

## Chapter 1

# A Trip to the “Alter”

In November 1998, 69 percent of the voters in Hawai‘i approved an amendment to the state constitution to permit the legislature “to reserve marriage to opposite-sex couples.” Coming five years after the Hawai‘i Supreme Court, in *Baehr v. Lewin*,<sup>1</sup> held for the first time that same-sex marriage was a matter of equal protection law, and two years after the state lost its legal defense of “traditional marriage” on remand, the hard-fought vote capped a political uprising against same-sex marriage that tore through the nation and reverberated around the world. Although not one legally recognized marriage between two men or two women existed, the prospect of same-sex marriage—and gay rights more generally—has antagonized electorates and legislatures in all fifty states, fueled constitutional amendments to remove civil rights protections, and provoked the federal Defense of Marriage Act,<sup>2</sup> which authorizes the nonrecognition of same-sex matrimony. This movement and countermovement has reworked fundamental American ideals about law, democracy, and citizenship. This politics of the rights of gays and lesbians is only tangentially about the gay body and gay practice; by implicating the place of courts and the limits of legal discourse, same-sex marriage operates as a transformative metonym for the body politic. The manner in which civil rights have been challenged by this reaction and the means by which they inform and reform the mentalities of American governance is the terrain investigated by this book.

### *Disputing about Courts*

The 1998 amendment to the Hawai‘i constitution overshadowed another that was passed in Alaska on the same day by an identical lopsided margin.<sup>3</sup> Both votes were local referenda on the extension of civil rights protection to lesbians and gays, but it was the Hawai‘i case with its sinuous and protracted struggles that mobilized the concern and

interest of national civil rights and religious organizations, and politicians of all stars and stripes. The Hawai'i case began in 1990 when two lesbian couples and one gay couple<sup>4</sup> applied for marriage licenses from the department of health. Although these six people acted on their own initiative, similar uncoordinated, dispersed efforts to challenge marriage laws were taking place in other states, with a golden national payoff: the first state to grant rights would open the door for lesbians and gays throughout the United States, who could rely upon constitutional guarantees that contracts in one state would be given "full faith and credit"<sup>5</sup> in any other.

Similar efforts in other states had been rebuffed as early as the 1970s.<sup>6</sup> There were, thus, dashed hopes but little surprise when the Hawai'i attorney general, secure in these earlier precedents, denied the applications for marriage licenses.

Joined by Dan Foley, a local civil rights attorney, the three couples sued in state circuit court, alleging violations of their rights of privacy and equal protection. At trial in 1991, the court case was dismissed by Judge Robert Klein, who ruled, after considering equal protection arguments, that same-sex couples did not enjoy a right to marry. Foley appealed, and in May 1993, the state supreme court in *Baehr* made the first national ruling that rejection of these marriage applications was unconstitutional gender discrimination absent a showing of compelling state interest. The state immediately filed a motion for reconsideration, citing the public interest in restricting marriage to opposite-sex couples as a means to uphold moral values and protect children, but the supreme court rejected the motion and remanded the case for a trial in the circuit court to determine whether such an interest could be adequately asserted.

The aftershock of the supreme court's decision trembled throughout Hawai'i and headed for the mainland like a slowly building tidal wave. Rightly believing the standard of a compelling state interest could not be met, legislators concerned about the potential fiscal, political, moral, and social impacts of the ruling sought to mold public opinion into opposition to same-sex marriage and resistance to the role of courts in extending civil rights protections and social policy. In a series of hearings held in the fall of 1993, just months after the *Baehr* ruling, testimony from hundreds of citizens on all islands was heard by a circuit-riding house Judiciary Committee in anticipation of legislative action to derail the case. Although the passionate testimony was mixed

in its support for, and opposition to, court-sanctioned same-sex marriage, the house leadership was firmly opposed and produced legislation in the spring of 1994 declaring procreation to be the basis of the marriage laws (a position purged from the law books by the same body in 1984 as prejudicial against the handicapped, the elderly, and others). The new legislation declared "that Hawai'i's marriage licensing laws were originally and are presently intended to apply only to male-female couples, not same-sex couples." In addition, the law, signed by the governor, declared the supreme court's decision "essentially one of policy, thereby rendering it inappropriate for judicial response."<sup>7</sup> In exchange for the support of the more progressive senate for the legislation, a constitutional amendment reinforcing this position was not brought up for a vote.

Uncertain of the effect of the new statutory language and spurred on by conservative religious groups who were aroused by the first significant opportunity for political mobilization by conservatives in the state's history, the legislature created a Commission on Sexual Orientation and the Law to advise it on public policy, mandating two seats for Mormon and Catholic representatives. The makeup of the commission was successfully challenged in court on First Amendment grounds, and a newly constituted board purged of its official religious representatives began to take testimony in the fall of 1995. With two conservatives dissenting, the commission ultimately recommended five-to-two that no further interference with the *Baehr* case be contemplated and that, as an alternative, a comprehensive domestic partnership statute be created to give same-sex couples most of the benefits of marriage. Conservatives reacted vigorously against the commission report, agitating for a political end to the case before the court trial—scheduled for the fall of 1996—would place another legal support in the foundation for same-sex marriage. Again, conservatives demanded a constitutional amendment to limit marriage to opposite-sex couples. Emotional hearings on an amendment were held by the senate (where support for it was uncertain), which again drew hundreds of citizens testifying for and against same-sex marriages. Amid heavy lobbying by groups for all sides, the senate remained deadlocked, rejecting a midnight attempt to revive the amendment on the last day of the session.

When the circuit court trial finally began in September 1996, marriage law remained substantially unchanged since the *Baehr* decision. The judge, Kevin Chang, would ultimately disappoint opponents of

same-sex marriage with his ruling that rejected every argument made by the state in behalf of restricting access to marriage. But before the trial began, Congress had moved quickly to forestall unwanted national ramifications of the Hawai'i decision. The Defense of Marriage Act was passed in four months from the time it was introduced in the House—in spite of the summer recess. Final approval by the Senate was timed to coincide with the opening day of the Hawai'i trial, September 10. DOMA was signed by President Clinton days later, three months before the Hawai'i judge handed down his ruling.

Despite the unequivocal nature of the Hawai'i trial court's decision, which legalized same-sex marriage, Judge Chang allowed the state's motion for a stay pending another appeal to the same supreme court, which had issued the original *Baehr* ruling. As the ultimate judicial outcome was no longer in doubt, opponents doubled their efforts to stop the case. With public focus high, several longtime legislators, marked (sometimes unfoundedly) as supporters of same-sex marriage by their challengers, were thrown out of office in the November 1996 elections. Fearful of more electoral carnage, legislators held hearings again in 1997, and once more hundreds of people presented oral and written testimony. Added into the legislative mix for the first time were conservative groups that brought together religious and lay activists and many citizens who had never before been involved in social politics and were wary of both legislative and judicial handling of same-sex marriage. This grassroots campaign was kicked off by a five-thousand-person rally at the state capitol in January 1997, the largest political rally Hawai'i had seen since statehood. No longer able to resist the ferment of opposition, the senate finally agreed to amendment language in exchange for the house's support for the country's most comprehensive domestic partnership legislation. Bowing to concerns that the political process was no longer working in the interest of popular forces and the desires by some activists to have a second bite at the marriage issue, the legislature also authorized a ballot measure calling for a constitutional convention. The siren song of same-sex marriage saturated Hawai'i politics—including media time and fund-raising—throughout 1997 and 1998 until the November election.

What is true for Hawai'i—social iconoclasm and independence, a history of political stability, and insularity—is also true of Alaska. In 1994, inspired by the *Baehr* decision, two Alaska men filed for a marriage license in their home state. Although Alaska authorities rejected

the demand on the authority of a previous ruling that Alaska's statutory scheme did not contemplate same-sex marriage, a court in February 1998 ruled that Jay Brause and his partner were entitled to a marriage license unless the state could show compelling reasons at trial to deny equal protection.<sup>8</sup> In an opinion that seemed to consciously search for a judicial antidote to the anticourt politics attendant on the *Baehr* decision in Hawai'i, circuit court judge Peter Michalski strove to justify same-sex marriage as an inevitable consequence of the individual right to choose one's life partner. Within months, the Alaska legislature proposed an amendment for the fall ballot similar in wording to the Hawai'i amendment designed to limit court jurisdiction.<sup>9</sup>

Also inspired by the Hawai'i case, three same-sex couples in Vermont who had been denied marriage licenses sued for relief in the summer of 1997. The trial judge, Linda Levitt, agreed with the state's arguments that the language of "bride" and "groom" in the statutes was evidence of legislative intent to limit marriage to couples of the opposite sex, and she dismissed the case.<sup>10</sup> The plaintiffs appealed. Ten days after the Hawai'i Supreme Court issued its final ruling in *Baehr* that the 1998 amendment had removed its jurisdiction over marriage and further signaled its unwillingness to resurrect the constitutional equal protection principles it had enunciated in 1993,<sup>11</sup> the Vermont Supreme Court revived the *Baehr* template and ruled that same-sex couples are entitled to "the common benefit, protection, and security that Vermont law provides opposite-sex married couples."<sup>12</sup> Whether common benefit requires marriage or some other "equivalent" legal status was a question left by the court to the legislature in cognizance of the popular reaction against judicial activism in Hawai'i and Alaska, as well as the "political caldron"<sup>13</sup> stirred by the marriage rulings that have led thirty-three states to ban same-sex marriage since 1995.<sup>14</sup> The Vermont legislature ultimately opted, in the early months of 2000, for the creation of a "civil union" for lesbians and gays. Signed into law on April 26 by Governor Howard Dean, the legislation went further than any other state law in recognizing same-sex partnerships.

But seven years after the Hawai'i court had ruled that marriage was a matter of equal protection, civil union stands as an ambiguous sign for the progress of civil rights. Unlike marriage, civil union lacks portability outside of Vermont and is unlikely to affect federal rights and duties. As a sign of equality, civil union thus appears in some light as an atavism, a throwback to the separate-but-equal status rejected in

*Brown v. Board of Education* (1954). Many commentators agree with Andrew Sullivan (2000) that civil union for gays and lesbians “is an act of pure stigmatization.” Yet, in its recognition of the cloyingly divisive political atmosphere that has targeted courts for their support for gay and lesbian rights, it is a thoroughly contemporary decision, marking the denouement of civil rights.

