

ABSTRACT

Title of Dissertation: BEYOND POLITICAL NEUTRALITY:
TOWARDS A COMPLEX THEORY OF
RIGHTS IN THE MODERN DEMOCRATIC STATE
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As of late, women, racial and ethnic minorities, gays and lesbians, and other similarly situated groups have begun to make right-claims that once again test liberal notions of neutrality and raise significant questions concerning whether or not full equality and autonomy is possible in modern democracies. This study focuses on the impact of race, class, gender, sexual orientation, and other markers of difference on the realization of rights in the modern democratic state.

This dissertation uses three case studies, which separately and together demonstrate attempts to realize full freedom and autonomy through practices of direct democracy, the California Referendum Initiative; appeal to the courts, the issue of Gay Marriage; and the creation of public policies and landmark legislation, the Violence Against Women Act. The findings of my research suggest that at all levels of government, race,

class, gender, sexual orientation and other markers of difference shape the realization of rights in the modern democratic state.

In this study, I extend the insights offered by critical race scholars by proffering a complex theory of rights that is able to account for the impact of identity and culture to the realization of rights and rights-claims made by individuals and groups in the public sphere. Employing a complex theory of rights, the findings of this study confirm that there are a variety of factors that influence the realization of rights in the modern democratic state. Chief among them are: (1) A notion of the good operating in society that is connected to deeply entrenched societal values and norms and that privileges the dominant culture; (2) the structures and institutions that govern society are enmeshed in race, class, sexuality, and ethnic hierarchies; (3) the accumulated advantages gained through historic practices of exclusion, conquest, and enslavement; (4) the representation of the dominant group and subjugated groups in the public sphere through texts, the media, and discourse; and (5) whether or not individuals or groups are recognized as bearers of rights under the law.

BEYOND POLITICAL NEUTRALITY: TOWARDS A COMPLEX THEORY OF
RIGHTS IN THE MODERN DEMOCRATIC STATE

By

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Beyond Political Neutrality: Towards A Complex Theory of Rights in the Modern Democratic State

CHAPTER 1

INTRODUCTION

Pale skin, long, straight hair, ambiguous features, and non-existent familial ties assured her that she would take her secret to the grave. Her husband had died many years prior and she had bore no children. When asked about her background, she answered by describing herself of Portuguese descent.

As she grew older and unable to care for herself, the mask she had worn for what seemed like an eternity began to fade. Her long, straight hair was revealed to be a wig and underneath it suffocated short, coarse hair. Without the wig, her skin appeared darker and her features more pronounced.

Lydia Turnage Connolly who lived her life as a White woman, as death neared had become Black. Her secret life and past had been revealed. When she passed, among the possessions left behind was a journal written by her father detailing his life as a slave in Alabama and old photos of her with family members. All of who were Black.¹

¹ Staples, Brent. 2004. "Editorial Observer: Secret Father, a Black Literary Treasure and an Old Woman." New York Times. 28, June. Also, for a more in depth discussion on this issue, see O'Toole, James. 2002. *Passing for White: Race, Religion, and the Healy Family, 1820-1920*. Massachusetts: University of Massachusetts Press.

At the time of Lydia Connolly's death in 1984, the Civil and Voting Rights Acts had been in effect for nearly twenty years. Collectively, both Acts symbolized an important turning point for the nation. Civil rights activists and leaders spoke passionately about change and progress. In fact, in a speech to congress, President Kennedy noted in the years leading up to the passage of the legislation that the progress in securing the civil rights of all Americans had been more than any period in the history of the country. "Progress, he said, had been made through executive action, litigation, persuasion, and private initiative in achieving and protecting equality of opportunity in education, voting, transportation, employment, housing, government, and the enjoyment of public accommodations."²

The question is why then didn't Mrs. Connolly toss her wig and false identity away with the signing of the legislation and the promise of a better tomorrow? It is my belief that Mrs. Connolly understood something very real and very true about race, class, gender, and rights in the modern democratic state. She clearly understood the value and privilege attached to whiteness or one's proximity to whiteness, specifically white maleness.³ Further, it is possible that she understood that revealing herself might mean risking the mobility, institutional power, access, protection, and invisibility she had come to rely on as a white woman in a society that privileges

² Kennedy, John F. Special message to the Congress on Civil Rights. Feb. 1963.

³ This point is made by Adrienne Davis in her ground breaking article "Don't Let Nobody Bother Yo Principle (2002)," in *Sister Circle: Black Women and Work*, ed. Sharon Harley and in an interview in the documentary film NO! by Aishah Shahidah Simmons (2006) where she notes that white women although disadvantaged because of their gender benefited from patriarchy and whiteness through their relationship to white men.

whiteness, despite legislation and laws enacted to erase⁴ racial differences and inequality.

While the story of Mrs. Connolly might appear to be an aberration or an antiquated tale from yesteryear, I believe it is made fresh by the fact that the core tensions arising from the gap between formal equality and the everyday lived experiences of women, racial and ethnic minorities, Gays, and other similarly situated groups still remain. In the liberal democratic state, attempts to remedy historic inequalities and to create a level playing field are mitigated by the norms, values, culture, institutions, and structures present in society. As Frederick Douglass⁵ (1866) notes, “Human law may know no distinction among men in respect to rights, but human practice may.”

In this dissertation, I focus on the impact of race, gender, class, sexual orientation, and other markers of difference on the realization of rights in the modern democratic state. Looking beyond the simple interaction between the state and the individual, I attempt to investigate the factors that prevent groups and individuals from attaining their full bundle of rights in society.

Individual Liberty and Freedom in the Modern Democratic State

Individual liberty and freedom are highly prized values in the modern democratic state. As a political theory, liberalism places a heavy emphasis on individual rights, autonomy, equality of opportunity, and the pursuit of goods. The appeal of liberalism in modern democracies rests in its originary tale of natural rights codified in the social

⁴ It is noted that perhaps erase is a strong word to use in this context and the goal at least as civil rights leaders stated it was to move us toward a more color-blind society.

⁵ Reconstruction by Frederick Douglass. Atlantic Monthly 18 (1866): 761-765.

contract and the ability of all individuals to assert and defend those rights in the public sphere.

In all liberal democracies, the protection of individual rights is entrusted to the state. Conflicts arising either concerning a violation or a denial of rights are made through the state by invoking agreements set forth in the original contract. As such, rights constitute the heart of the conception of justice that make plausible claims of legitimacy of any modern polity . The state, a general term for the institutions, agencies, and procedures related to the government, serves as a kind of arbitrator of conflicting interests and acts as both a mediator and regulator of rights-claims in the public sphere.

In Modern democracies, rights—human, civil, and legal depend on liberal notions of political neutrality and the relegation of difference to the private sphere for its success. The sharp distinction between the public and the private sphere and the denial of difference under liberalism is problematic because it denies women, racial and ethnic minorities, and other similarly situated groups full recognition and equal freedom in society.

As a matter of course, the history of the United States has been the extension of rights to groups previously excluded.⁶ Throughout the 19th and into the late 20th Century social groups identified common interests based on experience and formulated agendas to have their concerns addressed in the public sphere.

⁶ A prime illustration of this point is the fourteenth amendment and the *Dred Scott* ruling which defined citizens as “all persons born or naturalized in the United States.” As a result, the courts were tasked with the protection of individual liberties. The Fourteenth amendment defined the subject of rights by constituting all individuals as moral equals under the law.

Conversations about power, politics, rights, and justice were conducted largely in terms of identity-based claims.⁷ Women, Gays, Blacks, Native-Americans, the disabled, and other groups appealed to shared experiential and historical knowledge of discrimination in order to establish a collective identity and further rights in the political arena.

Many among the excluded and disadvantaged believed securing formal equality, that is, equal political and civil rights,⁸ would lead to their full freedom and equality. However, women, Blacks, Native Americans, Latinos, Gays, and other similarly situated groups still find themselves treated like second-class citizens, with a half-full bundle of rights, or constantly reasserting or defending their rights in the public sphere.

In this dissertation, I will argue liberal democratic theory fails to adequately account for the impact of race, class, gender, sexuality, and other markers of difference on the realization of rights in the modern democratic state. Even the most complex accounts of identity and difference under liberalism does a poor job of providing an integrative and historical understanding of how difference among and between individuals and groups has shaped rights-claims, privileges, and the distribution of wealth and resources in the public sphere.

⁷ For a more thorough discussion on this point see, Valverde, Mariana. 1999. "*Identity Politics and the Law in the United States*." *Feminist Studies* 25:2 (November) 345-361

⁸ In the Civil Rights movement, mobilization around race and gender issues tended to be framed around issues of equality, access, and rights and within the liberal framework. Calls for Freedom and Justice in some, not all cases, meant equality before the law, access to information and resources, and formal rights.

Further, I will seek to demonstrate how Rights—civil, social, and political, hinge on difference in liberal democracies and how the realization of rights is directly related to how close one is to the core-self as articulated through the liberal discourse. The core-self is defined as the masculine subject of rights as articulated through the liberal discourse. I seek to better understand the promise of political neutrality in relationship to rights as a means of securing material goods, civil freedom, and social equality in liberal democracies. I focus on the ways in which the possibility of a truly civil and participatory democracy are compromised because of the smoldering tension between liberal claims of neutrality and equality and rights-claims made in the public sphere by marginalized groups and individuals.

Finally, in this dissertation, I propose to extend some of the insights offered by critical race scholars by proffering a complex theory of rights that is able to account for the impact of identity and culture on the realization of rights and rights-claims made by individuals and groups in the public sphere. Moreover, I attempt to explain why formal equality does not necessarily translate into social and political equality for some groups in the modern democratic state.

An Originary Tale of Rights in Modern Democracies

In this dissertation, I argue that there is an originary tale that provides context for contemporary discussions of rights in modern democracies. The story, as it has been traditionally told tends to emphasize the moral and political equality of all individuals. As Carole Pateman (1988) notes, it is often presented as a story of freedom. One interpretation of the original contract is that the inhabitants of the state of nature exchange the insecurities of natural freedom for equal, civil freedom, which

is protected by the state. In this new civil society freedom is universal; all adults enjoy the same civil standing and exercise their freedom by, as it were, replicating/enforcing the original contract . In Hobbseian terms, all individuals are seen as equal partners in the moral dialogue when it comes to asserting and defending rights-claims in the public sphere. I would like to take the opportunity to present this tale differently.

Let us imagine that there is a group of people. They don't know one another, but they have X in common. Let us assume that X stands for property. Because of X they decide to form a group to protect the rights bestowed upon them because of their possession of X. In establishing the group, they agree to a set of rules to govern the group. The rules serve their individual interests of protecting X and their rights to hold X. As a group, they adopt symbols, language, laws, establish institutions, and ultimately enter into a binding agreement to protect X.

Next, let us further imagine that over time others wish to join the group. It is not a stretch to imagine that there will be a number of issues that will surface. The individuals seeking to join the group are at an obvious disadvantage in relationship to the founding members on several accounts: (1) the laws and institutions governing the group are reflective of the interests and concerns of the founding members, (2) the original agreement did not include the Others, (3) Power rest almost exclusively in the hands of the members, and (4) upon entering the group, the Others have no rights.

As a result, we end up with two distinct classes of people. The first class of people consists of those who have rights from the beginning and as members of the group go about ensuring the state or others do not infringe upon those rights. Conversely, the

second class consists of those who enter into the group with essentially no rights and must use the mechanisms and laws set up by the founding members to secure rights or advance rights-claims. What we are talking about here is the classic distinction between negative and positive liberty.⁹

In the above story, the founding members of the group establish the terms of agreement and define neutrality. The so-named neutral position is constructed through the lens of the original members. The laws, language, institutions, and structures are skewed to their benefit and normalized through practices and behaviors of the members. Consequently, their ideals and beliefs come to be considered natural, obvious, and therefore true. Others who enter the group must adopt the terms of agreement and the definition of neutrality of the group in order to participate even if they are incommensurate or undermine their own beliefs and values. It is my contention that an originary tale set forth in this way chips away at claims of neutrality and equality set forth in liberal democratic theory. It also provides a historical context for the ways in which groups previously excluded enter into society and the set of circumstances under which they must engage.

⁹ See Isaiah Berlin, *Two Concepts of liberty* in *Four Essays on Liberty* (1969). In *Two Concepts of Liberty*, Berlin sets out to define negative and positive liberty. He argues: “The extent of a man's negative liberty is, as it were, a function of what doors, and how many are open to him; upon what prospects they open; and how open they are [and] The 'positive' sense of the word '[freedom]' derives from the wish on the part of the individual to be his own master. I wish my life and decisions to depend on myself, not on external forces of whatever kind.” Embedded in positive freedom are the notions of agency and autonomy. I believe it is important to make a further distinction between the two classes of individuals set forth in the above tale. It would be misleading and quite simplistic to assert that there are only two groups of individuals and that there are no further distinguishing characteristics that matter. Indeed, women, racial and ethnic minorities, gays and lesbians compose sub-groups within the latter group.

Political Neutrality, the right, and the good in Modern Democracies

The promise of neutrality in the liberal democratic state is expressed most completely in constitutional law. As a mediator between competing conceptions of the good in society, the court gives voice to the liberal ideal of the priority of the right over the good. Rather than promote a particular conception of the good, the liberal framework insists on toleration, fair procedures, and respect for individual rights. As Sandel notes, the court increasingly interprets the requirement of neutrality as expressing or advancing a conception of persons as free and independent selves.

The liberal notion of neutrality draws a clear and discernable distinction between the right and the good. For liberals like Kant and Rawls, individuals possess rights that are inviolable and are separate from the good people choose to pursue within the framework. The claim for the priority of the right over the good connects the idea of neutrality to individual rights. As such, rights function as “trump cards” and protect individuals from policies and laws that infringe upon one’s ability to pursue his or her own good in his or her own way. In a pluralist society where there are necessarily irreconcilable and competing conceptions of the good, the individual or group must trust the state to deliver on its promise of political neutrality when disputes arise.

In this dissertation, I will attempt to demonstrate that to the extent that individuals or groups have difficulty realizing or exercising rights in liberal democracies, it is, in part, a result of the state’s failure to deliver on its promise. Further, I will attempt to demonstrate there exists a working notion of the good present in the liberal

democratic state that imposes itself on the group and the individual and in turn affects the realization of rights in the public sphere.¹⁰

¹⁰ Michael Sandel raises this question in *Democracy's Discontent* (1996) when he asks how is it possible to affirm certain liberties and rights as fundamental without embracing some vision of the vision of the good life or without endorsing some ends over others.

Egalitarianism and Ascriptive Inequality in the Modern Democratic State

Some have argued that concern with difference and the inequalities that exist in the public sphere is not a result of the flaws of liberalism, but rather a result of the social and political dynamics present in society that make the normative ideals of liberalism difficult to realize. In fact, they argue, individual liberalism has no real responsibility to ensure the welfare of the whole or to ensure that those with the least amount of resources and opportunities are placed on equal footing with those whom resources and opportunity favor. Difference does not figure in the liberal subject as features such as race, religion, ethnicity, and gender do not define our identity. As Sandel points out, they are not constituents, but merely attributes of the self, the sort of the thing that the state should look beyond. Further, he goes on to say, once these contingencies are seen as products of our situation rather than aspects of our person, they cease to supply the familiar grounds for prejudice and discrimination.

