# A CRITICAL EXAMINATION OF *UNITED STATES* V. *WINDSOR*: RETHINKING VICTORY, NORMALCY, AND ASSIMILATION

by

Sean Patrick Mulloy

A thesis submitted in partial fulfillment of the requirements
for graduation with Honors in Politics.

Whitman College
2014

*Certificate of Approval*

This is to certify that the accompanying thesis by Sean Patrick Mulloy has been accepted in partial fulfillment of the requirements for graduation with Honors in Politics.

_____
Jack Jackson

Whitman College
May 14, 2014

# Contents

## Acknowledgments

First and foremost, I cannot express enough gratitude to Professor Jack Jackson for his tremendous mentorship and support, as well as for being an intellectual resource throughout my entire thesis writing process. This project would not be possible without the scholarly contributions you and others have made to the study of feminist and queer legal theory. Likewise, I am very grateful to Melisa Casumbal for your support and thoughtful commentary during the fall discussion of my prospectus and for your ongoing participation in my intellectual pursuits.

My completion of this project would also not be possible without the amazing professors I have had at Whitman. I want to thank Susanne Beechey who helped to establish the foundations of my understanding of queer politics and social justice and who has provided my great personal support over the years. To Kristy King, Matt deTar, and Drew Walker: I have greatly grown personally and academically because of your teaching. As well as to Melissa Wilcox, who ignited my interest in gender studies and queer theory at the very beginning of my time at Whitman.

I am likewise immensely grateful to Jane Carmody: you have been instrumental in helping me advance my thoughts about feminism and I am grateful to have had the opportunity to work with you during the editing process. I also thank Zoë Erb for putting up with me in the library and for continuing to brighten my day during the long writing process. Finally, thank you to Marga DeJong, Molly Dubrovsky, and Madelyn Peterson; I have greatly enjoyed the casual intellectual conversations we have had over the years and I am constantly blessed to learn so much from all of you amazing women. I am also grateful to everyone in the Whitman debate community for your continued support throughout my time at Whitman.

Last, but not least, I would like to thank my parents, who have provided me with so much material and emotional support throughout my endeavors at Whitman and abroad. You have greatly empowered me by raising me to find my voice and think critically about the world around us.

## Introduction

On June 26, 2013, LGB(T)[1] organizations and advocates celebrated when the United States Supreme Court ruled that Section 3 of the Defense of Marriage Act (DOMA) is unconstitutional in the landmark decision *United States* v. *Windsor*. Because of this decision, the federal government must recognize and include lawfully married same-sex couples in over 1000 places in federal law, overturning the prior definition only recognizing marriages between "one man and one woman." This very recent political and legal development provides a potent site of analysis into the nature of LGB(T) organizations' increasing visibility and political power. The overturning of DOMA has already had a variety of social, political, material, and symbolic consequences, but there has been little scholarship yet written about the decision. Mainstream liberal progressives and LGB(T) organizations continue to highlight the importance of the decision as a step toward state recognition, social inclusion, and affirmation of LGB(T) people. I aim to interrogate and disrupt this simplistic narrative of *Windsor* by revealing how it has emerged within the context of LGB(T) assimilationist movements that have emphasized marriage equality at the top of their agenda. Specifically, I will show how *Windsor* emerges as a signal of a larger transformation towards a fairly conservative LGB(T) politics that eclipses and weakens more radical queer political movements and organizing.

I aim to accomplish this task by analyzing the inadvertent consequences of *Windsor* within the context of increasing lesbian and gay assimilation. The *Windsor* decision, at its core, secures and ensures economic benefits for same-sex couples. In

[1] I denote Lesbian, Gay, Bisexual, and Transgender as "LGB(T)" to reflect that minimal inclusion or outright exclusion of transgender persons and issues from the mainstream "LGBT" movement and organizations. We ought to be deeply critical of the inclusion of the "T" so often in name only.

doing so, it include gay men and lesbians into the existing capitalist and legal apparatus, without challenging the underlying structures of heteronormativity, cisnormativity, patriarchy, and whiteness associated with the institution of marriage. Through unsettling the assumptions and underlying foundations of a movement that heralds the *Windsor* decision, I hope to open up room for more imaginative, more radical, and more liberating alternatives that may bring about empowerment for queer communities and social justice generally.

In order to accomplish this goal, I will take an interdisciplinary approach to analyze and critique these systems of oppression in order to situate how they continue to operate within LGB(T) political movements, particularly with each victory for marriage. In such a way, *Windsor* serves as a test case and a site to glimpse into a larger political movement that has co-opted queer political struggles. Through this analysis, I aim to reveal how *Windsor* may be more complicated and perhaps even harmful in bringing about deeper social change. Ultimately, *Windsor*'s reluctant endorsement of including same-sex couples into benefits and privileges of civil marriage, *Windsor* forecloses an opportunity to reconceptualize liberty and equality in a way that would actually bring about real empowerment and self-determination for many queer individuals.

In Section 1, I analyze the state of LGB(T) and queer political movements to reveal that there are actually two opposed movements with very different goals, strategies, and tactics. I structure these two movements as many scholars have through the lens of a central question of liberation versus assimilation. Pushing beyond the mere ideological differences between these two movements, I argue that they are often actually quite antithetical and mutually exclusive to one another in that the gains of one trade off

with the other. I argue that we need to shift from strategies of assimilation to those of liberation in order to actually begin to change the conditions of social, economic, and political inequality and perpetual violence that currently hinder the daily lives of queer individuals.

In Section 2, I analyze the contemporary debates surrounding the implications of the LGB(T) agenda centered around marriage equality. Through considering the merits and critiques of the institution of marriage and politics of recognition, I look at the foundations of marriage through a lens conscious of socio-economic exploitation and inequality, patriarchy, and racial injustice. Based on these social criticisms, I argue victories for marriage equality, such as *Windsor*, work more to normalize queer experience and family arrangements more than gay marriage transforms the institution of marriage itself.

Section 3 finally considers the legal reasoning of *Windsor* itself by applying the framing of the previous two sections. I consider how Justice Anthony Kennedy analyzes federalism, due process, and equal protection in a way that affirms particularly limited notions of liberty and equality within our existing understanding of civil marriage. As such, the *Windsor* decision limits possibilities of family and life for queer individuals and others through bolstering the existing familial norms and institutions rather than opening up possibilities for broader understandings of equality and liberty. I argue that *Windsor* would have been better to decouple the liberty and equality values from civil marriage by abolishing the acceptable discriminatory nature of marital status in the first place. In such a way, I illustrate how *Windsor* marks a missed opportunity to interpret the Constitution in a much more racial way.

Finally, as I contemplate alternatives to the contemporary approach that underpins the *Windsor* decision, I call for a return to more radical, uncompromising, and creative queer political struggles. By doing so, I hope to call into question our notion of contemporary success and instead advocate for a political movement that opens up new and imaginative queer possibilities for liberation and social justice.

## Section 1: Assimilation or Liberation? Divergent Political Movements

In the history and current trajectory of contemporary gay and lesbian political movements, I argue that there is not one movement, but two distinct movements with very different and competing goals and methods. Contemporary political organizations and movements that aim to empower the LGB(T) community are deeply divided between two very different ideological camps: LGB(T) assimilationist political movements and radical queer political movements. The *Windsor* decision emerges as a substantial "victory" for assimilation in that it expands and strengthens the existing institution of civil marriage and its associated economic and social privileges. In contrast, radical queer political movements have attempted to dismantle institutions of privilege and to uproot underlying social structures of injustice and inequality. Central to my argument is that these movements, rather than working to benefit one another, are diametrically opposed in their goals and tactics in such a way that a victory for one most likely weakens the other.

In order to best situate how *Windsor* changes the landscape of queer political activism, I will first establish how these two movements differ in their goals, tactics, and overall philosophy for empowering queer communities. Many scholars and activists have

framed the core dilemma as the question of "assimilation or liberation?" (N. Sullivan 2003; Rimmerman 2008). I think that this dichotomy effectively frames the divergence occurring within ongoing debates and disagreements within LGB(T)/queer communities today. This disagreement is not unique to gay, lesbian, and trans movements, but has a long history within social movements that have sought to challenge oppression, mass violence, inequality, and injustice. Disagreements over tactics and strategies have faced a variety of movements concerned with race, class, gender, nationality, and many others. From the civil rights and black power movements, to socialist and communist revolutionaries, and also within feminist movements, these debates have a lively past and present. Thus, this central question facing LGB(T) communities today is a glimpse into a larger debate between normative strategies of assimilation and inclusion and that of more radical, liberationist political strategies.

