Introduction

The Past and the Future

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The question of marriage has been the subject of discussion and activism from the beginning of the LGBT rights movement in the United States. In 1953, *ONE*, the first American magazine aimed at advancing the equality rights of sexual minorities, published an essay on the question of marriage. At the time, of course, the idea that two individuals of the same sex could legally marry seemed fanciful, but the author nonetheless urged the nascent homophile movement to consider the implications of seeking marital rights.¹ Sixteen years later, during the summer following the Stonewall riots, Metropolitan Community Church ministers began conducting marriage ceremonies for same-sex couples. In the early 1970s, about a dozen same-sex couples around the country applied for marriage licenses.

After officials turned down the applications, three of the couples sued, arguing that the denials violated their constitutional rights. The courts rejected the constitutional claims out of hand, a fact that contributed to a twenty-year-long hiatus in the filing of new marriage equality lawsuits.² But some activists continued to push for marriage, focusing their efforts primarily on local officials. In 1975, the county clerk in Boulder, Colorado, who was also the president of the local chapter of the National Organization for Women, became the first government official in the United States to issue marriage licenses to same-sex couples (later deemed legally invalid by the state attorney general). Also in 1975, a Washington, DC, city council member introduced a marriage reform bill that called for the adoption of no-fault divorce and referred to spouses in gender-neutral terms in order to encourage a debate over marriage by same-sex couples.³ In that same year, two members of the
Wisconsin Assembly introduced a bill that would permit same-sex couples to marry while decriminalizing sodomy and repealing a prohibition against the advertising of contraceptives.  

Different components of the LGBT movement had different reasons for focusing on marriage. The author of the 1953 essay worried that marriage threatened the sexual freedom enjoyed by at least some gay men at the time. For some members of the gay liberation movement in the early 1970s, the push for marriage represented an opportunity to question the sexist and heteronormative components of marriage.  

As for liberal and reform-minded activists, rights to marriage represented a logical outgrowth of their demands for full and equal citizenship for lesbians and gay men.  

Relationship-recognition advocacy during the 1980s emphasized smaller, practical steps that could be taken to provide limited forms of recognition, in particular through domestic partnership regimes. The focus on domestic partnerships was the result of different factors, including the growing clout of the social conservative movement, a political ascendancy that made marriage equality seem even less attainable than it had in the 1970s. In addition, some LGBT activists expressed concerns about expanding the institution of marriage, preferring instead to minimize its social, legal, and economic significance by pushing for alternative forms of recognition.  

Despite the fact that many of the movement's leading organizations did not pursue marriage during the 1980s, there remained a strong grassroots interest in marriage equality. Metropolitan Community Church ministers, for example, continued to marry dozens of same-sex couples every year. And during the 1987 gay rights March on Washington, several hundred same-sex couples participated in a collective marriage ceremony in front of the IRS headquarters as part of a rally demanding legal rights for LGBT people.  

The grassroots push for marriage equality also manifested itself, with significant historical consequences, in Hawai‘i. In 1990, three same-sex couples, with the support of a small band of Honolulu gay rights activists, applied for marriage licenses. After officials denied the applications, the couples approached legal rights organizations, including the ACLU and the Lambda Legal Defense & Education Fund, seeking legal representation in order to constitutionally challenge the denials. The orga-
organizations, believing that a lawsuit would be futile, refused to represent them. The couples then turned to a local civil liberties attorney, who agreed to file a lawsuit on their behalf despite his lack of experience litigating LGBT rights cases. To everyone’s surprise, the Hawai’i Supreme Court in 1993 issued a ruling questioning the constitutionality of denying same-sex couples the opportunity to marry.

After the court’s ruling, social conservatives, energized by their victory in forcing President Bill Clinton to backtrack on his promise to lift the military’s ban on lesbian, gay, and bisexual service members, began to sound the alarm about what was taking place on the island state. For their part, a growing number of LGBT rights organizations, facing both the surprising prospect of a possible victory in the Hawai’i courts and a growing conservative backlash against marital rights for same-sex couples, quickly turned the pursuit of marriage equality into their most important objective.

