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Same-Sex Marriage and Simulacra: Exploring Conceptions of Equality

Heather Lauren Hughes*

The prospect of same-sex marriage has provoked divergent responses from gay rights proponents. Some consider the right to marry an essential part of equal protection and the single most important step towards equality for gay people.¹ "Equality" in this context means consistent legal treatment for all regardless of sexual orientation, in hopes that the exercise of legal rights will force greater acceptance of lesbian and gay people.² However, other pro-gay activists warn that declaring equal rights is an assimilation decree: a demand that gays and lesbians embrace institutions modeled on the heterosexual, monogamous relationship and achieve equal treatment only as analogous to heterosexual "counterparts."³ Still others criticize the idea of identity politics itself as reinforcing minority categories defined through marginalization and promoting an essentialized vision of minority groups that suppresses diversity and inequalities within categories.⁴

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¹ See, e.g., ANDREW SULLIVAN, VIRTUALLY NORMAL 185 (1995) (stating that "[i]f nothing else were done at all, and gay marriage were legalized, ninety percent of the political work necessary to achieve gay and lesbian equality would have been achieved"); WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE 123-82 (1996) (building constitutional arguments for same-sex marriage); Tom Stoddard, *Why Gay People Should Seek the Right to Marry*, in LESBIAN AND GAY MARRIAGE 13 (Suzanne Sherman ed., 1992).

² See SULLIVAN, *supra* note 1, at 113; BRUCE BAWER, A PLACE AT THE TABLE: THE GAY INDIVIDUAL IN AMERICAN SOCIETY 28-29 (1993); David L. Chambers, *What If?: The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 450 (1996).

³ See, e.g., URVASHI VAID, VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION (1995) (arguing against "mainstreaming" and for fundamental transformation of existing social institutions in pursuit of greater gender, racial, and economic justice); Paula L. Eittlebrick, *Since When Is Marriage a Path to Liberation?*, in LESBIAN AND GAY MARRIAGE, *supra* note 1, at 20, 21 (arguing that marriage will constrain gays and lesbians, make them more invisible, force assimilation, and undermine the goals of gay liberation).

⁴ See, e.g., WILLIAM E. CONNOLLY, IDENTITY\DIFFERENCE: DEMOCRATIC NEGOTIATIONS OF POLITICAL PARADOX 65-66 (1991); JEAN BETHKE ELSHTAIN, DEMOCRACY ON TRIAL 85 (1995); SULLIVAN, *supra* note 1, at 149, 151; VAID, *supra* note 3, at 286; Shane Phelan, *The Space of Justice: Lesbians and Democratic Politics*, in SOCIAL POSTMODERNISM: BEYOND IDENTITY POLITICS 332, 333 (Linda Nicholson & Steven Seidman eds.,

Strategies to secure equal rights for gays, lesbians, and bisexuals within the existing legal order move along one trajectory towards an equality defined in reference to that order.⁵ Simultaneously, questions about the efficacy of the existing legal order as a means of social transformation,⁶ about how the social construction of the individual informs and limits agency, and about what the latter means for political activism⁷ persist, implying that the goal of equal rights for homosexual and bisexual people might be hopelessly conservative and ultimately stagnating to true social transformation. This dissonant cacophony presents two questions: What does "equality" among people of different sexual orientations mean? What forms of equality are possible?

1995) (emphasizing diversity among lesbians and criticizing "traditional identity politics" for positing an "intimate connection between one's sexuality and one's political sympathies or 'true interest'"); Jane S. Schacter, *Skepticism, Culture and the Gay Civil Rights Debate in a Post-Civil-Rights Era*, 110 HARV. L. REV. 684, 697-717 (1997) (book review) (arguing that although their approaches differ radically, both Sullivan and Vaid question the utility of a traditional civil-rights model that places at the center of equality struggles laws banning discrimination based on aspects of identity like race, gender, and sexual orientation).

⁵ See *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (upholding the Georgia Attorney General's decision to withdraw a job offer made to a woman who married another woman, on grounds that employing her could disrupt working relationships and create confusion in Bowers's office); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995) (holding that the word "marriage," when used to denote a legal status, refers only to relationships between one man and one woman); *Baehr v. Miike*, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996) (holding that Hawaii did not demonstrate a compelling state interest in denying same-sex couples the right to marry); *Rutgers Council of AAUP Chapters v. Rutgers, the State Univ.*, 689 A.2d 828 (N.J. Super. Ct. App. Div. 1997) (upholding denial of health insurance coverage for Rutgers employees' same-sex partners on the basis that they are not "spouses" under New Jersey law); *Baker v. State*, complaint filed with Vermont trial court July 21, 1997 (on file with the *Harvard Civil Rights-Civil Liberties Law Review*) (involving three same-sex couples who have sued their respective municipalities in Vermont seeking marriage licenses). See generally Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283 (1994) (providing an overview of anti-discrimination statutes).