The underlying tension develops from how these different movements seek very different social, economic, and political goals and often use varying methods to accomplish them. The assimilationist mainstream perspective embraces strategies and goals that work to include LGB(T) people into the already existing social system. This is facilitated through an attempt to increase LGB(T) visibility and solicit recognition into the existing social and political system by lobbying for acceptance into political and social institutions, such as the state, marriage, military, the workplace, and many others. The sentiment is that LGB(T) people are simply misunderstood, but are actually "just like everybody else" (N. Sullivan 2003, 24). Thus, most assimilationist strategies attempt to protect LGB(T) people from blatant instances of discrimination and violence. This

perspective also accepts, at least generally, the current liberal democratic mode of social organization as desirable at its core, so long as it is inclusive of LGB(T) individuals.

Both the Mattachine Society, the first of a many early homophile movements, and the Human Rights Campaign (HRC), currently the largest national LGB(T) organization, serve as prime examples of the assimilationist lesbian and gay political movement. Both have worked to increase awareness and inclusion of gay men and lesbians into normative social and political life by lobbying politicians and key power-holders, by advocating for rights and protections, and by ending outbreaks of violence and hate crimes. The Mattachine Society most notably emphasized its "allegiance to the church, state, and society" and espoused their slogan "evolution not revolution," which illustrate a very openly assimilationist political strategy (N. Sullivan 2003, 25).

In contrast more radical, liberationist movements have struggled to bring about much more fundamental and transformative change to the very social, political, and economic conditions that have led to violence, inequality, and injustice in the first place. For radical organizers and activists, the very roots of current social order are rotten and thus should be uprooted, vehemently opposed, and/or reimagined entirely. Rather than trying to include marginalized communities into existing institutions of power, liberationist models call upon us to rethink and question these systems. Thus queerness and non-normative ways of living, being, and thinking are embraced and there is value placed in the creation and imagination of alternative social systems, values, lifestyles, and communities (N. Sullivan 2003, 29).

Both the Gay Liberation Front (GLF) and the AIDS Coalition to Unleash Power (ACT UP) illustrate the radical orientation of these movements. Both were birthed during

times of immense turmoil and violence, that of police brutality surrounding the Stonewall Riots for the GLF and the ongoing AIDS crisis for ACT UP. Likewise, rather than seeking inclusion and assimilation, both tried to fundamentally transform cultural assumptions and the social norms of the day by engaging in direct action, sit-ins and protests, and through "in-your-face" tactics and advertising campaigns. Rather than trying to push the differences of queerness aside or make the community more palatable for straight society, the GLF and ACT UP affirmed their differences in order to build power and bring about resistance. GLF's Manifesto (1987) most notably demonstrates its radical creed by stating "gay liberation does not just mean reforms. It means a revolutionary change in our whole society" and by calling upon "gay people to stop copying straight."

Notably, the politics of naming that circulates between these two movements also sheds some light on their fundamental differences. The emergence and social meaning of the term "queer," which developed out of queer scholarship, reveals why typically more contemporary radical, liberationist individuals, communities, and movements use the term "queer" over "gay and lesbian" or the increasingly popular alphabet-soup formation, "LGB(T)." While queer is often used in a vernacular sense as an adjective or noun identity-formation, the verbal formation and meaning is perhaps more significant for understanding the potential of radical queer politics today. While not so easy to define explicitly, most queer studies scholars understand "queering" as a process of unpacking, disrupting, unsettling, and unraveling something that is normative. David Halperin defines queer as "whatever is at odds with the normal, the legitimate, the dominant" (1995, 96). Likewise, Cherry Smith believes queer to be "a strategy, an attitude" and a "radical questioning of social and cultural norms, notions of gender, reproductive

sexuality, and the family" (1996, 280). Many scholars have broadened the definition of what can be queered to include basically any social, political, or cultural phenomenon, institution, or identity. In contrast, the terms "Gay and Lesbian" or "LGB(T)," are frequently used by many mainstream assimilationist individuals, organizations, and movements. This language selection itself suggests a legitimization of rights-based identity politics, a move which "queer" movements would likely resist or at least question. While LGB(T) politics attempts to solidify these identities in order to garner political power and strength, queer politics tries to reveal how identity and experience is much more fluid and unstable. Lee Edelman accordingly states, "Queerness can never define an identity; it can only ever disturb one" (2004, 17). I think that the different use of language and rhetorical dimension between these two political orientations reveals a deeply irreconcilable difference between them, which I would like to explore further.

I argue that only a radically critical queer politics can produce the amount of change necessary to emancipate underprivileged members of the queer community from their current condition of systemic oppression and violence. I also argue that these two movements, beyond being vastly different, are also fundamentally antithetical to one another. In other words, they are mutually-exclusive in that the gains of one movement often necessarily trade off with the other. This point is contested by some scholars. For example, Darren Rosenblum argues that this dichotomy hides more complex interactions in how both reformist liberals can work side by side with radical activists to bring about social change (2009, 50). Additionally, he argues that the radicals make the moderate reformers and assimilationists more attractive to mainstream society, pressuring those on the Right to change their beliefs (2009, 51). While this may be true, the more radical

liberationist goals are often left behind in order to appeal to the more traditional and (hetero)normative political perspectives. In such a way, most forms of coalitional politics between the two movements have multiple barriers and fail to accomplish each of their goals, since they are not compatible. There are a few contrasting dimensions that reveal that the dichotomy between assimilation and liberation as quite significant.

*Goals*. First, these two movements have vastly different political, social, and economic goals. Assimilationist movements have often perpetuated the neoliberal framing of social problems through an individualized lens that seeks to emphasize individual acts of violence, discrimination, and bigotry, while not fully addressing the underlying social and cultural system that underpins those individual incidents. Hate crime legislation, employment discrimination, and other similar initiatives illustrate this move to individualize violence against specific LGB(T) people. Assimilationist politics often centers around bringing about "equality" through specific and individualized rights and protections. Urvashi Vaid notes how this equality rhetoric has led to a sort of "virtual equality" that covers up the underlying systems while giving us the illusion that there has been social change (1996; 2012, 3-8). An agenda seeking to expand and increase equal access to civil marriage, for instance, ignores the ways in which marriage itself has been historically unjust and used to perpetuate gender and racial injustice in the first place. In contrast, a more radical orientation opposes the underlying structures of heteronormativity, cissexism, racism, and classicism. All of these considerations illustrate how the gains of assimilationist politics ultimately embolden the systems and institutions that radical politics attempts to dismantle by masking larger structural issues through individualizing systemic problems.

*Short-Term Victories vs. A Process of Change.* For many radical political movements, the very process and method of political engagement itself is inherently significant to the political project. In contrast, mainstream assimilationist political agendas often have very specific benchmarks of success and will often utilize any means necessary to achieve these short-term, measurable ends[2]. By emphasizing short-term victories, these mainstream movements will often sacrifice broader social change to bring about small incremental advancement. Dean Spade (2011), a radical trans activist and scholar, characterizes all politics as "a process rather than a singular point of 'liberation.'" Thus, while assimilationist movements focus on measurable gains, many radical projects view the process of activism, disruption, and political tactics themselves as a critical moment to change and reveal unjust political and social problems. For example, Rev. Martin Luther King Jr. (2003)[1963] advocated for non-violence in the civil rights movement because he believed the tactic itself to be a powerful form of resistance in how it "paralyzed and confused the power structures against which it was directed." For many radicals, the means in itself is just as significant as the ends, and should not be compromised for short-term fixes. Thus, in the case of Supreme Court cases, the precedent and underlying values behind the decision emerge as a greatly important part of the process of change, beyond merely the effect of the Court's decision. In other words, for liberationist movements, utilizing unjust or problematic tactics and reasoning to bring about material change may actually affirm existing injustices and flawed assumptions that may only benefit an already privileged community.

[2] This is often to satisfy key shareholders and donors of large non-profits organizations. This trend flags a larger concern with the way in which organizations are beholden to the desires of their wealthy donors, creating a non-profit industrial complex (See INCITE! 2009).