The struggle for marriage equality that began in earnest around the middle of the 1990s allowed the movement to humanize the discrimination faced by LGBT individuals in ways it had never been able to do previously. The focus on marriage put the spotlight on same-sex relationships in ways that other campaigns, such as the push for laws that prohibited discrimination on the basis of sexual orientation, had not. Through the process of demanding admission into the institution of marriage, the movement sought to establish that LGBT individuals were capable of entering and remaining in committed relationships—and, for those who had them, of raising children—in ways that did not differ fundamentally from the experiences of heterosexuals. Although some feminist and queer activists continued to criticize the embrace of marriage as an assimilationist and conservative move that would not help individuals who were not interested in, or would not benefit financially from, marriage, those voices were largely drowned out as many movement organizations, as well as an apparent majority of LGBT individuals, made marriage equality their top political priority.

The movement’s prioritization of marriage was initially followed by many more defeats than victories. In Hawai’i, the progress in the courts was stymied by a constitutional amendment authorizing the legislature to define marriage as the union of a man and a woman. In addition, Congress in 1996, after conducting a vitriolic debate in which conserva-
tive legislators repeatedly claimed there was an urgent need to protect American marriages and families from LGBT people and their relationships, enacted the Defense of Marriage Act (DOMA). That law prohibited the federal government from recognizing the state-sanctioned marriages of same-sex couples (at a time when there were no such marriages). The statute also sought to exempt states from any obligation to recognize the validity of marriage licenses issued to same-sex couples by other jurisdictions. Between 1997 and 2000, fourteen states (including liberal ones such as California, Minnesota, and Washington) enacted laws prohibiting the recognition of marriages by same-sex couples.

While the marriage equality movement was experiencing a series of crushing political and legislative defeats, some of the nation’s state supreme courts began accepting its constitutional claims. In 1999, the Vermont Supreme Court held that denying same-sex couples the rights and benefits that accompany marriage violated the state constitution. The Vermont legislature responded the following year by enacting the nation’s first civil union law, offering same-sex couples the same rights and benefits available to heterosexual married couples under state and local laws.

During the first decade of the new century, the question of whether same-sex couples should be permitted to marry became one of the mostly hotly contested political, social, and legal issues across the country. The Massachusetts Supreme Judicial Court in 2003 became the first state supreme court to hold that the government was required by a state constitution to offer same-sex couples the opportunity to marry. Although the supreme courts of California, Connecticut, and Iowa soon followed with similar rulings, the highest courts of Maryland, New York, and Washington upheld the constitutionality of their states’ same-sex marriage bans. Also during the ’00s, voters in more than half the states approved constitutional amendments prohibiting the recognition of marriages by same-sex couples. One of those amendments, known as Proposition 8, received the support of a majority of California voters in 2008, bringing to an end the issuance of marriage licenses to same-sex couples that had followed the state supreme court’s ruling of a few months earlier striking down the statutory marriage ban.

The fury of the political and legal debates over the issue of marriage equality only increased in the years that followed. However, several im-
portant events seemed to change the debates’ dynamics, with equality proponents gaining the upper hand for the first time. It began in 2012 when President Barack Obama became the first sitting president to embrace equal marriage rights for same-sex couples. At around this time, polls showed that a majority of Americans, for the first time, supported granting same-sex couples the right to marry. And marriage equality proponents, who had won only one of more than thirty ballot-box measures in the previous decade, prevailed in all four such measures—in Maine, Maryland, Minnesota, and Washington State—placed before voters in 2012.

The next year saw state legislatures in Delaware, Hawai‘i, Illinois, Minnesota, and Rhode Island enact statutes granting same-sex couples the opportunity to marry. These political and legislative victories took place around the same time that the movement gained two crucial judicial victories before the Supreme Court. In the first case, the Court held that the supporters of California’s Proposition 8 did not have standing to defend its constitutionality, a ruling that left in place the district court’s finding that the measure violated the federal Constitution. In the second case, the Court struck down the DOMA provision prohibiting the federal government from recognizing state-sanctioned marriages by same-sex couples on the ground that it violated the equality and liberty protections afforded by the federal Constitution. Between that ruling in 2013 and the end of 2014, more than twenty federal courts, at both the trial and the appellate levels, struck down same-sex marriage bans. As a result, the number of states allowing same-sex couples to marry more than doubled in 2014, increasing from sixteen to thirty-five.