The Liberal mind places a high premium on a description of the modern democratic state as egalitarianism and shaped mostly by “the comparatively free and equal conditions and the enlightenment ideals to have prevailed at its founding.”¹¹ This thinking, I contend, has prevented us from seriously being able to grapple with the impact of difference on the realization of rights in the liberal democratic state. For

¹¹ Alexander Tocqueville, for example, in *Democracy in America* (1831) wrote “Amongst the novel objects that attracted my attention during my stay in the United States, nothing struck me more forcibly than the general equality of conditions.” His observation is short-sided and exclusive of women, Blacks, Native-American, and other ethnic minorities. However, *Democracy in America* (1831) remains a seminal text in describing the early republic and the conditions under which individuals go about exercising rights and freedom in society.

example, the question is rarely raised concerning the status of Women, Blacks, and Native-Americans in the early republic. Under liberal democratic theory, there is never an acknowledgement of the historic exclusion of groups from the republic that demonstrates the existence of inegalitarian ideologies that shaped the liberal state as well.

For this point, I rely heavily on an alternate framing of the modern democratic state as put forth by Rogers Smith that recognizes the “inegalitarian ideologies and institutions of ascriptive hierarchies that defined the political status of racial and ethnic minorities and women through most of U.S. History.” Smith argues rather than seeing illiberal, undemocratic beliefs and practices as expressions of ignorance and prejudice, destined to marginality because of their lack of rationality to see them as elaborate justifications for ascriptive hierarchies, differential treatment, and exclusion. For example, he goes on to say:

“...the comparative moral, material, and political egalitarianism that prevailed at the founding among moderately propertied white men was surrounded by an array of other fixed, ascriptive systems of unequal status, all largely unchallenged by the American revolutionaries. Men were thought naturally suited to rule over women, within both the family and the polity. White northern Europeans were thought superior culturally—and probably biologically---to black Africans, bronze Native Americans, and indeed all other races and civilizations. Many British Americans also treated religion as an inherited condition and regarded Protestants as created by God to be morally and politically, as well as theologically, superior to Catholics, Jews, Muslims, and others (Smith, 1993 p. 549).”

As such, I argue in this dissertation that the history of the United States is one that has allowed for the influence of race, gender, religion, ethnicity, and other markers of difference on rights and individual freedom. Further, liberal democratic theory must

deal seriously with its legacy of exclusion and ascriptive inequality as a fundamental aspect of the modern democratic state.

Difference and the Politics of Recognition

Demands for recognition by groups arise in part out of the belief or suspicion that liberal politics and law covertly imports its own, non-neutral norms into the political sphere. Connectedly, these norms influence individual and group mobility; access to political and economic resources; and rights and privileges in society. As such, the claims of individuals and groups to rights and protection under the law in the public sphere are ‘embroiled in characteristic struggles for redistribution and recognition in society.’¹²

The politics of recognition¹³ relies on the centrality of group membership as a determining factor in the formation of individual identity and as the impetus for rights-claim made in the public sphere. The attraction of a politics of recognition for marginalized groups is that it provides pride of place to difference and group identity. It places difference and diversity at the center of the discussions of rights, autonomy, and justice in liberal democracies.

Connectedly, Benhabib (1994) writes the identity politics of “we” depends on a power structure that relies heavily on paradigms of inclusion, exclusion, and by the oppression of others, over and against whom they define themselves. She goes on to say, ‘the identity of the “we” contains the result of collective struggles for power among groups, culture, genders, and social classes. The collective “we” is formed as a result of past struggles for hegemony and power.’ Lister (1997) concurs by noting the

¹² For a more thorough discussion on this point see Seyla Benhabib’s *The Claims of Culture* (2002).

¹³ See Chuck Taylor’s Multiculturalism and “The Politics of Recognition” (1994) in *Multiculturalism: Examining the Politics of Recognition*, ed. Amy Guttmann.

individual's ability to act as a citizen or to be seen as a part of the "we" is shaped by where one stands on a continuum of inclusion or exclusion.

The defense of claims made by marginalized groups for recognition in society is rooted in the idea that securing rights in liberal democracies is related to how close one is to the dominant culture.¹⁴ To the extent that there is distance between the core and the periphery, marginalized groups are at a distinct disadvantage in terms of being able to integrate their norms, values, and beliefs into the fabric society. They must compete with dominant culture to provide a context of choices for members and advance claims in the public sphere. For example, the rights and liberties of Gays and Lesbians depend, in part, on the group's ability to move closer to the core by being able to successfully assimilate by adopting dominant cultural norms or values or by being able to demonstrate the value of alternative familial and relationship structures in a heteronormative society.

As of late, the politics of recognition or identity politics has come under increased scrutiny and criticism (Young 1990, Fraser 1997).¹⁵ Charges leveraged against group specific representation include its essentialism and the tendency to take the focus of broad structural and institutional problems by turning them into narrow group-specific concerns. The politics of recognition transforms what could be collective struggles against state and institutional forms of oppression into struggles for recognition for Blacks, Women, or Gays, thereby decreasing the likelihood that

¹⁴ *ibid.*

¹⁵ It is important to note that many of the critiques of identity politics have come from the political left with feminist scholars of color leveraging some of the most powerful critiques against identity politics. For a more thorough discussion, see the Combahee River Collective Statement (1986).

groups will recognize common or similar goals. Further, some argue that identity-based rights-claims are rooted in a politics of suffering and subordination and the coherence of the group identity depends heavily on its marginalization (Brown 1995). In other words, as Susan Bickford (1997) argues politicized identity has an ontological investment in its own subjection. While the above points are reasonable, they fail to account for the historic denial of rights and subjugation of groups by the dominant class, and the continued and systemic acts of injustice that plague groups and individuals present day; instances of which are not imaginary, but well documented and preserved.

Next, it has been recently accepted that social group identities are socially constructed and not fixed as previously assumed. Markers such as race, ethnicity, gender, and sexual preference are no longer assumed to be fixed, but a result of human discourse and social relations. As such, they are inherently contestable, subject to power relations that in turn embed them in political life . To address this point, I find Benhabib's framework on narrativity and the self particularly useful. Benhabib understands group identity as dynamic and argues that the focus should be less on what the group is or who constitutes the group, but what the political leaders of such groups demand in the public sphere. Further, she argues that to be and to become a self is to insert oneself into the webs of interlocation where one knows how to answer when one is addressed and how to address others (Benhabib 2002). Individuals are born into webs of interlocation or narratives—real, constructed, or imagined—that ultimately shape rights and privileges in the public sphere.

Benhabib's framework is supported by Feminists and communitarians¹⁶ who have consistently argued against the transcendental subject of liberalism and for a subject that is connected and constituted by the necessary connections that bind us human beings to those around us . In this way, attention is called to underlying and inherent assumptions of the subject of liberalism and the significance of social associations and institutions in shaping the individual's concept of the self. For example, feminists have claimed that the subject is inherently masculine and patriarchal, and exclusive of that which has been defined as feminine. As such, many feminist scholars have attempted to move the discourse in a new direction by proposing a "politics of difference" or a radical pluralist epistemology or politics that rests on a conception of multiplicity and diversity, rather than homogeneity and polarity .

Accordingly, in thinking about identity and culture in relationship to rights, it is important to consider how once assumed stable categories have become complex and dynamic with individuals sharing membership in one or more social groups. In some instances, identities overlap, contradict, or betray others. The political implications of such recognition are significant and far-reaching. At once, we can begin to theorize about the relationship between complex identities and the demand for rights on the part of marginalized groups and individuals in society. Further, we can begin to understand how such claims challenge the legitimacy of established constitutional democracies.

In response to the challenges posed by difference and complex identities to liberal democracies, contemporary political philosophers such as John Rawls (1993), Joseph

Raz (1994), and Will Kymlicka (1996) have sought to formulate responses or propose relevant alternatives that recognize the potency of group and individual identity to citizenship rights in the public sphere. While these frameworks have been useful in terms of articulating the significance of cultural membership to our sense of identity, they fail to adequately address the core concerns of some marginalized groups with regard to securing rights and personhood in the liberal democratic state, specifically the lack of social and political equality. In an effort to harmonize claims by marginalized group with the liberal framework, difference is relegated to the private sphere leaving the masculine subject of liberalism in tact.

Contemporary political philosopher John Rawls' answer to the dilemma of difference is to confine it to the private sphere; a move he considers necessary if we are able to accommodate the wide variety of incompatible, yet reasonable, religious, philosophical and moral doctrines characteristic of contemporary liberal democracies¹⁷. He argues that we must seek a freestanding conception of political justice, which can nonetheless be endorsed by an overlapping consensus of reasonable comprehensive doctrines (Rawls 1993). Rawls' consensus theory obscures the fact that marginalized groups are at a distinct disadvantage in relation to the dominant culture because their values and beliefs have never constituted the consensus or majority in western societies.

¹⁷ While normally at two separate ends on the discussions, Jurgen Habermas starts with a similar assumption that asserts in modern, pluralistic societies, social norms, [values, and beliefs] can derive their validity only from the reason and will of those who decisions and interactions are supposed to be bound by them. However, Habermas differs from Rawls in that he believes there exists a more universal basis for agreement on general normative principles even among members of pluralistic societies who differ on questions on values and the good life (Habermas 1996).

Under the terms of an overlapping consensus, beliefs need not be threatening, fanatical or undemocratic to lose out under the terms of particular core commitments or an overlapping consensus.¹⁸ They only need to fall outside of dominant cultural norms and beliefs to be at a risk for loss. While Rawls accounts for this loss by noting “there is no social world without loss: that is, no social world that does not exclude some way of life that realizes in special ways fundamental values (Rawls 1993),” he fails to account for the reasons why marginalized groups and individuals seem to endure more than their fair share of losses in liberal democracies.

For many liberals, the accommodation of diversity and difference is seen as undermining political liberalism and therefore impossible to achieve. As David Miller (1995) notes, the cost of incorporating are high, for the recognition of groups can only be attained on the basis of a prior decision about which groups are to be granted recognition.

The liberal response to difference leaves a lot to be desired. In this dissertation, I will seek to establish that rights-claims made by marginalized groups need not be seen as threats to democracy or cause for political instability, but in line with historic struggles for recognition and equal freedom in liberal democracies. Further, I will argue that from a rights standpoint, there are very few grounds on which to deny recognition and rights to individuals in society.¹⁹

¹⁸ For a more thorough discussion see Emily Gill’s *Becoming Free: Autonomy and Diversity in the Liberal Polity* (2001).

¹⁹ For this point, John Stewart Mill’s discussion on the Harm Principle in *On Liberty* (1860) is important. In *On Liberty*, Mill argues “[T]he only purpose for which power can be rightfully exercised over any member of a civilised community against his will, is to prevent harm to others. His own good, either physical or moral, is not a

Towards a Complex Theory of Rights in the Modern Democratic State: The Major Questions of the Research

As of late, women of color; gays and lesbians; and other similarly situated groups have begun to make rights-claims that once again test liberal notions of neutrality and raise significant questions concerning whether or not full equality and autonomy is possible in modern democracies.

It is my belief that the current historical moment presents us a fair opportunity to grapple with the ways in which rights are intimately linked to culture, social identity, political institutions and structures present in society. A liberal conception of rights that refuses to acknowledge the accumulation of privilege as a result of historic exclusion and relies heavily and almost exclusively on the relationship between the individual and the state is incomplete. As such, I will advance a complex theory of rights, which will attempt to explain not only the impact of race, gender, sexuality, and class on the realization of rights in the modern democratic state, but also how rights and privileges are intimately shaped by difference and identity in the public sphere.

In this dissertation I seek to answer a series of questions: What is the impact of race, gender, sexuality, and other markers of difference on the realization of rights in the modern democratic state? Does even the most complex account of multi-cultural identity under liberal democratic theory accurately account for the impact of difference on the realization of rights in liberal democracies? Lastly, why doesn't

sufficient warrant." In other words, we may do as we please as long as we do not harm others or infringe on others rights or privileges.

formal equality, say the right to vote, translate into social and political equality for some groups and individuals? These questions form the central inquiry of this dissertation and provide the opportunity to theorize a rights framework that is rooted in and reflective of the lived experiences of women, racial and ethnic minorities, Gays, and individuals affected by class status.

I pursue these questions through three case studies, which separately and together demonstrate how racial, sexual orientation, and gender differences continue to impact the realization of rights in the liberal democratic state despite legal gains made by marginalized or disenfranchised groups. As will be demonstrated, the case studies will be chosen on the basis of their suitability for demonstrating the limitations of liberal democratic theory with regard to the accommodation of difference in the public sphere; interrogating liberal claims of neutrality and equality; and shedding light on the reason why despite legal equality, social and political equality remain elusive for some and not others in the liberal democratic state.

The story I tell about rights is different from the one that has been told many times over. Much of the literature on rights has focused on discrediting the transcendental subject of rights or the need to relegate difference to public sphere. This dissertation focuses on the significance of race, class, gender, sexuality and other markers of difference on an individual's or group's ability to obtain rights and equality in civil society. It describes the struggle for recognition in modern democracies on the part of individuals who up until recently had not been defined as the subject of rights under the law.

The findings of this dissertation confirm that there are a variety of factors that contribute to the realization of rights in liberal democracies. Chief among them is the interaction between various markers of difference and the structures and institutions that govern society. Over time, institutional and structural discrimination have become entrenched and embedded in the laws, structures, and institutions present in civil society thereby making identifying the ways in which rights are denied or go unrealized difficult to pursue.

In my analysis, I conclude that race, gender, and sexual orientation shape the rights and privileges that individuals and groups are able to enjoy in the modern democratic state. Further, I argue that race, gender, sexual orientation, ethnic, and cultural hierarchies dominate American political and legal institutions. In a commodity-based economy these hierarchies are intrinsically meaningful and have direct social and material benefits or consequences. Remedies available to marginalized groups and individuals depend in part on the political recognition of difference and the demonstration that it is the cause for the denial of rights and privileges in the public sphere.

Outline of the study

In the subsequent chapters, I set out to paint a more accurate account of individual rights and freedom in the modern democratic state by examining three instances where difference has played a significant, if not determining role on the realization of rights in the public sphere. In Chapter two, I provide the theoretical framework necessary for exploring the significance of difference in relationship to rights-claims made by individuals and groups in modern democracies. It examines the core claims

of a complex theory of rights and why it promises to be a more complete political and theoretical framework in terms of contemporary discussions of political and social equality in the liberal democratic state.

I develop a complex theory of rights which enables us to understand the impact of difference and culture on rights-claims made in the public sphere and to recognize the structural and institutional barriers that undermine liberal notions of neutrality. Having said this, I seek to displace the unitary subject of rights by intentionally privileging difference in the discourse on rights in modern democracies.

In chapter three, I explore the meaning of race and rights through the State of California ballot initiative, Proposition 54. The referendum sought to ban the collection of racial data by the government. In the last decade, the State has served as a testing ground for many of the racially charged issues of the country like affirmative action, immigration, and bilingual education. While Proposition 54 is a very specific case, the implications of passage of the proposition would have been far-reaching. If passed, it would have reverberated across the country and opened the door for similar kinds of legislation in other states. At the core of the initiative was an intense debate around the relevance of race to privileges and opportunities available to groups and individuals in the public sphere and whether or not race should indeed be a private issue. Like the other cases chosen, this case challenges liberal notions of equality and neutrality and demonstrates how the dominant group has benefited from historic exclusion and accumulated privileges and opportunities that all but ensure racial and ethnic minorities never realize their full bundle of rights.