Why have the idea of same-sex marriage and the struggles over its legalization in Hawai‘i antagonized so many so quickly? And how has this politics produced a willingness on the part of courts in Hawai‘i and Vermont to retreat from a post-*Brown* commitment to equality without separate legal status? Popular opposition to same-sex marriage has been variously voiced as a compelling matter of tradition, religious teaching, and natural law. For the Mormon Church, which has spent millions of dollars to thwart same-sex marriage, “This issue has nothing to do with civil rights. For men to marry men, or women to marry women, is a moral wrong.”<sup>15</sup> For others, it “is not about civil rights. It is about the survival of a civilization.”<sup>16</sup> Despite these protestations against the significance of civil rights to the same-sex marriage issue, rights seem to have everything to do with it.

Indeed, it is surprising from the various sources of authority invoked by the guardians of traditional marriage that marriage policy itself is not more fully on trial. One activist in Hawai‘i complained against this oddity by pointing out that “The CONVICTED felons in our State penitentiary are able to marry and receive ALL the benefits of marriage, even while they are still in prison. Why am I, a law-abiding and taxpaying citizen, not able to have the rights that a convicted felon has?”<sup>17</sup> The line drawn at same-sex marriage seems especially curious considering the degree of toleration acceded the right to marry. As M. D. A. Freeman has noted,

We allow murderers and rapists (even those who have murdered or raped previous spouses) to marry; we allow pedophiles and child molesters to marry. We do not stop child abusers or . . . “dead beat dads” . . . from marrying. Sadists, masochists and fetishists may marry and are not obliged to choose partners with similar inclinations. People who are HIV-infected or suffer from AIDS are allowed to marry. There is special legislation to facilitate death-bed marriages. Transvestites may marry (that the groom is wearing a bridal dress is no impediment to marriage). And transsexuals may

marry [in some states] so long as they marry someone of the other gender from that which they themselves were born in: two "women" may thus marry if one of them was born a man. Indeed, two transsexuals may marry, provided one was born a boy, the other a girl. . . . [T]here are furthermore no laws requiring persons wishing to marry to prove that they are heterosexual: homosexual men may marry women and lesbian women may marry men (and, indeed, do). (1999, 1)

Public acquiescence to these potentially objectionable unions tacitly sanctions the Supreme Court's recognition in 1967 of the liberty to marry as "essential to the orderly pursuit of happiness" and "one of the 'basic civil rights of man.'"<sup>18</sup> The recognition of marriage as a vital civil right, alongside the declining tendency to criminalize sodomy<sup>19</sup> and the growing tolerance for diverse living arrangements, makes the public rejection of same-sex marriage seem all the more a significant limit in need of explanation and comprehension.

I argue in this book that the political majorities aligned against same-sex marriage should be understood as a consequence of two interlocking movements that together reveal the changing character of rights discourse. The first is a reaction against the fast-growing visibility of gays and lesbians and the forms of knowledge and political presentation of the self under which the demand for civil rights has been made. This has created a responsive set of political strategies that use lesbian and gay identities and political claims as an "alter" against which majorities have realized their opposing interests. If the challenge by lesbians and gays for recognition and legal protection is the underlying motivation for these majorities, it is not in itself sufficient to account for such an energetic reaction against same-sex marriage. I explore a second, related reason for the vitality of this politics. The rhetorical tactics used to retain the privilege of marriage for nongays have combined formerly diverse, contradictory, and sometimes dormant American discourses into mutual coherence, amplifying their effects. This hybrid political language has sampled from liberal and nonliberal political ideologies, neoliberal economic notions, nationalist ideas of political space, religious morality, themes of civilization, and even—indeed, especially—from the discourse of civil rights. Cobbled together, these discourses aid the constitution of new identities capable of building majorities and

driving them to the polls in opposition to courts and rights-based movements. The organization of political power that is focused through the lens of opposition to same-sex marriage, more than just defensive of traditional hierarchies and privileges challenged by sexual minorities, has projected a new and compelling American sovereignty with important consequences for our understanding of law and civil rights.

While an emphasis on the same-sex marriage debates as public culture will tend to miss much of the private vitriol and religious vilification that have underscored recent opposition to lesbian and gay rights in the United States (see Herman 1997), it provides a chance to explore the political forces that bowdlerize these debates, the character of, and opportunities opened by, rights talk amid massive public opposition, and the political field of alliance and majority formation, all tasks that this book takes up. Understanding the ways civil rights have been deployed in these public debates does not necessitate a choice between the moral good or utilitarian ill of same-sex marriage, nor need it lead to a normative argument about how liberalism can best be saved from its emerging illiberal counterparts, issues that have likewise been removed to the background of this narrative. Nevertheless, my interest in this study remains critical. As Foucault reminds us, one “does not [have] to be ‘for’ or ‘against’ the Enlightenment” (1984, 43) in the interest of discovering where the possibilities of freedom remain to be found today. In order to trace the opportunities revealed and foreclosed in the same-sex marriage controversy, I study public discourses about rights and assess their consequence for the identities and tactics of the social movements involved in the same-sex marriage debates that have taken place in Hawai’i and elsewhere. As a national and local politics linking marriage for some to the status of citizenship, this is a multifaceted study of the limits to union.

### *A New American Sovereignty*

The reaction against same-sex marriage and other rights for lesbians and gays has been depicted as a long-simmering culture war with three broad fronts: attacks on state programs aiding group empowerment, restaffing of the judiciary with personnel less supportive of minority rights, and direct referenda asserting the interest of the “people” above the civil rights of minorities.<sup>20</sup> Imagined severally as a

moral crusade, reassertion of the traditional, standing up for civilization, or defending and reinforcing domestic and international security, the inchoate culture war is nonetheless confronted with a singular problematic: the constitution of a majoritarian political identity committed to social, political, cultural, and economic change. Facilitating the creation of common cause among religious conservatives, neoliberals, and the generally intolerant and socially disgruntled has been a language of sovereign right and entitlement. Sovereignty long predates this political coalition but has morphed along with it. In democratic political discourse, sovereignty is often seen to contour the shadows of more animating modern political inventions: the nation-state, the rule of law, the autonomous and rationally self-interested individual, the historical career of civilization. What is novel today is that sovereignty is increasingly articulated as an autonomous discourse able to realign democratic institutions, remake social commitments, anneal political memories, and unify new majority identities. Lesbian and gay demands for civil rights have increasingly bumped up against the language of sovereignty.

Democratic sovereignty has usually been thought synonymous, or at least coterminous, with the rule of law and the state. This modern genealogy derives from the defeat of the divine right of kings (Morgan 1988, 24ff.), orienting us toward the sanctity of autonomous individuals, the will of political majorities, and a singular and exclusive source of political power—a diversity within unity represented by a constitution—to which both political and legal spheres must ultimately answer. This sovereign logic is enshrined in one form of celebrated contemporary constitutional culture: “Beginning with the words, ‘We the People,’ the Constitution is a collective representation because it signifies the unified body of the nation, fusing that nation into a single text in which all members can find themselves represented” (Levin 1999, 2). Nonetheless, the very form of this representation—especially the abstractions of individual autonomy and the assumptions of unity supporting a constitutional nation—tends to work against new demands for inclusion by particular claimants, making prominent an alternative form of American constitutional culture: the spectacle of popular limitations to the universal (see Smith 1997).

The same-sex marriage debates draw their energy from this alternative model made possible by the political dissociation of sovereignty, law, state, and nation. The defense of sovereignty raised against the

intrusion of civil rights for same-sex partnerships is projected by political majorities as one means of realizing that security that state and government are expected to provide, as well as defining the meaning of rule that law and civil rights are understood to enforce. Pulled loose from its moorings in the state and delaminated from the rule of law, the articulation of sovereignty can be used to create new identities, redirect state actors, instruct judges, and frustrate those asking for acknowledgment of their full rights of citizenship.

Distinguishing sovereignty from its common association with state, nation, and law helps make sense of several historical and philosophical problems. The first is that citizenship has long been an unfinished category. In the United States, this incompleteness is recognized in the constitutional impediments to democratic participation of slaves and later people of color, women, workers, the indigenous, and resident aliens. Despite the common progressive narratives of expansion of political opportunities, many today—such as lesbians and gays—assert identities that are not fully recognized in the law, limiting democratic participation.

If citizenship is a limited category, so, too, is the nation that famously has been given problematic status by Anderson as an “imagined political community . . . imagined as both inherently limited and sovereign” (1983, 15). What limits the nation is, in part, that which contributes to the power of this imagination, and the potential dissociation of national boundary and sovereign authority asserts a powerful ideological force in this regard. As Stychin has argued, “The boundaries of nations and nation states are rarely identical, but the belief that they *should* be has conveniently served as the basis for dominance by some national groups at the expense of others and for the construction of minorities as outside of the nation *and* the nation state” (1998, 3). In the case of America, this general problem of fixing boundaries is exaggerated by the weakness of the usual categories of national history. Without a strong tradition of class conflict, or a common origin of the settler community, lacking a full accounting of indigenous sovereignty and a bounded space unperturbed by an expanding frontier, there is no foundational referent for “America.” As Campbell has argued, “if all states are ‘imagined communities,’ devoid of ontological being apart from the many and varied practices which constitute their reality, then America is the imagined community *par excellence*” (1992, 105).

The imaginary and sovereign boundaries of nation-states as much

as nations-as-peoples continue to be flexed and tested by geopolitical and economic changes long after the frontiers have been closed and historical memories have been fixed. International markets have given rise to powerful global corporations and significant transnational flows of capital rivaling the economic resources of many smaller countries. While rivals in size, these same markets have also revalued the meanings of national security around which sovereign borders have been drawn. Tourism, for example, has enabled border crossing to shift meaning from a danger to state security to the enhancement of economic well-being of the commodified state. This holds important implications for internal threats to security, as once-dominated cultural minorities are increasingly marketed as exotic attractions or economically desirable customers (Alexander 1994; Evans 1993; Hennessy 1995). At the same time, globalization has accelerated social change, altering on the one hand the forms of self-identification, social aspiration, and demands for inclusion that some excluded groups, such as indigenous peoples and social movements, can make, and, on the other hand, forcing migrants and refugees to cross borders and challenge national imaginaries (Soguk 1999). Economic changes have also established new forms of political authority that, in the case of the European Union, create multinational opportunities for reasserting legal rights, identities, and international imaginaries that confront traditional notions of state sovereignty (Darian-Smith 1995, 1999; Stychin 1999). All these factors have tended to dissociate the representational strategies around which nation, state, and sovereignty are imagined and articulated.