⁶ See Schacter, *supra* note 4, at 686 (arguing that Sullivan and Vaid's skepticism of the traditional civil rights model reflects doubts about the capacity of law to secure equality); see also RICHARD DELGADO & JEAN STEFANCIC, *FAILED REVOLUTIONS: SOCIAL REFORM AND THE LIMITS OF LEGAL IMAGINATION* xvi (1994); CORNEL WEST, *The Role of Law in Progressive Politics*, in *KEEPING FAITH: PHILOSOPHY AND RACE IN AMERICA* 235, 235 (1993).

⁷ See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 1-3 (1990); CONNOLLY, *supra* note 4, at 44-48; Etlebrick, *supra* note 3, at 20, 22; Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA. NOT!*, 28 HARV. C.R.-C.L. L. REV. 395, 485-86 (1993) (arguing that race and gender are "socially constructed categories established and maintained through relations of power and powerlessness").

This Note applies Jean Baudrillard's concept of simulacrum⁸ to the institution of marriage in general and the Defense of Marriage Act⁹ ("DOMA") in particular. This Note is not meant to be a thorough reading or complete application of Baudrillard's philosophy. Rather, it extrapolates one concept from his work *Simulacra and Simulations* and uses it to reassess the same-sex marriage debate.

The concept of simulacrum asserts the absence of external referentials. It posits that subjects (the subject of marriage, for example) are not constituted by, and do not originate in, any objective reality beneath the endless representation and simulation engaging them. A simulacrum describes complete continuity between real and imaginary, model and subject, map and territory, abstraction and actuality. Baudrillard describes it as "the generation of models of a real without origin or reality: hyperreal. The territory no longer precedes the map, nor survives it."¹⁰ As such, the idea of simulacrum challenges real/imaginary distinctions in two complementary ways. On one axis, it subverts the concept of "real" by negating the existence of any actual substance (upon which the idea of the real is contingent) beyond the model or representation. On another axis, it invests power and authority in the model itself—the abstraction—giving weight to the imaginary. Simulacrum conflates real and imaginary. The idea of simulacrum, then, allows for an assessment of models and maps on their own terms. In the context of the same-sex marriage debate, it moves beyond the question of which forms of love are legitimate to a

⁸ See JEAN BAUDRILLARD, *Simulacra and Simulations*, in JEAN BAUDRILLARD: SELECTED WRITINGS 166 (Mark Poster ed., 1988). The concept of simulacrum that Baudrillard uses differs significantly from the common use of the word "simulacrum," which is defined as an image or likeness, a vague representation or a sham. See WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH 1251 (3d college ed. 1988). Judge Posner writes that registered partnership and homosexual cohabitation are "in effect a form of contract that homosexuals can use to create a simulacrum of marriage." RICHARD A. POSNER, SEX AND REASON 313 (1992). While Posner uses the word "simulacrum" to describe imitation marriage for same-sex couples, this Note uses Baudrillard's work to state that all marriage already operates in the absence of any distinction between real and imitation—at the level of simulacrum.

⁹ 28 U.S.C. § 1738c (1996). The DOMA codifies a definition of marriage as the union of one man and one woman, and it permits states not to give effect to acts by any other state that treats relationships between persons of the same sex as marriage. See *id.* It was passed 342–67 in the House, see 142 CONG. REC. D736 (daily ed. July 12, 1996); 84–14 in the Senate, see 142 CONG. REC. D912-02 (daily ed. Sept. 10, 1996); and it was signed by President Clinton on September 21, 1996, see Melissa Healy, *No Wedding Bell Blues for Gay Couples*, L.A. TIMES, Sept. 22, 1996, at A1. The federal government has never before officially defined marriage; definitions of marriage have always been determined by the individual states. The Act was passed in reaction to the Hawaii circuit court decision in *Baehr*, which declared that Hawaii did not demonstrate a compelling state interest in denying homosexual couples the right to marry. See *Baehr*, 1996 WL 694235. *Baehr* marks a significant move towards legalizing same-sex marriage in Hawaii.

¹⁰ BAUDRILLARD, *supra* note 8, at 168.

question of how legitimacy is negotiated and how we might affect that negotiation. It prompts simultaneous assessment of the existence of a real beneath the rhetoric and of the power of imagination to effect social change.

Congress's debate over the DOMA asserts a distinction between real, heterosexual marriage—an event taking place daily, sanctioned by law, repeated infinitely throughout history, time-tested and true—and imaginary, homosexual marriage—a fiction, an idea concocted by equal rights claimants that in no way reflects the actual order of human society. Simulacra—series of copies with no original, “a metastable . . . descriptive machine which provides all the signs of the real and short-circuits all its vicissitudes”¹¹—operate in the gay marriage debate at multiple levels. When marriage is considered as a simulacrum, a presentation of a system of signs, distinctions between “real” heterosexual marriage and “imaginary” homosexual marriage prove elusive and irrelevant. Then the real/imaginary distinction itself emerges as a simulacrum.

