new norms, which they created through their bid to gain inclusion in the exclusive heteronormative institution of marriage. This project has produced many findings regarding the current state of the supposed culture war between the two sides; each side's reverence for the institution of marriage; and the mainstream LGB's shift to the normalizing discourses of love and marriage. These findings have contributed to knowledge and understanding of the relationship between sexualities and citizenship; the production of new inclusions and exclusions on the basis of sexuality; and the current state and future possibilities for LGBT and queer social and political organizing and activism in California and beyond. Each of these findings and contributions will be discussed briefly in this section.

This study of Proposition 8 reveals that the relationship between the American social conservative and the mainstream LGB movements was not a simple case of a fight between opposing cultures, but rather, the relationship between the two movements was one of mutual and constitutive dependence. The two movements influenced each other's priorities, strategies and discourses, and ultimately the two movements were reproducing mirrored discourses within a heteronormal citizenship regime. The social conservative organizations gained ground in terms liberal rights discourse by establishing a hierarchy of rights wherein children's rights to a mother and a father trumped homosexuals' claims to same-sex marriage rights. In counterbalance, the mainstream LGB organizations gained ground through their adoption of heteronormative and social conservative discourses of love, commitment and marriage. The tension between these two visions of the proper function – either as the producer of future citizens or as the legitimization of love and commitment – were pitted against each other through the court trials.

I have argued that this battle over the true meaning and function of marriage demonstrated both sides' unique reverence for marriage. The mainstream LGB advocates asked for inclusion without challenging the system itself. The social conservative organizations argued that the legalization of same-sex marriage would fundamentally alter the unique social power, function and status of marriage, as stated by Protect Marriage:

Redefining marriage to include same-sex couples would have to alter the institution. As an initial matter, such a redefinition would eliminate California's ability to provide special recognition and support to those relationships that uniquely further the vital interests that marriage has always served. (Protect Marriage July 2013a)

Same-sex marriage advocates countered that marriage is a fundamental right that should be extended to homosexual citizens who fit the heteronormal ideal. Both sides, then, shared a commitment to this culture and club of marriage, which was characterized by the assertions that marriage should be an exclusionary institution, reserved for those who can fulfill certain criteria for normal sexuality, gender and family; that marriage should be protected, in part, by being an exclusionary institution that allocates certain state rights, benefits and protections to deserving citizens; and that ultimately marriage serves as a means to creating hierarchies and privilege within society according to citizens' ability to assimilate to the required criteria for acceptance. Ultimately, I have argued that these discourses had the effect of limiting the possibilities for state-sanctioned marriage: either same-sex marriage would be made legal, or it would not, but alternatives to marriage itself were not considered.

This narrowing of possibilities was reinforced through the mainstream LGB organizations' shift in discourses from rights and equality, to love and commitment. As

argued, the LGB organizations' use of discourses of love and commitment was not an abandonment of the liberal rights model. Rather, they used love and commitment discourses in order to make their claim for rights more digestible for fellow citizens and the state. I hold that the growing support for same-sex marriage was made possible, in part, because mainstream LGB organizations in California (and the United States) made same-sex marriage more palatable to citizens and the state by evoking pre-existing and widely supported<sup>80</sup> social conservative discourses of normal sexuality, proper family form and function, and the unique value of marriage in society. I also argued that the same-sex marriage advocates employed love and commitment discourses to veil the fact that they were not seeking to end discrimination on the basis of sexuality, but were actually pursuing the narrower goal of acquiring membership into the marriage club. The project was narrower still, as the discourses of love and commitment were used to demonstrate that heteronormal homosexuals would not fundamentally disrupt the principles or boundaries of marriage.

Proposition 8 was a unique case, in part, because the shift in discourse occurred over the course of its five-year battle. Same-sex marriage fights in other states certainly engaged in discourses of love and commitment. But Proposition 8 offered a case in which the shift in discourses occurred in a pronounced and calculated fashion, giving me the opportunity to investigate the organizations' justifications for the switch, and to compare both types of discourses within a single case. Demonstrating the broader effects of Proposition 8, campaigns that have been initiated since the beginning of Proposition 8 have used love and commitment discourses, and the call to "legalize love" has gained

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<sup>80</sup> LGBT and queer communities in the United States have not had a long history of pro-family goals, political organizing or discourses. When LGBT people and organizations did begin to develop pro-family discourses in the 1990s, the field was dominated by social conservatives' campaigns for family values.

popular, cultural and celebrity attention and endorsements. Yet these campaigns have been following the prototype that was set by the Proposition 8 campaigns and trials. For example, for Maine's 2012 referendum on same-sex marriage, Proposition 1, activists created video campaigns that featured the love stories of heteronormative gay and lesbian couples who wanted to marry. This shift in discourse is potentially problematic for the broader LGBT and queer movement as select LGBT activists endorsed the expectation that homosexual citizens must demonstrate their normality in order to access rights and equality.