What, then, is unique about the representation of sovereignty? Marx observed in *The Eighteenth Brumaire* that the origins of modern democratic sovereignty and the consolidation of bourgeois power in nineteenth-century France were yoked to a hierarchical dichotomy separating *security*, voiced in the recurrent theme of "property, family, religion, order," from *anarchy*, understood primarily as socialism and communism (Marx 1963). Property signifies the realm of the sovereign individual whose self-ownership justifies the ownership of things (Locke 1963) or whose things guarantee self-possession and subjectivity (Hegel 1967), secured within wider institutions of society, government, thought, and order, demonstrating the essential linkage—if not overlap—between sovereignty writ small and democratic, political sovereignty. Today, the dangers of anarchy that Marx noted are repre-

sented less by the body of the proletariat that took aim at property and bourgeois individuality, than in the accelerating political and social dynamics of modern capitalism, and the bodies representing these threats to economic and political order. Nevertheless, both the particularities of the construction of sovereignty and the rhetorical form of the dichotomy between sovereignty and anarchy suggest a remarkable consistency.

Consider the case of the family that in the same-sex marriage debates has once again become a significant rallying cry for political order. The conservative politics of family values entails a particular forgetting of the wild diversity of forms in which familial relations have been lived and sanctioned in the past in order to create the image of a stable, naturalized, and timeless social institution (see Brown 1995a, 206ff.; Nicholson 1997; Shapiro 2001). What remains historically constant, as McClintock (1995) reminds us, is that the family has served as a handy naturalizing metaphor for hierarchy, generalizing the subordination of woman to man and child to adult into the ordering of social difference—what she calls a naturalized “hierarchy within unity” (45). As she and other postcolonial theorists have remarked, family rhetoric and the sovereign imagination that it upholds have particular affinities to the discourses of civilization and Christianity that promise security, progress, and salvation on the renunciation of savage sexual customs, and the institutionalization of monogamy and patriarchy (see Merry 1998, 2000). Imagining sovereignty in the terms of the family legitimates a form of order in which social differences have their place.

The latent tensions of a “hierarchy within unity” in the family prevent a sovereign politics of family values from reaching any definitive closure. Feminists have argued that patriarchal power is not entirely contained by profamily political rhetoric. De Beauvoir (1953), for example, argued for the importance of autonomy within the private sphere, what she called a “precarious sovereignty” enjoyed by women despite the identification of sovereignty with male privilege. As Hoffman (1998, 65ff.) has noted, this idea of a precarious sovereignty endorses the notion of the sovereignty of self-control within the private realm that lies alongside a hierarchical notion of state sovereignty. Minow has shown how women used the social and legal assumption of their caregiving roles adhering to this private realm to establish a “shadow government” based on imputed feminine norms that later permitted the exercise of power within the public sphere (1985, 837ff.). In like man-

ner, gays and lesbians, disadvantaged by heterosexual family rhetoric, have been setting up same-sex marriages, increasingly solemnized by churches and synagogues and informally recognized by some employers, without recourse to state sanction. Their attempts to move out from this shadow government into public acceptance have obviously hit a sore public nerve, suggesting the importance of boundaries between the sovereignty of private autonomy and its universal form.

Boundary maintenance is challenged by more than shadow governments. Evolving economic relations such as the extermination of the family wage, the advent of flexible production, and the commodification of domestic work have encouraged the family to be reimaged away from the nuclear forms associated with industrial capitalism and now articulated in the conservative rhetoric of family values (see Casey 1995; D'Emilio 1983; Gramsci 1971, 296ff.; Stacey 1996). Seemingly agent-less mechanisms of social change, economic processes have proved to be poorer political targets than social movements and the culture industries that embrace social difference. Identifying new familial forms with more visible targets permits inchoate concerns over economic uncertainty, the meaning of progress, and even civilization to reinforce dominant norms by sharpening lines of social cleavage.

Nietzsche's notion of *ressentiment* as an affect of suffering that blames particular groups in order to assuage the hurt of poor fortune seems particularly apt to explain this dynamic. Connolly observes that, fueled by *ressentiment*, identity increasingly "requires difference in order to be and converts difference into otherness in order to secure its own self-certainty" (1991, 64). In an important sense, the political identity of citizenship that assumes this logic emerges as gendered and sexualized: "citizenship is about virility, that is, active defense of that which is threatened, rather than being the victim of threat" (Phelan 1999, 73). Herman (1997) and Patton (1995, 1997, 1998) have demonstrated that the Christian Right has increasingly become focused on gays, and to a lesser extent lesbians, as an alter against which it has clarified its message of Christian identity, cultural cleansing, and national renewal. Stychin (1998) has furthered this exploration of sexuality as a normalizing discourse and demonstrated the implications of family rhetoric for nationalism. Across numerous case studies he has shown that the homosexual body has become a marker in terms often applied to the feminine: as weakness unbefitting nationhood, and as a lack of control and subversion threatening order and security (see also Moran

1991). The demands for marriage and for recognition are a powerful combination that, for many, makes homosexuality a significant threat to political sovereignty.

If sovereignty is still imagined on the terrain of family, property, religion, and order, it also has maintained a consistent rhetorical form. This form, understood as the dichotomy between sovereignty and anarchy, has been shown by scholars critical of the unreflective traditions of international relations to require the discursive production of "insecurity" as much as the security supposedly guaranteed by sovereign states (e.g., Ashley 1988; Campbell 1992; Weldes et al. 1999). I argue in this book that the primary site for this articulation is not necessarily the state as is commonly presumed, but is often also the "people" differentiating itself from state procedures and institutions, particularly the rules of law. What distinguishes sovereignty from the state is a particular form of subjectivity and rationality with no essential connection to the legitimated violence of the state or the justice guaranteed by law. As Ashley sees it,

The sign of "sovereignty" betokens a rational identity: a homogeneous and continuous presence that is hierarchically ordered, that has a unique centre of decision presiding over a coherent "self," and that is demarcated from, and in opposition to, an external domain of difference and change that resists assimilation to its identical being. . . . The sign of "anarchy" betokens this residual external domain: an aleatory domain characterised by difference and discontinuity, contingency and ambiguity, that can be known only for its lack of the coherent truth and meaning expressed by a sovereign presence. [Sovereignty is invoked] as an originary voice, a foundational source of truth and meaning . . . that makes it possible to discipline the understanding of ambiguous events and impose a distinction . . . between what can be represented as rational and meaningful (because it can be assimilated to a sovereign principle of interpretation) and what must count as external, dangerous, and anarchic. (1988, 230)

From this perspective, the discourse of sovereignty draws attention to its grounded epistemology, opposing itself to legal logic, state procedure, and minority political demands through claims that each violates the bulwark of common sense and natural hierarchy. As a unifying

form of interpretation, sovereignty stands against anarchy in the guise of the body politic, an organic whole threatened by dissociation, plural meaning, and practice. "The trope of the body politic works powerfully to transform contests within society into attacks on society" (Phelan 1999, 73).

The image of the body politic has important implications for the public sphere in which the sovereign voice is articulated (Habermas 1989). Warner has suggested that the body politic is persuasive to the extent that it enacts a "utopian universality" in which "what you say will carry force not because of who you are but despite who you are" (1992, 382). For this reason, sectarian religious sentiments that have exercised some recent antirights activism are nonetheless publicly suppressed in favor of more universalist positions. Nonetheless, this does not mean that all differences are restrained. Women, gays, people of color—all those who are figured as passionate more than rational—are marked with a "surplus corporeality" (Berlant 1997) that softens sovereign boundaries through excess or weakness, making them vulnerable to penetration (Bordo 1993; Butler 1990; Phelan 1999). As Warner argues,

The ability to abstract oneself in public discussion has always been an unequally available resource. Individuals have to have specific rhetorics of disincorporation; they are not simply rendered bodiless by exercising reason. . . . The subject who could master this rhetoric in the bourgeois public sphere was implicitly, even explicitly, white, male, literate, and propertied. These traits could go unmarked, even grammatically, while other features of bodies could only be acknowledged in discourse as the humiliating positivity of the particular. (1992, 382)

One consequent logic of the public sphere has been silence, not just about those whose positivity is marked by difference, but also as a privilege of those whose unmarked presence can go without saying. The enforcement of silence in this latter form, as I show in the chapters that follow, is one paradoxical aspect of the public articulation of sovereignty in the debates over same-sex marriage. Of course, the democratic sovereign, recognizing itself as political majority, is necessarily more inclusive than the unmarked bodies protected by this silence. Thus, some "particular" bodies are symbolically *remarked* as valuable through commodification, or integrable due to sanctioned political

memory, acceptable lifestyle, or protected legal status, and conceptually united through common consumption of public symbols and figures (celebrity), as well as antipathy and anxiety toward those—especially lesbians and gays—whose bodies and practices are not permitted to conform to the markings of publicity and the naturalized hierarchies of sovereignty.

I have argued that sovereignty takes the rhetorical and representational form of rationality and publicity with a logic incidental to that of the state. I have also suggested that the substantive concerns and forms of sovereignty have an enduring history, but I do not want to treat sovereignty in this book in the same timeless, ahistorical fashion in which it is often articulated by its partisans. My interest in this concept is not designed to abstract sovereignty from its history, but, contrariwise, to show how it is modulated by subtle shifts in economic reason and the political dynamics of group demands, how as a trope it reinforces political rule and also dissolves extant forms of rule in favor of other types of authority. Perhaps nowhere has the dissociation between state and sovereign become so visible in recent years as in contemporary political conflicts pitting electorates against civil rights.<sup>21</sup> The classical liberal contractarian theorists saw law and rights as coterminous with state authority since, in their narrative, it was a collectivity of self-sovereign individuals who first banded together in the interest of security for their persons and their property to create a government.<sup>22</sup> Civil rights for women, people of color, and others have become one set of markers for those whose inclusion in this original compact was incomplete or disregarded, and whose later struggles for inclusion have been deemed worthy and compatible with collective well-being.

In a logic similar to that of the modern public sphere, civil rights operate as a sign of inclusion only to the extent that they continue to mark particular bodies as capable of generality, of remaining, in Marx's words, "an imaginary participant in an imaginary sovereignty . . . filled with an unreal universality" (1977b, 46). Wendy Brown sees this paradox as inherent in liberalism.