The DOMA implies that even unsanctioned imitation of a moral order can threaten that order. As Baudrillard asks: “How can you punish the simulation of virtue? Yet as such it is as serious as the simulation of crime. Parody makes obedience and transgression equivalent, and that is the most serious crime, since it *cancels out the difference upon which the law is based*.”¹² The DOMA was passed with overwhelming, bipartisan support even though same-sex marriage currently has not been legalized in any U.S. state.¹³ How can the legislature punish homosexual couples for simulating marriage?¹⁴ Yet, if same-sex couples appear married, then how can the law distinguish obedience and transgression in the moral realm? On one level, this Note's application of the idea of simulacrum to the DOMA debate can be read as an exploration of the extent to which the state's power to administer law is staked upon its ability to produce oppositions and external referentials in the face of simulacra.

To challenge the construction of heterosexual marriage as “real” is not to say that all marriage is imaginary. Nor is the statement that homosexual marriage is not “imaginary” an assertion that homosexual marriage is “real.” Rather, it is the proposed distinction between things real and things imagined that is problematic. Politicians delineating the “real” in terms of marriage—cognizable only in contrast to a correlative “imaginary”—attach power and legitimacy exclusively to the real. Statements in support of the DOMA situate the real/imaginary distinction in congruence

¹¹ *Id.* at 167.

¹² *Id.* at 178.

¹³ See *supra* note 9.

¹⁴ Sullivan states that conservatives should want same-sex marriage because it would “buttress the ethic of heterosexual marriage, by showing how even those excluded from it can wish to model themselves on its shape and structure.” SULLIVAN, *supra* note 1, at 112.

with binary oppositions such as biology/social construction, natural/fabricated, and legitimate/illegitimate that link heterosexual marriage to the natural and legitimate in production of a moral order. The real/imaginary distinction perpetuates social inequality for bisexual, gay, and lesbian people by casting different-sex marriage as real and same-sex marriage as the artificial and unnatural creation of imaginative equal-rights advocates.¹⁵

However, I am not arguing here simply for expanding this domain of the real in hopes of achieving legitimacy for homosexual couples through their recurring performance of marriage. Just securing the right of same-sex couples to marry would dilute the potential of a queer movement to challenge more broadly gender roles confining all women and men.¹⁶ The same-sex marriage issue is not just about the denial of equal rights on the one hand, or the need for a queer movement that emphasizes difference rather than sameness between straight and gay people on the other. It is about the privileging of marriage as the ultimate officiation of romance.¹⁷

Erasing distinctions between "real" institutions and "imaginary" phenomena reveals marriage as a simulacrum. Presenting marriage as a system of signs that do not correspond to any external real undermines the assumption that marriage, as a social institution, is necessarily desirable or stable. If the privileging of marriage hinges (as it does in the DOMA debate) on asserting that marriage is real in contrast to other, less legitimate officiations of love, then simulacra remove the *sine qua non* of marriage's peculiarity.

If the signs of marriage themselves do not translate into any actual lifelong commitment to family, why is the state so invested in these signs? The DOMA delineates the real in defense of the state's power to define legitimacy. In doing so it protects the state's ability to administer law. Both DOMA supporters and opponents generate distinctions in the production of a moral order, portraying what they oppose as scandalous. DOMA supporters denounce the scandal of homosexuality, infusing social morality through legislation. DOMA critics denounce the scandal of passing legislation that threatens an unpopular minority, is constitutionally questionable, and for which there is no imminent need, several weeks before election time. They implicate politics as a simulacrum, asserting in response a distinction between lawmaking that is proper or "legal" and that which is purely "political," injecting a dose of political morality.¹⁸ Presenting the liberal opposition's response to DOMA supporters as also

¹⁵For a discussion of how dominant terms or groups derive power from binary opposition, see *infra* text accompanying notes 44–47.

¹⁶See Eittlebrick, *supra* note 3, at 21; see also VAID, *supra* note 3, at 208.

¹⁷I assume that the current marriage debate is, at least in part, about how society should treat romantic love between two people of the same sex.

¹⁸See *infra* text accompanying notes 36–42.

generated through simulacra undermines any misconception that the marriage simulacrum is "imaginary" and what we need to do is "get real," as DOMA opponents propose.