*Who is Included and Prioritized?* The question of who is included in a political movement is critical. Existing systems of power and privilege create an invisible center that greatly benefits subjects of certain social locations, while those lacking privilege (be it class, white, male, straight, or other forms) are often pushed to the periphery of social and political life (Ferguson 1990). This is often duplicated within many social justice focused movements, particularly more mainstream and normative ones. Liberationist movements today, in contrast, will often prioritize the needs of marginalized and underprivileged subjects at the fore of their political project (Spade 2011, 62; Rimmerman 2008, 6). Who is included and prioritized within these movements' agendas and strategies reveals a tension between the argument that each movement may support or strengthen the other, since they ultimately have different starting points for political action.

The result is that assimilationist movements and radical movements do not neatly operate side-by-side together. Instead, the victories of an assimilationist ideology actually scale back the degree by which radical movements may take hold. While it may be true that radical approaches make more incremental change more palatable to mainstream society, those incremental changes are insufficient and contrary to the goals of radical liberation. Mattilda Bernstein Sycamore says, "Assimilation *is* violence, not just the violence of cultural erasure, but the violence of stepping on anyone who might get in the way of your upward mobility" (2008, 4). LGB(T) movements, through organizations like HRC, emphasize small incremental victories, such as *Windsor*, in a way that masks greater underlying systems of oppression. The rich history of resistance and queer struggle becomes hijacked by white gay and lesbian elites who prioritize their own

advancement over less privileged queer subjects and seek inclusion in institutions of privilege and status, such as civil marriage, without challenging the underlying structures of oppression and violence.

The contestation between these movements is still very alive, although the social and political context of *Windsor* reveals a deeper transformation towards assimilation by framing the issues of gay and lesbian advancement through civil marriage. In light of our understanding of these two different political ideologies, I will reveal how *Windsor* may actually secure and enshrine existing systems of violence and inequality, and foreclose new queer possibilities of living and loving. In such a way, *Windsor*'s expansion of civil marriage serves as a test case and glimpse into the dying queer liberation movements and a continuation of institutions that privilege certain forms of life and family over others. I now turn to an analysis of the specific issue of marriage equality that is central to the *Windsor* decision.

## Section 2: *Windsor* within the Gay Marriage Movement

When the *Windsor* decision was issued on June 26, 2013, it was immediately hailed as a substantial victory by LGB(T) organizations advocating marriage equality around the country.[3] While many of these marriage equality battles have focused on state marriage laws through referenda and legislation, *Windsor* signaled a major victory for the movement on the federal level by gutting DOMA. In this section, I will analyze the current marriage equality movement within which *Windsor* emerges. I hope to place the

[3] The organization Freedom to Marry, for instance, proclaimed "Love Wins" (Polaski 2013), as advocates hailed the "joyous occasion" (Pearson 2013, par. 1). Buzzfeed and other trendy news media outlets popular with young adults constructed celebratory lists and photojournalistic accounts of the decision, designating it a "historic day" (Stopera 2013).

on-going debate around marriage equality within LGB(T) communities into the context of the debate between assimilationist and radical political perspectives, in hopes of revealing how *Windsor* signals a broader move towards the former.

Following the early struggles for marriage equality in the Hawaii Supreme Court in 1993, the marriage movement most notably began to gain momentum in 2003. That year, the Massachusetts Supreme Court ruled it unconstitutional to deny same-sex couples marriage benefits, making it the first state to fully recognize same-sex marriages. Since then, there has been a cascading movement in local state elections and legislative efforts, with huge sweeping victories in 2012 in Washington, Maryland, and Maine. At the time of the *Windsor* decision, 12 states and the District of Columbia recognized same-sex marriage. Following the *Windsor* decision, there has already been substantial momentum and a spillover effect in district courts, with 18 court rulings in the favor of marriage equality and many different states pending in the legal process (Knickerbocker 2014). In short, there is no dispute that the *Windsor* decision followed and expanded massive momentum for marriage equality around the country.

But what are the actual social, material, and political implications of a growing movement, in which *Windsor* is one of the latest victories? Since the beginning of the marriage equality debate, the question has been posed as "are you for or against marriage equality?" Most visible has been the disagreement between social conservatives and LGB(T) advocates and their allies. However, these questions have also been heavily debated within LGB(T) communities as well with dissenters attempting to challenge the nature of the yes/no question itself. My argument is that this question itself is an assimilationist approach to queer politics, divorced from an analysis of the historical

oppression in the roots marriage as an institution. I will analyze how gay marriage functions as an assimilationist goal that only benefits an already privileged part of the queer community. Likewise, I hope to lay bare the plethora of radical critiques that reveal queer liberation is not found through gay marriage, but rather how marriage equality expands an institution complicit with normalizing classist, racist, and sexist systems of power and oppression.

**Securing Economic Privilege in Contemporary Capitalism**

I argue that presenting the question of marriage equality as yes or no question is problematic in that it shifts our attention away from larger structures of socio-economic inequality and social prejudice of marriage in the first place. The advocates of marriage equality base many of their arguments on the fact that LGB(T) people should be treated equally by the law and afforded the same economic benefits, privileges, and recognition that heterosexual married couples receive. At its heart, the marriage question is a debate about expanding access to a status of economic and social privileges that is itself founded through exclusion. Throughout the emergence of the contemporary institution of marriage, the dominant social and cultural belief has been that marriage was worth incentivizing, therefore determining who is most deserving of governmental benefits, social services, and status. I, however, would like to turn to what assumptions are implicit within an affirmation of civil marriage.

Federal marriage benefits are enshrined in federal statutory law in over 1000 places, which were since modified by the *Windsor* decision to include recognized same-sex couples (Bravin 2013). These benefits include everything from tax breaks and joint

filing deductions to access to social security survivors' benefits, to access to medical leave and hospital visitation rights, veterans' spousal benefits, access to certain welfare programs such as Temporary Assistance for Needy Families (TANF), and much more (GAO 2004). In particular, the lawsuit in question was prompted when Edith Windsor was refused a spousal estate tax exemption following her wife's death. Another very significant federal marriage benefit is family visa privileges, which *Windsor* expanded to allow access for undocumented and immigrant same-sex married spouses (Titshaw 2013). For each of these benefits, I pose the question of they are conditioned on marital status in the first place. Marriage has been promoted for decades as a desirable social good for promoting stability and reproduction, justifications arising from "family values" that have been deeply reactionary and heteronormative in their foundations. These protections, rights, and benefits should be awarded to individuals regardless of marital status. Tax benefits in this system are regressive in that they reward an often socio-economically privileged class of people. Instead of expanding these tax benefits, we should actually address economic injustice by redistributing wealth and ending poverty (Spade 2011). Likewise, anyone should be able to visit someone they care about in the hospital regardless of their marital status. Additionally, substantial changes need to be made to U.S. immigration law to rethink deportation and the ways in which immigration has been crafted through an often racist and xenophobic rationale. Marriage equality fails to actually change the larger systems of inequality, hierarchy, and exclusion that emerge from these economic, political, and social systems. Merely modifying civil marriage to include same-sex couples does nothing to address the unjust nature of these structures in the first place.

Likewise, there is increasing data and evidence that the proponents of marriage equality are already fairly socio-economically privileged in society (Puar 2011, 61-3). As an institution that secures economic benefits and privileges for an already privileged class of lesbian and gay people, marriage represents an institutional extension of economic injustice and inequality. Likewise, many poor and working class queer subjects may coerced into marriage as a means to gain access to its associated economic benefits, as a sort of survival strategy. Thus we face a situation where upper and middle class LGB(T) people advocate for marriage equality to protect and secure their class privilege, while working class queer folks feel compelled to marry for survival, or in hopes of one day moving up the economic latter, persuaded by the contemporary neoliberal "boot-straps" logic. In such a way, fighting for marriage equality ultimately expands and entrenches the existing socio-material arrangement of capitalism that ensures the economic security of one class at the expense of another. Thus, gay marriage ultimately attempts to incorporate the LGB(T) middle class into the existing system of capital accumulation and class inequality. This further illustrates why the agenda of gay marriage is ultimately conservative and assimilationist in nature, attempting to secure and further the existing social and economic apparatus of capitalism.