After same-sex marriage became a reality in most of the country, the Supreme Court in 2015 agreed to decide the question of whether the federal Constitution guarantees same-sex couples the opportunity to marry. The Court, in Obergefell v. Hodges, concluded that the fundamental right to marry applies in equal terms to same-sex couples. As the Court explained, laws that prohibited lesbians and gay men from marrying the individuals of their choice “are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right.”

As this brief account shows, the LGBT movement concerned itself with the issue of marriage for several decades, and it made marriage
equality its most important objective starting around the middle of the 1990s. In many ways, the movement has been so focused on, and driven by, the pursuit of marriage equality that there has been little time for discussing what the movement’s priorities should be once the goal of nationwide marriage equality was achieved. This book brings together a diverse group of academics, consisting of political scientists, law professors, and a sociologist, to address questions related to LGBT rights following the recognition of same-sex marriages. The attainment of the long-sought goal of nationwide marriage equality provides a highly opportune moment to consider old and new challenges, as well as old and new possibilities, in promoting the political, legal, and social interests of sexual and gender-identity minorities.

It is a grave mistake to believe that the favorable resolution of the marriage equality question somehow represents the end of the struggle for LGBT equality in this country. To so think would be analogous to having believed, in the 1950s, that the Supreme Court’s ruling in Brown v. Board of Education meant the end of any further need to grapple with questions of racial equality in the United States. It does not minimize or trivialize the importance of nationwide marriage equality to remind ourselves, for example, that LGBT individuals continue to be the subjects of violence and harassment in places ranging from schools to streets; that denying jobs, housing, and goods and services to sexual and gender-identity minorities remains legal in most states; and that, as of this writing, both houses of Congress (as well as most state legislatures) are controlled by the GOP—a political party that has traditionally been unsupportive of LGBT equality measures.

At the same time, however, the attainment of marriage equality across the country constitutes a monumental achievement by the LGBT movement. In many ways, there is no bigger or more important question facing the movement’s leaders and constituents than how to respond to this historic success, an accomplishment that almost no one, a few years ago, predicted would happen as soon as 2015. That is the reason I have asked the contributors to this volume to grapple with the question of what marriage equality means for the future of LGBT rights.

In exploring what is likely to be next, Gary Mucciaroni, in chapter 1, argues that the attainment of marriage equality will not push the movement in a starkly different direction. Mucciaroni discusses several dif-
ferent factors that limit the movement’s ability to change directions in significant ways, including its diversity and fragmentation; its organizational emphasis on professional advocacy over grassroots participation; and its identity-based civil rights orientation. Within those restraints, Mucciaroni envisions the movement, post–marriage equality, seeking to increase LGBT representation among elected and other government officials and placing greater emphasis on LGBT rights issues in other countries. He also argues that the movement would benefit from moving beyond issues of civil rights, and the policing of nondiscrimination obligations, in order to focus more explicitly on efforts to engage and educate institutions of civil society, such as corporations and schools, on the need to adopt policies that make LGBT individuals feel safe, secure, and respected as equals.

Donald P. Haider-Markel and Jami Taylor, in chapter 2, explore some of the challenges in implementing marriage equality, including resistance from some government officials; the enactment of religious-based exemptions allowing public officials and private individuals to refuse to facilitate marriages by same-sex couples; and the absence of legal antidiscrimination protections for sexual minorities and transgender individuals in most states. Haider-Markel and Taylor also discuss the possibility that the attainment of the marriage equality objective may leave progressives feeling less inclined to expend money and energy on LGBT issues. They also urge those in the movement to pay greater attention to the challenges and complexities raised by both HIV/AIDS and transgender issues. And, like Mucciaroni, they envision the American LGBT rights movement becoming more engaged with questions of international human rights and the treatment of sexual minorities in developing nations.