Understanding the pervasiveness of simulacra is a first step towards envisioning different modes of equality. This Note proposes one possible conception of equality: equality as equivalence of real and imaginary, as multiple possibilities for romance without privileging. The concept of simulacrum undermines binary oppositions such as real/imaginary, legitimate/illegitimate, and natural/unnatural, which pervade the same-sex marriage debate. Presenting equality as the equivalence of real and imaginary then becomes an equalizing strategy. It seeks to avoid an alignment of binary oppositions that perpetually locates sexual minorities on the unprivileged, impure side of the dichotomy. It is a strategy to move equality for people of different sexual orientations beyond analogy to a heterosexual counterpart. It erodes the "on/off" quality of current legal marriage that dictates that all couples are either married or unmarried, and that the state of being married has some common social meaning. This mode of equality takes the idea that the law produces the subjects it comes to represent, and conceives of equality first in terms of the various legal options for the officiation of romantic union themselves, rather than in terms of categories of minority peoples.¹⁹ It is an attempt to help the law produce equal citizens.²⁰

I. The DOMA as a Strategy of the Real

The Defense of Marriage Act retaliates against the image of same-sex couples displaying all accoutrements of marriage—an image murderous to the conception of marriage as inexorably and immutably heterosexual. Baudrillard states that "perhaps at stake has always been the murderous capacity of images," and "to this murderous capacity is opposed the dialectical capacity of representations as a visible and intelligible mediation of the real."²¹ The DOMA is a legislative "strategy of the real," designed to deter homosexual legitimacy, waged with myths of origin and the production of referentials.²²

¹⁹ See *infra* text accompanying notes 50–54.

²⁰ I do not pretend here to have formulated a new conception of equality and a proposal for effectuating it that is watertight. Rather, this piece is meant to provide a framework for thinking about new modes of equality and how we might achieve them.

²¹ BAUDRILLARD, *supra* note 8, at 170. Mark Poster writes that in *Simulacra and Simulations*, "[Baudrillard] has moved from the TV ad which, however, never completely erases the commodity it solicits, to the TV newscast which creates the news if only to be able to narrate it, or the soap opera whose daily events are both referent and reality for many viewers." Mark Poster, *Introduction* to JEAN BAUDRILLARD: SELECTED WRITINGS, *supra* note 8, at 6.

²² See BAUDRILLARD, *supra* note 8, at 171.

In support of the DOMA, Senator Byrd declares: "Woe betide that society that fails to honor that heritage and begins to blur that tradition which was laid down by the Creator in the beginning Certainly we do not want to launch further assault on the institution of marriage by blurring its definition in this unwise way."²³ In a similar vein, Senator Lott states: "The Defense of Marriage Act is . . . a response to an attack upon the institution of marriage itself We should not have ambiguity in this area. We should not have confusion."²⁴ In response to this sentiment, several liberal Senators ask: how can the institution of marriage be "assaulted" when no state has legalized same-sex marriage and the one considering it is nowhere near rendering its final decision?²⁵ The assault lies in the "blurring" of the definition of marriage—in the capacity of images of homosexual marriage to show that Byrd's vision of marriage does not reference any external reality. The assault is ambiguity and confusion over what marriage is.

On one level, by analogizing to Baudrillard and asking whether the real itself could be "reduced to signs which attest [its] existence,"²⁶ one can articulate precisely Byrd and Lott's fear. For "[t]hen the whole system . . . [is a] simulacrum: not unreal, but a simulacrum, never again exchanging for what is real, but exchanging in itself, in an uninterrupted circuit without reference or circumference."²⁷ Byrd and Lott fear that performance of marriage by homosexual couples will reduce the real—heterosexual marriage, "that tradition laid down by the Creator in the beginning"—to mere signs without reference. They warn against extinction of a real embodied by heterosexual marriage through perversion of its sacred form.

But the Senators' fear admits continuity between signs or representations and the real they claim to mediate. If a mere claim to same-sex marriage or a mere representation of marriage as befitting a homosexual couple amounts to an assault on the institution itself, then marriage must already operate at the level of simulacrum. It must already exist as an "uninterrupted circuit" of images "without reference" to any substance or actuality, but which "provides all the signs of" actual commitment and "short-circuits all its vicissitudes"—the vast differences between mar-

²³ 142 CONG. REC. S10,110 (daily ed. Sept. 10, 1996) (statement of Sen. Byrd).

²⁴ *Id.* at S10,101 (statement of Sen. Lott). Similar statements were also made in the House. For example, Rep. Barr stated: "[M]arriage throughout the entire history of not only our civilization but Western civilization has meant the legal union between one man and one woman." 142 CONG. REC. H7275 (daily ed. Sept. 10, 1996) (statement of Rep. Barr). Likewise, Rep. McInnis appealed to "the long-held tradition that a marriage is defined as a union between one man and one woman." *Id.* at H7279 (statement of Rep. McInnis).

²⁵ See generally 142 CONG. REC. S10,101 (daily ed. Sept. 10, 1996) (arguing that consideration of this Act is premature).

²⁶ BAUDRILLARD, *supra* note 8, at 170.

²⁷ *Id.*

riages and the impossibility, in fact the insult to romance, of ascribing them consistent meaning. Some couples may consider their marriage a codification of a blissful love, others a trap fostering various forms of abuse; still others may be indifferent, having entered marriage for reasons unrelated to love or family. Given the variety of the substance of individual marriage relationships, the institution of marriage can only be accessed collectively through a system of signs. Marriage, the social institution, becomes the repeated performance of ceremonies, dresses, rings, and taxes. The marriage ceremony does not exchange for any promise of real love or romance. It is the generation of a system of signs, exchanging only in itself.