[T]he latent conflict in liberalism between universal representation and individualism remains latent, remains unpoliticized, as long as differential powers in civil society remain naturalized, as long as the "I" remains politically unarticulated, as long as it is willing to have its freedom represented abstractly, in effect, to subordinate

its "I-ness" to the abstract "we" represented by the universal community. (1995b, 203; see also Danielsen and Engle 1995, xiv ff.)

Where the imagination or naturalization of generality fails, or where this is not allowed to occur, the claims of civil rights as a marker for inclusion become a palpable threat to sovereign authority. To no small degree, this threat is magnified by rights claims because of the power of courts to command speech and demand the defense of privilege, thereby breaking the sovereign entitlement of silence while threatening to mark the abstract self as the particular. One need only recall the marriage trial that occurred in Hawai'i in 1996, in which the state lost every argument on behalf of "traditional" marriage, to see how dangerous the compulsion of speech can be. Faced with this threat, *ressentiment* reemerges as a triple achievement: Brown notes that "it produces an affect (rage, righteousness) which overwhelms the hurt; it produces a culprit responsible for the hurt; and it produces a site of revenge to displace the hurt" (1995b, 214).

That site of revenge has increasingly become the law in an attempt to pry courts and legal doctrine loose from the demands of lesbians and gays and from the sovereign imaginary across a broad spectrum of issues. Service in the military, criminal regulation of same-sex conduct, employment protections against discriminatory treatment and same-sex harassment, public speech and the right to parade, domestic partnership and same-sex marriage have all been sites of intense anti-gay rights politics. Of course, this anxiety over rights is not without precedent. Arguments about civil rights protections as "special rights" that have been used to position gays and lesbians as "strangers to the law" (Keen and Goldberg 1998; see also Gerstmann 1999; Goldberg 1994) were voiced against the 1964 Civil Rights Act (Marcosson 1995), and recent initiatives to forestall legal enforcement of civil rights for gays in Colorado, Oregon, Alaska, Hawai'i, and elsewhere were previewed in California and Akron in 1964.<sup>23</sup> Despite similarities to the past, significant differences reflecting the defense of sovereignty abound. For one thing, as Gamble (1997, 257ff.) has observed, gays and lesbians have seen their rights put to popular vote more often than any other minority group; in forty-three incidents between the years 1977 and 1993, 79 percent of these ballot measures were passed by what Madison would have called "tyrannical" majorities opposed to civil rights for lesbians and gays. In addition, the assertion of majority power opposed to judi-

cial acknowledgment of the rights to same-sex marriage and other civil rights for gays and lesbians has taken new and paradoxical forms. For instance, the 1964 mobilizations against rights for African Americans prodded a national state applying federalist prerogatives to end racial segregation, whereas federal sovereignty in response to antigay mobilization is limited by lack of political will and formally barred by the Defense of Marriage Act.<sup>24</sup> It is now the rise of popular (and perhaps populist) majorities who make the claim of political sovereignty, one bound to an image of the state whose guarantee of public and individual security is promoted by doing less, rather than more, on behalf of civil rights. In self-conscious parody, civil rights themselves have been put on political trial.

Empirical studies of political attitudes suggest the depth and breadth of this concern over civil rights, especially for gays and lesbians. Research into public opinion since the civil rights movement of the 1950s and 1960s has shown that support for and faith in rights exists inconsistently, more in the abstract than the concrete (McClosky and Brill 1983; Prothro and Grigg 1960; Sarat 1977). For instance, early surveys uncovered strong support for the Bill of Rights and for such ideals as free speech with particular exceptions for communists, atheists, and socialists. More recently—but prior to the recent mobilization against gay rights—these studies reveal what one theorist has called a “pluralistic intolerance” (Sullivan et al. 1982; see also Grossman and Epp 1991), denoting the broad diversity of targets denied support for their civil rights. Recent concerns over the free speech rights of flag burners and hate-mongers, welfare rights of immigrants, the right to bear automatic arms, the right of women to have abortions and their opponents to protest, and the rights of the homeless to housing remind us of the diverse anxieties that civil rights provoke. However ill-focused these anxieties have been in the past, there is growing reason to speculate that this equal-opportunity intolerance has found a fresh coherence coalescing around a new social outcast. Alan Wolfe’s recent study of American attitudes reveals the deep unease over the place of gays and lesbians in American politics and society. Despite finding many diffuse antipathies, gays and lesbians emerge in his study as “the ultimate test of American tolerance: the line separating gay America from straight America is a line that an unusually large number of middle class Americans are unwilling to cross” (1998, 77; see also Button, Rienzo, and Wald 1997; Herman 1997; Yang 1999).<sup>25</sup>

The manner in which civil rights have been promoted and opposed to rigidify this line is a concern of this book. I argue that the separation of rights from the sovereign imagination fueling the opposition to same-sex marriage and gay rights generally is a complex and somewhat paradoxical division. Sovereignty—governed by ideas of individual autonomy, rationality, and universalism—competes with alternative discourses that bypass a sovereign logic, yet also promise collective and individual security. Concerns for economic value and the viability of postindustrial markets, the maintenance of social status, and the requirements of knowledge about and control over the self ground security in normalizing disciplinary modes of authority. These are all concerns that Foucault, in his narrative of modernity, has called a resurgence of the *social*: discourses comprising what he has termed a governmentality inclusive of, but extending beyond, the boundaries of political sovereignty. "Government not only has to deal with a territory, with a domain, and with its subjects, but . . . also with a complex and independent reality that has its own laws and mechanisms of disturbance" (Foucault 1989, 261). Governing the social involves promoting self-regulating domains as small as the family and as large as the political economy.<sup>26</sup>

The relationship between sovereignty and alternative discourses and practices of security comprising the social is complex. "Sovereignty [is] democratized through the constitution of a public right articulated upon collective sovereignty, while at the same time this democratization of sovereignty [is] fundamentally determined by and grounded in mechanisms of disciplinary coercion" (Foucault 1980b, 105). This does not imply, against my arguments here, that sovereignty is a mere patina disguising bureaucratic power and objective knowledge, or that rights cease to have important meaning in contemporary governmentality (see also Constable 1993; Dillon 1995; Fitzpatrick 1999). Rather, Foucault has urged us to "see things not in terms of the replacement of a society of sovereignty by a disciplinary society by a society of government; in reality one has a triangle, sovereignty-discipline-government" (1991, 102).<sup>27</sup> This triangular relationship suggests that autonomy, rationality, and the like are frequently evaluated not as ends in themselves, but as specific values promoting identifiable social interests. It is for this reason that the ability of civil rights law to mark the appropriate generality associated with citizenship and inclusion in the sovereign community is never far removed from the specific social

rationales for inclusion. This conceptual proximity permits disruption of the sovereign/social relationship with important implications for the ability of courts and civil rights to regulate citizenship demands. I further elucidate this point below in a discussion of equal protection law, especially as it has affected lesbians and gays.

### *Equal Protection at the End of Civil Rights*

Equal protection law has one of its justifications in what Ely (1980) has called “representational reinforcement,” or the constitutional imperative to protect “discrete and insular”<sup>28</sup> minorities who would otherwise remain at the mercy of political majorities. This interpretation of the Fourteenth Amendment’s equal protection clause is inherently counter-majoritarian and cognizant of the limits of the passive Madisonian political solution to American antagonism in which multiple political factions make it “less probable that a majority of the whole will have a common motive to invade the rights of other citizens” (Hamilton, Madison, and Jay 1961, 83, no. 10).

The universalist impulses behind equal protection law—that is, its goal of integrating excluded minorities and re-creating the democratic sovereign—ironically has been seen to depend upon the acknowledgment of difference in the form of “suspect” and “quasi-suspect” classes that raise the governmental threshold for differential treatment. Thus, in federal equal protection law, race is treated as a suspect class, and gender as a quasi-suspect class requiring a lesser, though still “heightened,” level of scrutiny or suspicion of official discrimination; any other target of discrimination need be defended as merely “rationally” related to a legitimate governmental interest. However, as Gerstmann has cogently argued, this three-tiered framework was created not to further antidiscrimination policy but “to sharply limit the scope of the equal protection clause in the wake of the Warren Court’s and early Burger Court’s adventurous expansion of equal protection doctrine” (1999, 5).

Indeed, nearly commensurate with the creation of the doctrine was a judicial unwillingness to expand suspect or quasi-suspect class status beyond race, gender, illegitimacy, ethnic identity, and alienage to other groups demanding protection from official discrimination; despite countless demands by gays and lesbians, poor people, and the elderly in federal litigation, no additional protections have been forthcoming

since 1977.<sup>29</sup> Gays have faced difficulty even gaining minimal protection under the rational-basis threshold of the bottom tier. Indeed, much in the manner that the rights of Communist and socialist pamphleteers were held unprotected earlier in this century, since their advocacy was seen to contribute nothing to rational and democratic discourse, gays and lesbians have been historically banned in the legal imagination from participating in the rational polity, making discriminatory policies hard to legally restrict.

*Bowers v. Hardwick* (1986) made this exclusion explicit. Coming after more than a decade of increased lesbian and gay activism, the case was developed as a test of a Georgia antisodomy statute that was used to justify the arrest of a man observed by a police officer making love with another man in his own bedroom. Although decided under the due process clause that avoided raising equal protection questions,<sup>30</sup> *Hardwick* nonetheless set out the parameters under which gays could be denied privacy rights and their sexual expression subjected to the criminal law. The majority opinion by Justice White and concurring opinions marshaled a phalanx of historical, ethical, biblical, and natural authorities in their repugnance toward homosexuality.<sup>31</sup> As volumes of subsequent analysis have made clear, "to the lower courts, *Bowers v. Hardwick* was not a case about the implied right to privacy, but a case about lesbians and gay men" (Matthew 1997, 1357). As such, the case stands as justification for further public as well as private discrimination based on the "tendency or desire"<sup>32</sup> of gays for homosexual relations (Koppelman 1988; Schacter 1997a; Tymkovich, Daily, and Farley 1997, 309). *Hardwick's* legacy has been that sexual orientation should be seen as a matter of legal status, lacking analogy to the "discrete and insular" character of other civil rights subjects, a legal exclusion with deep resonance to *Plessy v. Ferguson* (1896)<sup>33</sup> and *Dred Scott v. Sandford* (1856),<sup>34</sup> which refused to recognize the legal subjectivity of blacks or slaves.