**Normalizing Queer Identity**

In addition to reifying existing capitalist systems of class inequality, marriage equality perpetuates a normalization of the social and cultural dimension of queer kinship arrangements. While material justifications have brought marriage equality to the fore of LGB(T) political agenda, there have also been broader narratives of what it means to be a

LGB(T) person in the cultural debates surrounding gay marriage. This is perhaps one of the most explicit examples of the "we're just like you" mentalities that I highlighted earlier as a core tenant of assimilationist politics. Rhetoric surrounding gay marriage is often laden in appeals to show how LGB(T) couples have the same challenges, concerns, and love stories as straight couples.[4]

However, the social and cultural discourses surrounding marriage date far back to before the emergence of gay and lesbian activism and subsequent requests for inclusion. Scholars note how the cultural exaltation of marriage was ultimately meant to induce the population to lead a certain form of morality in their family life characterized by long-term commitment and monogamy. Martha Fineman argues gay marriage attempts to ultimately legitimize and affirm marriage as a "sexual family," an exclusive institution and form of social organization that orders kinships around sexuality (2009, 45-46). The result is a demonization of all those outside of the normative marriage arrangement who are deemed unnatural or socially deviant (Fineman 2009, 48). Most notably, this has occurred in the past with single women, single mothers, divorcees, and others who have been induced to marry in order to gain economic and social acceptability. Gay marriage thus propagates a certain hierarchy of recognition and intelligibility centered on elevating those who are in long-term, committed, monogamous relationships, which excludes many forms of queer life.

This normalizing effect is exemplified by how certain gay and lesbian identities have become designated as socially acceptable, hiding many of the diverse familial and sexual choices and arrangements embraced by queer people. Michael Warner critiques

[4] A recent example is a video advertisement for the Mainers for Marriage Equality campaign which depicts a lesbian couple who emphasizes their loyalty to one another, lifelong commitment, and features them saying "we do all the things married people do" (Aravosis 2012).

LGB(T) politics' attempts to sanitize and moralize queer identity and experience. He argues that gay marriage attempts to bring queer life into the traditional understandings of family values, by distancing queer identity from the stereotypes of alternative lifestyles that revolve around gay bars, pornography, public sex, and one-night stands (2002, 286; see also Pedriana 2009; Valdes 2009) In attempting to displace and eradicate this history of queer life, marriage equality discourses utilize outwardly homophobic rhetoric that is based in a history of pathologized understandings of gay identity. In doing such, they attempt to only portray the "good gays" to make the assimilationist political movement more acceptable and understandable to straight society (Warner 277). By presenting a singular possibility for queer ways of loving and living, the marriage discourse forecloses potential alternative forms of queer family. Tucker Culberton and Jack Jackson frame this move as a shifting of the axis of power that sacrifices certain forms of queerness, entrenching a "regime of inequality between such couples and everyone else, married or not" (2009, 144). It also erases the alternative kinship arrangements and forms of relationships that flourish among queer communities today.

Nancy Polikoff (2012) provides a concrete example of how these regulatory effects have taken place as a result of broader marriage equality. She examines how in several legal suits relating to employment and healthcare benefits, Lambda Legal and the Human Rights Campaign have explicitly avoided advocating for individuals who have chosen not to marry. As the marriage movement has grown and gained visible momentum, many queer communities have felt the need to marry and alter their previous sexual and familial preferences. Polikoff illustrates how many are being left behind and sacrificed for the overall goal of marriage equality, a phenomenon she calls "winning

backwards" (2012, 759). These examples demonstrate how the discursive tactics and strategies deployed by many LGB(T) organizations, and I would argue the reasoning by the Court, are in themselves significant, even if viewed as merely a means to a specific goal. They have created new norms that socially and juridically coerce queer people to meet a set of expectations or be left behind by the broader assimilationist objective.

Many scholars and activists, however, continue to argue that marriage equality is not necessarily normalizing and assimilationist, but that it has the possibility to strengthen lesbian and gay families, and perhaps fundamentally alter marriage as an institution itself. There are first a large group of liberal advocates that argue same-sex marriage will bring about LGB(T) equality and end an era of second-class citizenship (such as Eskridge 1993, A. Sullivan 2004, Moore and Stambolis-Ruhstorfer 2013).This sentiment appears in the *Windsor* oral arguments when Justice Ruth Bader Ginsburg refers to current same-sex civil unions as a sort of "skim milk" version of heterosexual marriage (transcript, 71). These arguments about a limited notion of equality based on the similarity between homosexual and heterosexual marriage are assimilationist and seek to merely include gays and lesbians into the existing social apparatus. Likewise, advocates concerned with adoption and parenting rights, such Carlos Ball (2004;2012), illustrate another marital benefit that can be denied of same-sex couples. These concerns are important, but again indicative of a larger social problem of tying adoption rights to marriage in the first place. Rather than only affording married couples the right to adopt, the state and adoption agencies should prioritize selecting the most suitable parent(s) that will provide the best care for the child, regardless of marital status. Finally, there is a robust and respectable defense of marriage as a religious institution, albeit assimilationist.

Andrew Sullivan, a self-proclaimed liberal gay Catholic, embraces assimilating lesbian and gay families into the stability and long-term commitment espoused by Judeo-Christian values (2004, 148; 250). I think this is an important perspective, one that may present traditional marriage as a fit for certain folks with particular religious worldviews. However, it seems unnecessary and improper to espouse these religious and historically developed ideologies of the institution of marriage as a universal solution for the whole queer community and society more generally. Likewise, marriage as a religious institution need not necessitate a civil institution associated with political benefits not accessible to other lifestyles and religious beliefs.

Other scholars argue that same-sex marriage has the potential to disrupt or "queer" the heteronormative foundation of marriage itself. For instance, many scholars have argued that gay marriage has the potential to dislodge heteronormativity and reproductive sexuality from the institution of marriage by subverting its original gender dynamic of one man and one woman (Eskridge 2002; Boellstrof 2007, 229, 242; Rosenblum 2009, 48). Mary Bernstein, for example, argues that queer identity is intrinsically outside the very logics foundational to heterosexual marriage (2001; see also Kimport 2013, 9). All of these attempts on the Left to defend same-sex marriage, however, I believe fail to overcome the before stated criticisms for a few reasons. First, while "queering" marriage may be possible in particular instances, these narratives are rarely the ones that gain visibility in mainstream media coverage and in organizations' websites. In this way, the discourses surrounding marriage equality sacrifice the radical potential of queer families to determine their own lives so that same-sex marriage seems less threatening to society at large. Second, in many cases the institution of marriage (and

the historical baggage of heteronormativity it carries) appears to be transforming queer families, more than queer families have transformed the institution itself. This can be evidenced by the ways in which gay marriage is increasingly becoming the new norm of gay and lesbian life. As gay marriage has more victories and becomes widely available, it seems likely that the old cultural norms will likely continue to remain hegemonic, rather than opening new space to recreate and reimagine marriage and family in the first place. In short, gay marriage is likely not necessary and perhaps even restricting in allowing for a queering of the family.

**An Institution of Patriarchy and Racism**

In addition to upholding and perpetuating an institution of class privilege and normalizing queer identity, gay marriage also props up a historically sexist and racist institution. Feminist scholars have long criticized the institution of marriage as a site of women's oppression, subordination, and dependence on men and as an institutionalization of the sexual division of labor (for example Friedan 1963; de Beauvoir 1949; Firestone 1970; Pateman 1988). Yet, despite these criticisms, marriage retains an ideological, social, and cultural dominance, even as divorce rates reach an all-time high and more people than ever are choosing not to marry (Halberstam 2012, xix; 40). While there is some disagreement over what degree these criticisms apply to same-sex marriage as it may de-gender the institution, the gay marriage movement still aims to expand and reify a historically oppressive and patriarchal institution. In particular, gay marriage would codify the existing division between private and public spheres that has allowed for sexual and domestic violence to persist. Lynne Huffer, for example, notes

how much of the marriage equality movement privileges privacy rhetoric and jurisprudence, which has ensured that violence against women in the home was protected and shielded from public or state intervention (2009, 419-20). In addition to on-going movements for marriage, the *Lawrence* v. *Texas* (2003) decision, which ended the criminalization of sodomy laws in the United States and paved the way for *Windsor*, codified a discourse of privacy and separation between the public and private. This, in turn, has legitimized a sexual division of labor and had dire consequences for women's movements and liberation (Culbertson and Jackson 2009,142; see also MacKinnon 2004). Likewise, condoning the "sexual family" that forecloses alternatives is a problematic goal because it would continue the narrative and designation of single women, single mothers, and women of color as deviant and in need of wedlock (Fineman 2009, 45-46). Overall, the movement to expand marriage to same-sex couples is contrary to some of the central goals of women's emancipation from patriarchy, gender violence, and oppression.