Senators Byrd, Coats, Nickles, and Gramm, to name four, combat the notion of marriage as a system of signs with adamant insistence on the real, with "a proliferation of myths of origin and signs of reality."²⁸ Baudrillard observes: "The only weapon of power, its only strategy against this defection, is to reinject realness and referentiality everywhere."²⁹ According to Baudrillard: "This is . . . the phase that concerns us: a strategy of the real . . . whose universal double is a strategy of deterrence."³⁰ Senator Byrd identifies "the Creator" and the heritage "He" laid down as the origin and the external referent around which the institution of marriage is built. Similarly, Senator Coats invokes nature as marriage's interminable source:

The definition of marriage is not created by politicians and judges, and it cannot be changed by them. It is rooted in our history, in our laws and our deepest moral and religious convictions, and in our nature as human beings. It is the union of one man and one woman. This fact can be respected, or it can be resented, but it cannot be altered.³¹

Coats's statement names marriage itself as the real, as beyond legal or social determination—so real it is part of nature itself. Heterosexual marriage is a "fact" not to be confused with the fiction of altering the definition of marriage. Coats endows marriage with the authority of law, morality, religion, and human nature. Same-sex marriage is rendered illegitimate in contrast—so incongruous to any reality that it is not even possible. Senator Nickles took a similar approach, stating that "these provisions simply reaffirm what is already known, what is already in place."³² Finally, Senator Gramm states:

²⁸ *Id.* at 171.

²⁹ *Id.* at 179.

³⁰ *Id.* at 171.

³¹ 142 CONG. REC. S10,113 (daily ed. Sept. 10, 1996) (statement of Sen. Coats).

The traditional family has stood for 5,000 years [It] has always been important to civilization Human beings have always given traditional marriage a special sanction. I do not believe 5,000 years of recorded history have been in error. I believe the traditional family—the union of man and woman, upon which our entire civilization is based—is unique, and I believe it is the foundation of our prosperity, our freedom, and our happiness.³³

Gramm creates referentiality by asserting the antiquity of marriage. Portraying “traditional marriage” as an unchanging fixture, he locates it on a continuous and unbroken axis of time that serves as referent. Same-sex marriage, then, appears in relief to this referent (time, the real) as a recent, imaginary concoction with no basis in history, making no contribution to civilization.

In the DOMA debate, the sanctity of heterosexual marriage is proved by the alleged perversity of its antithesis: anti-marriage, gay marriage. It is the threatening prospect of legalized same-sex marriage that makes this whole presentation of the natural-ness and real-ness of marriage possible. Baudrillard posits that strategies of the real are “always a question of proving the real by the imaginary; proving truth by scandal; proving the law by transgression; . . . proving the system by crisis Without counting: proving theater by anti-theater; proving art by anti-art”³⁴ It is the “attack,” the “assault” on marriage by the confusion of its meaning that creates the need for the DOMA. In this sense, the real/imaginary distinction itself can be understood as a simulacrum, emerging from the constant exchange of the natural with the word of God with the ancient with tradition with human nature with civilization, and so on “in an uninterrupted circuit without reference or circumference.”³⁵

II. Paying Homage to the Law

Given that the signs of marriage do not exchange for any actual lifelong commitment, procreation, religious conviction, or love, what does the state have at stake in these signs? Why must the signs be reinforced at all costs against the “murderous capacity” of images? Through delineating the real, the DOMA defends the state’s power to define legitimacy, to produce a moral order. The ability to articulate a moral order precedes the power to differentiate between obedience and transgression, the dif-

³² *Id.* at S10,103 (statement of Sen. Nickles).

³³ *Id.* at S10,105–06 (statement of Sen. Gramm).

³⁴ BAUDRILLARD, *supra* note 8, at 176–77.

³⁵ *Id.* at 170.

ference upon which the law is based. The state defends its ability to administer law, to define obedience and transgression, in multiple ways. In denouncing the scandal of homosexuality, DOMA supporters fuel the marriage simulacrum and the idea of the real, paying homage to law's ability to identify transgression in the name of social morality.

But defending the state's ability to enforce a moral order is not just the work of DOMA supporters. DOMA opponents denounce the scandal of passing such dubious legislation so near election time. They pay homage to the legislative process, implicating the DOMA itself as a transgression of law, an order of political morality. Senator John Kerry states:

If this were truly a defense of marriage act, it would . . . provide for counselling for all troubled marriages It would provide treatment on demand for those with alcohol and substance abuse It would expand the Violence Against Women Act. It would guarantee day care for every family that struggles and needs it.³⁶

Like the Act's supporters, DOMA opponents, too, lay claim to the real. Much of the force of Senator Kerry's argument lies in its implication that, in fact, the Republicans are the ones in fairyland.