*Hardwick's* genealogy in these pre-civil rights cases<sup>35</sup> emphasizes exclusion by what I want to call the delimitations of the social. By failing to recognize gays and lesbians as legitimate legal subjects able to claim rights under the constitution, and by emphasizing their difference via reference to their sexual behavior or desires, the opinion reveals a particular epistemological assumption about the ends of government. The Court's failure to authenticate the distinction between public and private spaces in which autonomy for homosexual desire

can survive allows state power to extend broadly over both by enchain- ing liberal categories not to a jurisprudence of contractarian theory or natural law, but to social ends. The private sphere, White argues in *Hardwick*, is protected as a matter for “family, marriage, or procreation” that has no imaginable link to “homosexual activity.”<sup>36</sup> Although the private sphere is defined within law and distinguished from political life, it is nonetheless permeable to social regulation for a given end. This expectation of social regulation has no proper site of enunciation in this opinion; judgments of majorities, religious and other moralities, the weight of tradition, as well as authentic families are all legitimate guardians of public power applied in the interest of social well-being. It is this connection between common purpose broadly realized and collective security that constrains this social moment while estranging gays and lesbians.

Interpreted from the perspective of the social, *Hardwick* reveals some of the liberal mentalities of rule (*governmentality*) that render reality thinkable. These mentalities can be seen to constitute the conditions under which particular forms of power are “assembled into complexes that connect up forces and institutions deemed ‘political’ with apparatuses that shape and manage individual and collective conduct in relation to norms and objectives . . . constituted as ‘non-political’” (Rose 1996, 37–38). As rights based on gay and lesbian identity are not judicially thinkable, those epistemologies, moral forms, and modes of reasoning that oppose these rights and open the door to sovereign authority reinforce the former “regime of invisibility” (Schacter 1997a) that has kept activist gays and lesbians in a legal closet.

While *Hardwick* is not overruled in fact, the entitlement to hostility<sup>37</sup> toward gays and lesbians for which it stands has been superseded by two significant legal developments. The first is *Romer v. Evans* (1996), which struck down Colorado’s Amendment 2, which would have eliminated local antidiscrimination ordinances protecting gays, lesbians, and bisexuals. The *Romer* Court argued that there was no rational basis for excluding gays and lesbians from antidiscrimination protections. Although the lower Colorado courts had called for a more fundamental right not to be politically excluded, the *Romer* majority rejected this line of reasoning, merely interrogating the banning of local antidiscrimination statutes for their tight relationship between permissible means and ends. This ultimately substituted the Court’s “rela-

tively adventurous" (Sunstein 1994b, 269) moral judgment about the propriety of discrimination for that of the Colorado legislature. If the issue of suspect class standing was sidestepped by the opinion, so, significantly, was the *Hardwick* case, which was never once mentioned by the majority, an omission that Janet Halley wryly observes to "take the sex out of homosexual" (Halley 1997, 433). Behind this desexing lies the rather dubious assumption that while Colorado's majority was wrongly passionate in its rejection of antidiscrimination protection for gays and lesbians, its action as a rational democratic body could only take place through the partial erasure of lesbian and gay identity.

The protection of and appeal to public rationality that lies behind *Romer's* murky reasoning provides gays and lesbians at most with what one observer has called "thin gay rights" (Massaro 1996). Gays and lesbians "can win [but] only by appealing to judicial sympathy and intuitions about fairness rather than by invoking any coherent legal principle" (Gerstmann 1999, 8). The weak protection that this provides can be seen in the courts' wandering directions, upholding the "Don't ask, don't tell" military policy,<sup>38</sup> ordering the protection of a gay student,<sup>39</sup> prohibiting homosexuals from immigrating,<sup>40</sup> and the like. Public reaction to court-enforced protection policies has been intense, suggesting to some that "hate, vituperation, and personal insult have been let out of their [legal] boxes and probably cannot be entirely pushed back into them" (Halley 1997, 437).

The legal policy of thin gay rights articulated by the *Romer* court also has meaning for the types of identities articulated within the law. Antidiscrimination complaints have often been personally costly in terms of the need to identify as a victim and have courts accept the claim that one is representative of a socially and politically powerless group (Bumiller 1988). Without clear recognition of a history of oppression, or a long-term visibility as a discrete minority, gays have been forced to assert and assume identities with an uncertain democratic and legal status. As Gerstmann understands this, "rather than framing their arguments in terms of equality, gays and lesbians must frame their arguments in terms of oppression and difference. This renders gays and lesbians vulnerable to charges that they are seeking special rights rather than equal rights" (Gerstmann 1999, 39). In light of *Hardwick's* claim that behavior *is* identity, gays and lesbians are also vulnerable to popular dismissal based on the assumed behavioral—and thus

voluntary—markers of their identity, forcing an adverse surface comparison of their claims with blacks or women whose identity seems much more naturalized.<sup>41</sup>

Despite these serious limitations of *Romer*, the opinion is voiced in a much different tone than *Hardwick*. Where the earlier case articulates the *social* as a means of reasserting the barriers to gay and lesbian integration, *Romer* emphasizes what I will call here the *sovereign* moment with its attention to the comportment of democratic majorities and the forms of rationality made on behalf of public policy. To the extent that this rationality remains general and disembodied, the unity to which it aspires permits rights to be imagined as expansive and flexible entitlements entailing no undue burden on others and having no necessary connection to the goals and aims of collective security. Nonetheless, *Romer* does not guarantee inclusion through appeal to the sovereign, for it still leaves lesbians and gays unmarked and, so, unentitled to the protections of the universal.

The meaning of civil rights is contested between the social and sovereign discursive frameworks that characterize *Hardwick* and *Romer*, but they are not fully discrete in the legal imagination. This is evident in the second line of cases that have modified the *Hardwick* holding, the marriage cases. Like *Romer*, *Baehr v. Lewin* (1993) failed to find gays and lesbians a suspect class. Rather, the Hawai'i court argued that gender discrimination—a quasi-suspect class under federal law but a declared suspect class in Hawai'i due to that state's equal rights amendment—was the basis for concluding that a denial of marriage licenses to same-sex couples was impermissible without compelling justification.<sup>42</sup> *Baehr* depends upon the sovereign imagination to conjure the power of what might be called deep analogy. Rather than simply identify gays as discrete minorities like women or blacks, the court argued that denial of marriage licenses to same-sex couples was *exactly* like the Supreme Court's refusal to abide the denial of marriage licenses to interracial couples in *Loving v. Virginia* (1967).<sup>43</sup> In so doing, the court defeated arguments of symmetry that were used to deny racial discrimination in the miscegenation case.<sup>44</sup> The court also separated itself from prior decisions that had defeated attempts to secure same-sex marriage by claiming that marriages were, by definition, strictly between a man and a woman (and, by implication, solely determined by a higher authority beyond the power of courts and legislatures to redefine).<sup>45</sup> A vast outpouring of scholarly support for the analogy between antimiscegena-

tion statutes and prohibitions against same-sex marriage supports the Hawai'i court's arguments by analyzing oppression against gays and lesbians as a consequence of the reproduction of gender inequality: women's subordination is seen to be furthered by constricting the appropriate expression of partner choice in the same manner that antimiscegenation statutes reproduced white supremacy by separating the races in the name of racial purity, thereby perpetuating attitudes about racial difference, social hierarchy, and limited social roles for particular races (Koppelman 1988, 1994; Sunstein 1994a, 1994b; Valdes 1995, 198ff.). Additionally, some feminist and queer theorists have shown the strong linkages between rigid gender roles and heterosexism (Butler 1990; Okin 1996; Richards 1998). And the Supreme Court has recently unanimously ruled that, at least when it comes to sexual harassment under Title VII, same-sex harassment *is* discrimination on account of sex.<sup>46</sup>

Whether the scholarly and juristic recognition of this analogy will translate into increased popular support for gay rights is an open question, one I pursue further in chapter 6. One problem is that deep analogies of this type tend to efface analysis of the particularities of gay and lesbian oppression; in an effort to promote an appropriate marker for inclusion they hide the sex under a cloak of race. The invitation to analogy is also an invitation to comparison, and here, both from the perspective of rights detractors and from gays and lesbians whose social identities stress difference, gays who lack a clear legal identity reemerge as a particular whose sovereign claims on the universal are open to challenge through arguments about their social contribution to security and community. For some gay and lesbian advocates, the analogy model is actually a reason to *question* the marriage goal. As Lehr has recently argued, "It is not at all clear . . . that *Loving* played a significant role in furthering either a decline in racial discrimination or an increase in interracial interaction, since systems of domination are maintained in part by private relationships, but even more by structural constraints" (1999, 39). As these concerns make clear, the Hawai'i marriage case has left lesbian and gay rights vulnerable to challenge.

Both the Vermont case, *Baker v. Vermont* (1999), and the Alaska marriage decision, *Brause v. Bureau of Vital Statistics* (1998), attempted to skirt the analogy issue and ground same-sex marriage rights in a more strictly sovereign framework. The Vermont plaintiffs appealed a superior court decision that upheld the state's argument that its inter-

est in procreation provided a rational basis for denying marriage licenses to same-sex couples. The plaintiffs asked the supreme court to find against the state under the Vermont constitution's common benefits clause, which reads as follows.

That government is, or ought to be, instituted for the common benefit, protection and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community. (Vt. Cons., chap. 1, art. 7)

The expectation was that the sovereign language of "people, nation, or community" would compel not only heightened scrutiny for discrimination against gays and lesbians, but also a legal command to "an equal share in the fruits of the common enterprise"<sup>47</sup> that would encompass marriage. Despite accepting the plaintiffs' arguments that the common benefits clause controlled the case and required equal protection for same-sex couples, the Vermont Supreme Court could not agree that marriage was the necessary remedy.

If the Vermont case suggests that sovereign strategies will not compel same-sex marriage, the Alaska same-sex marriage case demonstrated that analogies to other civil rights subjects often hide submerged beneath the legal surface. The Alaska court that heard the demands of Brause and his partner for a marriage license sidestepped the *Baehr* court's argument-by-analogy to find a strict scrutiny protection for same-sex marriage in the constitutional protection for privacy (an argument that was advanced, but not accepted, in *Baehr* as well). The trial judge who heard the case wrote that the Hawai'i court began its reasoning with the wrong questions.