For this discussion, I examine existing literature on race and racialization processes to map the ways in which race has shaped American law, public policies, individual rights, and freedom in the liberal democratic state. I also rely on exit polls, national surveys, newspaper articles, and the national debates surrounding proposition 54. In Chapter three, I conclude that race is a determining factor in whether an individual will be able to realize his or her full bundle of rights in the public sphere. Race not only shapes the rights one is able to enjoy, but the privileges and the share of resources one is able to benefit from as well.

In Chapter four, I continue to emphasize the impact of difference on the realization of rights through the lens of sexual orientation. Over the last two decades the issue of Gay rights, most recently in the guise of marriage, has been a highly debated and divisive topic for politicians, legislators, legal scholars, and ordinary citizens. Whereas once the struggle for Gay rights took a back seat to racial and gender equity during the civil rights era, in the millennium the rights of Gays and Lesbians tend to be at the center of legal and moral discussions around individual rights, autonomy, equality, and freedom.

In this chapter, I examine the issue of gay marriage to explore notions of neutrality and the concept of the good in the modern democratic state. I use the recent Massachusetts Supreme Court case of *Goodridge v. the Department of Health* to discuss the subject of rights and abstract individualism under liberalism. In this chapter, I focus on the legal history of same-sex marriage and the public debates around homosexuality and the definition of marriage. I show that the issue of Gay marriage problematizes and highlights the tension between liberal claims of political

neutrality and rights-claims of individuals and groups who until recently had not been defined as individuals under the law. For this chapter, I rely on court decisions and briefings; newspaper and magazine articles; and legislation and public opinion polls.

Chapter five examines gendered citizenship in the modern democratic state. In this chapter, I seek to further demonstrate how race and gender continue to be primary tools of social organization and shape individual rights and freedom in the modern democratic state. I also demonstrate how the intersections of race and gender alter rights-claims made in the public sphere by women situated within multiple hierarchies. For this chapter, I use the issue of violence against women to illustrate the ways in which the struggle to attain and secure rights on the part of women has been closely tied with not the protection of rights, a kind of negative freedom, but by the denial of rights or privileges based on gender or sex. As such, a woman's right is defined contextually within the masculine public sphere and towards securing protection and freedom long extended to men in the liberal democratic state. For this chapter, I rely on court decisions and briefings, the existing literature on violence against women, and legislation.

Chapter six concludes this dissertation and in this chapter I summarize the findings of the dissertation, argue for a fuller and more accurate account of citizenship and rights in the modern democratic state, and suggest ways in which we can reconcile liberal ideals of egalitarianism and full equality with the lived reality and experiences of marginalized groups and individuals.

METHODOLOGY AND APPROACH

The general theoretical approach of this dissertation is critical theory. In my attempt to tell the story of the difficulty of accommodating difference in modern democracies, I rely heavily on the history and origins of narratives that seem to have been weaved into the very fabric of society. I explore the obvious and not so obvious disruptions to interject a more complicated reading of the experiences of individuals and groups in modern democracies. My plan is not to tell a neatly, integrated story of rights, but to raise significant questions with regard to how and why, despite legal gains, some groups and individuals struggle to realize their full autonomy and agency in supposedly in society.

The case studies represent my attempt to examine the struggle for the attainment of rights at different levels of government—local, state, and federal, and to demonstrate how these various branches have played significant roles in shaping individual rights and freedom in the liberal democratic state. Further, the cases demonstrate attempts to realize full freedom and autonomy through practices of direct democracy, the California Referendum Initiative; appeal to the courts, the issue of Gay Marriage; and the creation of public policies and landmark legislation, the Violence Against Women Act. The findings of my research suggest that at all levels of government, race, class, gender, sexual orientation and other markers of difference shape the realization of rights in the modern democratic state. The case studies are fastened together by their capacity to demonstrate the limitations of liberal democratic theory with regard to the accommodation of difference in the public sphere; interrogation of liberal claims of neutrality and equality; and shedding light on the reason why despite legal equality,

social and political equality remain elusive for some and not others in the liberal democratic state.

CHAPTER II

Theoretical Framework: A Complex Theory of Rights in the Modern Democratic State

The question of the deliverability of rights to those whose citizenship is dependent upon the subordination of identity markers such as race, gender, sexual orientation, and class to a national identity is of critical importance. The collapse of global and national boundaries (Soysal 1994); the recognition and constructedness of identity classification systems (Lopez 1995, Butler 1999, Guttman 2003); and rights claims made on the part of individuals who are situated within multiple hierarchies or who until recently had not been defined as the individual of which the laws speak,²⁰ provide us the opportunity to theorize a rights framework that extends beyond the simple interaction between the state and the individual.

During the late 1980s and throughout the 1990s, the topic of citizenship rights in relationship to difference was explored by feminist and legal scholars who sought to address the fundamental flaws of individual liberalism, specifically the liberal conception of the individual (Pateman 1988), the primacy of rights within the liberal framework, the concept of the good, and the neutrality of the state (Delgado 1995). However, despite these powerful critiques of individual liberalism, there is still much we do not know about the impact of difference on the realization of rights in the modern democratic state. Particularly, there is a need for a broader and nuanced

²⁰ See *Goodridge v. Department of Health* 440 Mass. 309, 798 N.E. 2d 941 (Nov. 18, 2003)

explanation of why social and political equality remains elusive for some groups and individuals.

This study of rights in the modern democratic state attempts to not only encompass the legal ramifications of the denial of difference, but the implications for public policies, material resources, mobility, and visibility in the modern democratic state. In this chapter, I will review the frameworks that have been offered thus far to address the impact of difference on the realization of rights in liberal democracies. Finally, building on these frameworks, I suggest a complex theory of rights that attempts to fairly account for the impact of identity and culture on the realization of rights by individuals and groups in the public sphere.

Defining Rights in The Modern Democratic State

In this dissertation, I employ T.H. Marshall's tripartite formulation of citizenship rights as a starting point for the discussion on the realization of rights in the modern democratic state. Marshall holds that there are three sets of rights that taken together should guarantee formal or full equality in liberal democracies—civil, political and social rights. Civil rights refers to legal equality or equality before the law. The civil pays close attention to the rights of property and speech, and the right to work (Sarvasy 2001). Within the civil sphere, the courts are entrusted to handle disputes that arise over the interpretation or the extension of these rights to groups previously excluded. Political rights refer to the right to participate in the exercise of political power (Sarvasy 2001) and is seen as fundamental to the idea of citizenship. The political right is an active engagement in politics in the public sphere and can be seen as a duty or obligation. The last, social rights concerns itself with equality of

opportunity and the rights to education, health care, and social services, and protection from harm. Social rights ‘provide a modicum of economic welfare and security, that allows citizens to live the life of a civilized being according to the standard prevailing in the society (Marshall 1965).’ Social rights are protected and implemented by state and federal agencies.

According to Marshall, the relationship between the three sets of citizen rights is historical in nature, with citizenship status attached to civil rights in the eighteenth century, political rights in the nineteenth century, and social rights in the twentieth century. In the millennium, however, citizenship rights and status tend to be defined partially or wholly by all three sets of rights. Civil, political, and social rights intersect, overlap, and inform individual and groups lived experiences and the possibility of full autonomy and freedom in society.

In the case of women, and racial and ethnic minorities in the United States, legal equality under the law has not always translated into social and political equality. A prime example can found by examining the struggle of Blacks to achieve social and political equality in the United States. The thirteenth through fifteenth amendments abolished Slavery and constituted Blacks as core-selves under the law. However, the laws failed to consider the second-class status or half-full bundle of rights Blacks possessed upon entering society. Politically, Blacks were entering a society that until recently had viewed them as inferior. Economically, they were resource poor. Both put them at a distinct disadvantage for being able to secure and exercise social and political rights in the public sphere (Bell 1992). The struggle of Blacks to secure full rights in the civil sphere post fifteenth amendment continued well after reconstruction

(DuBois 1935). While newly emancipated Blacks were allowed to vote, there were limitations imposed by states to prohibit them from exercising the right. Poll taxes and literacy test are just a sampling of these limitations.²¹ In struggles to repeal racist and biased laws, Blacks were not only asserting their rights as individuals, but also relying on the promise of neutrality for the assurance in the delivery of those rights within the liberal democratic state. A similar example posited by Wendy Sarvarsy (2001) is that of Women in the United States where women reformers of the early twentieth century argued for universal equal citizen rights, but they had failed to persuade men in power. Women were granted aspects of married women's civil property rights in the nineteenth century, but complete civil rights, especially ownership and control of their bodies eluded them.

For the purposes of this study, social rights are of extreme importance and pivotal to postulating a more complex understanding of the impact of difference on the realization of rights in modern democracies. In the words of Ruth Lister (2001), Social rights help to promote the exercise of political and civil rights by disenfranchised groups in terms of power and resources. Moreover, they are essential to the promotion or exercise of individual autonomy. Qualitatively, social rights provide a measure of equality and freedom in society. Social rights focuses on the distribution of wealth, resources, and power in society by shedding light on the beneficiaries and benefactors of social rights. Through the lens of social rights and the

²¹ This point is explored further in *The Possessive Investment in Whiteness* (1998) by George Lipsitz where he argues that the extension of formal equality through laws were met by resistance by Whites and supported by parallel laws that sought to curtail or limit the exercise of newly granted rights by disenfranchised groups. In some states, for example, poll taxes were a pre-condition to exercising the right to vote.

mechanisms (institutions and social structures) put in place to protect and ensure these rights by the state, the context for struggles for the realization of rights or the attainment of rights comes into focus.

OPPOSITIONAL RIGHTS FRAMEWORKS

Oppositional rights frameworks are those that as a course of engagement critically examine the fundamental assumptions and biases embedded in American political liberalism. During the late 1980s, Critical Race Theory emerged as one of the leading oppositional frameworks in the discourse on rights. As an oppositional rights framework, Critical Race Theory rejects many of the core assumptions of liberalism, particularly its claims of political neutrality and substantive doctrines of formal equality.

The significant contribution of Critical Race Theory to the discourse on rights is that it clearly articulates the ways in which race and through extension other makers of difference, are differentiated and commodified in modern democracies. Further, that this differentiation and commodification is the root causes for discrimination and unequal treatment in society. By foregrounding race in the discussion on rights, Critical Race Scholars make visible key political institutions and structures by shedding light on the ways in which laws, public policies, and legal remedies or penalties work to maintain dominant cultural, societal and political norms.

Derrick Bell's seminal work *Faces at the Bottom of the Well* (1992) underscores the above point by noting that despite legislative gains, the chance that Blacks [and other disenfranchised groups] will gain full equality in [America] is nearly impossible because the Herculean efforts often hailed as successes and signals of progress are no

more than short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance. This observation made by Bell calls into question the very core of civil rights discourse particularly the idea that formal equality would translate into social and political equality and desirability of colorblind approaches to justice.

In the years following the emergence of Critical Race Theory as an oppositional rights framework, Latinos, Women of Color, Gays and Lesbians began to articulate critical theories, which sought to foreground their complex, and layered experiences of discrimination and unequal treatment. LatCrit, Critical Race Feminism, and Queer Critical Theory speak directly to the importance of an intersectional analysis of power, difference, rights, and privilege in society. Whereas, Critical Legal Studies tended to reflect the experiences of white men and Critical Race Theory, the experiences of Black men, these frameworks stress the need to broaden the lens of analyses to gain a fuller grasp of the range of experiences of individuals and groups in society. For example, In her insightful article, *Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color* (1994), legal scholar Kimberle Crenshaw closely examines the intersections of race and gender in relationship to violence against women and demonstrates that these intersections dramatically alter the individual's experience of violence in the public sphere and remedies available to her in the public sphere.

In the next section, I will work to extend the frameworks and insights offered by Critical Race Theorists to develop a Complex Theory of Rights that will attempt to explain the impact of race, class, gender, sexual orientation, and other markers of

difference on the realization of rights in modern democracies. The theory grows out a deep concern over the lack of coherency and consistency in liberal democratic theory with regard to the relevance of difference and identity to rights. On the one hand, under liberalism, difference and identity are treated as non-issues or as private matters. On the other hand, the courts and laws have responded to difference and rights-claims made by women, racial and ethnic minorities, Gays, and other similarly situated groups in the public sphere by making accommodations and allowances;²² protecting and/or delivering rights²³ or providing remedies for injuries,²⁴ thereby essentially recognizing the ways in which difference and identity has shaped and impacted rights in the modern democratic state.

A complex theory of rights fits squarely within the tradition of critical legal theory and studies and makes many of the same core assumptions, specifically the idea that the logic and structure attributed to the law grows out of power relationships present in the society. Further, the law exists to support the interests of the party or

²² For example, the Family Medical Leave Act (FMLA) of 1993 acknowledged the sexual division of labor whereby women are often the primary caretakers and responsible for childrearing. It also acknowledged the traditional roles of men and women in society and held that ‘employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender. The gender differences, real or imposed, between men and women were accommodated under the law to protect women from discrimination.

²³ Protection here is used broadly and meant to imply protection from harm as well as protection that would allow individuals to pursue his or her own good. Examples include the landmark sexual harassment case *Meritor Savings Bank v. Vinson* (1986) and the Civil Rights Act of 1964.

²⁴ *ibid*

class that forms it and is merely a collection of beliefs and prejudices that legitimize the injustices of society.²⁵

And like many of the other oppositional rights frameworks, Critical Race Theory, LatCrit, Queer Critical Theory, and Critical Race Feminism among them, I attempt to foreground the experiences of discrimination and unequal treatment of marginalized groups and individuals to demonstrate the biases in institutions and structures that govern society; inform and shape public policy outcomes; and influence remedies for injuries²⁶ in the public sphere. Similarly, I also take issue with the notion under liberalism that ignoring race, class, gender, sexual orientation, or other markers of difference will eventually eliminate racism, class, sexism, homophobia, or ethnocentrism. Moreover, that the problem in terms of the realization of rights in modern democracies is the constant attention paid to difference and identity by marginalized groups and individuals.²⁷

TENETS OF A COMPLEX THEORY OF RIGHTS

What is a Complex Theory of Rights?

A complex theory of rights attempts to explain empirical reality and the reasons why groups and individuals fail to realize their full bundle of rights in the modern democratic state. Further, it critically explores the impact of identity and culture on

²⁵ http://www.law.cornell.edu/wex/index.php/Critical_legal_theory. Bruce, Thomas. November 2005

²⁶ For a more thorough discussion on this point, see Wendy Brown's *Finding the Man in the State* (1995)

²⁷ A similar argument is made by Kimberle Crenshaw (1991) when she notes race, class, gender, and other identity categories are often treated in mainstream liberal discourse as vestiges of bias or domination.

the realization of rights and rights-claims made by individuals and groups in the public sphere.

The theory suggests the need to pay particular attention to the interaction between various markers of difference and the structures and institutions that govern societies. By linking race, class, gender, religion, sexuality, ethnicity, and other markers of difference to institutions and structures that inform and shape individual rights and freedom, we can begin to understand how marginalized groups and individuals resist subordination and subvert power; advance rights-claims in the political arena; and expose the limits of the liberal claim of political neutrality. More importantly, it is likely that we can begin to understand why formal equality does not necessarily translate into social and political equality for some groups and individuals in modern democracies.