DOMA opponents invoke proper legislative process as a referent to erect a distinction between what is cynical "politics" and what is "legal." Senator Kerry, for example, aligns the political with "ugly" and "flawed," as opposed to legislation that displays the aesthetic and rational integrity of law.³⁷ He implies that politics and law can be separated just as his opponents imply that the formal institution of marriage and its constraining reinforcement of gender roles can be separated.

A politics simulacrum—a politics/law distinction—again illustrates the way in which the power of the state seems to depend on the capacity of representations to mediate intelligibly the "real." Both sides of the DOMA debate invoke a moral superstructure, protecting their interests in the pursuit of political power. "Capital" in Baudrillard's following statement may be read to mean political capital or power: "The denunciation of scandal always pays homage to the law Capital, which is immoral and unscrupulous, can only function behind a moral superstructure, and whoever regenerates this public morality (by indignation, denunciation, etc.) spontaneously furthers the order of capital."³⁸

Senator Kennedy chastises the DOMA as "a mean-spirited form of Republican legislative gay-bashing cynically calculated to try to inflame the public eight weeks before the November 5 election."³⁹ He notes that

³⁶ 142 CONG. REC. S10,107 (daily ed. Sept. 10, 1996) (statement of Sen. Kerry).

³⁷ See *id.* at S10,107.

³⁸ BAUDRILLARD, *supra* note 8, at 173.

³⁹ 142 CONG. REC. S10,101 (daily ed. Sept. 10, 1996) (statement of Sen. Kennedy).

"Federal law, which has never recognized same-sex marriages, hardly needs clarification at this suspicious moment."⁴⁰ Senator Moseley-Braun states that "the Defense of Marriage Act is all about the politics of fear and division and about inciting people in an area that is admittedly controversial."⁴¹ Likewise, Senator Kerry argues:

[T]his debate is fundamentally ugly, and it is fundamentally political, and it is fundamentally flawed I suppose we really should not be surprised that the U.S. Senate is spending its time in an exercise of this kind, which ought to properly feed the cynicism that already attaches to so much of what we do in Washington.⁴²

Similar to their conservative counterparts, these Senators attempt to reinject referentiality and real-ness into a politics simulacrum. Kerry cries for adherence to legislative process: he demands that the Senate honor the law by enacting legislation that upholds constitutional principles, that is worthy of the Senate's time, and that does not fuel divisive fires for no "real" reason. The idea of proper legislative process serves here as a moral superstructure which must be preserved to mask the unscrupulous force of political capital.

III. The DOMA's Defense of Marriage

In defending the state's ability to delineate the real, produce a moral order, and identify transgression of that moral order, *the DOMA fulfills its promise as a defense of marriage*. Infusing referentiality and reality everywhere, the DOMA does such a thorough job of defending marriage that it leaves its opponents to protest in alternative terms: the denunciation of political scandal, the claim to equal rights. The DOMA makes the sanctity of marriage, the privileging of marriage, a risky target for dispute, lest its opponents implicate themselves in the same project of producing a moral order by erecting dubious distinctions in the wake of simulacra.

Reinjected with external referentials by the DOMA, the marriage contract invites countless couples to enter it again and again, gaining power by its repetition, taking pleasure in its serial presentation as the natural, privileged relationship, not caring at all whether there is any love involved. Marriage's desirability is perpetuated by a fetishization of its form. The more times a person gets married and divorced, the better: there will be that many more presentations, that many more waves in the "irradiating synthesis of combinatory models in a hyperspace without

⁴⁰ *Id.* at S10,102.

⁴¹ *Id.* at S10,104 (statement of Sen. Moseley-Braun).

⁴² *Id.* at S10,107 (statement of Sen. Kerry).

atmosphere.”⁴³ Serial marriage and divorce become not the antithesis of the idea of marriage, but its ultimate reinforcement. It is the repeat offenders who invest the most privilege in marriage by subscribing to its ability to legitimate love even though they have experienced first-hand its inability to mediate substance.

The belief of the “left” that this institution can be made accommodating by subjecting it to contemporary equal rights rules merely furthers the privileging of marriage. Efforts to make the institution work for and accommodate everyone create a system of deterrence by diverting the question of why we continue to subscribe to the idea of marriage in the first place.

IV. Exploring Modes of Equality

By asserting continuity between the real and the imaginary, the concept of simulacrum challenges binaries such as law/politics, natural/un-natural, and legitimate/illegitimate. As such, the idea of simulacrum challenges conceptual frameworks central to the perpetuation of inequality for those associated with binaries’ less privileged halves. Fixed oppositions suppress the extent to which the things in opposition are interdependent, deriving their meaning from contrast, rather than from innate antithesis.⁴⁴ In its strategy of the real, the DOMA presents a fixed opposition between real, different-sex marriage, and its fictive antithesis, same-sex marriage. In so doing, the Act suppresses the extent to which the meaning that it fuses into the idea of marriage is derived simply from contrast to same-sex unions, rather than from any inherent substantive difference between current marriage relationships and homosexual relationships.