The relevant question is not whether same-sex marriage is so rooted in our traditions that it is a fundamental right, but whether the freedom to choose one's own life partner is so rooted in our traditions. . . . Here the court finds that the choice of a life partner is personal, intimate, and subject to the protection of the right to privacy.<sup>48</sup>

Perhaps correctly sensing the weak popular appeal of such reasoning, the judge also alluded to the *Loving* analogy in obiter dicta, suggesting,

"In some parts of our nation mere acceptance of the familiar would have left segregation in place."

The legal recourse to the antimiscegenation analogy demonstrates the ironic incompleteness of civil rights for gays and lesbians seeking constitutional and community integration through marriage law. Bereft of clear legal identities and dependent upon assumptions that do not resonate deeply even within gay and lesbian communities, the legal supports for equal protection have remained an attractive target for opponents of further development of civil rights. If this politics is emblematic of what Schacter (1997b) has evocatively called the "post-civil rights era," it is not because civil rights are eclipsed as much as because they are paradoxically deployed in new ways and given new meanings.

The mix of sovereign and social discourses in the marriage cases demonstrates the potential polarities in the contemporary legal space, but it also offers a clue as to why civil rights seem to provide neither a boundary against gay and lesbian demands (for those worried about same-sex marriage), nor a simple exposition of citizenship (for its supporters). The failure of equal protection doctrine to provide identities adequate for gays and lesbians to mobilize the law against discrimination has left the sovereign claims linking civil rights with citizenship vulnerable to the social claims articulating rights with the well-being of community and economy. This ambiguity has forced advocates of same-sex marriage to argue not just for the right to marriage as a sign of citizenship but also for the economic and social value of diverse family relationships as the basis for social welfare and community security. In like manner, the weak specification of adequate public rationality associated with sovereign majorities encourages opponents of same-sex marriage to articulate their political will as representatives of the sovereign community as much from antipathy toward meddling courts as from economic dangers imagined to inhere in gay rights.

In the examination of the boundaries separating these cross-cutting discursive frameworks, I pay particular attention to how the changing dynamics of the political economy that underlie the conception of social value have altered the ability of groups to successfully mobilize the law. Much as the discourse of sovereignty divides political space in order to exclude some from access to the commons, the emerging neoliberal political economy today bars many—including large segments of the middle class—from sharing the spoils of economic

growth and exposes many more to increased economic risk due to rapid changes in production and a rotting safety net. This is also an economy no longer dominated by labor unions that traditionally valorized rights and the rule of law. How these material changes have influenced collective identity and social movement strategies around rights organizes many of the central questions of this research.

### *Social Movements, Sovereign Movements*

The politics of sovereignty has been magnified by the limitations of equal protection law for lesbians and gays and the social movement strategies that have been pursued. Many of the organizational and representational novelties of lesbian and gay politics can be traced back to the dynamics of union organizing in the United States. The civil rights movement (advancing the interest of African Americans) and the women's movement were partially impelled by the failure of the American labor movement to significantly spread workers' gains beyond the population of white males and to subsequently recognize group identity and demands for political equality that were fast replacing class interest as the lingua franca of political mobilization (Boris 1994; Draper 1994; Fraser 1997; Gabin 1990; Goldfield 1997).<sup>49</sup> The rise of legal and administrative departments and discourses designed to enforce civil rights for these groups implicitly acknowledged the failure of workers' rights to express universal interests, while they also changed the political logic of social space from an "immigrant" model based on incorporation into a universal body politic to an "integrationist" model in which wrongly excluded groups comprised a divided, pluralist space (Patton 1997, 8; W. Brown 1995b). The democratic fiction that pluralist spaces were infinitely flexible and did not materially overlap was threatened by union decline in the mid-1970s, which tumbled the progressive, civil rights wing of the Democratic party at the same time that it raised economic tensions between downwardly mobile workers and identity groups (Edsall and Edsall 1991).

The implications of these dynamics for gay and lesbian politics cannot be downplayed. Once sexual minorities successfully challenged the stigma of a medical psychopathology in the early 1970s, many of the public rationales for isolating and restricting gays from immigration, public service, housing, and everyday life by which they previously had been socially "contained" (Fortin 1995) were dissolved.

Freed from a malignant classification and broadly mobilized, lesbians and gays began to develop distinctive social and political identities and divergent strategies around these postpluralist conceptions of public space.

Lesbian and gay social movement strategies have bifurcated roughly along what has been called an ethnic/essentialist and a deconstructive (or queer) model (Gamson 1996; Seidman 1993, 1997; Sinfield 1996). Each faces particular difficulties in light of civil rights law and the transformations of the political economy. The ethnic/essentialist model projects gay and lesbian identity as a quasi ethnicity, one

complete with its own political and cultural institutions, festivals, neighborhoods, even its own flag. Underlying that ethnicity is typically the notion that what gays and lesbians share—the anchor of minority status and minority rights claims—is the same fixed, natural essence, a self with same-sex desires. The shared oppression, these movements have forcefully claimed, is the denial of the freedoms and opportunities to actualize this self. In this *ethnic/essentialist* politic, clear categories of collective identity are necessary for successful resistance and political gain. (Gamson 1996, 396)

The maintenance of distinctive social and cultural categories that enhance self-actualization is undermined by law that has refused to recognize sexual orientation as the basis for heightened scrutiny. As a consequence, lesbian and gay rights activists have been forced to assert and defend analogies to other ethnic groups whose more naturalized identities make gays vulnerable to the claims that they are seeking rights for deceptive reasons. The power of analogy is weakened by the problems of mutual understanding and common cause among progressive social movements exacerbated by the growing material consequences that flow from official recognition (Valdes 1997a; Brandt 1999; Butler, 1996, 40; Hutchinson 1999). Absent an assimilable marking that could accommodate an integrationist pluralism, ethnic/essentialist gay politics faces a particularly difficult hurdle with a rights strategy. Because "male and female homosexualities [are] still fuzzily defined, undercoded, or discursively dependent on more established forms" (De Lauretis quoted in Weeks 1995, 109), it is not accidental that this politics privileges "coming out" (Blasius 1992; Stychin 1995b, 143ff.)—not coming across boundaries, but emerging already—from within

suburban and urban life, family and workplace, church and organization. For some queer theorists and activists, this has been a conscious “project of cultural pedagogy aimed at exposing the range and variety of bounded spaces upon which heterosexual supremacy depends, [to] see and conquer places that present the danger of *violence* to gays and lesbians, to reterritorialize them” (Berlant and Freeman 1993, 205). The love that once dared to speak its name has now spoken, but in borrowed languages and reclaimed spaces. This tactical bricolage has profoundly unsettled the sovereign practices and tacit understandings around which status and personal security have been seen to cohere, “a kind of ultimate heresy or treason against essential moral values” (Richards 1999, 90). As Sinfield has observed, this treason against sovereign privilege is a complex war of maneuver.

[Even] the phrase “coming out” . . . is not special to us. It is a hybrid appropriation, alluding parodically to what debutantes do; the joke is that they emerge, through balls, garden parties, and the court pages of the *Times*, into centrality, whereas we come out into the marginal spaces of discos, cruising grounds and Lesbian and Gay Studies. This implication in the heterosexism that others us has advantages. It allows us to know what people say when they think we aren’t around. And at least we can’t be told to go back to where we came from, as happens to racial minorities. . . . Conversely though, it makes us the perfect subversive implants, the quintessential enemy within. (1996, 281)

The uncertain legal status of lesbians and gays who have argued for inclusion into a pluralist polity, and the threats to sovereign understandings posed by a “subversive” queer politics have allowed and even encouraged new conservative movements in the 1990s to operate on similar but countervailing notions of political space. As Patton has argued,

The New Right and queer activists each . . . in contrast to liberal pluralism . . . [believe] that that space is deeply material and non-partitionable, and the presence of any group necessarily presses on every other group. . . . The New Right views dissident bodies—homosexuals, women who seek abortion, Afrocentric blacks—as intrusions of evil into space, intrusions encouraged by liberal plu-

ralism's mismanagement and fragmentation of space. "Queer" politics stepped into this gap and attempted to produce a politics of presence that did not rely on the dispossession strategy held in common by lesbian and gay rights and black civil rights groups. In this logic, space is a matrix of surges and flows in which queerness precedes any attempt to balkanize bodies that represent points of density in a continuous, gridlike space. . . . New Right and queer activist logics of space may be more similar to each other than either is to liberal pluralist conceptions. (1997, 10, 11)

On the terrain of nonpartitionable space, political stakes and sovereign demands are both conceptually magnified.

These spatial ideas also have important consequences for the ways in which the demand for equal marriage rights is articulated, even by nondeconstructionists. For some neoconservatives unhappy to embrace the full panoply of gay cultural politics, the normalizing effects of marriage are likely to lead to greater acceptance of gays and lesbians by enconcing the dangers of sexuality in the traditional republican space of the domestic sphere (Bawer 1993; Eskridge 1996). For Andrew Sullivan, marriage rights burden the state less than antidiscrimination statutes, whose intrusion into private freedoms he opposes on grounds of liberal philosophy and efficiency: legalizing gay marriage would accomplish "ninety percent of the political work necessary to achieve gay and lesbian equality. . . . [Marriage is] ultimately the only reform that truly matters" (1996, 185; see also Epstein 1994).

Some liberal supporters of same-sex marriage are less concerned with disturbing boundaries between public and private. Wolfson sees the attainment of marriage by same-sex couples as "conservatively subversive" (1994, 580). "Winning marriage rights would alter society's understanding of, and attitude toward, gay people and same-sex love generally—the rising tide that raises all boats" (604). This buoyant subversion even appeals to some radical theorists who are fundamentally skeptical of the rights-based and culturally mainstream marriage project. As Patton has argued,

No matter how disgustingly suburban I found the Ideal Lesbian moms who appeared in a 1993 *Newsweek*, they were a radically different image of neonatalistic Mommism to the majority of even the most liberal readers. They both reaffirmed a conservative ideal and

shattered the image of the family; they both aligned with and reformed the project represented in the Contract with America. (1997, 22)

Understood from these varied perspectives, marriage retains the potential for a more insistent politics of difference by loosening not only its gendered form, but also its very sign of privilege, permitting greater social acceptance of alternative and emergent forms of sexuality and gay culture (Butler 1998; Donovan, Heaphy, and Weeks 1999; Herman 1994; Law 1988; Okin 1996). As Catharine MacKinnon—a cultural feminist who is ambivalent about marriage—has noted, “I do think it might do something amazing to the entire institution of marriage to recognize the unity of two ‘persons’ between whom no superiority or inferiority could be presumed on the basis of gender” (1987, 27).<sup>50</sup>

How the political arguments for and against equal marriage rights affect the success and strategies of lesbian and gay, and right-wing social movements is one concern that this book takes up. I pay particular attention to how the discursive field of sovereignty has altered the meaning of civil rights and the tactics used by social movements. Of particular interest in this regard is how these discourses have influenced coalitions and alliances among defenders of equal rights to marriage, unions and nationalist groups on the one hand, and conservative groups and their electoral supporters on the other.