To be clear, the account of rights and freedom in the liberal democratic state proposed here is not meant to replace or dismiss liberal democratic theories that tend to emphasize individual autonomy or the role of the state in ensuring individual liberties and freedom, rather it is a call for the recognition of historic racial, ethnic, gender, sexuality, ethnic, and cultural inequalities that limit the exercise of autonomy and freedom in modern democracies. Moreover, it seeks to paint a fuller and more accurate account of rights in the liberal democratic state.

As such, a complex theory of rights is both a theory and a method. It is simultaneously a way of understanding the reasons why and how groups and individuals make rights-claims in the public sphere and in turn resist subordination and domination. As a method of social inquiry, it points to dependent variables and

factors that might be driving policy outcomes, the realization of rights, and distribution of resources in societies. It asks the question why doesn't X translate into Z for some groups and individuals when the law clearly guarantees or protects Z.

Connectedly, it purports to be a direct and critical social theory. As a direct theory, it allows us the opportunity to substantively examine how groups and individuals mobilize to have their needs met and concerns heard in the public sphere. It demonstrates the need to look beyond the interaction between the state and the individual for securing or realizing rights. As a critical social theory, it concerns itself with the role of difference and identity in relationship to rights and justice; the entry point of the discourse on rights and justice for what has been excluded or included in narratives and history; the mystification of power relationships in society; and the examination of rights-claims made by individuals and groups in the public sphere.

Next, a complex account of rights allows for a dynamic interpretation of the liberal notion of individual rights, the good, and equality. By dynamic, I mean to intimate there are many factors that shape individual rights, the good, and equality in society. Further, that the good and neutrality are determined in part by the culture in which these terms are being negotiated or defined.

Lastly, a Complex Theory of Rights in the modern democratic state presupposes that relations among human beings and groups are contentious. The contentious nature of human relations speaks to the complex marked and unmarked spaces of individual realities and experiences. In civil society, there exist competing moral

claims, values, and conceptions of the good that serve as counter-claims to others.²⁸ Moral claims and disputes over the good are never settled. In some instances, they overlap, contradict, or betray other claims. An analysis, which understands social relations as contentious reveals plays for power within society and the violence that is required in order to create a unitary, neatly threaded narrative.

Epistemological and Theoretical Claims of A Complex Theory of Rights

A Complex Theory of Rights makes several epistemological and theoretical claims: (1) Race, class, gender, religion, age, ability, and ethnicity are markers of difference. These markers are socially constructed and only possess meaning or value in a hierarchically arranged society. They are neither good nor bad; (2) If markers are neither good nor bad, it becomes critical to understand the complex relationship of not only the individual to the state, but to institutions and structures in society; (3) Social relations are about the maintenance or subversion of power. In every social relationship, there is power. Abstract notions of the individual, deny the many ways individuals and groups exercise power or advance rights-claims in society; (4) There is no center or good that can assert itself as the entry point of discourse; and (5) the public and private sphere are inextricably linked. One depends on the other for its definition and meaning.

For the purposes of this discussion, I would like to examine each of the above claims in turn. The first assertion is that race, class, gender, religion, ability, culture,

²⁸ This point is made by Friedrich Nietzsche in the *Genealogy of Morals* (1956) where he argues that present-day morality is not a set of duties passed down by God or some universal power, but an arbitrary code that has evolved over time made by man. Further, he asserts that the only constant is that we and everything else are constantly striving for power.

ethnicity and sexuality are markers of difference. A marker of difference is a defining, sometimes evident, characteristic or attribute that distinguishes groups or individuals from one another in society. The meaning and value of these markers are shaped and informed by society and gain currency in the public sphere. As such, markers of difference are not inherently oppressive or valuable. The value attached to markers of difference are socially constructed and only possess meaning in a hierarchically arranged society that places value on a particular race, gender, religion, or sexual orientation (i.e. white, male, Christian, heterosexual).

For example, simply being a Latina is not inherently oppressive. As a woman of color, she may find strength and power in both her race and gender. Further, her position may allow her to understand power and domination differently than those located elsewhere in the societal hierarchy.²⁹ The problem is being Latina in racist and sexist society. Racism, classism, heterosexism, ethnocentrism, ableism, anti-Semitism, or ageism are the forms of oppression and the manifestation of unequal power relations. They are the systematic and violent acts of maintaining hierarchies and privilege in society. Hence, it becomes crucial to examine the structures and institutions that inform individual subjectivity.

²⁹ Many Feminist scholars have challenged the entry point of traditionally masculine, enlightenment discourse and category of woman by creating a standpoint from which to articulate their experiences and deconstruct notions of womanhood and femininity (Moraga and Anzadula 1981, Harstock 1983, Jaggar 1983, Hooks 1984, Collins 1990, Harding 1991, Mohanty 1992). The starting point of standpoint theory is the idea that women's different lives have been devalued and neglected as starting points for producing knowledge and as generators of evidence for and against knowledge claims (Calhoun 1995). Standpoint theory aims to make visible the ways in which marginalized groups and individuals are silenced, coerced, or neglected in the process of knowledge production. Under standpoint theory all knowledge and views are situated and partial because each reflects a particular standpoint rooted in individual subjectivity.

A thorough examination of the structures and institutions that inform individual subjectivity reveals what Foucault (1980) notes as the changing modes and apparatus' of power and domination. Structures and institutions present in society work to maintain hierarchies and protect the interests of the dominant group.

The third claim put forward is the idea that social relationships are about the maintenance or subversion of power. In every social relationship, there is power. Abstract notions of the individual deny the many ways individuals and groups exercise power or advance rights-claims in the public sphere. As Foucault (1978) asserts, power must be understood as the multiplicity of force relations present in the sphere in which they operate and which constitute their own organization. Through these processes wrought with struggle and confrontation, power is transformed, strengthened, or reversed. Further, he goes on to argue, power is everywhere not because it embraces everything, but because it comes from everywhere. It is not an institution, structure, or certain strength one is endowed with, but a complex strategic situation in a particular society.

In the liberal democratic state, the gain of power of one group or individual is often associated with the loss of power by another group or individual. A ready example is affirmative action, where the gains of Blacks, women, and other minorities are directly associated with the loss of power and resources by Whites. Further, in social justice movements to end racial or gender discrimination, there is an acknowledgement that individuals who enjoy power because of their gender—male in the patriarchal society and race-white in a racist society risk the loss of power,

privilege, and status when advocating for fair and equal treatment of those situated below them in race or gender hierarchies.

The refusal of liberal democratic theory to acknowledge race, gender, sexual orientation, age, ability, ethnicity, and other markers of difference in the public sphere, it is as though power is diffused and shared equally between bodies regardless of defining characteristics. In pluralist societies and in the modern democratic state, individuals and groups are in direct competition for resources and cultural recognition is easily translated to mean power. Coincidentally, the distribution and share of resources seem to align with racial and gender hierarchies present in society with those individuals closest to the core having the most and those along the periphery having the least amount of resources and access.

The fourth claim holds that there is no center or good that can assert itself as the entry point of discourse. The entry point is the historical record of the origins of a particular discourse, society, or shared knowledge. It is a compilation of stories, symbols, key figures, events, writings, and turning points. The entry point constructs the present moment by invoking a point in time out of which it unfolds (K. King 1994). It questions the necessity of a center or core that excludes primary tools of social organization such as race, class, ethnicity, ability, gender, sexual orientation or other markers of difference.

As Nancy Harstock (1997) argues, all individuals and [groups] have truth claims or originary tales, but the difference is that all experiences are not seen as epistemologically valid as a means of correcting or supplementing historical records. Flax (1990) concurs by noting that in order to make the whole appear rational and

complete, the contradictory stories [histories] of others must be erased, devalued or suppressed. Women, racial and ethnic minorities, Gays and other similarly situated groups have consistently challenged the entry point by interjecting their experiences in the discourse of rights and freedom in the modern democratic state.

Connectedly, with respect to the good in society, there is an acknowledgement that there exists some sort of working notion of the good present in society and that this good is shaped by the norms and cultural practices present in any given society

(Geertz 1973). As Iris Young (2003) notes:

The democratic state protects the dominant culture [the good], whether intentionally or not, through the language it uses, the education it accredits, the history it honors, and the holidays and other customs that it keeps. The state and the dominant public culture that it supports, both indirectly and directly, cannot be culturally neutral in this sense. Government conducts its business, public schools teach, and the mass media broadcast in the dominant language and in conformity with a culturally distinctive calendar. Family law conforms to the dominant culture. The civic associations with highest social status favor people who identify with the dominant culture (Young, 2003 p. 81).

The last epistemological claim that a complex theory of rights makes is the notion that the public and private sphere are inextricably linked. The public and private spheres depend on the other for its definition and meaning.

Historically Constituted Meta-Spaces in the Modern Democratic State

Extending the framework offered by noted Critical Race Scholar Kimberle Crenshaw³⁰ (1991), a Complex Theory of Rights holds that there are five meta-spaces

³⁰ In *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color* (1991), Crenshaw identifies three aspects of subordination: the structural dimension of domination (structural intersectionality), the politics engendered by a particular system of domination (political intersectionality), and the representation of the dominated (representational intersectionality). These intersections, she argues, serve as metaphors for different ways in which women of

that are paramount: the structural, political, representational, economic, and institutional dimensions of society. These meta-spaces are where the relationship between individuals and groups, and structures and institutions are revealed. These meta-spaces highlight the ways in which markers of difference interact, intersect, inform individual realities, and shape individual rights and freedom in modern democracies. As such, these sites are historically specific and materially constituted.

The structural meta-space encompasses the political, economic, representational and institutional dimensions of society. It refers to the creation and operation of systems and structures in society that maintain privilege for some groups while restricting the rights and privileges of others. The structural meta-space highlights the connectedness of systems and structures in society and helps us to understand how each system affects or impacts others. Stated differently, the structural meta-space is the interlocutor where all of the other meta-spaces converge and intersect. It is not just a collection of independent parts, but functions as a whole that ultimately shapes and informs individual realities and experiences. As Crenshaw (1991) notes, any particular disadvantage or disability is sometimes compounded by another disadvantage reflecting the dynamics of a separate system or structure of subordination.

The structural meta-space speaks to the ways in which societies are organized or structured. This meta-space is not static and is constantly shifting and changing. However, it is important to note that the systems and institutions that constitute the structural meta-space are in some ways resistant to pressure and change and only

color [and other similarly situated groups] are situated within categories of difference when they may be regarded as mutually exclusive.

really incorporates change by force or inevitability. In modern democracies, the systems and structures are shaped by economics (capitalism), the laws of the land at both the federal and state levels with an eye toward ensuring that individuals are free to pursue his or her own interests without interference and to protect individuals from harm from others or by the state, and the culture.

Next, the political meta-space refers to the structures and systems of laws and policies that govern individuals and groups in societies. It focuses on the impact of laws, the criminal justice system, public policies, and the role of state in shaping the individual's or group's sense of fairness, equality, and justice in society. The political meta-space highlights how laws and public policies are shaped and informed by dominant cultural perspectives of race, class, gender, ethnicity, age, ability, sexual orientation, or other markers of difference. As such, the political meta-space speaks directly to the ways in which rights are intimately shaped by differences that exist among and between groups and individuals.

An example of the political meta-space is the discrepancy in sentencing in the notorious Rockefeller Drug laws, which institute stiffer and harsher penalties for individuals caught in possession of “solid”³¹ cocaine versus cocaine in its power form. The mandatory minimum in sentencing for possession of “solid” cocaine, thought to be used mostly by poor, urban dwellers, is nearly 100-to-1 in comparison to powder cocaine. Said differently, an individual in possession of 5 grams of “solid” cocaine receives the same penalty or sentence as someone caught with 500 grams of powder cocaine. Further, the possession of less than 500 grams of powder cocaine

³¹ In the U.S. drug policy legislation, “solid” cocaine is also referred to as Crack or “Base.” Office of National Drug Control Policy (2006).

carries a less harsh sentence than 5 grams of “solid” cocaine. Another illustration of the political meta-space at work is the sentence discrepancy between batterers who murder their wives or girlfriends in comparison to women who kill their abusers. According to a study conducted by Pace University, women who kill their batterers or abusers are likely to get double or triple the number of years in prison as a man who murders his spouse, girlfriend, or partner.

The institutional meta-space focuses on the impact of institutions on the individual and the group. It highlights how institutions present in society restrict, limit, or deny access to resources by marginalized groups or individuals. Institutional oppression and discrimination is harmful because it is virtually invisible or hidden in society. It is essentially "the rules of the game." It may maintain systems of privilege and oppression.

Institutions present in society include, but are not limited to, schools, universities; banks, hospitals, the military, the criminal-legal system, prisons, marriage and family. All of the aforementioned institutions are governed by “rules” or laws that may be invisible depending on your social or political location. Moreover, it is possible to engage in one or many of these institutions and not be fully aware of the full benefits or repercussions of the engagement. In the modern democratic state, the institutional meta-space is of extreme importance because of the high premium placed on individual choice, autonomy, and agency. There is very little regard for the impact of the shape and structure of institutions that govern society on individual choice, autonomy, and agency. For example, it is highly unlikely that a black child in a poor

performing high school with very few resources will end up as the CEO of Bank of America.

The economic meta-space pays attention to the distribution of wealth and resources in societies; the individual's or group's access to information; and the impact of social class on an individual's access to resources. The economic meta-space explores how class can impact an individual's access to resources, information, employment opportunities, and potential for advancement in society. In the modern democratic state, the economic system is capitalism, which places a heavy emphasis on free enterprise, free market, and individualism. Under this system, there is a severe gap in the distribution of resources and public goods.

Lastly, the representational meta-space refers to the representation of individuals and groups in dominant culture and society through media, texts, language, and images. It pays close attention to how both the dominant and marginalized groups are represented in society. The representational meta-space highlights the way race, class, gender, sexual orientation, and ethnic images in society come together to create unique and specific narratives that shape and inform the policies, laws, rights, and institutions in society. As Robin Kelly (1997) notes cultural and ideological constructions shape public policy, scholarship, and social movements, as such it important to be cognizant of the role of identity plays in key political and economic struggles of our time.

In the modern democratic state, the fore-mentioned meta-spaces are interdependent, intersecting and critical to any conception of rights or justice that seeks to accommodate rights claims made by marginalized groups or individuals.

Conclusion

In this chapter, I have outlined the components of a Complex Theory of Rights that attempts to explain why some groups and individuals fail to realize their full bundle of rights in the modern democratic state. Further, it seeks to demonstrate the ways in which rights and privileges are intimately shaped by difference in the public sphere. The theory holds that there are a variety of factors that contribute to the denial of rights in liberal democracies: (1) the structures and institutions that govern society; (2) the representation of dominant and subordinate groups in the media and culture; (3) Accumulated privileges gained through historic practices of exclusion and marginalization; and (4) the refusal of liberalism to acknowledge the role of difference in shaping rights and freedom in the early republic. In the subsequent chapters, I will seek to apply the theory to three case studies.