The interdependence of terms in binary opposition is hierarchical, with one term consistently dominant and prior to the other.⁴⁵ Feminist and philosopher Elizabeth Grosz explains: “[W]ithin these binary couples, the primary or dominant term derives its privilege from a curtailment or suppression of its opposite. Sameness or identity, presence, speech, the origin, mind, etc. are all privileged in relation to their opposites, which are regarded as debased, impure variants of the primary term.”⁴⁶ Grosz’s passage suggests that meaning is made through contrast: positive definitions derive their meaning from the negation of their represented opposites.⁴⁷ Set in this theoretical context, the DOMA can be read simply as

⁴³ BAUDRILLARD, *supra* note 8, at 167.

⁴⁴ See Joan W. Scott, *Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism*, 14 FEMINIST STUD. 33, 37 (1988).

⁴⁵ See *id.*; see also JACQUES DERRIDA, *OF GRAMMATOLOGY* (Gayatri Chakravorty Spivak trans., Johns Hopkins University Press 1st Am. ed. 1976) (1976).

⁴⁶ Elizabeth Grosz, *Derrida, Irigaray, and Deconstruction*, in LEFT-RIGHT INTERVENTION 73 (1986), *quoted in* Scott, *supra* note 44, at 49 n.4.

⁴⁷ See Scott, *supra* note 44, at 36–37.

an infusion of meaning into the institution of marriage through the representation of same-sex marriage as an opposing, impure variation of form.

This reading of the DOMA again indicates that questioning why marriage is considered desirable in the first place is a necessary concomitant of any gay rights agenda. If same-sex couples are permitted to marry legally, then gay rights proponents must be prepared for a second infusion of meaning into marriage. We must be ready for representations of a "lifestyle" or life choices that either implicitly or explicitly come to contrast marriage, that become its next antithesis. My fears here are first, the creation of a "model minority" of married gays and lesbians, resulting in further marginalization of those who do not desire marriage; and second, a false pretense of equality for people of minority sexual orientations generally—a false sense that the battle to expand conceptions of gender is over.

The idea of simulacrum also provides a different explanation of why binary oppositions persist despite the elusiveness of actual referentials. They persist because the power of the state itself appears contingent upon the state's ability to produce moral orders, to reinject reality everywhere. Revelation of the endless circuits of signs without reference or circumference threatens the law itself by diluting our ability to distinguish obedience and transgression.⁴⁸ One conclusion here could be that equal rights is a tenable form of equality precisely because it preserves a framework for distinguishing obedience and transgression, however limiting that framework may be. Securing the right of same-sex couples to marry is a goal that should not be abandoned. However, simply expanding access to the institution of marriage without evaluating forces perpetuating marriage's desirability undermines the potential of a queer social movement to question traditional gender roles seriously.⁴⁹

In contrast, articulating equality as the equivalence of real and imaginary, or as multiple possibilities for romance without privileging, is highly experimental. However, this approach may produce greater equality among people of differing sexual orientations in two important ways.

First, it is an attempt to formulate a conception of equality that does not reinforce marriage's exclusive association with legitimacy. Forcing couples to choose among various options in conferring legal status on their relationship would put both heterosexual and homosexual couples in the position of having to consider the desirability of various forms of union. This in turn could foster greater acceptance of people's choice to remain unmarried or to construct a non-traditional union. This is not just a proposal to offer same-sex couples an alternative to legal marriage. It

⁴⁸ See BAUDRILLARD, *supra* note 8, at 178.

⁴⁹ See *supra* text accompanying notes 44–47 (explaining that dichotomies typically privilege one of the binary opposites over the other).

is a proposal to erode the "on/off" quality—the idea that people are either married or unmarried, cut and dried—that current legal marriage implies for all couples. Each of the various legal statuses, including different forms of both marriage and domestic partnership, would be available to everyone.

One possible way to effectuate this conception of equality might be for states to offer all couples several forms of, and alternatives to, marriage in endowing a relationship with legal consequences.⁵⁰ For example, states could make a range of marriage agreements and partnership options available to couples without regard to sex, restricting access to some of the agreements and granting tax benefits on the basis of other, gender-neutral criteria such as the length of time the couple has lived together or whether the couple has custody of a child.⁵¹ Like marriage, alternative legal unions also could exist as simulacra. The goal here is to use the idea of simulacrum to challenge binary oppositions pervading the same-sex marriage debate and then to present multiple ways to legalize romantic union as a potential strategy to avoid an alignment of binary oppositions that relegates sexual minorities to binaries' less privileged sides.