Based on these findings, I hold that the discourses that have been produced over the course of the Proposition 8 fight spawned several significant effects, notably shifting the conversation and the parameters of debate. First, the mainstream LGB organizations and the defendants in the trials relied on a limited definition of sexuality as they argued that homosexuality specifically was innate and unchanging. In so doing, the same-sex marriage advocates reinforced the relationship between demonstrating a suspect class, presenting coherent, immutable identities, and making rights claims. Second, while the (eventual) attainment of same-sex marriage was presented as a watershed moment for LGBT rights activism, the expansion of marriage to include same-sex couples was actually only a victory for a small proportion of America's LGBT and queer communities: those who could most closely replicate the heteronormal family model complete with two monogamous partners. Thus while the legalization of same-sex marriage created new inclusions for certain same-sex couples, it also created new exclusions for those who still could not marry or did not want to marry. As a result, avenues for LGBT and queer claims making were significantly narrowed as marriage was

presented as the final, or at least most important, step toward equal citizenship. At the same time, unmarried and non-monogamous queer people became subject to increased governmental and social judgment, regulation and marginalization because they do not conform to the newly normalized model of same-sex marriage. Same-sex marriage was a victory for the individualized, private realm as it failed to speak to the systemic social discrimination and violence that non-conforming people experienced.

Third, this redrawing of the lines of normality created more social, political and cultural distance between heteronormal homosexuals and marginalized queers, than there was between heteronormal homosexuals and heterosexuals. Accordingly, the new lines of normality have threatened the cohesion, strength and vitality of Californian LGBT and queer communities, organizations, movements and political organizing. Having gained marriage rights, privileged gays have few reasons to stay in movement, and have far fewer reasons to use their newly acquired political and social power to go back and help those who were left out of the same-sex marriage fight.

Thus the Proposition 8 case left us with many important questions. With this push to demonstrate heteronormativity, what unites LGBT and queer people and communities? What happens to differences within the communities? With the campaigns to deny and obscure LGBT and queer citizens' sex and sexuality, how do we define the queer community? With the legalization of same-sex marriage, what is left to collectively fight for? The following sections of this Chapter present future avenues for research of the changing landscape of LGBT and queer community building and political organizing in the wake of Proposition 8.

## **2. Limitations of the Research**

This dissertation has been framed in terms of the culture war discourses that have informed same-sex marriage debates and campaigns since the early 2000s. Accordingly, I examined the ten organizations that were most significantly involved in the Proposition 8 campaign, and that, by the nature of Proposition 8, were self-proclaimed rivals divided along support and opposition to same-sex marriage. I have argued that the mainstream LGB and social conservative organizations were less engaged in a war than a broader dispute about inclusion in heteronormative marriage.

Still, this dissertation has presented a limited assessment of the discourses and arguments that were produced in the same-sex marriage debates in California, and throughout the United States. Because I only focused on the organizations that were officially involved in the Proposition 8 campaigns, I did not analyze the discourses of groups, organizations and/or collectives that stood outside of the mainstream LGB and social conservative binary. Voices outside of this binary are not insignificant, offering important insights regarding the limitations, omissions, and exclusions that the Proposition 8 fight created.

As I stated in the introductory Chapter, during the Proposition 8 Supreme Court proceedings, one hundred and thirty-one prominent federal Republican representatives publicly supported same-sex marriage (The Daily Beast February 28, 2013). The Republican Party has historically maintained unequivocal opposition to same-sex marriage in order, in part, to appease its socially and religiously conservative base. Despite this reversal in opinion among some party members, public support for same sex marriage was not expressed among any of the social conservative organizations of this

study. The Mormon Church remains publically opposed to same-sex marriage, though it did quietly end its campaign against same-sex marriage in California to stave off the negative attention it had been receiving for its heavy involvement (Mother Jones July/August 2013).