THE MIXTURE OF RACE AND RIGHTS IN MODERN DEMOCRACIES

CHAPTER III

INTRODUCTION:

As was the case in the late twentieth century, in the millennium, race continues to be a highly contested category of social organization or marker from which to draw conclusions concerning the denial of individual or collective rights in society. Once seen by many political scientists and sociologists as the primary, if not most significant marker (DuBois 1903, King 1975, Locke 1992, West 1994) in the post-civil rights, post-colonial era, race presents like a stale holdover from yesteryear. Neo-conservatives and others have attempted to move us towards a more color-blind society by insisting that racial mixing, legislative gains made during the 1960's and 1970's and the creation of a visible racial and ethnic minority middle-class, underscore the need to relegate race to the private sphere (Wilson 1978, Connerly 2003).

While the meaning of race has shifted over time and has increasingly become noted as socially constructed (Winant 2000) Race still remains a fundamental organizing principle of social relationships in modern democracies. As a social and political construct, there are direct social and material benefits or consequences associated with race. Moreover, the historical process of racialization of systems and structures present in society over time, work to ensure that race remains indeterminably linked to the realization of rights in modern societies. In short, Race

not only shapes the rights one is able to enjoy in society, but the privileges and the share of resources one is able to benefit from as well.³²

For example, in the United States, Race is likely to determine whether or not an individual is likely to live in poverty, with a total of 22% of Black and Hispanics living below the federal poverty line compared to only 7.8 % of all whites.³³ It also determines the likelihood of home ownership, whites are almost two times as likely to own homes compared to Blacks, Latinos or Asians,³⁴ whether or not an individual will become incarcerated, Blacks and Latinos represent 63% of adults incarcerated although they make up only 25% of the nation's population,³⁵ or will receive a quality primary and secondary education.³⁶

³² This point is taken up by Neil Gotanda in her article *A Critique of "Our Constitution is Color-Blind"*, 44 Stanford Law Review 1 (1991). In the Article, Gotanda asserts that America's system of racial categories is historically and socially contingent. She employs the "one-drop of blood" rule to explain how any trace of African Ancestry makes one Black and the classification of white signifies "uncontaminated" racial purity. Therefore, she goes on to argue, the socially constructed racial categories of Black and white are not equal in status. Racial categories are highly contextualized, with powerful deeply embedded social and political meanings.

³³ Hispanic refers to people whose origin is Mexican, Puerto Rican, Cuban, South or Central American, or other Hispanic/Latino origin, regardless of race. Poverty statistics exclude unrelated individuals under 15 years. U.S. Census Bureau, Current Population Survey, March 2002, Racial Statistics Branch, Population Division.

³⁴ This percentage varies from state to state. Other issues to consider in terms of home ownership in relationship to race is the documented discrimination against racial and ethnic minorities through lending practices, red-lining, and other forms of institutional racism. For more information on this topic please see Oliver and Shapiro's *Black Wealth/White Wealth: A New Perspective on Racial Inequality* (1995).

³⁵ These statistics are made stark when broken down by state. For example in twelve of the states in the union, black men are incarcerated at rates between twelve and sixteen times greater than those of white men and in six states, black youth under the age of eighteen are incarcerated in adult facilities at rates between twelve and twenty-five times greater than those of white youth. Connectedly, in ten states, Latino men and women are incarcerated between five and nine times greater than those of white

In this chapter, I use the California ballot initiative Proposition 54 to explore the significance of race to the realization of rights in modern democracies. In the post-civil rights, post-colonial era, many liberals and progressives have begun to look sideways or become critical of the goal of attaining a color-blind society. Today, color-blindness has become code for the erasure of difference and a hidden conservative agenda to mask inequalities and disparities between groups. What this chapter aspires to do is to bring back into focus the ways in which race has and continues to shape rights and privileges in the modern democratic state.³⁷ By critically noting the impact of difference on individual and group rights, we will better be able to understand how hierarchies are maintained and reified in societies.

To draw this out a bit further, I plan to demonstrate how a complex theory of rights that is able to account for the dynamic impact of identity, social institutions, social structures, and representation on individual rights is a viable alternative to strands of liberal democratic theory that tend to favor the static relationship between the individual and the state for understanding the realization of rights in modern democracies.

In this chapter, I lead with a discussion on racialization processes in the liberal democratic state to understand how race has shaped rights and freedom from the very beginning of the republic. Then, I provide context for Proposition 54 by examining

men. For more information see Human Rights Watch Report entitled *Race and Incarceration in the United States* (2002)

³⁶ See Howard Winant's *The New Politics of Race: Globalism, Difference, Justice* (2004).

³⁷ This point is supported by Howard Winant (2003) when he notes despite claims of equality of opportunity and the improvement of conditions across racial and ethnic groups 'by almost every conceivable indicator researchers can bring forward, the same racial inequalities—or structural racism—that existed in the past persist today.'

why it arose in the first place, in whose interest the battle was waged, and the status and position of racial and ethnic groups in the state at the time of the vote. Lastly, I conclude by suggesting that consciously or subconsciously voters rejected the idea that ignoring racial difference would bring the state closer to the realization of a color-blind society and equality.

RACE AND RACIALIZATION PROCESESS IN MODERN DEMOCRACIES

The process of racialization in western societies is key to formulating any critical understanding of the intimate relationship between race and rights in modern democracies. In its ideological form, the process of racialization provides context for the organization of social structures, hierarchies, and institutions present in society. Taken as always occurring, the process of racialization becomes the means by which we are to contextualize nation and empire building; enslavement and conquest (Winant 1994; Lipsitz 1998); and ultimately rights and freedom.

Beginning with its colonial origins, enslavement, conquest and exclusion were the chief means through which burgeoning democracies were racialized.³⁸ In North America, for example, the extermination of Native Americans, the enslavement of Africans,³⁹ and exclusionary immigration practices are crucial to the construction of freedom and the building of the early Republic. As Lipstiz (1994) notes, racialization was solidified in the colony through early national legal systems that authorized

³⁸ For a more thorough discussion on this point see Howard Winant's *Racial Conditions* (1994).

³⁹ Here I make the clear distinction between Africans as slaves in the political economy and White Europeans who served as indentured servants or contractants. Although some White Europeans were "unfree" in relationship to other Whites, the racialization of Africans worked to ensure unequal social status and treatment in comparison to White indentured servants.

attacks on Native Americans and encouraged the appropriation of their lands; the legitimization of chattel slavery by fashioning it as a proprietary political economy; and by limiting naturalized citizenship to “white” immigrants. All of which, he argues, provides the pretext for subsequent unequal treatment or denial of rights such as restricting political participation, exploiting labor, and seizing the property of Asian Americans, Mexican Americans, Native Americans, and African-Americans.

In terms of rights, the process of racialization makes it possible to institutionalize and normalize racial difference and hierarchies. To this end, the construction of difference, the creation of the *Other*, and the process of assigning value to difference are central to the racialization process. To be sure, conquest, enslavement, and exclusion hinge on Othering and difference. Othering, defined as the marked interaction between the colonizer and the colonial (Said 2003, Bhabha 1994), and the understanding that the ideas, beliefs, and culture of the colonizer are superior and the beliefs, ideas, and culture of the colonial are inferior or marginal. By constructing the latter as backwards, amoral, and uncivilized, and the former as opposite this, racialization and racial formation processes become enmeshed in struggles for cultural recognition and resistance to subordination (Benhabib 2002).

For example, the conquest of Native-Americans relied heavily on a carefully constructed public definition or representation of Natives as “inherently and permanently racially inferior” beings in need of morals, religion, and culture (Stannard 1992). This public perception, in turn, fueled public laws that allowed genocide and the confiscation of native land rights. In his presidential address concerning the Removal Act of 1830, President Jackson wrote of Native Americans:

The consequences of a speedy removal will be important to the United States, to individual States, and to the Indians themselves. The pecuniary advantages, which it promises to the Government, are the least of its recommendations. It puts an end to all possible danger of collision between the authorities of the General and State Governments on account of the Indians. It will place a dense and civilized population in large tracts of country now occupied by a few savage hunters. It will relieve the whole State of Mississippi and the western part of Alabama of Indian occupancy, and enable those States to advance rapidly in population, wealth, and power. It will separate the Indians from immediate contact with settlements of whites; free them from the power of the States; enable them to pursue happiness in their own way and under their own rude institutions; will retard the progress of decay, which is lessening their numbers, and perhaps cause them gradually, under the protection of the Government and through the influence of good counsels, to cast off their savage habits and become an interesting, civilized, and Christian community...(Jackson, 1830 p. 1)

From the above address, the link between the racialization of groups and the denial of individual rights is quite evident. By casting Native-Americans as “primitive, uncivilized, savages” in comparison to Europeans, Jackson was able to use the power of the state to justify the denial of individual and group rights.

In Liberal democratic Theory, property⁴⁰ is usually singled out as the most important factor in terms of determining whether or not one is considered free. Within this context, I am defining property not only as land, but the ability to own one’s self and labor. Defined as such, whiteness becomes intertwined with democracy and fundamental to citizenship, legal protection, or freedom. When property is used as the sole marker for which to understand individual rights and liberty in modern

⁴⁰ Property not only consisting of land, but the ownership of one’s self. See John Locke (1690), *Two Treatises of Government* where in Section 27 of the Second Treatise he argues every man has property in his own person and that no person has any right to it, but himself. Further, he asserts that the labour of his body, and the work of his hands are properly his.

democracies,⁴¹ whiteness is displaced and not seen as fundamental to the shaping of rights and privileges in the public sphere. As Williams (2003) writes, race and ethnicity are as centrally constitutive of American life as liberal individualism and republicanism.

A useful frame for understanding the connection between racialization processes and property in Modern democracies is that put forth by Cheryl Harris' in her provocative article *Whiteness as Property* (1993). In *Whiteness*, Harris argues that undergirding property rights in the United States was the right to exclude both Native American and Africans through conquest and enslavement respectively. Property was racialized and implemented by force and ratified by law. Eloquently, she writes:

The hyper-exploitation of Black labor was accompanied by treating Blacks themselves as objects of property. Race and property were thus conflated by establishing a form of property contingent on race---only Blacks were subjugated as slaves and treated as property. Similarly, the conquest, removal, and subsequent extermination of Native American life and culture were ratified by conferring and acknowledging the property rights of Whites in Native American land. Only white possession and occupation of land was validated and therefore privileged as a basis for property rights. Hence, she argues that race and property are conflated and establishes a form of property contingent upon race (Harris, 1993 p. 1716)

Within a rights-based framework, Blacks and Native Americans were placed outside of the law and had little, if any, legal protection or rights. In fact, laws were passed to ensure subordination and prevent them from using laws enacted to protect the property rights of Whites for themselves. For example, in 1661, the state of Maryland enacted legislation that provided that all Negroes and other slaves shall

⁴¹ See Thomas Hobbes and John Locke for a more thorough discussion on the relationship between property and freedom.

serve *Durante Vita* [for life].⁴² As Harris notes, between 1680 and 1682, slave codes appeared which denied freedom and liberty to Blacks. As law, Blacks were not permitted to travel without permits, own property, assemble publicly, or own weapons.

To be sure, Blacks and others brought cases before the court asserting their individual freedom and rights. In most every instance, the courts sided in the interest of Whites. To prevent further disputes and rights claims on the part of Blacks, in 1705 the Virginia state legislature, passed a statute that would eventually serve as a model for other States. The statute held that “All servants imported and brought into the Country...who were not Christians in their native Country...shall be accounted and be slaves. All Negro, mulatto and Indian slaves within this dominion...shall be held to be real estate. If any slave resist his master...correcting such slave, and shall happen to be killed in such correction...the master shall be free of all punishment...as if such accident never happened.” This code not only worked to ensure the unequal status and position of Blacks, but set a precedent for what would become the frame from which Blacks would go about struggling to attain rights naturally extended to whites for generations to come.

To be more explicit, with regard to race; freedom, rights, citizenship, and legal protection belonged exclusively to whites. All others were excluded and subject to ownership and/or exclusion. The presumption of freedom arose from color or the racial identity category of white. In turn “un-freedom,” its opposite, was defined by

⁴² Gossett, *supra* note 20, at 30

black.⁴³ As was the case Whites were always considered free and others who were not defined as white, either because of skin color or country of origin, the line demarcating Whites and Others is extremely critical to the formulation of rights in modern democracies. In the early Republic, White skin served as the marker or guarantor of political and legal citizenship. As such, racial identity and racialization processes in the modern democracies are closely tied to an individual's proximity to whiteness.

Literature on racialization and racialization processes in the latter part of the twentieth century and into the millennium have emphasized the shifting hegemonic nature of race where the "outmoded antinomy of racial domination (the assertion of power of one group over another group) has been replaced by a range of racial projects whose formation and superceding constitutes the process of racial formation (Winant 1994)." As a result, race has become a nebulous category that is constantly up for renegotiation or re-definition. Whereas once the body constituted the primary site of racialization, today race is deeply embedded in the many institutions and political structures that govern our society. In short, race is everywhere and everything is racialized.

Winant (1994) defines racialization as the extension of racial meaning to a previously unclassified relationship, social practice or group. An historic example, he contends, is the creation of the racial category of Black to define Africans whose specific identity may have been Mande, Akan, Ovimbundo, or Ibo, among others. Relatedly, the creation of the category White depends on a similar kind of grouping

⁴³ For a more thorough discussion on this point, see Thomas R.R. Cobb, *An Inquiry into the Law of Negro Slavery in the United States* 68-69 at 66-67 (1858).

where, Blacks, non-Christians, and immigrants from particular countries, say Asia and Mexico, are excluded.

The literature on racialization can be classified according to three basic approaches— the ethnic approach which argues that race is a social category defined by group formation processes based on culture and descent; the class approach, which understands the process of racialization as a result of class relations; and the nation approach which emphasizes the relationship between the colonizer and the colonized and the organized attempts on the part of the colonized for self-definition and determination (Omi and Winant 1994).

The ethnicity paradigm of racialization rose to prominence as a direct challenge to biologicistic and Darwinistic conceptions of race that held currency during the period preceding World War II. The biological paradigm had evolved to explain racial inferiority as part of a natural order of humankind.⁴⁴ Based on taxonomies, which placed Europeans at the top of the racial hierarchy, Africans at the bottom, and all others in between,⁴⁵ the paradigm was used to explain differences in intelligence, temperament, sexuality, and morality, among other things. As Omi and Winant note, Whites were considered the superior race; white skin was the norm while other skin colors were exotic mutations that had to be explained.

⁴⁴ Omi and Winant's *Racial Formation in the United States: From the 1960s to the 1980s* (1986). p.15

⁴⁵ See Stephen Gould, *The Mismeasure of Man* (1981) Gould, Stephen Jay. 1981. In 1758, Swedish Botanist Carolus Linnaeus designated the human races as biological categories: European whites belonged to the category *Homo sapiens europaeus* while African blacks belonged to *Homo sapiens afer*. Linnaeus himself added ranking to his classification; he wrote that the former is "ruled by customs," the latter "ruled by caprice"

By the early decades of the 20th century, the explanation of racial differences in terms of biology lost most of its credibility. Proponents of the theory had been found to have been inflated their findings to support the taxonomic models of Linnaeus and other influential scientists of the time. As a result, the ethnic paradigm became seen as a viable alternative for understanding racialization processes and racial identity formation. The paradigm framed race as a social category and also introduced the notion of cultural pluralism to the discourse.