### *Legal Mobilization and Legal Demobilization*

Much has been written from the standpoint of keeping the law in our lives. Sociolegal studies have oriented a legion of scholars toward the constitutive character of law that has eroded the conceptual dualisms of law *and* society and questioned assumptions about the autonomy of self from social and legal discourse. As Ewick and Silbey express this methodological perspective:

Law does not simply work on social life (to define and to shape it). Legality also operates through social life as persons and groups deliberately interpret and invoke law’s language, authority, and procedures to organize their lives and manage their relationships. In short, the commonplace operation of law in daily life makes us all legal agents insofar as we actively make law, even when no for-

mal legal agent is involved. (1998, 20; see also Merry 1990; Trubeck and Esser 1989)

Constitutive analyses examine culture, consciousness, and social action in order to gain a "bottom-up" picture of the law and rights in their everyday manifestations (Bumiller 1988). From this perspective, law "shapes society from the inside out, by providing the principal categories that make social life seem natural, normal, cohesive, and coherent" (Sarat and Kearns, quoted in Silverstein 1996). At the same time, this perspective acknowledges that "social life is a vast web of overlapping and reinforcing regulation" (Galanter 1983, 129) in which law comprises only part of social ordering.

The ubiquity of law from this perspective ironically raises particular questions about the efficacy of law for social transformation (Schein-gold 1974). Studies of "legal mobilization" critically examine the reproduction and successes of rights advocacy with the understanding that "legal norms and discourses derive their meaning primarily through the practical forms of activity in which they are developed and expressed" (McCann 1994, 261-62), a contemporary echo of Marx's argument that law is one of the "ideological forms in which men become conscious of . . . conflict and fight it out" (1977b, 390; see also Bourdieu 1987; Ewick and Silbey 1992; Thompson 1975, 267). Mobilization theory suggests that rights are conducive to social alliance, and hence, facilitative of group conflict (McCann 1994; Milner 1986; Schein-gold 1974; Silverstein 1996; Zemans 1983). Legal meaning is therefore not precise and definitive, but rather contingently mapped onto wider social textures and dependent on divergent experiences with and beliefs about rights (Herman 1994; Milner 1986) as well as the "inclinations, tactical skills, and resources of the contending parties who mobilize judicial endowments" (McCann 1994, 170). This diversity of belief and engagement with the law reveals legal consciousness to be "variable, volatile, complex and contradictory" (McCann 1994, 8).

In efforts to fix meanings, agents exploit this pluralistic environment, extending conflict to legal norms and institutions in novel contexts and in social spaces beyond the primary arena. Herman (1994) has explored the ways in which litigation on behalf of gays and lesbians can advantageously destabilize legal and social categories by challenging gender expectations in various settings, and how, when legal and non-legal discourses mix, gays and lesbians are sometimes harmed. Legal

mobilization studies have also revealed that law retains a powerful source of meaning for social groups even where favorable opportunities and adequate resources for legal action are few. In McCann's study of the pay equity movement in the 1980s, law and legal rights were shown to be an enduring force even after litigation had failed and the rights sought were never vindicated in court. These studies reveal the ways in which the social imagination is vividly constructed through legal meaning.

The vast majority of these studies have approached law from an implicit civil rights model in which law's utility for social action is evaluated from the standpoint of progressive groups seeking fundamental political and social reform. The same-sex marriage controversy raises interesting questions rarely asked in these studies, however. Primary among these is how some social movements mobilize *against* the law and seek to transform discourses about rights—particularly civil rights—into exclusionary limits. An important ancillary issue, too often forgotten, is how rights discourses and legal strategies may fail to provide the glue of common interest and a social imaginary shared between groups advancing civil rights strategies. Legal mobilization theory does suggest, I believe, many of the correct starting points for an analysis of the politics of same-sex marriage. Law's articulation with other political and economic languages, the interconnection between local strategies and more global legal consciousness, and an assessment of how well law serves social movements are all integrated into the present study.

But while mobilization studies are exemplary for building a phenomenology of law by getting into the heads of legal actors, they can also trade off two related issues of importance for the present study. The first is large-scale changes in social and economic structure—the contours of governmentality—that have a diffuse and indirect bearing on legal mobilization. Mobilization studies have addressed the impact of resources including beliefs about the law, social movements, rules of legal standing, and the like. But the emphasis on ground-level struggle to make the law work for disadvantaged groups often overshadows the broader structural changes with relevance for understanding the social context in which law is mobilized. An example can be found in McCann's study of pay equity, which reveals that materially dominant social groups do not retain every advantage, in part because they are susceptible to rights talk and because workers can mobilize within

unions providing sanctuary, momentum, and solidarity. Nonetheless, McCann misses one of the most important structural and hegemonic changes occurring in American labor politics at the time these pay equity struggles were taking place: union membership declined drastically, and the place that unions had struggled so hard to get and maintain was threatened as it had not been since before the New Deal. With union density decline in the 1980s, emblematically captured by the demise of Professional Air Traffic Controllers Organization at the hands of President Reagan, came a period of diminished political power, decreased activism and solidarity, and increasing fragmentation. This loss of momentum provides an alternative interpretation to that propounded by McCann in his observation that the events in Philadelphia in 1986 were a turning point for the pay equity movement. McCann argues that it was Philadelphia's "belief that the union could not win in court which most sustained official resistance to large-scale wage restructuring during the 1980s" (1994, 186). However, this conclusion might have followed from a gestalt of the tide running against the entire labor movement.

The transparency of structural concerns points up one of the weaknesses of the phenomenological perspective where structure is not ignored but instead reduced in solidity. A second concern is that this very emphasis on the fluidity of legal mobilization tends to see more law than its social and discursive limits. One tactic advanced by some mobilization theorists (Herman 1994; Milner 1986) and students of legal consciousness is to examine the discursive structures of law in order to attend to the social spaces into which law rarely intrudes, or to the contradictions through which law enunciates its own applicable limits. Ewick and Silbey have examined these discursive limits in their elicitation and analysis of stories that people tell about their encounters with the law. Three types of narratives emerge in their analysis: stories about law as a separate sphere in which objectivity is seen as the normative ideal, stories about law as a game in which interested representation is idealized, and stories about law as a product of power. "Woven together . . . the three stories collectively constitute the lived experience of legality as a struggle between desire and the law, social structure and human agency" (Ewick and Silbey 1998, 29).

Legal consciousness appears to be a contradictory amalgam of various types of narratives in this account. For Ewick and Silbey, the constitution of law as both normative ideal and practical knowledge is the

source of its appeal. They show that since these various images are dependent on each other for their very potency and meaning, these divergent and ambivalent beliefs about the law become an integral aspect of legal meaning. As structure, these contrasting images operate to divide the legal from the nonlegal.

At the same time that legality is constructed as existing outside of everyday life, it must also be located securely within it. Legality is different and distinct from daily life, yet commonly present. Everyday life may be rendered irrelevant by a reified law, but the relevance of law to everyday life is affirmed by the gamelike image of law. In the gamelike threat of hegemonic legality, law is available as an aspect of social relations in which one can deploy the resources and experiences of everyday life to gain advantage through its special rules and techniques. (232)

Of course, these images of inside and outside the law are part of the ideological construction of law itself, for "with the constitutive theory, there can no longer be any inexorable mode or structure of connecting law to society" (Fitzpatrick 1992, 8). Yet this modern myth of law's transcendence, as Fitzpatrick calls it, offers its own hegemonic overlay to the stories of law. Modernity is constituted by the paradoxical myth that it has transcended myth, and in the wake of that story follows "not the destruction of myth but, rather, its perfection" (1992, 36).

With myth seeking to harmonize "mutual relations of opposition and support, of autonomy and dependence" (Fitzpatrick 1992, 146), the juxtaposition of various legal narratives and their potential for contradiction are enhanced and regulated. Among other antinomies, Fitzpatrick shows how modern law seeks to reconcile the particular (rights) with the general (justice), to reconcile order with illimitable sovereignty, the universality of the nation with the particularity of citizenship, the guarantee of progress with ordered legality, the autonomy of the subject with the power of the state. "Outside" of the law but within this mythical field, law is countered by other myths seeking a similar comprehensiveness, such as individuality and popular justice. These opposing myths reconcile the stories told about law's place and its absence, without problematizing its ontological status.

In my presentation of the debates over same-sex marriage, I emphasize the power of these competing discourses to solidify and dis-

solve the limits to law. Specifically, I strive to bring material discourses and practices into alignment with narratives told about gays and civil rights in order to explore the popular appeal for limiting the reach of law and courts.<sup>51</sup> Attending to antinomical tensions within the law and the relationship of law to alternative discourses of governance, I show how these debates over same-sex marriage are all about rights, and ironically all about their limits.

### *Plan of the Book*

In this book, I elaborate on the public articulation and collective implications of sovereign and social discourses in order to show how they have framed the debates over same-sex marriage. The chapters that follow show that these two broad discourses have produced majorities willing to oppose rights granted to gays and lesbians by the courts, and to inhibit the formation of political allies—especially those of organized labor, ethnic groups, and indigenous nationalists—that gays and lesbians can use to defend their legal victories. At the same time that these discourses are deployed to inhibit civil rights, I conclude, they are sufficiently ambiguous and contradictory to provide novel forms of argumentation that could revivify public commitments to diversity and inclusion for gays and lesbians.