Still, this high-level support for same-sex marriage, demonstrates that conflicts and divisions are beginning to surface on the right wing side of the culture war. The one hundred and thirty-one federal Republican representatives who publically supported same-sex marriage used liberal rights discourse, namely stating that marriage was a fundamental right that should not be denied to citizens. Thus what remains to be seen, and should be analyzed, is whether the mainstream LGB organizations' strategy of normalizing certain homosexual couples has contributed to this change in support among prominent Republicans and other right wing actors. If this is the case, which I suspect it is, then I predict that future Republican and some right wing actors will be able to maintain their claim to be "pro-marriage" because the acceptance of same-sex marriage will only help to strengthen and legitimize marriage, regardless of the gender of the heteronormal participants. As such, the culture war will cease to be fought on the lines of straight vs. gay marriage, and will instead be fought between those who do and do not abide by the heteronormative marriage regime.

Also troubling the marriage culture war binary were LGBT and queer people who were not interested in the Proposition 8 campaign because they saw the prioritization of same-sex marriage as misguided and ultimately ineffective at solving their experiences with forms of daily oppression and violence. In other cases, LGBT and queer people actively criticized the prioritization of same-sex marriage through various means

including protests, manifestos, and academic research. Ignoring their dissenting voices and projects only reinforces the legitimacy of the opinions, goals and strategies of the most powerful within the movement, who have set the agenda for the LGBT community. As such, they represented the voices of the most marginalized, and thereby offered important critiques and alternative social justice projects. Instead of analyzing the discourses of LGBT and queer groups who were critical of the prioritization of same-sex marriage through Proposition 8, I decided to apply a queer critique - based on these dissenting voices, and other queer academic works - to my discourse analysis of the ten organizations. Doing so enabled me, as an outside observer, to offer a more robust and nuanced critique of the campaigns for and against same-sex marriage. This level of critique would have been difficult to produce by people and organizations that were directly involved and invested in the campaigns. Still, to fill the gap in terms of dissenting voices, the next section offers a model for queer social justice in relation to same-sex marriage, and the section after that proposes relevant future research questions.

### **3. A Queer Model for Social Justice**

Queer activism and academic work has not only critiqued the prioritization of same-sex marriage, it has engaged in the productive pursuit of alternative social justice models, campaigns and projects. Queer activism, politics and academic critiques challenge the normalization and regulation of sexualities, genders, and other social categorizations. It seeks to dismantle intersecting oppressions, and to produce communities in which the experiences, voices, needs and goals of the most marginalized and vulnerable are prioritized. Accordingly, I argue that queer models of social justice, in relation intimate relationships, have produced four important considerations.

First, the elevated status of state sanctioned marriage needs to be challenged. In their 2006 manifesto “Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families & Relationships,” Dean Spade and Craig Willse write:

To have our government define as “legitimate families” only those households with couples in conjugal relationships does a tremendous disservice to the many other ways in which people actually construct their families, kinship networks, households, and relationships [...] Marriage is not the only worthy form of family or relationship, and it should not be legally and economically privileged above all others. While we honor those for whom marriage is the most meaningful personal – for some, also a deeply spiritual – choice, we believe that many other kinds of kinship relationship, households, and families must also be accorded recognition. (Spade and Willse 2006, 2)

Spade and Willse argue that alternative relationships, which reside outside the monogamous, married, childbearing model, can be based on emotional and economic dependence and therefore should have the same protections and privileges as heterosexual and homosexual marriage relationships. Accordingly, Cossman argues, marriage must be de-privileged in order to recognize other emotionally and economically significant relationships (Cossman 2005).

Theorists and activists argue that the relationship between the state and the institution of marriage needs to be severed. State institutionalization of intimate relationships only enables the state to regulate, and deny social justice to citizens in order to produce the desired population (Butler 2002). Marriages, in their current heteronormal romantic/emotional form, would occur in private, and would not receive acknowledgement or privileges and protections from the state. At the same time, the state would acknowledge and support a wide variety of economically dependent relationships. State acknowledgement and social support of these relationships would ensure that dependence is not privatized but instead that citizens’ relationships of choice do not have

a negative bearing on their chances of economic survival, and quality and longevity of life.

Second, queer activists and academics have proposed many alternative avenues to social justice. In terms of social and economic survival, they call for guaranteed minimum income; the rejuvenation of social welfare programs and services that are not dependent on the basis of sexual or familial status; universal healthcare that is not administered through work or familial relations; and a secure and enhanced Social Security system. They have also fought for fair housing rights and affordable housing, and fair work place rights.