Second, gay marriage is immersed with racial discourses and considerations. Traditional marriage has a long history of racial injustice and oppression. Marriage is socially constructed as an institution of whiteness, while the diverse family arrangements and structures embraced by immigrant communities and people of color have often been excluded, demeaned, or criticized by conservatives and proponents of marriage (Bernstein and Reimann 2001, 4-5; see also Petzen 2012, 290). Many families and people of color fall outside the economic and social structure of acceptability and desirability promoted by the traditional family structure. Likewise, while marital status correlates to increased social and economic opportunity for white people, evidence shows these benefits are not experienced to nearly the same degree by people of color (Kimport 2013,

112). This illustrates a deep racial divide in the gay marriage movement. While marriage enhances the social and economic well-being of white folks, the deeply seeded structural racism and economic oppression facing black queer and queer people of color make marriage of little significance for them.

An increasing number of black scholars and activists have forwarded that the gay marriage movement has been blatantly anti-black, as well as being a tool of family regulation used to further oppress black communities (e.g. Bailey, Kandaswamy, and Richardson 2004; Farrow 2005; Spade and Willse 2013). This is evidenced by how marriage has been used as a condition for welfare and government programs to implicitly exclude people of color, in particular single back women and mothers (Spade and Willse 2013). These illustrations show how marriage operates as a tool for white supremacy and systems of anti-black violence. Sabrina Alimahomed notes that within the representations and discourses of the marriage equality movement, people of color are often placed on the periphery, tokenized, or excluded altogether (2012,153; also see Bailey et al. 2004, 113). The discourses following the Proposition 8 election in California demonstrate how black communities are also quickly scapegoated and cast out of the movement, as the dominant media and prominent gay rights activists blamed the black voting block for its failure, even though these allegations have proven to be patently statistically false (Roker 2008).

**Moving Beyond Marriage, Shifting the Political Agenda**

In light of all of these criticisms and the problematic dimensions of marriage equality, I argue that there should be alternative and more encompassing approaches to

bring empowerment and liberation for queer individuals and families. The LGB(T) assimilationist agenda has demarcated marriage as the final frontier, the biggest and most significant political objective. Yet, marriage equality at its base primarily benefits a relatively small socio-economically (highly white and male) privileged group, while failing to address the underlying systems of power and oppression inherent in classism, sexism, racism, and cissexism. Gay marriage, contrary to enhancing the quality of life for all, pushes those at the margins out of the agenda, ultimately revealing it to lack a collective emphasis on social justice. Specifically, gay marriage shifts substantial resources, money, time, and power away from the issues that are actually impacting the most marginalized in the queer community. Perhaps even worse is as the marriage equality quickly reaches its goals, there is a likely possibility that there will be a false sentiment in mainstream culture and politics that gay and lesbian issues have already been addressed.[5] Widespread poverty, lack of access to medical care, unemployment, mass incarceration, homelessness, bullying, and social stigma face many queer people and youth today, and in particular are disproportionately affecting trans and queer people of color. Eric Stanley (2011) argues that the people at the very margins and periphery of queer life and social intelligibility should be at the center of our social movement, since they experience the most pressing and prolific violence in their daily lives. This includes forming a radical politics that centers its analysis around the structures of oppression and violence affecting trans and queer people of color, working class queers, homeless queer youth, queers living with HIV/AIDS, and queer people who face mass incarceration and police brutality as examples (Stanley 2011, 2; see also Spade 2011, 620). A

[5] This is often the case with many social justice movements, such as the birth of colorblindness after the civil rights movement or the rise of "post-feminism" following a steady decline in the power of feminist movements in the 1990s.

multidimensional and intersectional understanding of systems of power and privilege should drive our queer political movement in order to actually bring autonomy, self-determination, and liberation. Rather than investing so heavily in a flawed institution, we should move beyond marriage in search of new imaginative possibilities for ways of living and loving. Gay marriage simply falls short and counteracts with these objectives, and therefore marks a transition away from a social justice-oriented queer political strategy.

## Section 3: The Legal Reasoning of *Windsor*

Having considered the background contours of the disagreement between queer political movements generally and the problems of the marriage equality agenda specifically, I now turn to the legal opinion and decision of *United States* v. *Windsor* itself. *Windsor* follows an ever-growing transition to assimilation by expanding and entrenching existing social and economic hierarchies associated with civil marriage. The Court's majority opinion, authored by Justice Anthony Kennedy, can be confusing at first in that it deploys both an analysis of federalism, as well as equal protection and due process in deeming DOMA unconstitutional. I aim to unpack these two different components of the decision's reasoning to reveal how *Windsor* may be much more limiting for queer individuals than has been discussed by most mainstream accounts of the decision. Specifically, I argue that the *Windsor* decision frames its reasoning through a very narrow and limited understanding of equality and liberty that perpetuates and expands the privileged social status associated with marital status. This hinging of equal protection and due process liberty to marriage condones queer assimilation with the

existing regime of civil marriage, foreclosing the possibility of affirming and encouraging alternative forms of sex, family, and relationships. For this reason, I argue the *Windsor* decision is actually contrary to the constitutional values of liberty and equality that are at the very heart of the 14th amendment, as well as contrary to the goals of a more comprehensive radical queer politics.

Central to my argument is that the reasoning of *Windsor* unnecessarily emboldens the institution and privileged status of civil marriage by defending an inclusion of same-sex couples, narrowly tailoring our legal understanding of due process liberty and equal protection by framing these issues through the lens of civil marriage. I argue this is an assimilationist jurisprudence in that it attempts to strengthen the existing institution of familial recognition, rather that abolishing the significance of that institution. In contrast, ruling civil marriage as discriminatory and unconstitutional would allow for a reconceptualization of liberty and equality that would be beneficial for many queer and non-conforming individuals and kinship arrangements. In order to properly understand the reasoning of *Windsor*, I will first the use of federalism to reveal a problematic turn in jurisprudence for enhancing individual liberties and protections. Second, I will analyze how *Windsor* frames equal protection and due process through the tradition of *Lawrence* v. *Texas* and *Loving* v. *Virginia* to show how marriage has come to delimit the horizon of familial possibility. I will show how privileging married couples for federal benefits and protections necessarily reproduces inequality and stifles liberty for many who do not comply with the traditional norms of married life. Finally, I will offer an analysis of how actually overturning the use of marital status as an acceptable form of discrimination

would open up space for affirming difference and empowering the diverse sexual and familial relationships of queer and non-normative individuals.

**Federalism**

First, a discussion of federalism emerges as central in the first section of the *Windsor* decision. While federalism is generally understood as a set of principles relating to the appropriate relationship between federal and state governments, it has more recently often become a robust defense of states' rights and sovereignty. Justice Kennedy frames his analysis around "the state power and authority over marriage as a matter of *history and tradition*" (16; see also 14, italics added). Despite the central component of federalism in the *Windsor* decision, there is some disagreement to what degree the decision actually rests on federalism itself. Chief Justice John Roberts argues in his dissent, "It is undeniable that its judgment is based on federalism" (2). In contrast, Justice Antonin Scalia believes that the federalism component of the decision is a façade, stating in his dissent that the opinion "fool[s] many readers…into thinking this is a federalism decision" (15).