The divide between red and blue states is explored by Clifford Rosky in chapter 3. While legal equality is now a reality in most blue states, Rosky reminds us that such equality is still far off for LGBT individuals living in most red states, a phenomenon that remains true even though same-sex couples are now able to marry nationwide. He therefore urges that the movement turn “back to work” by prioritizing the passage of antidiscrimination laws. Rosky contends that such a prioritization will require two strategic shifts: first, an increased investment in local rather than national lobbying, and second, an increased investment in swing
and red states. Rosky also flags two important questions that the movement must address when it goes “back to work”: (1) whether to lobby for limited or expansive laws and (2) how to use litigation and lobbying in ways that support, rather than undermine, each other. In exploring these issues, Rosky counsels that lobbying must not entertain exemptions from antidiscrimination laws that apply only to claims brought by LGBT plaintiffs, and activists should reject proposed laws that fall short of what may be achieved through successful litigation under existing antidiscrimination laws.

In chapter 4, Nancy Knauer tackles the topic of LGBT elders and their interests, a subject that has received little attention from LGBT organizations and activists. Knauer notes that although the advent of nationwide marriage equality offers LGBT elders a much-needed measure of legal protection and security, the right to marry fails to address some of the most pressing issues facing such elders, including the legal fragility of their extended chosen families, their disproportionately high levels of financial insecurity, and their fear of encountering anti-LGBT bias across a wide range of senior services. Knauer also uses LGBT elder issues to make two broader points about the nature and future of LGBT rights advocacy. First, while emphasizing the similarities between sexual minorities and heterosexuals can be helpful in some settings, it fails to address disparities between the two groups. As Knauer explains, there are several crucial characteristics that distinguish LGBT elders, including the fact that they are more likely to be single, to live alone, and to be estranged from their families of origin, while being less likely to have children. Second, Knauer points out that LGBT elders challenge the strong claims of shared identity that undergird the contemporary LGBT rights movement. Many members of the older generation, for example, do not identify as homosexual or gay, much less as “out and proud.” As a result, she argues, they stand as living examples of the historically contingent nature of LGBT identity.

While Knauer discusses the elderly, Nancy Polikoff, in chapter 5, focuses on children. Polikoff delineates the ways in which marriage equality advocates emphasized the needs and interests of primarily white and well-to-do lesbian and gay families while ignoring those of LGBT parents of color. Polikoff argues that because same-sex marriage advocacy overlooked the family circumstances of the majority, and the
most disadvantaged, of children raised by gay and lesbian parents, future advocacy must put the needs of those children at the forefront. She also questions the assumption by many in the marriage equality movement that the recognition of same-sex marriages will help solve the legal parentage questions arising from the formation of LGBT families. She urges advocates not to conflate marriage with parentage. By focusing so intently on marriage, advocates have ignored the fact, for example, that children sometimes have two parents who are not interested in marriage. Polikoff also warns that there is no guarantee, post–marriage equality, that legislatures or courts, especially in conservative states, will allow nonbiological lesbian mothers to gain parentage rights through marital presumption laws. The focus on marriage rather than on parentage, Polikoff argues, has created troubling blind spots for the LGBT movement, blind spots that can be removed only if advocates recognize the need to separate parentage questions from those of marriage.

I argue in chapter 6 that the imminent attainment of the marriage equality goal offers the LGBT movement the opportunity to push for reforms that reduce the legal salience of distinct gender and sexual identities. A growing number of Americans, especially young ones, are becoming increasingly comfortable with the idea of fluid and changing notions of gender and sexuality. I contend, therefore, that the movement should prioritize encouraging the state to adopt laws and policies that recognize and protect gender and sexual fluidity and multiplicities. This objective can be pursued through political and legal campaigns that, for example, seek (1) to promote an understanding of sex and sexual-orientation antidiscrimination law that is unmoored from the protection of distinct identities and (2) to remove one of the last gender-based barriers to accessing public spaces by ending gender segregation in bathrooms and other similar facilities. I argue that these types of objectives represent reforms that are not grounded in the need to protect individuals on the basis of distinct—and ostensibly fixed and static—gender and sexual identities. Instead, the attainment of these goals would promote the equality rights of all individuals regardless of how (or even whether) they identify, or of how society identifies them, along gender and sexuality continuums.