In sharp contrast to the biologically oriented models, the ethnicity based approach held race as one of many factors that determined group identity formation and classification. Culture and descent joined race to explain racial hierarchies and difference. “Culture in the ethnicity framework included markers such as religion, language, “customs,” nationality, and political identification. Descent, however, offered a seemingly more objective standard similar to that of the biological model, which involved heredity and group origins (Omi and Winant 1994).” It is important to note that the phenotypical or hereditary attributes of groups were not ranked or classified in the manner typical of the Eurocentric model of racialization processes present in the 16th century.

In line with the current historical moment, the ethnicity model tended to be preoccupied with problems posed by migration, immigration, and “culture contact.” In other words, what would become of all the free Blacks and immigrants who were now “milling” around the country and in direct contact with Whites? Mounting racial tensions and fear resulted in riots and deaths in cities across the states, thus underscoring the need to critically examine the impact of racial identity on social

relations. What had not been given so much attention in the discussion was the ways in which Whiteness and white privilege had become entrenched and institutionalized during the 17th and 18th centuries so much so that it posed the most significant barrier to the exercise of freedom and rights for Blacks and others.

For the purposes of this project, I want to emphasize three major aspects of the ethnicity model for understanding racialization processes in relationship to rights in modern democracies: Assimilation, cultural pluralism and essentialism.

First, assimilation is key to the ethnicity model of racialization. In seeking out ways to address “the Negro problem” or the influx of immigrants, social scientists held assimilation to be the ticket to easing racial tension and strife. Essentially, Blacks and others would adopt the American Ethos of hard work, choice, individualism and Christianity and be woven into the fabric of society. As Omi and Winant point out, assimilation was viewed as the most logical, and “natural,” response to the dilemma imposed by racism. Indeed, Black culture was viewed as morally corrupt and pathological and only full assimilation could cure (Myrdal and Sissela, 1944).

Fueled by the rhetoric of the Civil Rights Movements where Blacks demanded equal and fair treatment in comparison to their White Counterparts, assimilation held that in order for Blacks to receive equal treatment, they would have to look and behave like Whites. Through the lens of the ethnicity paradigm, the Civil Rights

Movement was a drive for Black integration and for the removal of institutional and structural barriers⁴⁶ characteristic of the period.

What was not accounted for however was the entrenched nature of the social and institutional barriers confronting Blacks. There was no accounting for the historic damage that had already been done and the accumulated advantages gained by Whites by denying rights and privileges of Blacks and other racial and ethnic minorities. It was assumed that with the passing of legislation and the reluctant acknowledgement of racial discrimination by the federal government, the playing field was now leveled.

In fact, in this same period, we begin to witness representations of Blacks in the media and popular culture that fall in line with the assimilationist frame. For example, in the popular situation comedy, the *Jeffersons*, a Black couple who once lived next door to a bigoted, white family, through hard work and small business ownership are able to overcome racial biases to “move on up to the big time” and “get their piece of the pie.” Similar, but distinct, is the situation comedy *Good Times* that tells of a poor Black family, that despite living in the housing projects, manages to work hard, pray daily, and maintain a two-parent household. While these two examples may seem trivial or beside the point, they point to the political current of the time which stressed the idea that racial barriers had all but dissipated and that poverty could be attributed to individuals and not group failings or discrimination.

The emergence of a vibrant black middle class and the distancing from poor, urban Blacks by the Black middle class support the claims put forth by Monihyan in his report, entitled *The Negro Family: The Case for National Action* (1965), that poverty

⁴⁶ Omi and Winant’s *Racial Formation in the United States: From the 1960s to the 1980s* (1986). p.15

is a result of a pathology found in urban Black communities and what is needed to remedy this pathology is full integration.

Next, while cultural pluralism seems to be at odds with the assimilationist frame espoused by the ethnicity paradigm, it is indeed complimentary. Cultural pluralism can be defined as the acknowledgement of the presence of multiple racial and ethnic groups with distinct values, culture, language, and traditions in society and the belief that these groups can bring their distinct selves to the public sphere and participate as such.

Implicit, but not clearly stated, is that the cultural pluralism strand of the ethnicity model still holds that there is a superior culture that individuals and groups should strive to attain. So, while there might be an embracing and valuing of cultures on some level they are still relational to the dominant cultural paradigm present in the public sphere. In the instance of the United States, it is the American Ethos characterized by a free-market economy, rugged individualism, Christianity, and freedom of association. Groups and individuals who do not buy into these values or beliefs are limited in terms of political participation and economic gain in the public sphere.

Lastly, I would like to turn my attention to the essentialist tone of the ethnicity model of racialization. In the model, racial groups are essentialized and classified despite differences that may exist among and between groups. While the category of White has expanded to include European immigrants, it has never expanded to include Blacks, Hispanics, Native-Americans, or Asians in its definition. In this same vein differences existing between Blacks and other racial and ethnic minorities with

regard to geographic location, class background, language, immigration patterns had also been suppressed. Essentialist strands of the ethnicity model paved the way for nationalist frameworks for social organization and the demand for rights in the public sphere.

Despite its early embrace by noted social scientists and the wide body of literature, the ethnicity model failed to account for the ways in which the experiences of racial minorities are distinct from ethnic minorities who immigrated to the United States. As Omi and Winant (1994) assert the historical experience of Blacks and Native Americans with respect to slavery and exclusion create a wholly distinct set of circumstances from which one can go about attaining or ensuring rights.

Further, not enough attention was paid to difference between ethnic minorities that immigrated from European countries versus those who immigrated from parts of Asia or Mexico. To this, the process of racialization that I have discussed thus far is important. Expanding the category of White to include European Immigrants and the exclusion of other immigrants created markedly different experiences of immigration. After all, it was not until 1965 that all references to race were removed from the Immigration and Nationality Act. Finally, the “bootstrap” model and victim-blaming aspect of the model is most problematic because it avoids examination of structural and institutional barriers to equality to focus on individual failings.

As mentioned previously, the ethnicity model ushered in a brand of essentialized identity politics commonly found in the nation model of racialization. The nation-model of racialization tends to emphasize the differences that exist between racial and

ethnic groups by way of culture, language, histories, and other distinguishing characteristics.

As a frame, the nation-based model views the process of racialization as a complex series of occurrences rooted in the dynamics of colonialism.

The nation-based theory argues that racial dynamics and the racialization of groups can be understood through exploring the dynamics of colonialism and the relationship between the colonized and the colonizer. Colonialism, defined for our purposes as the exploitation of one group by another to the maximization or benefit of the former. By the late 1800s all nations and territories had been assigned a place in the global world order with Europe ranking at the crest of the hierarchy. In the nation-based frame, racialization processes and dynamics are understood as the outcome of colonialism and as a result extend beyond national boundaries.⁴⁷

Unlike the ethnicity approach, the nation-based theory explores factors such as historic inequalities; structural and institutional barriers; territorial and institutional segregation; political disenfranchisement and the legacy of colonial order in post-colonial societies (Omi and Winant, 1989). All of which can be seen as contributing to the racialization of groups in the public sphere. As a result, racialization becomes the result of unequal and stratified power relations developed over time whereby racial group identity is embedded in struggles for self-definition and determination.

In the United States, for example, the ability of Europeans to colonize Native Americans through land appropriation and to enslave Africans set in motion specific racialization processes that defined national boundaries and laws. In fact, it was not

⁴⁷ *ibid*

until 1866⁴⁸ and 1924,⁴⁹ respectively that Blacks and Native Americans were considered citizens of the state. Connectedly, by racially coding laws and institutions, the racialization process and the exercise of political freedom becomes intimately linked to racial identity. As Lopez (1996) notes, from the country's inception the laws of citizenship and who could or could not become a citizen were tainted by racial bias and/or exclusion.

A significant component of the nation-based theory is the critical rejection of the assimilationist and integrationist tone of the ethnicity-based paradigm. In line with leading theories of group consciousness there is a deep rejection of the explanation of the group's social condition or status rooted in individual failings. Moreover, there is a belief among the group that there is an unfair distribution of power within structures and institutions present in society and collective action will remedy these problems (Wilcox 1989).

Rather than assimilate (dissolution of group identity) or integrate into the core, the nation frame proposes the idea of a "nation within a nation" whereby racial identity groups are able to define their own culture without regard for dominant cultural narratives or pressures. The Black Nationalist and Pan-Africanism Movement of the 1970s and the Tribal Sovereignty Movement⁵⁰ led by Native-Americans are two

⁴⁸ In 1866, after the Civil War, the Dred Scott decision was invalidated and the Civil Rights Act of 1866 was passed, which held that all persons born in the United States...are declared to be citizens of the United States. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 383 (1857) Civil Rights Act of 1866, ch. 31, 14 Stat. 27

⁴⁹ Prior to 1924, Native-Americans were awarded citizenship tribe by tribe. The Act of June 2, 1924, ch 233, 43 Stat. 253 conferred citizenship on all Native Americans in the United States.

⁵⁰ For a more thorough discussion on the Tribal Rights Movement in the United States see Charles Wilkinson's *Blood Struggle: The Rise of the Modern Indian*

examples of this notion of a nation within a nation. Both movements sought to bring attention to the historic inequalities and injustices experienced by both groups and in the end rejected the idea that they could depend on the state for remedies or redress.⁵¹

Next, the distinction between the core and the periphery is key to the nation-based lens of racialization. The core, defined as the dominant group and the periphery as those situated on the margins or outside of the core, create tension and political struggle. On the part of the periphery, there is a constant questioning of the authority and legitimacy of the core in terms of cultural, moral, and political superiority. Within the U.S. context, struggles between the core and periphery tend to play themselves out in the form of identity-based movements where groups mobilize around a set of common experiences to address perceived social injustice.

As Omi and Winant (1994) note, the nation-based theory never took hold in the same way that the ethnicity and class frameworks did. While the frame succeeded in bringing necessary attention to the importance of structural and institutional barriers to racialization processes as well as the fundamental role of colonization in racial identity formation, it failed to demonstrate or theorize how one nation could exist within an already established nation. Further, it never accounted for how one would resolve the issue of nation or race contact, if and when new nations were established.

Another significant drawback of the nation frame is the rigid definition of nation employed by some groups. The definition of nation tended to be narrow and based on

Nation. (2005) In *Blood Struggle*, Wilkinson eloquently writes of the struggle of Native American to achieve tribal sovereignty. He recounts tribal victories in major conflicts including Indian land claims in Maine, the "salmon wars" of the Pacific Northwest, the return of Blue Lake to the Taos Pueblo, and the establishment of tribal casinos as a way of making inroads into poverty.

⁵¹ See also Wendy Brown's *Finding the Man in the State* in *States of Injury* (1995).

some sort of common culture, values, and beliefs. However, the definition of group member often relied on values borrowed from the dominant culture and tended to exclude some members.

For example, within the framework of Black Nationalism, the definition of nation is racially defined and roles of Black men and women are based on normative, western standards of behavior and interactions. Equality or social redress was often equated with Black Manhood and the redemption of Black masculinity (Marable 2000, Oyewumi 1999, hooks 1981). The Million Man March of 1995 is a prime illustration of the problem posed by nation-based theories of racialization. The March called for a day of atonement for the absence, in too many cases, of the Black male as the head of the household, positive role model, and builder of the community. Louis Farrakhan, the march convener urged Black Men to return to their “homes” and reclaim their place as the head of the household and emphasized the need for Blacks to assume “personal responsibility” for their own circumstances. He advised Black women, particularly mothers, to be with “our” children teaching them the value of home, self-esteem, family and unity...(Farrakhan, 1995). The narrow construction of nation and Blackness alienated a significant segment of the “Black community,” mainly women, and Black Gays and Lesbians.

In terms of my project, what is salvageable in the nation-frame is the critical understanding of the role of institutions and structures in racial formation processes in modern democracies. Like Critical Race Theory, the nation-based framework explores the advantages gained through historic exclusion and the denial of rights

made possible by way of national institutions and structures codified by laws. It also sheds light on the role of colonization on racial dynamics and formation globally.

The literature focusing on class-based frameworks of racialization is vast. The class-based theory of racial formation includes approaches that argue that social divisions can be explained chiefly through economic structures and processes (Hall 2002, Omi-Winant 1994) Hence, racialization processes can be attributed or explained by reference to economic structures. Within the class-based discussions of racial formation there are three approaches that are paramount: The market relations approach; class conflict theory; and stratification theory. For the sake of brevity and the purposes of our discussion, I will focus my efforts on stratification theory.

Structural in nature, stratification theory stresses the significance of life chances, which Weber (1930) argues is a consequence of three dimensions of stratification: Social class (based in economic relationships to the market), status class (associated with non-economic qualities such as education, honour, and prestige, and party class (consisting of affiliations in the political domain). Within the context of racial formation, these dimensions are historically constituted and produce social meaning and relevance that in turn provide racialized meaning to group economic positioning in modern democracies. For example, the economic system of slavery not only shaped the “polity,” but also racialized groups through the law and in the public sphere (Wilson 1978).

Further, the theory argues that individuals with similar life chances, meaning roughly equal incomes, equal qualities of wealth, and equal status should fare the same in modern democracies. As a result, individuals are assigned to groups based on

economic positioning in “status order” rather than racial identity group. Thus, emerging a hierarchy of classes, which Weber postulates as Upper Class, Middle Class, Working Class, and Poor. Degrees of access and mobility are formulated among the ranks of the hierarchy. Simply put, the higher one’s position on the hierarchy the more opportunities, mobility, and access one has in relation to an individual positioned lower in the social hierarchy. The issue with this is that very little consideration is given to the historic experiences of racial identity groups in society whereby Blacks, Latinos, Native Americans, and others groups have been systematically denied access to resources and equal participation in the marketplace. For example, in the pre-industrial period, the slave-based plantation economy allowed a small group of elite planters to capture enormous regional and economic power. This power was transferred to political and legal institutions of the day to ensure continued economic control and power. As Wilson notes, the economy provided the basis for the development of the system of slavery and the polity [the citizens] reinforced and perpetuated the system. As in liberal democratic theory, political affiliation, mobilization, and participation are crucial to stratification theory in the guise of relationship between classes; the dynamics of political rule or authority; and struggles for recognition and re-distribution of wealth and resources.

In *The Declining Significance of Race* (1978), sociologist William Julius Wilson employs stratification theory to explain contemporary racial dynamics in the post civil rights era, the period following the passage of the Civil Right Act of 1964. Briefly, Wilson argues while race was a salient and important marker in terms of social organization during the pre-industrial and industrial periods, in the modern

industrial period the experiences of social advantage can be more closely linked with economic class (Wilson, 1978). Further, he goes on to assert, in modern democracies, the state has developed a fair degree of autonomy in handling racial problems. Pre-1965 Blacks life chances were determined by racial stratification. However, Post-1965, this was no longer the case.

He goes on to argue, that after state-enforced racial inequality was eliminated by civil rights legislation, Blacks were no longer defined by their racial caste,⁵² but allowed access to the same system-wide stratification as Whites. What Wilson had not considered was the cumulative advantages that had been gained by Whites through long-standing and historic exclusion of Blacks and others from social institutions critical to determining and shaping one's life chances. Nor did he take into account the level of resistance Blacks and others would encounter in their attempts to exercise their rights. As Lipsitz (1998) points out, at every stage since the passage of the Civil Rights Act, Whites have responded with coordinated collective politics characterized by resistance, refusal, and renegotiation.