Based both on liberationist and feminist alternative and separatist community building, and the HIV/AIDS communities of care, LGBT and queer organizations have been working toward the expansion and sustainment of community networks of care. Communities of care have been based on providing for the needs of LGBT and queer people in terms of health, finances, safety, child and dependants care, mental health, and home maintenance, among other areas. The solutions are not universally pursued within queer communities as some see state solutions as sustainable and potentially egalitarian, while others see state solutions as always exclusionary and regulatory. At the same time, some believe that alternative communities of care are truly democratic and liberating, while others hold that alternative communities of care are insular and replicate pre-existing power relations. I think that LGBT and queer communities will be best served by a combination of state and alternative community solutions, which would allow them to use state programs to their own ends; and to build community-based solutions on the foundation of anti-oppression, anti-hierarchy and inclusion. To ensure that such programs

serve the LGBT and queer communities, representation is critical, which brings us to the third and fourth considerations.

Third, with queer theory and politics as their foundation, projects have broad potential as they not only question the sexualized criteria of rights allocation, but also offer a template for challenging state practices of normalization and intersecting oppressions in relation to sexuality, race, gender identification and expression, physical and mental ability, and income. LGBT and queer people experience high levels of poverty (especially among people of colour, gender-non-conforming people and people with disabilities); sexuality- and gender-based violence; racially-based violence (at the hands of citizens and law enforcement officials); and overrepresentation in the legal and prison systems (especially among gender-non-conforming people and people of colour) (Aiello et. al. 2013; Kafer 2013; Razack et. al. 2010; Ahmed 2006; McRuer 2006; Davis 2003). As is argued in this dissertation, these issues were not addressed, and were actively ignored, and several may be exacerbated through the fight for and legalization of same-sex marriage. Thus this intersectional approach requires that projects focus on the most socially and politically marginalized within LGBT and queer communities. It is argued, for example by theorist and activist Dean Spade, that social justice will not be realized for the most marginalized by pursuing ends, such as marriage, that only stand to benefit the most privileged within LGBT and queer communities. Dean Spade argues that LGBT and queer communities need to ask whether current projects for political and social change divide communities by leaving out the most marginalized and vulnerable people. Spade suggests that social justice communities should be asking: “Is this incremental step conveniently eliminating the people who are easiest to eliminate in our

community?” (Spade 2009) The fight for same-sex marriage has certainly been a project of eliminating marginalized and vulnerable voices and people within California’s LGBT and queer communities. To avoid such exclusions, the experiences and knowledges, needs and desires, and strategies and projects of the most marginalized must be acknowledged and collectively prioritized. As an example, Spade offers:

If you address the problems of white gay people who want to marry an immigrant have, you won’t necessarily address the problems of two undocumented queer people who aren’t partnered with a citizen [...] Although if you address the problems of undocumented queer people, you will address the problems of someone who wants to marry [an immigrant]. (Spade 2009)

Thus Spade argues that in collectively working toward the ends of the most marginalized, most everyone in the community will stand to benefit: “Social justice doesn’t trickle down, and so we should centre the experiences of the most vulnerable first [...] that’s how we should determine our agenda.” (Spade 2009)

Fourth, as interviewee Andrea Shorter from Equality California argued, true social and political change will only be realized if social justice communities move beyond insular, exclusionary identity politics, and instead seek to build coalitions and solidarity with other marginalized communities. Duggan and Cohen have both argued that communities, which have historically formed around identity categories, should look outward, seek commonalities and pursue issue-based, as opposed to identity-based projects (Duggan 2009; Cohen 1997). Cohen says:

We must begin to link our intersectional analysis of power with concrete coalition work. In real terms this means identifying political struggles such as the needle exchange and prison projects of ACT UP that transgress the boundaries of identity to highlight, in this case, both the repressive power of the state and the normalizing power evident within both dominant and marginal communities. (Cohen 1997, 461)

For Cohen, communities can build coalitions around their shared experiences with state oppression and normalizing communities, even though the nature and means of the repression and normalization may vary. As Duggan states, for example, to extend beyond narrow and exclusionary marriage politics, communities can fight against state repression and community normalization by fighting for representation and redistribution across identities.