In chapter 7, Joseph Fischel argues that, despite the contentions of marriage equality proponents to the contrary, the push for same-sex
marriage has opened the door for the legal recognition of polygamous marriages. Rather than denying the likelihood or advisability of such recognition, Fischel urges the movement to embrace it as part of its commitment to relational autonomy, which he defines as the capability to codetermine intimate and/or sexual relations. In Fischel’s view, the movement should shift perspectives from an identitarian to a relational one, from LGBT equality to relational autonomy, and from individualized discrimination to social transformation. In calling, in effect, for LGBT rights without the “LGBT” part, Fischel encourages the movement to offer ethically defensible approaches to pressing policy issues that it has largely sidestepped or ignored, including sexual violence and sex education. In the case of sexual violence, Fischel calls for a more nuanced approach that moves beyond demonization, ostracization, or trivialization and focuses on how sexual assaults destroy the capability of persons to codetermine their sexual and intimate relationships. He also argues that if advocates approach questions of sex education and youth sexuality from a relational autonomy perspective, they would avoid the current desexualization and singularization of the victimized gay teen while empowering and enabling young people to be skilled sexual decision makers.

Russell Robinson, in chapter 8, contends that there are important differences between lesbians and gay men in matters of relationships and monogamy, differences that have been largely ignored by both scholars and advocates. Robinson argues that the push for LGBT rights, and in particular the need to present a unified and sympathetic “gay and lesbian” subject to the courts and public in order to attain marriage equality, has led many community leaders to “closet” gender differences. On the positive side, Robinson believes that the success of the marriage equality campaign may offer greater opportunities for admitting and engaging divergent gender patterns in sexual minority communities. But he also worries that the attainment of marriage equality may lead to a renewed attack on LGBT people, gay men in particular, whose sexual relationships fall outside of traditional and monogamous ideals.

While Robinson tackles questions of gender, Katherine Franke, in chapter 9, grapples with those of race. Franke warns that same-sex couples today face the challenges of enduring bigotry; as with emancipated black people who gained the right to marry in the nineteenth century,
the types of highly problematic justifications for the longstanding exclusion of sexual minorities from civil marriage will survive the repeal of that exclusion and fuel a backlash against the new rights holders. Franke argues, in other words, that homophobia, like racism, will have a significant postmarriage afterlife. In doing so, she urges same-sex couples to prepare for the ways in which access to marriage licenses will lead to new forms of state discipline and regulation driven by prejudice. Franke also points out that what the marriage equality cases have done for gay people has not been, and cannot be, accomplished for individuals bearing the signature of racial inferiority. In the marriage cases, lesbians and gay men have accomplished a kind of rebranding of what it means to be “homosexual”—they have been awarded a type of “dignity of self-definition” that law and culture still deny to African Americans. Finally, Franke cautions that the members of the gay community who have succeeded, through marriage equality gains, in lifting a badge of inferiority that marked them are those who are willing or able to present their relationships as respectable. The process of redeeming the social reputation of “good gays,” Franke argues, depends on a contrast with “bad gays” who do not want to marry or discipline their sexual selves into a tidy couple form.

The United States, of course, is not the first country to grant same-sex couples the opportunity to marry nationwide. The LGBT rights movements in those other nations have gone through a process that the movement in this country is now embarking on: addressing and responding to the challenges facing sexual and gender-identity minorities in a post-marriage equality society. Although every country has social, political, and legal characteristics that impact differently on LGBT issues, we can learn from each other’s experiences. For this reason, the book ends with chapters written by experts on three countries—Canada, Holland, and France—that preceded the United States in recognizing the need for nationwide marriage equality.