Another significant component of Wilson's argument is the creation of a prominent, but small group of Black elites or middle class whose life chances are more determined by class status than by racial identity. This group, he argues, is similar to Whites of the same class status. Consequently, the Black underclass is a result of individual failings and not result of racial bias or discrimination. Implicit and underpinning Wilson's argument is a tinge of the "bootstrap mentality" and

⁵² See Mae King, 1975. In *Oppression and Power: The Unique Status of Black Women in the American Political System*, she argues that Blacks make up a caste and within the hierarchical order, skin color is what determines one's caste or place within the society.

“victim-blaming” characteristic of the ethnicity framework. Very little attention is paid to the fact the achievements and gains of a small group of Blacks is the result of a massive group struggle and mobilization efforts that included poor and working class Blacks as well. In this sense, “the Black middle class remains tied to the lower class through racial dynamics which are structured through the U.S. economy, culture, and politics (Omi and Winant, 1994).”

The class-stratification model of racialization processes asserts that racial formation and racialization processes can be negotiated and understood through an economic lens that attempts to balance inequalities that are a result of historical economic relationships that have been created over time.

Nation-based, ethnicity-based, and class-based theories of racialization processes are not mutually exclusive. As Omi and Winant (1994) point out, none of these paradigms can stand alone. There is necessary overlapping among them. In terms of advancing a complex theory of rights, the relationship between the three frameworks are used to demonstrate the intersecting nature of nation, ethnicity, and class approaches to understanding complex social structures and institutions.

Finally, I would like to spend some time in consideration of racial formation theory as articulated by Omi and Winant in *Racial Formation in the United States*. In *Racial Formation*, Omi and Winant argue that the nation-based, ethnicity-based, and class-based paradigms all engage race on their own terms rather than view race as an approach in and of itself shaped by the socio-historical processes by which racial categories are “created, inhabited, transformed, and destroyed.”

Omi and Winant assert that racial formation is a process of historically situated projects in which human bodies and social structures are represented and organized. This point is strengthened by critical race scholar Henry Lopez (1996) who notes that races do not exist as detached entities, but as amalgamations of people standing in complex relationships with other such groups. In this sense, race formation and racialization processes must be contextualized and understood relationally to geographic location; political institutions and structures present in society; and the historic conditions under which groups and individuals become classified.

Essential to racial formation theory is the inclusion of hegemony as a critical component of understanding racialization processes. For Omi and Winant, hegemony, the way in which society is structured and organized, helps us to understand “the nature of racism, the relationship of race to other forms of difference such as sexism and nationalism, and the dilemmas posed by racial identity contemporaneously.”

I would like to extend this a bit further by noting that hegemony not only allows room to negotiate past and present racial identity concerns, but reveals in the words of Antonio Gramsci (1929), the power of the dominant group to define reality and culture, whereby the perspective becomes skewed to favor those with the most amount of power in society. The dominant perspective is considered good, normative, or proper, and comes to be seen as real and as always existing. As feminist scholar Chris Weedon (1997) notes, not all discourse [perspectives] have the social power which comes from a secure institutional and [structural] location. The degree to which marginalized [perspectives] can increase their social power is governed by

wider contexts of social interest and power within which challenges to the dominant culture are made.

From a racial formation perspective, racialization occurs “through a linkage between structure and representation (Omi and Winant 1994).” This linkage is revealed through racial projects, which are interpretations, representations, or explanations of racial dynamics, and efforts on multiple levels to reorganize and redistribute resources among racial lines. Racial projects contextualize the meaning of race within particular discursive practices to better grasp the ways in which both social structures and everyday experiences are racially organized.

Racial formation Theory gives a significant amount of weight to the power of social structures and institutions to shape meanings of race, racial classification systems, and individual experiences of racial identity. Institutions and structures work at the micro and macro levels to maintain or reify racial hierarchies. In this sense, it is important to consider the political, economic, representational, and legal dimensions of racial formation and its impact on the realization of rights in modern democracies.

In examining California Ballot referendum Proposition 54, I rely heavily on the Racial Formation approach put forth by Omi and Winant because I believe it provides the most thorough account of the role of institutions and structures in shaping groups and individual’s sense of fairness and equality; the distribution of wealth and resources in society; and the influence of cultural and social representations on public policy outcomes at the federal and state levels.

To extend the framework and to provide context for the discussion on the realization of rights and equality in modern democracies, I employ a Complex Theory

of Rights to argue that the outcome of Proposition 54 is, in part, recognition that despite formal equality and state intervention, equal access and equality remains elusive for some groups and individuals. Further, lack of equal access and equality is a result of multiple factors, including, but not limited to social institutions and structures, but also representations of groups in society through the media, texts, and images; economic mobility and access; and the laws created to maintain hegemony and dominant social order.

RACE AND RIGHTS IN MODERN DEMOCRACIES

“You do not take a person who for years has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, ‘you’re free to compete with all the others,’ and still believe that you have been completely fair. Thus, it is not enough to open the gates of opportunity. All our citizens must have the ability to walk through those gates,”

--President Johnson, Harvard University Commencement Address, 1965

As long as race counts in America, we will count race in America.

--Julian Bond, Chair NAACP

...An overwhelming majority of Americans embraced the vision of President John F. Kennedy when he said, “Race has no place in American life or law.” The initiative we are discussing today seeks to move California a step closer to fulfillment of Kennedy’s vision. Contrary to how it is portrayed by some, this initiative is not an extreme measure. It is a tempered, moderate approach to reduce the influence and obsession that our society has with race.

--Ward Connerly, Statement to the UC Board of Regents on Proposition 54

The mixture of race and rights has always presented like an oxymoron in modern democracies. By this I mean to imply that race and racial classification systems often stand in direct opposition to the fundamental assumptions of liberal democratic theory; namely the idea that individuals regardless of race or other markers of difference enjoy the same basic rights and privileges in society and through laws,

legislation, and public policies and are free to pursue his or her own ends without interference from the state or others. The problem with this is that racial classification systems present in liberal democracies are historically and inherently unequal, thus making it all but impossible for racial and ethnic minority groups to realize their full bundle of rights in modern democracies.

In the case of proposition 54, the struggle to fuse the normative ideals of liberal democratic theory with the pragmatic reality and experiences of racial and ethnic minorities highlights the challenges and barriers to realizing rights in modern democracies despite legislative and legal gains codified in the Civil Rights Act of 1964 and set of policies and programs that collectively came to be known as Affirmative Action.⁵³

The simultaneous denial and recognition of race by proponents and those in opposition respectively, point to the need to explore the continued significance of race to the realization of rights in modern democracies. In this section, I use ballot initiative proposition 54 to argue that racial identity plays a critical role in the attainment of rights and the exercise of freedom in modern democracies.

Context and Background

In the last decade, the state of California has served as a testing ground for many of the racially charged issues of the country like affirmative action, immigration, and bilingual education. In fact, the mid-1990s saw the passing of legislation that ended state-sponsored affirmative action in hiring and public universities (proposition 209);

⁵³ As Manning Marable (2002) points out, Affirmative Action was not a law or even a coherent set of government policies, rather it was a series of Executive Orders, civil rights laws, and governmental programs regarding the awarding of federal contracts and fair employment practices designed to level the playing field.

the end of the use of bilingual education in public schools (proposition 227) and the denial of public aid to undocumented immigrants (proposition 187). The passage of these historic pieces of legislation depended heavily on the votes of Whites⁵⁴ and in order to be defeated almost 100% of minority voters would have had to turn out to the polls.

Studies indicate election outcomes with regard to propositions 187, 209, and 227 were closely tied to race, geographic location, and assembly district (Ramirez 2002; Hajnal and Louch 2001). For example, Tolbert and Hero (1996) demonstrate that support for proposition 187 was most prominent in counties with significant numbers of racial and ethnic minorities. Similarly, Ramirez (2002) finds that white public opinion regarding proposition 209, the anti-affirmative action legislation, was shaped by the demographic diversity in the districts where they lived and whether or not their assembly was in close proximity to majority-minority districts.

California local and state politics has become synonymous with racial and ethnic politics (Barreto and Ramirez 2005). In the 2001 Los Angeles Mayoral election, for example, the promise of an African-American police chief turned out Black voters for Gray Davis while support for an imprisoned Latino drug dealer hurt the chances of the Latino Candidate by alienating moderate White Voters.

Connectedly, in 2003, the prominence of race and racial identity in the recall election was noticeable. Disappointment across race and ethnic lines with then

⁵⁴ See Ronald Walters' *White Nationalism, Black Interests* (2003) where he deftly notes "at the beginning of the twenty-first century, we are living in an era when a dominant sector of the White Majority seems to have lost confidence in the promise of America as a liberal democratic state and has been recoiling from this vision. Instead, the White Majority is proceeding to concentrate economic and social power within its group, using its control over political institutions of the state.

Governor Gray Davis prompted the election and the candidates for his replacement resembled a rainbow of racial and ethnic diversity. In the free for all that became the California recall election; conservative Ward Connerly seized the opportunity to place the Racial Privacy Initiative known as proposition 54 on the ballot. Banking on the large Republican turnout to oust Davis, the proposition would finish the work that had been initiated by proposition 209 which banned affirmative action in state.

Proposition 54 emerged within a national political context fraught with angst over race and the significance of racial identity to rights and privileges in society. “The liberal vision of the country that resulted in the civil rights laws of the 1960s and 1970s (Walters 2003), and many of the policies collectively referred to as Affirmative Action, was now being chipped away and or challenged at the local, state, and national levels by conservatives.”⁵⁵ The gains of Conservatives in every level of government from the White House down to State legislatures created a political environment hostile towards difference and the goals and ideals captured during the Civil Rights Movement. Further, in line with individual liberalism, conservatives strategically maneuvered to frame race as an issue of privacy or argued that to take race into consideration in hiring or education was to give preferential treatment to racial and ethnic minorities. In the state of California, the recall election presented the perfect opportunity to push through a referendum like Proposition 54 for two reasons: (1) There was much distraction and media focus on the gubernatorial race, thus decreasing the likelihood that individuals, citizens and community organizers alike, would have focused on defeating the initiative until it was too late. In fact, in polls

⁵⁵ See *Grutter v. Bollinger*, 539 U.S. 306 (2003)

leading up to the election less than 30% of voters had heard of the Racial Privacy Initiative;⁵⁶ and (2) the dissatisfaction with democratic governor Gray Davis ensured a high republican turnout for the election.

Race-baiting and the Recall Election

In the recall election, race was used to strengthen and weaken credibility in a way uncharacteristic of racial identity politics. For example, then Lieutenant Governor Cruz Bustamante was accused of membership in a “racist” organization. Upon examination, the purported racist organization turned out to be *MeChA*, a Latino student group that promotes Mexican-American awareness and is open to anyone. Bustamante’s Republican opponent argued that he had a hidden Latino agenda that would exclude Whites. Similarly, Native Americans who held high positions in the state government were accused of currying favor with Democratic leaders and as a result were not paying their fair share in taxes. The ads around propositions related to Native-American casinos insinuated that by not “paying their fair share of taxes” because of preferential treatment Native Americans were the cause of the state’s financial crisis (Barreto and Ramirez 2005).

The racial identity and background of the gubernatorial candidates was key in the recall election with four out of five publicly identifying as immigrants or children of immigrants. In the media, the racial and ethnic background was used to portray the “positive aspect of the immigrant work ethic” as embodying the American Dream. This, however, stands in sharp contrast to the public debates and perceptions around immigration in the state during the time of the recall election where many argued that

⁵⁶ For more information see, Plurality Still Favors Prop. 54 But Margin of Support Narrows by Mark DiCamillo and Mervin Field. August 2003.

illegal immigrants “were stealing and committing a crime” by being in the state.⁵⁷ As conservative commentator Jane Chastain (2003) notes, “Breaking and entering remains a crime in your state.” However, once someone breaks into your home, you are responsible for taking care of the person for the rest of his or her life.” Chastain equates the border as the home of the American citizens and immigrants as criminals who are breaking into the home and asking to be taken care of. The contradictions between the representations of immigrants in the public sphere as simultaneously a burden as well as a relief is crucial in terms of the realization of rights in modern democracies. To the extent that there is a disconnect in the understanding of the role of immigrants in the state, the likelihood is high that public perception or representation of immigrants will continue to drive public policy outcomes.

In California, the meaning of racism has been distorted or maligned. Conservatives and in some cases, liberals have come to understand racism to mean the alleged preferential treatment of one group over another regardless of race, status, power, or history of past discrimination or unequal treatment. Employing this definition, Latinos, Native-Americans, Blacks, Asians who advocate for their interests, rights previously denied to them, or redress for past discrimination can be considered racist. Never mind that the living conditions and social status of these groups in many instances does not yield any of the real social or political power often associated with Whites.

Further, this definition of racism has fueled many of the race-focused public policies in the State, the latest in a string being Proposition 54. California Board

⁵⁷ Also see advertisement campaigns for proposition 187, the anti-immigrant legislation that portrayed Latinos illegally crossing the border.

Regent, Ward Connerly using the definition above, relying on public representations of race, and using the rhetoric of the civil rights movement was able to mobilize voters first in the passage of proposition 209 and second with Proposition 54.

Race-ing the State of California

California is one of the most diverse states in the Union with the 2000 Census reporting among the majority of Californians, 53% identified as non-White. Over the last twenty years, the state has experienced large growth in its non-White population, particularly Asians and Latinos (Lopez 2002). In fact, during the 1980s the state had higher rates for its Asian, Latino, and Black populations than the U.S. overall. Conversely, over the last twenty years, the percentage of Whites in California has declined. In general, as Lopez points out, Los Angeles has the smallest percentage of Whites, and the Eastern Mountains and Northern Regions of the state have had the largest percentages.

The racial and demographic composition of California as well as the fact that it is a majority people of color state provides a unique opportunity for understanding the significance of race to the realization of rights in modern democracies. It could be hypothesized that high numbers of racial and ethnic minorities present in the state would lead to higher levels of political participation which would in turn translate into direct social and material benefits like lower rates of poverty, quality schools, and pro racial and ethnic minority or immigrant public policies. However, this has not been the case. Despite the racial and ethnic demographic composition of the state, California has witnessed a backlash against immigrants and racial and ethnic minorities that is characterized by restrictive and racist public policies like

proposition 187, proposition 209, and proposition 54 that seek to ease the racial anxiety of Whites caused by the shift in demographics over the last twenty years.

Restrictive public policies create institutional and structural barriers for racial and ethnic minorities to realizing their full bundle of rights in the state and maintain unequal power relationships. Further, public policy outcomes are a result of the perception of the social or economic well being of the group, rather than the reality. For example, although Whites make up the minority in the state, they make up 40 out of 53 members of the House of Representatives. However, the public perception is that a large number of racial and ethnic minorities enjoy political power in the state. For the purposes of this discussion, I will focus on poverty, education, health, and the criminal legal system to demonstrate the impact of race on the realization of rights in state of California.