A call for basic fairness and full civil equality, made in terms that include queers but are not limited to them, can rally progressive action in even the most arid conditions. Such outside-the-box strategy, focusing on concrete material benefits that cut across constituencies, can help sidestep the polarizing ferocity of gay-marriage politics, which engulfed California last year. "Full civil equality" expressed in these terms extends beyond the conventional conjugal couple to include the distribution of rights and resources to other individuals and households, to homeless youth, transgendered workers, hounded immigrants, impoverished single parents and beyond. (Duggan 2009, 3)

To offer another example, LGBT and queer communities can focus on the regulation of intimate relationships, by recognizing the common oppression and regulation that is experienced by impoverished single mothers, undocumented immigrants, and sex workers. Each of these groups experience sexual regulation, which contributes in different ways to economic struggle, underrepresentation in political arenas, over-criminalization, and a diminished quality and shortened life. Focusing on the common root causes of these issues, such as sexual, racial and gendered oppression, will reveal the complexities of the issues, but will also reveal new avenues for social and political change.

Such coalition building will have two main effects. First, it will dismantle hierarchies and exclusions that exist within identity groups as the primary goals will not be to homogenize and normalize the identity category in order to gain acceptance into

larger society. Rather, people will work to ensure that the most vulnerable, as opposed to the most privileged, are represented and supported within the communities and larger society. Second, it will address issues from an intersectional approach, thus accounting for the complex ways in which oppression manifests through multiple social and identity categories. Identity politics communities have historically prioritized the singular identity that its members hold in common, usually to the exclusion of all other social and identity categories. When identity politics communities focus on one site of oppression, such as sexuality, the needs of only the most privileged tend to be addressed because the most privileged may only experience oppression on the basis of that one social categorization. That being said, as has been argued, same-sex marriage did not address fundamental issues of sexual inequality, despite the mainstream LGB movement's insistence of the contrary. Thus even within this limited understanding of inequality on the basis of sexuality, marriage is an inadequate solution.

For the majority of those in any community who experience oppression on the basis of multiple intersecting social and identity categories, it is impossible to single out and address the issues that affect one category at a time. As such, coalition building across identity categories will help to challenge the impulse to organize on the basis of one identity category, and will instead work on projects that span and cut across identity categories. Doing so will help to realize social justice as the needs of the most marginalized, spanning multiple communities, can be articulated, legitimized and met, either through state or community-based relationships, projects, and programs.

#### 4. Possibilities for Future Research

There are queer organizations and political projects that have been critical of the prioritization of same-sex marriage. Still, it is undeniable that the prioritization of and fight for same-sex marriage has significantly affected LGBT and queer political organizing in California and beyond. There are two main ways in which same-sex marriage has affected the future of LGBT and queer organizing: first, in terms of avenues for claims making and the state's willingness to address LGBT and queer issues beyond marriage; and second, in terms of LGBT and queer organizations' determinations and articulations of their needs, strategies and goals.

Regarding the first set of questions, the path to same-sex marriage in the United States has been unique<sup>81</sup>. The Supreme Court's decision to strike down key provisions of DOMA, and its decision in the *Hollingsworth et al. v. Perry et al.* case have been heralded as a major victory in the volatile twenty-year battle for the attainment of same-sex marriage rights in the United States. Still, at the time of this writing, same-sex marriage remains a vehemently contested issue among the American public, and it remains constitutionally banned in thirty-one states (Rayside 2010; Polikoff 2008). What remains unanswered, is how the country's unique legislative paths toward the legalization of same-sex marriage have affected the goals, strategies, opportunities, successes and failures of American queer organizations fighting for issues outside of the same-sex marriage framework. I ask whether the slow and antagonistic twenty-year battle for same-sex marriage has spawned the growth of queer organizations that focus on other diverse issues, and whether the radical branch of LGBT and queer political organizing has become focused on criticizing

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<sup>81</sup> Comparatively, the Canadian state, for example, has had a longer history of adopting a progressive approach towards recognizing sexual difference, having legalized same-sex marriage across the country in 2005 with relatively little popular and political contestation (Smith 2010; Rayside 2009; 2008).

the prioritization of same-sex marriage. Investigating these two questions would contribute to new social movement theories by deepening understandings of the relationship between the prioritization of a single, exclusionary issue, such as same-sex marriage, and the opportunities for implicated marginalized communities to develop and mobilize political organizations, and to advocate for their diverse and heretofore neglected social and political needs.