David Rayside, in chapter 10, explains that there is some evidence that LGBT activism in Canada post-marriage equality has declined, especially in the ability of movement groups to mobilize grassroots activism on a large scale. But he cautions that factors other than the attainment of nationwide marriage rights in 2005 probably contributed to the decline. These factors include the difficulty of sustaining
volunteer-based groups over long periods of time, the diffuse character of the Canadian LGBT movement, and the increasing proportion of LGBT advocacy taking place in largely disconnected institutional settings (such as government departments, major political parties, and the courts). Rayside also explains that movement groups, since the attainment of marriage equality, have paid increased attention to other issues such as the need for greater inclusivity for sexual and gender-identity minorities in schools. He also finds that sexual-minority communities historically on the movement’s margins, such as transgender people and LGBT members of the large diasporic communities in Canada’s major cities, are increasingly finding ways to be heard. Finally, Rayside explains that the postmarriage movement is grappling with competing rights claims on sexual and religious grounds while paying greater attention to the challenges facing sexual minorities in other regions of the world. Although most of the LGBT issues that Rayside identifies were already rising in prominence during the push for marital rights in Canada, the expanded rights regime that accompanied marriage equality has increased their profile by exposing ongoing disparities for LGBT people in that country.

Jan Willem Duyvendak, in chapter 11, explains that the attainment of marriage equality in Holland in 2001, and the accompanying further “normalization” of homosexuality, has had two troubling effects. First, it has allowed political parties and politicians, across the political spectrum from the far Right to the far Left, to use acceptance of homosexuality as an ideological benchmark to test whether other minorities, most prominently Muslim immigrants, can ever be “truly Dutch.” Duyvendak explores how, from this perspective, Muslim immigration is conceived as a threat to the stability of the Dutch progressive moral order and to Dutch cultural and sexual liberties. Gay rights and gender equality have thus become a normative framework that helps to shape a critique of Islam and multiculturalism. Second, the normalization of homosexuality has led lesbians and gay men to embrace heteronormative discourses and presentations that minimize overt expressions of sexuality and gender variance. Duyvendak points out how this mainstreaming of homosexuality leaves ongoing problems, such as the high rates of suicide attempts by LGBT youth and antigay violence in Holland, unaddressed and unchallenged.
Finally, Bruno Perreau, in chapter 12, explains that the 2013 law allowing same-sex couples to marry in France left in place many different forms of discrimination against LGBT people, including the absence of an automatic presumption that same-sex married couples are related to each other’s children, a ban on surrogacy, and an insistence on medicalizing the ability of transgender individuals to legally change their gender. These policies, when coupled with the Socialist Party’s tepid support for sexual-minority rights, have encouraged the continuation of the fierce resistance by religious and social conservatives to LGBT equality that took place in the months leading up to the adoption of the 2013 marriage law. Perreau details the chronology of that resistance, showing that its manifestations and motivations after the enactment of the marriage equality law are essentially the same as they were before. He also argues that the resistance is being fueled by the fear that the French society is embracing the teachings of so-called gender theory, which, in ostensibly calling for the denaturalization of sexual categories, seeks to destabilize the “traditional French family.” Perreau contends that the repeated denunciations of gender theory that are part of the political resistance to LGBT rights are saturated with nationalist overtones that contain racist, anti-Semitic, and anti-American elements. He also argues that political progressives should discard the very notion of a “postmarriage” LGBT politics and the mythology of the “battle won.”

It is, of course, difficult to predict with exact certainty what the priorities and challenges will be for LGBT organizations and activists in the decades to come. It is my hope, however, that the diverse perspectives, ideas, and insights contained in this book will help those who care about the rights of sexual and gender-identity minorities explore objectives and overcome obstacles in a post-marriage equality society.

NOTES
1 E. B. Saunders, “Marriage License or Just License?” ONE, August 1953, pp. 10–12.


8 Carlos A. Ball, From the Closet to the Courtroom: Five LGBT Rights Lawsuits That Have Changed Our Nation (Boston: Beacon, 2010), pp. 165–66.


13 Conaway v. Deane, 932 A.2d 571 (Md. 2007); Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006); Andersen v. King County, 138 P.3d 963 (Wash. 2006).

14 In 1996, Gallup found that only 27 percent of Americans believed that same-sex marriages should be legally recognized. In 2010, a majority of Americans, for the first time, told Gallup they supported the legal recognition of same-sex marriages. Gallup polls taken in later years also found that a majority of Americans supported marriage equality. See Jeffrey M. Jones, Same-Sex Marriage Support Solidifies above 50% in U.S., Gallup Politics (May 13, 2013), http://www.gallup.com/poll/162398/sex-marriage-support-solidifies-above.aspx, accessed April 2015.