Second, pursuing equality through alternative ways of legitimizing romantic commitment can bypass identity politics by mediating equality in terms of variant legal statuses themselves, rather than in terms of categories of people. In other words, rather than conceiving of the individual or minority group as the subject of equality, the legal statuses themselves could function as the subjects among which equality must be secured. Judith Butler's analysis of the subject sheds light on how offering multiple forms of legal union could generate an equality that departs from identity categories. Drawing on the work of Michel Foucault, Butler considers how the law produces the subjects it comes to represent. The

⁵⁰ Louisiana recently passed an act allowing couples to choose between "covenant marriage" and "no-fault" marriage. Couples must certify that they have received counseling "emphasizing the nature and purpose of marriage and the responsibilities thereto" to enter a covenant marriage and may obtain divorce only in limited situations such as adultery, abuse, or after a two year separation. (Note that the act defines marriage as the union of "one male and one female.") 1997 La. Acts 1380.

This Act has been considered a victory for the Christian right in their lobbying efforts against no-fault divorce. See Katha Pollitt, *What's Right About Divorce*, N.Y. TIMES, June 27, 1997, at A29; Kevin Sack, *How Do You Say "I Do?": Christian Right Scores a Legislative Coup In Crusade to Undermine No-Fault Divorce*, INT'L HERALD TRIB., June 25, 1997, at 1, available in LEXIS, News Library, Cumwvs File. However, the Act does make concrete the possibility of offering alternative forms of marriage or partnership.

⁵¹ Each of these cursory proposals has potential legal and social ramifications that need exploration. For example, a proposed requirement that couples be granted the right to marry only after successfully living together for a period of time would likely meet objection from those whose religion or personal morality forbids them to live together before marriage. These proposals are here merely to invite discussion of how different forms of equality, separate from rights claimed through identity politics, might be achieved.

very idea that legalizing same-sex marriage would produce greater (even if still limited) equality for homosexual people belies constitutive reciprocity between the law and its subjects. Equality as multiple possibilities for romance without privileging strategically harnesses this constitutive reciprocity. It uses the law's power to produce the subjects it comes to represent to move equality among people of different sexual orientations beyond the realm of analogy to a heterosexual counterpart.

Butler posits that "there may not be a subject who stands 'before' the law, awaiting representation in or by the law".⁵²

Juridical notions of power appear to regulate political life in purely negative terms—that is, through the limitation, prohibition, regulation, control and even "protection" of individuals related to that political structure through the contingent and retractable operation of choice. But the subjects regulated by such structures are, by virtue of being subjected to them, formed, defined, and reproduced in accordance with the requirements of those structures.⁵³

Equality as equal rights presumes the subject to be an individual or category of individuals standing before the law, striving to achieve equality within it. Ensuring equal rights can utilize the law's construction of subjects by inspiring greater social acceptance of persons who attain rights. But by presuming that the primary subject of equality is the individual standing before the law, an equal-rights strategy locks the pursuit of social equality into a chronological progression in which individuals claim membership in an identity group and present themselves to the law as deserving of equal rights before the law's constitutive force is acknowledged. The law's ability to produce the subjects it represents comes into play too late. A category of minority individuals has already been delineated and forced to argue by analogy,⁵⁴ on some level forced to claim sameness either to prior equal-rights claimants or to those who currently hold the right sought. In the case of equal access to marriage, the exclusive legitimacy of marriage already has been presumed and reinforced; another group of people simply has gained access to it.

In contrast, equality as multiple possibilities for romance without privileging harnesses the constitutive reciprocity between the law and its

⁵² BUTLER, *supra* note 7, at 2.

⁵³ *Id.*

⁵⁴ See, e.g., Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons between Racism and Sexism (or Other -isms)*, 1991 DUKE L.J. 397 (arguing that the suggestion that one minority's, or individual's, harm is similar to another's can cause important differences in harmful experiences to seem irrelevant).

subjects up front. It softens an equal-rights strategy's assimilationist strain by encouraging a transformation of ideas about marriage contemporaneous with its expansion to include sexual minorities. It is a strategy to help the law construct equal individuals.

The idea of simulacrum enables us to understand the same-sex marriage debate as the negotiation of a distinction between real and imaginary, generated with attendant binary oppositions reinforcing the delineated domains. As such, simulacrum advances the same-sex marriage debate in two important ways. First, asserting equivalence of real and imaginary—presenting marriage as a series of copies that does not reference any external reality—challenges the sanctity of marriage, potentially undermining its exclusiveness as the privileged officiation of love. Second, exploring how social institutions are perpetuated, empowered, or debased by the production of systems of signs illustrates how current inequalities among people of different sexual orientations persist. The DOMA, waging a strategy of the real with myths of origin, succeeding in defending marriage against the murderous capacity of images, is an example of a law designed to produce unequal subjects. Expanding the notion of the subject of equality beyond the individual or group standing “before” the law enables a vision of equality that does not reinforce minority categories.