The second set of questions is guided by the following primary question: how has the prominence of same-sex marriage shaped LGBT and queer organizations' understandings of full and equal citizenship for LGBT and queer people? Analyzing the influence of same-sex marriage on queer organizations that are seeking to move beyond the issue would give insight into how same-sex marriage has shaped the nature and trajectory of American LGBT and queer political organizing, which leads to the next three questions. Second, how do the queer organizations characterize and address the new inclusions and exclusions, inequalities and oppressions that have been produced through the legalization of same-sex marriage? Third, how do the queer organizations define and propose to address the problems that remain unsolved by same-sex marriage? Fourth, have the organizations experienced success in communicating with and making claims to government agents, or have they sought alternative means to ensuring that the needs of those they represent are met? This last question may reveal the degree to which the implicated governments have been receptive to the needs of marginalized communities.

The answers to all of these questions would offer important insights into the current state of LGBT and queer political organizing in the United States. Specifically, they would produce a nuanced and critical account of the social and political issues that remain

unsolved or even exacerbated by the legalization of same-sex marriage thus revealing precisely why same-sex marriage is not a sufficient indicator of a country's human rights progress. Ultimately, this line of research would contribute to new social movement theory by critically analyzing how single-issue political organizing affects the potential for the emergence of radical and diverse political organizing, and states' amenability to addressing the needs of marginalized communities and citizens in the wake of major victories for the single issue.

## **5. Conclusion**

The conflation of same-sex marriage with equal citizenship has produced several effects for LGBT and queer citizens, movements and politics: it overshadows, obscures and denies the myriad of historical and contemporary issues, goals and achievements of LGBT and queer activism and politics in the United States and California (Duggan and Kim 2005; Warner 1999). LGBT and queer activists and organizations have fought for many important issues beyond same-sex marriage including equality-based reforms to welfare, healthcare, immigration, and criminal justice systems, all of which recognize that citizens' social and political equality is based on challenging oppression and discrimination within many public institutions (Polikoff 2008; Warner 2002). Yet it is simply assumed that the majority of LGBT problems will be solved with marriage equality.

Accordingly, the attainment of same-sex marriage has been defined – by many influential activists and governments – as the most important and even final goal of mainstream LGB organizations' campaigns for rights and citizenship equality. Therefore the state's willingness to grant same-sex marriage rights has been used - by activists, governments and academics - to applaud or chastise states' rights and equality records in

relation to their LGBT citizens (D'Emilio 2010; Puar 2007). Yet using same-sex marriage as a litmus test for states' human rights records and the progressive nature of their governance obscures the realities and lived experiences of LGBT and queer citizens and non-citizens. LGBT and queer populations still experience disproportionate rates of poverty and homelessness, under-representation in governments, overrepresentation in prison and justice systems, neglect in immigration and refugee policies, and daily discrimination and harassment, and violence, suicide and murder (Crawford and Nichols 2012; Smith 2012; Albelda et. al. 2009). Yet being placated by the legalization of same-sex marriage, many activists and governments have failed to dig deeper to discern whether LGBT and queer citizens and non-citizens are actually experiencing markedly improving living conditions.

As I have argued, the freedom to marry is not freedom from social discrimination and violence, or from state exclusion and regulation. Still, governments allowing same-sex marriage will be applauded for their LGBT rights records regardless of whether they continue to produce other policies that harm and/or neglect LGBT and queer citizens and non-citizens. With such an emphasis on same-sex marriage, LGBT and queer activists stand to lose political and social influence for their remaining causes. More troubling still, as same-sex marriage is legalized across the country, the LGBT and queer movements stand to lose solidarity and purpose, and the ability to affect real change for those citizens who are regulated, excluded and marginalized on the basis of their sexuality.

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## **Appendix I. List of Interviewees**

Rick Jacobs, Courage Campaign, Los Angeles, California, November 2011

Mike Bonin, Courage Campaign, via *Skype*, December 2011

Adam Bink, Courage Campaign, via *Skype*, October 2011

Andrea Shorter, Equality California, San Francisco, California, November 2011

David Fleischer, L.A. Gay and Lesbian Center, via *Skype*, December 2011

Laura Gardiner, L.A. Gay and Lesbian Center, via *Skype*, December 2011

Trystan Reese, the National Gay and Lesbian Task Force, Los Angeles, California, November 2011

Moof Mayeda, the National Gay and Lesbian Task Force, San Francisco, California, November 2011

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