Importantly, if Justice Roberts is correct that the heart of the *Windsor* decision strikes down DOMA because it is an unjustified federal intrusion into state sovereignty (as many have quickly interpreted), then the *Windsor* decision is deeply troubling. The emergence of a jurisprudence centered on protecting state's rights is a relatively recent occurrence, emerging most notably during and since the Rehnquist Court, which struck down more acts of Congress than all previous Supreme Courts combined (Levinson 2006, 590-93).This parallels a trend of an increasing emphasis on federalism that has

been used counter to the goals of protecting individual liberties. Rosalie Levinson says, "The Rehnquist Court decisions demonstrate that the "New Federalism" has not furthered this liberty-enhancing goal. To the contrary, federalism has been invoked to narrowly construe constitutional rights to limit Congress' power to enact laws that protect individual rights (2006, 596). Examples of this include when the Court invalidated significant portions of the Violence Against Women Act (VAWA), a law meant to combat physical and sexual violence against women, finding that Congress had exceeded its Commerce Clause power in intervening into state sovereignty (Levinson 2006, 592).[6] Likewise, the Court used federalism principles to hold that state employees could not recover money damages for alleged violations of the Americans with Disabilities Act (ADA) because Congress did not sufficiently prove pervasive discrimination against people with disabilities and had therefore exceeded its authority in Fourteenth Amendment, improperly intruding in state sovereignty (Levinson 2006, 594).[7] These examples illustrate how expanding federalism jurisprudence has been used by the Court to gut and invalidate Congressional action to ensure individual liberties and enhanced protection for groups facing pervasive violence and discrimination. As Levinson says, "Rather than being liberty enhancing, the decisions [invoking federalism] appear to simply promote a conservative agenda – the same agenda reflected in a series of decisions narrowly interpreting other key civil rights provisions" (2006, 595). Likewise, the appeal to federalism by Justice Kennedy may actually enhance the ability of the Court

[6] See *United States* v. *Morrison* (2000).
[7] See *Board of Trustees of the University of Alabama* v. *Garrett* (2001). While this decision was later weakened by *Tennessee* v. *Lane* (2004), it still marks a dangerous use of federalism as a barrier to disability protections.

to counter the very protection and expansion of individual rights that the *Windsor* decision seemingly attempts to advance.

Ultimately, I agree with Justice Scalia and other constitutional scholars, such as Courtney Joslin (2013), that the *Windsor* decision does not actually make its conclusions about Section 3 of DOMA on federalism principles. This is perhaps made most clearly to me when Justice Kennedy states,

> Despite these considerations, it is unnecessary to decide whether federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism (18).

Instead, as Joslin argues, Justice Kennedy utilizes an analysis of the history and tradition of states' control over marriage and family law as a means to an analysis of equal protection and due process. Rather than deciding the decision on federalism grounds, DOMA's unprecedented move by the federal government to ignore or intervene in an area of law that has traditionally been reserved to state governments triggered a necessary heightened level of equal protection scrutiny since DOMA is "a law designed to injure the same class the State seeks to protect" (19).

While this use of federalism may seem less problematic than the other uses seen in the decisions regarding VAWA and ADA, I argue using federalism as a sort of test or trigger for equal protection is still problematic. The lip service of federalism in the *Windsor* decision is still rhetorically damaging as it grants legitimacy to a realm of constitutional jurisprudence that is historically regressive and has great potential to be misused. Conditioning protections of individual liberties and equal protection should not be hinged on principles that have historically been used weaken individual liberties in the

first place. Thus, I believe the appeal to federalism should have no place in the *Windsor* decision does and very little to actually enhance the liberty and equal protection for queer individuals.

**Due Process and Equal Protection**

In the second half of Justice Kennedy's opinion, he holds that DOMA violates both the equal protection and due process principles required of the federal government in the Fifth Amendment[8]. Citing *Romer v. Evans* (1996), Justice Kennedy holds that DOMA is a "discrimination of an unusual character" requiring a heightened level of scrutiny since it has a disparate treatment and application of law to exclude a politically unpopular group (20). Citing the language used in the House and Senate hearings surrounding the bill's passage and the language of the Act itself, he suggests DOMA's intent was to enshrine moral disapproval and animus at the law's inception. The Court holds that DOMA "places same-sex couples in an unstable position of being in a second-tier marriage" (23). He also concludes that DOMA "cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment" (25). Importantly, the opinion does not explicitly tell us which liberty is infringed upon, but does allude to the variety of benefits, social status, and dignity associated with marriage that are deprived of same-sex couples by DOMA (23-4).

[8] Importantly, the Fifth Amendment establishes the protection of individuals' liberty from being infringed upon by the federal government without due process, while the Fourteenth Amendment extends this protection by applying it to the states. The Fourteenth Amendment additionally establishes "the equal protection of the laws" for state governments, a protection not explicitly state in the Fifth Amendment. This equal protection clause was later interpreted to also implicitly be applicable to federal laws, establishing what is known as "reverse incorporation." See *Bowling* v. *Sharpe* (1954).

There are two very significant decisions that are cited in *Windsor* relating to equal protection and due process, which I believe require closer analysis. *Windsor* relies heavily upon the reasoning of both the *Lawrence* v. *Texas* (2003), and *Loving* v. *Virginia* (1967). In *Lawrence*, the court struck down anti-sodomy laws, overturning *Bowers v. Hardwick* (1986) on the basis that same-sex sexual intimacy was protected under the liberty clause of due process as a privacy right. Importantly, neither the *Lawrence* nor the *Windsor* decision explicitly establishes a right to sexual intimacy or same-sex marriage, but merely argues that explicit federal exclusion of same-sex marriage or criminalization of homosexual sex is unconstitutional. Tucker Culbertson perhaps best summarizes this point by stating, "*Lawrence* overrules a law against Homosexual sex by Constitutionally defending neither sex nor Homosexual sex *as such*" (2007, 587). Interestingly, however, Justice Kennedy utilizes *Lawrence* to say that the "[DOMA] differentiation demeans the couple, whose moral and sexual choices the Constitution protects" (23). I conclude that *Windsor* attempts to protect same-sex couples' liberty to have sexual, moral, and familial choices and freedoms, so long as those freedoms are associated with contemporary civil marriage. This is made clear by Justice Kennedy's condemnation of DOMA's attempt to "deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages" (20). It is also reiterated when the decision notes how DOMA deprives an entire class of persons of the liberty of recognition itself (25). Both of these passages suggest that *Windsor* ties these sexual and familial choices to the decision to get married very closely. While *Lawrence* was ultimately about sex, *Windsor* clearly applies the *Lawrence*'s understanding of liberty explicitly to the long-term commitment of marriage, rather than broader liberties of sexual autonomy, familial choice, and access

to economic and social benefits. I believe this is a problematic turn in that it substantially limits our understanding of liberty and equality to the very exclusionary institution of marriage, eclipsing and excluding the diverse experiences and choices of queer individuals.

There are also notably very ripe criticisms of the *Lawrence* decision that apply to *Windsor* as well. Utilizing *Lawrence*, *Windsor* extends the public/private dichotomy inherent in the logic of privacy rights (this time in marriage instead of sex) that has greatly hindered women's emancipation and prevented state intervention into the domestic violence and marital rape (MacKinnon 2004, 1087-8). Marc Spindelman (2004) also notes how the Court in *Lawrence* goes out of its way to not condone or outright accept "homosexual conduct," but instead uses a form of straight logic and rhetoric to justify its decision. Likewise, *Windsor*'s emphasis on the similarity between heterosexual and same-sex marriages further homogenizes and assimilates queer experience into a heteronormative understanding of marriage, by extending the "same status and dignity" to same-sex marriages (13).

*Loving v. Virginia* (1967) is also a significant decision cited in *Windsor*. *Loving*, authored by Justice Warren, considered the validity of a Virginia anti-miscegenation law that outlawed mixed-race marriages. The Court found these laws to be unconstitutional, violating both equal protection and due process liberty. Importantly, the *Loving* decision established marriage as a fundamental right, stating, "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. " Interestingly, the *Windsor* decision cites only *Loving* as an example of an appropriate federal intervention

into state sovereignty over marriage and family law in order to "respect the constitutional rights of persons" (16).

I believe *Windsor* extends and reifies the logic of the fundamental right to marriage established in *Loving,* only now extending that right to include lawfully recognized same-sex marriages. This is not so explicit, but implicitly arises in *Windsor*'s protection of the same dignity and status of recognized same-sex marriages and its criticism of the current "second-tier marriage" accessible to same-sex couples. In such a way, *Windsor*'s reasoning deploys equal protection and due process liberty in order to enhance a particular type of equality and liberty. Namely, *Windsor* attempts to protect the liberty to participate in the social status and economic benefits of a historically heteronormative and capitalist institution. *Loving* articulates this fundamental right to marriage as a component of substantive due process liberty (Culbertson 2007, 579). While *Windsor* did not explicitly announce a fundamental right to marriage for same-sex couples, its reliance on *Loving* and much of its rhetoric suggests an extension of this logic. Thus, *Windsor*, despite overturning section 3 of The Defense of Marriage Act, ironically upholds a constitutional defense of marriage, albeit a form potentially inclusive of recognized same-sex couples. I argue this implicit right to marriage, which frames an understanding of liberty and equality in *Windsor*, is deeply concerning, in that it places severe limitations in our doctrinal understanding of equal protection and due process as it relates to family, kinship, and sexual intimacy.