Using these discourses as guideposts, the story I tell about the same-sex marriage controversy forms less a linear narrative than a series of interlocking themes. These themes have emerged from my study of public testimony, legal briefs and arguments, public documents relating to same-sex marriage, and personal interviews with more than a hundred activists, lawyers, politicians, professional advisors, and religious and union leaders in Hawai'i and elsewhere who have been involved in the controversy. Most of the discussion in the pages that follow centers on the Hawai'i experience because of its legal importance. The *Baehr* case, despite its ultimately disappointing outcome, has secured the legitimacy of the legal category of same-sex marriage and, from the mid-1990s on, served to center Hawai'i in national political debates over this issue. However, the Hawai'i case also warrants this scrutiny for many other reasons. For one, as I have already discussed, the issue of same-sex marriage thoroughly saturated Hawai'i politics in the years after the 1993 ruling, and the subsequent maneuvering by political activists and professional politicians to have

a say in the court proceedings offers an opportunity to examine the intimate connection between legal rights and political anxieties. In order to offer the reader a reference for these complex political interventions, I have included a timetable at the end of this chapter that chronicles their order and development.

Hawai'i is also an important venue for this study for its place in the cultural imaginary. Hawai'i has long been identified in popular culture as a paradise of "primitive" erotic desire to which honeymooning couples ritually retreat to secure their love and explore their sexuality. The concern that Hawai'i might also have been the first of the world's governments to legalize same-sex marriage opens to scrutiny important cultural and economic concerns about this legal change. In addition, Hawai'i is a unique American cultural landscape lacking an ethnic or a Christian majority and no recent organization of conservative forces. As a one-party government, thoroughly dominated since statehood by a Democratic party and the strong public labor unions that undergird it, political authority has been premised on cultural and ethnic tolerance built over the layers of violence, segregation, and cultural destruction of its colonial past. Yet the memory of Hawai'i's precolonial past that allows the marketing of this social tolerance as "aloha" is also resplendent with acceptance for diverse forms of *sexual* expression. The ways in which same-sex marriage has played upon this complex cultural and political terrain and the means used by conservative groups to organize within this postcolonial space offer an important laboratory for understanding the contemporary limits to union.

In chapter 2, I open a discussion of the social and sovereign discourses that have been deployed in debates over gay and lesbian rights, including the demand for marriage rights. A common theme in these debates has been the notion that lesbians and gays ask for "special rights" above and beyond the equal rights that are their due. I show that the argument for special rights has been supported by a neoliberal economic discourse that has borrowed from the idioms of global competition, the need for flexible production, and the premise of material scarcity to picture civil rights (particularly gay rights) as excessive, costly, inefficient, and antagonistic to private property interests. The manner in which social hierarchies, sovereign rationality, and supermajorities are constructed to defend community security through the exclusion of lesbian and gay civil rights provides the central concerns of this chapter. I have sought to sink the roots of these discourses deeply

by drawing from the debates surrounding Colorado's Amendment 2 and the marriage controversies in Hawai'i, Alaska, and Vermont.

This discussion provides a springboard for later explorations. Chapter 3 examines the ways in which neoliberal ideas have amalgamated domestic partnership and same-sex marriage into fused concerns. I argue that this entanglement has confounded the progressive and modern expectation held by many lesbian and gay rights activists that domestic partnership might provide a back door to citizenship rights avoiding the agonistic politics of sovereign exclusion. Because the interplay of economic and sovereign demands is articulated on the very form of legal norms—mitigating the contrast between status and contract—domestic partnership is easily rhetorically projected as a surrogate for marriage, raising majority ire. The means by which neoliberalism has furthered this discursive dynamic in Hawai'i and elsewhere is a particular issue this chapter takes up.

Resistance to neoliberalism by labor unions—the quintessential Fordist institutions designed to advance worker rights and benefits within a local environment—made them a potentially promising ally in the same-sex marriage issue, yet one whose support never materialized. Chapter 4 looks at labor unions in order to assess and explain their mixed record working on behalf of civil rights. Again, my explanation of the difficulties faced by unions asked to form a coalition with other progressive social movements centers on the powerful effects of the economic and sovereign discourses that surrounded the case. Although unions see themselves as champions of the rights of workers, and have long committed themselves to increasing benefits for their members, same-sex marriage was resisted as an important union fight due to the perceived economic costs imposed on private and public employers as well as its challenge to the historical frameworks of union governance.

Chapter 5 asks whether and by what means another potential ally—Native Hawaiian nationalist groups who have a dramatically different argument about sovereignty than those opposed to same-sex marriage—have been able to change the nature of the debate. In particular, I examine the ways in which the arguments of tradition and civilization rallied in the name of sovereignty by antirights groups played themselves out among the poorly buried remnants of Hawai'i's colonial and precolonial past. Native Hawaiians emerged as much more than allies to civil rights advocates during the marriage debates. Because they were a constant reminder of the nineteenth-century his-

tory of violent imposition of Western rule, custom, and Christianity, Native Hawaiian demands for self-governance provoked a particular anxiety about tradition, progress, and sexuality that upset conservatives as much as they complicated common cause with rights activists.

Chapter 6 turns to the analogies that have run through same-sex marriage litigation and the public political campaigns designed to halt these legal cases. Lurking behind debates over the appropriateness of these analogies are two concerns. The first is the respect of other sovereigns, which I suggest is an essential element of sovereign discourse. The second is the fear of international competition that limits acceptance for novel legal developments. Both issues have made North American and European responses to the global demands for same-sex partnerships an inescapable issue for American courts and publics, and, I argue, have ultimately worked to modify the understanding and acceptability of the demand for equal rights. Finally, in chapter 7, I ask what alternative strategies can now emerge in the twilight of civil rights.

#### TIME LINE

1984	All statutory language regarding procreation as a basis for marriage is found by the Hawai'i legislature to be prejudicial against the handicapped, elderly, and others and is stricken from the law books.
17 December 1990	Two lesbian couples and one gay couple apply for marriage licenses from the Hawai'i Department of Health.
February 1991	Hawai'i attorney general denies these licenses on account of the sex of the applicants.
1 May 1991	Dan Foley, attorney for the three couples, files suit in circuit court alleging violations of plaintiffs' privacy and equal protection rights.
3 September 1991	Trial, <i>Baehr v. Lewin</i> . Circuit court judge Robert Klein rules that same-sex couples do not have a right to marry, but agrees to consider further equal protection arguments.

- 9 September 1991 Trial, *Baehr v. Lewin*, continued. Foley argues that gays and lesbians have historically been targets of discrimination, that sexual orientation is immutable, and that they are entitled to equal protection in this case. Judge Klein dismisses the case. Foley appeals.
- 5 May 1993 Hawai'i's Supreme Court rules that denying licenses to same-sex partners is under the state's equal rights amendment discriminatory absent a compelling state interest. Supreme Court remands case for trial in circuit court to determine whether such an interest can be adequately asserted.
- Autumn 1993 Public hearings held by the House Judiciary Committee throughout Hawaii to elicit testimony on same-sex marriage.
- April 1994 State legislature passes law declaring procreation to be the basis of the marriage laws and "finds that Hawai'i's marriage licensing laws were originally and are presently intended to apply only to male-female couples, not same-sex couples." Legislature rejects a constitutional amendment to stop same-sex marriage.
- April 1994 Legislature creates a Commission on Sexual Orientation and the Law to advise it on same-sex marriage.
- June 1994 Governor signs marriage statute limiting marriage to opposite-sex couples.
- August 1994 Two Alaska men file for a marriage license, which is denied by the State Office of Vital Statistics on the basis that "marriage between two persons of the same sex is not contemplated by [Alaska's] statutory scheme."
- September–December 1995 Commission on Sexual Orientation and the Law hears evidence. It issues a report

- in December recommending recognition of same-sex marriages and no legislative interference with *Baehr v. Lewin*. As a second alternative, the commission recommends a comprehensive domestic partnership statute.
- September 1996 Circuit court judge Chang hears the trial of *Baehr v. Miike* (as the case is renamed) on remand from the supreme court.
- September 1996 President Clinton signs the Defense of Marriage Act, which is designed to keep other states from having to recognize same-sex marriages made in Hawai'i and elsewhere.
- 3 December 1996 Judge Chang rules in *Baehr v. Miike*, ordering the state to stop discriminating against same-sex marriages. Same-sex marriage is legal in Hawai'i until the next morning, when Judge Chang stays his order pending final appeal to the Hawai'i Supreme Court.
- January 1997 House Judiciary Committee holds public hearings on same-sex marriage and domestic partnership.
- 24 January 1997 5,000 protesters amass at state capitol to demand a legislative solution ending the same-sex marriage cases. This is the largest political rally since statehood.
- 29 April 1997 Legislature passes a bill putting a constitutional amendment before voters: "Shall the legislature have the power to reserve marriage to opposite sex couples?" Reciprocal Beneficiaries Act, the nation's most comprehensive domestic partnership legislation, is passed at the same time.
- July 1997 Two lesbian and one gay couple sue Vermont after their applications for mar-

- February 1998  
 Circuit court judge Peter Michalski rules that Alaska's constitutional right to privacy entitles same-sex couples to a trial to determine whether a compelling state interest can be shown for the ban on same-sex marriage found in the Alaska Marriage Code.
- Spring 1998  
 Hawai'i's attorney general invalidates health benefits for reciprocal beneficiaries who are partners of state employees. State prepares to collect benefits already paid out under the program.
- July–November 1998  
 Same-sex marriage dominates fall campaign in Hawai'i.
- 3 November 1998  
 Same-sex marriage amendment declaring in part, "No provisions of this constitution may be interpreted to require the state to recognize or permit marriage between individuals of the same sex" passes with 69% of the vote in Alaska.
- 3 November 1998  
 Amendment designed to give the legislature jurisdiction over marriage passes with 69% of the vote in Hawai'i.
- November 1998  
 Arguments before the Vermont Supreme Court in *Baker v. Vermont*.
- December 1998  
 Hawai'i Supreme Court calls for briefs from both sides in the *Baehr* case evaluating the constitutional effects of the new amendment.
- 10 December 1999  
 Hawai'i Supreme Court rules that the amendment took the Hawai'i marriage statutes "out of the ambit of the equal protection clause of the Hawai'i Constitution," making the plaintiffs' demands for a marriage license moot.

20 December 1999

Vermont Court rules in *Baker v. Vermont* that same-sex couples are entitled to equal protection. The court refuses to rule on a specific remedy and refers the issue to the legislature to consider whether comprehensive domestic partnership or marriage is the appropriate choice.

26 April 2000

Vermont enacts civil union legislation.