*Windsor* is not the first decision to use *Loving*'s method of reasoning in relation to liberties protected for lesbian and gay individuals. Tucker Culbertson reveals significant parallels between the reasoning in *Loving* and *Lawrence*, arguing, "*Lawrence*'s anti-

Homophobic Heteronormativity resembles *Loving*'s maintenance of traditional Heterosexual marriage even while its traditional homoracial parameters are undone" (Culbertson 2007, 589). I would argue that *Windsor* extends the fatal logic of *Loving* even more directly than *Lawrence* by including same-sex married couples in the social status and federal benefits of marriage,.

**An Alternative to Affirming the Privileges of Marriage**

A much more radical and socially just alternative direction for *Windsor* would have been to abolish the privileged and preferential status of civil marriage, rather than merely extending its associated benefits to some same-sex couples. Rather than defending the superiority of married couples, *Windsor* would have been better to abolish the significance of marital status for determining federal benefits in the first place. I rely heavily on Tucker Culbertson's analysis in endorsing this alternative. He argues,

> Reframing The Marriage Question as a reconstructive demand for equal sexual and familial liberty might enable our c/Constitutional politics to be more than an anachronistic, chronically late, analogical, incremental, and exclusive expansion of presently unconstitutional and inherently unjust practices of governance (Culbertson 2007, 599).

I agree that the optimal alternative legal reasoning would reframe the discussion of equal protection and liberty in a more fully inclusive way that is not limited to merely federal marriage benefits, but rather about a more encompassing constitutional protection of sexual and familial liberty and equality. For instance, this would include the liberty to not marry or to enter non-monogamous or non-exclusive relationships, as well ensuring the equal protection and application of law to these individuals to access the same benefits, needs, and protections as married couples. By abandoning preferential treatment based on

marital status, the Court could have opened up space for alternative sexual and familial relationships. Only this would enhance liberty and equality in the application of the law for the diversity of queer relationships, as well as for the unmarried, divorced, single, non-monogamous, and many other ways of loving and living (Culbertson 2007, 576). Culbertson also notes that civil marriage is "neither a necessary nor sufficient means to c/Constitutional ends" (2007, 578). By reframing the question of estate tax benefits posed in the facts of *Windsor*, the Court would enable a much larger proportion of queer and non-normative people to benefit by promoting and protecting unique familial arrangements, such as families of choice and other alternative forms of relationships that have arisen based on individuals' "conscience, culture, identity, and desire" (Culbertson 2007, 609).

Additionally, there would be many political and ethical advantages of the overturning of protected marital status. I believe that such a transformation in jurisprudence relating to marriage would drastically depart from and interrupt the patterns of increasing assimilationist politics outlined in my first section. First, such a radical alteration in the current trajectory of federal jurisprudence would serve as a much needed rupture in the dominant discourse of LGB(T) organizations and advocates who have framed their agendas around marriage equality. Such a move would prompt a great pause and hopefully a rethinking of how mainstream LGB(T) politics have narrowly tailored their understanding of liberty and equality around an already unjust and unequal institution. This would likely also open up space for more radical queer political movements to articulate more encompassing and empowering goals of autonomy, self-determination, and liberty for queer individuals.

Second, it would be a victory for activists on the front lines combatting racial injustice and socio-economic inequality. This is because it would disallow the federal government to utilize marital status requirements as a means to exclude people of color and working-class people from accessing social safety-net programs, such as welfare, unemployment benefits, and other federal programs. It would also signal a victory for feminist advocates attempting to dismantle the public/private dichotomy and reproductive division of labor enshrined by the institution of marriage that has long served as a barrier to the emancipation and empowerment of women. Altogether, by moving away from a defense of the institution of civil marriage, there would be many opportunities to begin to break down the social, economic, and historical roots of inequality and discrimination that have constituted marital privileges. Instead, unfortunately, the precedent established by *Windsor* forecloses many of these alternative understandings of sexual and familial liberties, further reifying a singular conception of family, life, and love.

## Conclusion

The *Windsor* decision sheds light on a larger transformation occurring within LGB(T) political and social movements today. The state of LGB(T) politics has become greatly conservative, celebrating instances of inclusion and assimilation rather than finding radical and imaginative solutions that expand possibilities for queer life, family, and love. While heralded as a victory by many LGB(T) political players, the *Windsor* decision has further entrenched and valorized a political agenda that fails to address the pervasive oppression and violence facing the most marginalized in the queer community. Rather than attempting to change society, gay marriage advocates and decisions such as

*Windsor* have appealed to normalcy, assimilation, and inclusion. As we read news articles and hear stories of newly married gay couples, we often face a widespread illusion that gay and lesbian advocates are successfully changing social norms, when in reality they have just codified normalcy and enhanced the upward mobility of already privileged individuals.

There is no doubt that *Windsor* had a substantial symbolic effect, but I believe it symbols the wrong solution to very real problems. The lasting impact of *Windsor* is a national political and legal strategy that emphasizes expanding the privileges of marital status without addressing the underlying structures of injustice implicit within the institution itself. As gay politics centers more and more on marriage, those on the periphery of queer life continue to be left behind. As marriage equality inevitably becomes law across the country, dominant social attitudes believe that queer issues have been solved, while many marginalized queer people continue to face mass violence, injustice, and exclusion from social goods. We need to interrogate the supposed success of *Windsor*, re-centering our political action around the objective of achieving social justice.

I believe that queer politics has the potential to radically change society and queer communities in ways that bring about liberation, autonomy, and justice. Returning to the sentiment and poignancy of the term "queer," I believe there needs to be a reevaluation and disruption of how we imagine politics, community, and identity today and how we measure social change. Likewise, I believe there need to be more radical and fully encompassing interpretation of Constitution values in a way that expand options for queer individuals beyond civil marriage. In such a way, I believe *Windsor* was a missed

opportunity to develop an understanding of liberty and equality that are not hinged to civil marriage. Instead of appealing and aspiring to the heteronormative ideals like gay marriage, there needs to be a resurfacing of the radical queer movements that were uncompromisingly against structures of social injustice, violence, and oppression. Political victories such as *Windsor* challenge us to reconsider what is success. Jack Halberstam calls upon us to think about "ways of being and knowing that stand outside of conventional understandings of success" and to realize the ways in which capitalist, heteronormative society has substantially delimited the horizon of possibility today (2011, 2-3). We must rethink and interrogate the success invoked in *Windsor* in order to open up space for more imaginative possibilities of queer ways of thinking, being, and living.

## References


Alimahomed, Sabrina. 2010. "Thinking Outside the Rainbow: Women of Color Redefining Queer Politics and Identity." Social Identities 16(2):151-168.

Aravosis, John. 2012. "Lovely marriage equality video from Maine." *America Blog*, October 2. http://americablog.com/2012/10/lovely-marriage-equality-video-from-maine.html

Bailey, Marlon, Priya Kandaswamy, and Mattie Udora Richardson. 2008. "Is Gay Marriage Racist?" In *That's Revolting: Queer Strategies for Resisting Assimilation* (ed. Matilda Bernstein Sycamore). Berkeley: Soft Skull Press.

Ball, Carlos. 2012. *The Right to Be Parents: LGBT Families and the Transformation of Parenthood*. New York: NYU Press.

--------. 2009. "This is Not Your Father's Autonomy: Lesbian and Gay Rights From a Feminist and Relational Perspective." In *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (ed. Martha Albertson Fineman, Jack E. Jackson, Adam P. Romero). Farnham: Ashgate.

Bernstein, Mary and Renate Reimann. 2001. *Queer Families, Queer Politics*. New York: Columbia University Press.

Boellstorff, Tom. 2007. "When Marriage Falls: Queer Coincidences in Straight Time." GLQ: A Journal of Lesbian and Gay Studies 13(2-3):227-248.

Braven, Jess. 2013. "Historic Win for Gay Marriage." *The Wall Street Journal*, June 26. http://online.wsj.com/news/articles/SB10001424127887324520904578553500028771488

Culbertson, Tucker and Jack Jackson. 2009. "Proper Objects, Different Subjects and Juridical Horizons in Radical Left Critique." In *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (ed. Martha Albertson Fineman, Jack E. Jackson, Adam P. Romero). Farnham: Ashgate.

Culbertson, Tucker. 2007. "Arguments Against Marriage Equality: Commemorating & Reconstructing Loving v. Virginia" 85 Wash. U. L. 575 (2007).

De Beauvoir, Simone. 1949 (1989). *The Second Sex* (trans. H. M. Parshley). New York: Vintage.

Edelman, Lee. 2004. No Future: Queer Theory and the Death Drive. Durham: Duke UP.

Eskridge, William Jr. 2002. *Equality Practice: Civil Unions and the Future of Gay Rights.* New York: Routledge.

--------. 1993. "A History of Same Sex Marriage." Paper presented at Yale Faculty Scholarship Series at New Haven, CT, January 1.

Farrow, Kenyon. 2005. "Is Gay Marriage Anti Black?" *Kenyon Farrow* Blog March 5. http://kenyonfarrow.com/2005/06/14/is-gay-marriage-anti-black/

Ferguson, Russell. 1990. *Out There: Marginalization and Contemporary Cultures*. Cambridge; MIT Press.

Fineman, Martha Albertson. 2009. "The Sexual Family." In *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (ed. Martha Albertson Fineman, Jack E. Jackson, Adam P. Romero). Farnham: Ashgate.

Firestone, Shulamith. 1970. *The Dialectic of Sex*. New York: Bantam Books.

Friedan, Betty. 1963. *The Feminine Mystique*. New York: W. W. Norton & Company.

Gay Liberation Front. 1987. "Manifesto" in Internet History Sourcebooks Project (ed. Paul Halsall). Accessed 4/23/2014. http://www.fordham.edu/halsall/pwh/glf-london.asp.

Halberstam, J. Jack. *Gaga Feminism: Sex, Gender, and the End of Normal*. Boston: Beacon Press

--------. 2011. *The Queer Art of Failure*. Durham: Duke UP.

Halperin, David. 1995. *Saint Foucault: Toward a Gay Hagiography*. Oxford: Oxford University
Press.

Huffer, Lynne. 2009. "Queer Victory, Feminist Defeat?" In *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (ed. Martha Albertson Fineman, Jack E. Jackson, Adam P. Romero). Farnham: Ashgate.

INCITE! Women of Color Against Violence (ed.). 2009. *The Revolution Will Not Be Funded: Beyond the Non-Profit Industrial Complex*. New York: South End Press.

Joslin, Courtney G. 2013. "Windsor, Federalism, and Family Equality" 113 Colum. L. Rev. Sidebar 156 (2013).

Kimport, Katrina. 2013. *Queering Marriage: Challenging Family Formation in the United States*. New Brunswick: Rutgers UP.

King, Martin Luther, Jr. (2003 ed.). I Have a Dream: Writings and Speeches That Changed the World. San Francisco: HarperOne.

Knickerbocker, Brad. 2014. “Courts pave the way for more gay marriages.” *Christian Science Monitor*, February 15. http://www.csmonitor.com/USA/Justice/ 2014/0215/Courts-pave-the-way-for-more-gay-marriages-video

Levinson, Rosalie Berger. 2006. “Will the New Federalism Be the Legacy of the Rehnquist Court?” 40 Val. U. L. Rev. 589 (2006).

MacKinnon, Catherine. 2004. “The Road Not Taken: Sex Equality in *Lawrence* v. *Texas*.” 65 Ohio State Law Journal 1081 (2004).

Moore, Mignon R. and Michael Stambolis-Ruhstorfer. 2013. “LGBT Sexuality and Families at the Start of the Twenty-First Century.” Annu. Rev. Sociol. 39:491–507.

Pateman, Carole. 1988. *The Sexual Contract*. Redwood City: Stanford University Press.

Pearson, Michael. 2013. “Supreme Court rulings on same-sex marriage hailed as historic victory.” *CNN,* June 27. http://www.cnn.com/2013/06/26/politics/scotus-same-sex-main/

Pedriana, Nicholas. 2009. “Intimate Equality: The Lesbian, Gay, Bisexual, and Transgender Movement’s Legal Framing of Sodomy Laws in the Lawrence v. Texas Case.” In *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (ed. Martha Albertson Fineman, Jack E. Jackson, Adam P. Romero). Farnham: Ashgate.

Petzen, Jennifer. 2012. “Queer Trouble: Centering Race.” Queer and Feminist Politics, Journal of Intercultural Studies 33(3): 289-302.

Polaski, Adam. 2013. “Love Wins: Supreme Court overturns Section 3 of DOMA, restores marriage in CA.” *Freedom to Marry*, June 26. http://www.freedomtomarry.org/blog/entry/ marriage-at-the-supreme-court-june-26-2013.

Polikoff, Nancy D. 2012. “Two Parts of the Landscape of Family in America: Maintaining Both Spousal and Domestic Partnership Employee Benefits for Both Same-sex and Different-Sex Couples.” 81 Fordham Law Review (2012).

Puar, Jasbir K. 2007. *Terrorist Assemblages: Homonationalism in Queer Times*. Durham: Duke University Press.

Roker, Raymond. 2008. “Stop Blaming California's Black Voters for Prop 8.” *Huffington Post*, November 7. http://www.huffingtonpost.com/raymond-leon-roker/stop-blaming-californias_b_142018.html

Rosenblum, Darren. 2009. “Queer Legal Victories: Intersectionality Revisited.” In *Queer Mobilizations: LGBT Activists Confront the Law* (ed. Scott Barclay, Mary Bernstein, Anna-Maria Marshall). New York: NYU Press.

Smith, Cherry. 1996. “What is this Thing Called Queer” In *The Material Queer: A Lesbigay Cultural Studies Reader* (ed. D. Morton). Oxford: Westview Press, 227-285.

Spade, Dean. 2011. *Normal Life: Administrative Violence, Critical Trans Politics and the Limits of Law*. New York: South End Press.

Spade, Dean and Craig Willse. 2013. “Marriage Will Never Set Us Free.” *Organizing Upgrade,* September 6. http://www.organizingupgrade.com/index.php/modules-menu/beyond-capitalism/item/1002-marriage-will-never-set-us-free

Spindelman, Marc. 2004. “Foreword to 2004 Symposium: Equality, Privacy and Lesbian and Gay Rights After Lawrence v. Texas.” 65 Ohio State Law Journal 5 (2004).

Stanley, Eric. 2001. “Near Life, Queer Death: Overkill and Ontological Capture.” Social Text 29(2): 1-19.

Stopera, Matt. 2013. “40 Powerful Moments Outside The Supreme Court On The Day DOMA Was Struck Down.” *Buzzfeed*, June 26.http://www.buzzfeed.com/mjs538/40-historic-moments-outside-the-supreme-court-on-the-day-dom

Sullivan, Andrew. 2004. *Same-Sex Marriage: Pro and Con, A Reader.* New York: Vintage.

Sullivan, Nikki. 2003. *A Critical Introduction to Queer Theory*. New York: NYU Press.

Sycamore, Mattilda Bernstein. 2008.”Introduction.” In *That's Revolting! Queer Strategie s for Resisting Assimilation* (ed. Matilda Bernstein Sycamore). Berkeley: Soft Skull Press.

Titshaw, Scott. 2013. “Immigration for Same-Sex Spouses in a Post-DOMA World.” *Huffington Post*, July 26. http://www.huffingtonpost.com/scott-titshaw/immigration-for-same-sex-spouses-in-a-post-doma-world_b_3661282.html

United States General Accounting Office. 2004. *Defense of Marriage Act: Update to Prior Report*. Washington, DC: US GAO. Accessible: http://www.gao.gov/new.items/d04353r. pdf

Vaid, Urvashi. 2012. *Irresistible Revolution: Confronting Race, Class and the Assumptions of LGBT Politics.* New York: Magnus Books.

--------. 1996. *Virtual Equality: The Mainstreaming of Gay and Lesbian Liberation*. New York: Anchor Books.

Valdes, Francisco. "Queering Sexual Orientation: A Call for Theory as Praxis." In *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (ed. Martha Albertson Fineman, Jack E. Jackson, Adam P. Romero). Farnham: Ashgate.

Warner, Michael. 2002. "Beyond Gay Marriage." In *Left Legalism/Left Critique* (ed. Wendy Brown and Janet Halley). Durham: Duke University Press.