According to the 2000 Census, 14.2 percent of Californians live below the poverty line set by the federal government,⁵⁸ a slightly higher rate than the overall U.S., 12.4%. Despite declines in the poverty rate nationally since 1990, California's rate has increased by 2%. When race is taken into consideration, poverty rates in the State are highest among American Indians, Blacks, Latinos, and people identified on the census as some other race. In the State, those identifying as some other race had the highest rate of poverty at 24.0%, followed by Blacks at 22.4%, Latinos at 22.1, and American Indians at 21.9%. Poverty rates were lowest for Whites (7.8%) and Asian/Pacific Islanders (12.9%).

⁵⁸ According to the Department of Health and Human Services the federal poverty level for a family of four is \$18,850.00. The federal poverty threshold/lines helps to determine eligibility for government aid and programs for families. Source: *Federal Register*, Vol. 69, No. 30, February 13, 2004, pp. 7336-7338.

Regionally, poverty rates are highest in the Central Valley with 20.5% of the residents living below the federal poverty line, Los Angeles (17.9) and Northern Regions of the state at 16.9%. The lowest levels of poverty by region are found in the San Francisco Bay Area (8.6), Sacramento Metropolitan (12.7%), Coastal (11.7), and the Eastern Mountain at 11.6%. It is important to note that in the regions with the lowest poverty rates, they also have the lowest levels of racial and ethnic minority populations. Conversely, in regions with high levels of poverty, the percentage of racial and ethnic minorities is high.

In terms of poverty in the state of California, there is a strong correlation between one's racial and ethnic background and the likelihood one will live in poverty. In the public sphere and in relationship to rights, poverty directly impacts one's quality of life and life chances. Within the frame of a complex theory of rights, the intersections of race and class highlights the economic meta-space that pays close attention to the distribution of wealth and resources in societies; the individual's or groups access to information; and the impact of social class on an individual's access to resources. The economic meta-space explores how one's class position directly impacts an individual's ability to attain rights and material resources; access information and resources; employment opportunities and potential for advancement in society.

In terms of education, in the state of California, there is a dramatic concentration of the worst conditions of schools attended primarily by low-income children, African-American and Latino Children, and English Language Learners. In a state-wide survey, schools with a high percentage of racial and ethnic minority students were 11 times more likely to employ under-credentialed teachers, 40% more likely to

be negative on textbooks or instructional materials, and 3.3 times more likely to report teacher turnover as a serious problem.⁵⁹ Relatedly, on average Whites and Asians attend higher quality schools where about half of the students score above the national median on the math exam of the Stanford Achievement Test. Conversely, Blacks and Latinos are in schools where only about 35% of students score this well.

Racial and ethnic disparities were also present in the drop-out and number of high school graduates who go on to attend college. The dropout rates for Native American, Latino, and Black students were twice as high as the dropout rate for White students. With regard to college enrollment for the same period, although blacks represented 7.3% of high school graduates in the state, only 3.3% of students enrolled in California colleges and Universities were Black.

Lastly, in a recent suit filed against the state on the 46th anniversary of *Brown v. Board of Education* concerning the disparities in condition of public schools with high populations of racial and ethnic minorities, plaintiffs point to the fact that students from five classes share on set of Spanish textbooks, students lack desks, and teachers must pay for gas for field trips out of their pocket the suit alleges.

If we look towards an explanation rooted in a complex theory of rights and employ the institutional meta-space to provide a more comprehensive understanding of the disparities experienced by racial and ethnic minority students in the state, we can see that the dynamics at play extend further than the simple interaction between the state and the individual. The institutional meta-space focuses on the impact on

⁵⁹ See Report on the Status of Public School Education in California 2004 with Special Emphasis on the Status of Equality in Public School Education by Louis Harris.

institutions on the individual in the group. It highlights how institutions present in society restrict, limit, or deny access to resources to marginalized groups. Institutional discrimination and barriers are harmful because they are virtually invisible or hidden in society. It is essentially the “rules of the game” and either you know the rules or you don’t. It may maintain systems of privilege and hierarchies in society.

In the case of the disparities experienced by racial and ethnic minority students, their disadvantages hinges on inequalities embedded in the institutions and structures that govern society that have happened over time. And despite formal legislation such as Board v. Education, inequalities still persist.

Further, knowing or not knowing the “rules of the game” is very important in terms of the realization of rights in modern democracies. Because the rules of the game are not always explicit and for groups who have not been able to participate because of exclusion or because of laws prohibiting them to do so, they are at a particular disadvantage compared to the dominant group.

Let me provide a ready example of what I am trying to get at in the guise of a poker game. Say there’s a group of people who have been getting together for several years to play poker and over those several years they have established the rules of engagement and gained quite a bit of wealth through playing. One day, I am invited to play. I arrive to the table and I notice that I am not prepared; I don’t know the rules and as I look around the table and I notice my stack of chips is significantly smaller than the stack of others around the table. Rather than take the time to explain the rules, they start to deal the cards. Over the course of the game, I lose my chips because I’m trying to play and learn the rules at the same time.

With regard to race and health outcomes for the state, the infant mortality for Black infants in state is two times that of White infants⁶⁰. When broken down by zip code, the highest number of infant deaths in the first year of life where in neighborhoods occupied by Blacks and Latinos with the worst infant mortality rate covering the Crenshaw neighborhood of South Central Los Angeles. In this neighborhood, Babies died at a rate of 13.8 for every 1,000 births more than double the state average of 6.1%. The high infant mortality rate and poor health outcomes can be contributed to concentrated levels of poverty, environmental pollution, and the stress of urban living. It is important to note, that Whites occupied areas and neighborhoods with the least number of infant deaths at an average of 3.7 per 1,000 live births in the wealthiest counties in the State.⁶¹

Lastly, the rates of incarceration and arrest in the state of California are directly correlated to race. For the purposes of my project, I will use the Three Strike's Law, passed in 1994 to highlight the ways in which race have become embedded in institutions and structures that govern society and ultimately restrict individual rights. The Three Strike Law holds that if an individual is convicted of three felonies there is strong possibility that he or she could end up with a term of twenty-five years to life.

On its face, the law appears to be unaffected by race. However, its implementation demonstrates otherwise. An analysis of California Department of Corrections' data shows that Blacks and Latinos are imprisoned under the Three Strikes Law at far higher rates than Whites by nearly 25%. According to a study issued by Justice Policy Institute (2004), in the state of California, Blacks make up 6.5% of the total

⁶⁰ State of California Health and Human Services Statistics Report 2001

⁶¹ *ibid*

population, but they make up nearly 30% of the prison population, 36% of second strikers, and 45% of third strikers. Similarly, although Latinos comprise 32.6% of the population in California, almost 36% of the prison population is Latino and 32.6% are Strikers. In sharp contrast, while Whites make up 47% of California's population, only 29% of the prison population is White, as is 26% of second strikers, and 25.4% of Third Strikers.

The high level of incarceration of Blacks and Latinos in the state is a prime illustration of the political meta-space at the intersection of race and the criminal legal system. The political meta-space refers to the structures and systems of laws and policies that govern individuals in societies. It focuses on the impact of laws, the criminal legal system, public policies, and the state in shaping the individual's or group sense of fairness, equality, and justice in society. The political meta-space highlights how laws and public policies are shaped and informed by dominant cultural perspectives of race, class, gender, ethnicity, age, ability, or sexual orientation.

In the case of the California Three Strikes law, it disproportionately affects racial and ethnic minorities, not because of its design, but because of its implementation in the public sphere. Further, practices in the public sphere like racial profiling and the dominant representations or perceptions of Black and Latino men in the Media as criminals and deviants also contribute to the overrepresentation of racial and ethnic minorities in the criminal legal system.

RACIAL DISCRIMINATION IN THE STATE

In the Wake of proposition 54, race discrimination and race relations was still a relevant issue for voters in the state of California. In a statewide survey conducted by the Tomas Rivera Institute,⁶² over 50% of those surveyed believed racial discrimination was still an important issue. 56% of Whites interviewed believed race was a significant issue and 34% believed race relations were improving in the state. Among racial and ethnic minorities, the numbers were significantly higher. Among Blacks and Latinos, over 80% believed race discrimination was still an issue. 86% of Blacks agreed the issue of racial discrimination was important and only 24% believed that race relations was improving. Similarly, 80% of Latinos surveyed agreed racial discrimination was a very important issue, and like Blacks only 24% believed that race relations were improving. Among Latinos, 27% believed that race relations had worsened. While Asians agreed in larger numbers than Whites that racial discrimination was still an issue, the numbers were significantly lower than Blacks or Latinos at 68%. Further, the percentage of Asian surveyed who believed race relations were improving was almost double that of Blacks and Latinos at 44%. Of all groups surveyed, Blacks were most pessimistic about the improvements of racial relations in the state.

When asked about individual and familial experiences of racial discrimination 78% of Whites surveyed answered that they had never experienced racial

⁶² The survey was designed and conducted by a partnership of four organizations: the Institute for Justice and Journalism, Pew Hispanic Research Center, New California Media, and the Tomas Rivera Policy Institute. The survey contacted 1,608 registered voters between September 6-16, 2003.

discrimination compared to 52% of Blacks, 59% of Latinos, and 57% of Asians. It is important to note that 18% of Whites interviewed believed that they had been victims of racial discrimination. For blacks and Whites, there is a direct correlation between one's experience of racial discrimination at the individual and family level and one's opinion of race relations in the state. Blacks tended to view experiences of racial discrimination as evidence that race relations were worsening and Whites tended to view their lack of experience of direct racial discrimination as evidence that race relations had not worsened. Among Latinos and Asians, there is no direct correlation.

Question: How important is the issue of racial discrimination?⁶³

	Whites	Asian	Latino	Black
Very important	56%	68%	80%	86%
Somewhat	32%	21%	14%	9%
Not at all	8	7%	4%	4%

Question: Have you or family experienced racial discrimination

	White	Asian	Latino	Black
Yes	18%	39%	40%	44%
No	78%	57%	59%	52%

Question: Race relations in California

	White	Asian	Latino	Black
Improving	34%	44%	44%	24%
Worsening	16%	4%	10%	27%
Staying Same	41%	42%	42%	44%
Don't know	9%	10%	4%	4%

The overall position that racial discrimination was still an issue in the state helped to defeat proposition 54. Further, in relation to proposition 54 and those propositions preceding it, race was in the public sphere and carried significant weight in terms of the realization of rights by individuals and groups. Statistics in the state demonstrate

⁶³ *ibid*

that economic well being, health outcomes, education, and housing are all intimately tied to race despite formal intervention by the state to ensure that discrimination based on race or any other marker of difference does not occur.

Before Proposition 54: The End of Affirmative Action in the State

Before turning my focus to proposition 54, I would like to spend some time in consideration of proposition 209 often referred to as the big brother of proposition 54. Proposition 209 also known as the California Civil Rights Initiative was intended to end Affirmative Action in California's government hiring, public school admissions, and public contracting by eliminating preferential treatment on the basis of race, sex, color, ethnicity, or national origin. I believe a thorough discussion of Proposition 209 and affirmative action is important because it provides state and national level context for Proposition 54.⁶⁴

Proponents of the initiative argued, "special interests hijacked the civil rights movement. Instead of equality, governments imposed quotas, preferences and set-asides."⁶⁵ In fact, they argued that proposition 209 would move us toward the color-blind society so envisioned by Civil Rights leaders such as Martin Luther King Jr., Thurgood Marshall, and President John F. Kennedy and embodied in the Civil Rights Act of 1964 by affirming that "The state shall not discriminate against or grant preferential treatment to, any group, on the basis of race, sex, color, ethnicity, or national origin."

⁶⁴ The reason why I chose to focus my case on Proposition 54 is that unlike Proposition 209, it directly challenged the idea that racial was not a significant predictor of the realization of rights, quality of life, or life chances in the modern democratic state. Proposition 209 focused on ideas of preferential treatment and reverse discrimination.

⁶⁵ vote96.ss.ca.gov/vote96/html/BP/209yesarg.htm

To make their case, supporters of proposition 209 pulled on the idea of reverse discrimination and tapped into the anger and anxiety of whites that believed that they had lost a job, status, contract, or position to racial and ethnic minorities or women. They argued that students were being denied admission from public universities based on race and state contracts were being awarded to individuals based on race or gender. The subtext to all of this is that Blacks, other racial and ethnic minorities, or women were unqualified or under qualified to attend these schools in the first place or undeserving of public contracts. This underlying assumption proved effective because on the one hand it mobilized Whites who believed that they were being discriminated against on the basis of race or gender and racial and ethnic minorities who believed they could compete with Whites and that race or gender had very little influence on one's life chances.

What was interesting about the framing of the initiative was that fact that it rarely mentioned who was bearing the brunt of this "reverse discrimination". In the literature in support of the initiative the specific race or gender of the individual is never mentioned. However, the person is understood to be a white male. In fact, the first lawsuit alleging reverse discrimination was that brought forth in California by Allan Bakke (1978), a white male who had been rejected to Medical School two years in a row in favor of "less qualified minority applicants." Spokespersons, however, in favor of Proposition 209 tended to be racial and ethnic minorities with Ward Connerly, an African-American male taking the lead on the initiative. Hence, the public perception of the legislation looked like hardworking "deserving" minorities

on one side of the debate and “lazy, freeloading, victim-mongers” on the other side attempting to get a free ride on the system.

From the very beginning, affirmative action was instituted to redress discrimination that had persisted despite civil rights legislation, laws, and constitutional guarantees. Although not included in the Civil Rights Act of 1964, it was developed by the Johnson Administration to help ensure the active enforcement of the Act. A complex set of policies and federal programs, it mandated that measures be taken to ensure that Blacks, women, and other racial and ethnic minorities as defined by the Civil Rights act of 1964 enjoyed the same opportunities for promotions, salary, increases, career advancement, school admissions, that had been nearly exclusive to Whites. It was envisioned as a temporary remedy that would end once there was a level playing field.

By the mid-to-late 1990’s there had been an enormous backlash against affirmative action in practice and in theory. Those against the policy argued that it opened doors for minorities, but closed doors for Whites. The terms “quotas” and “preferential treatment” came to be viewed with contempt or resentment by Whites and some minorities.

In a 1995 Washington Post article entitled *Americans Vent Anger at Affirmative Action*, men and women across racial and ethnic lines were equally divided on the relevance and effectiveness of Affirmative Action. A housewife from Angleton, Texas noted “Blacks...walk around with a chip on the shoulder, like we owe them something. I don’t feel like we do.” Similarly, a white male in his mid-thirties believes “[Everything] is equaled out, there’s no need for [affirmative action]

anymore. It just makes me upset when this subject gets thrown down your throat. I am a white single man and they try to make you feel guilty because they're not getting jobs and that's it our fault."

On the other end of the continuum, racial and ethnic minorities were clear that affirmative action had fallen short of its expectations or promises of creating a level playing field. As one woman notes, "We [Asians] don't have the same opportunities as Whites. If we are discriminated against, we keep quiet...You accept what their decision is. You are content with what you have." Another interviewee concurs by noting " [Affirmative Action] is needed because of the serious disadvantages that Blacks and other minorities have suffered in the workplace and in education, even today. You have white managers in the majority of high-level positions making decisions on promotions, pay raises and management positions. In my experience, they tend to hire and promote and favor those who are most like them either in ethnic background or in educational background."

There are two points that I would like to make regarding the above statements. The first is that in the statements, the gain of power, influence, or economic stability of racial and ethnic minorities, and women has been linked to the loss of power, influence, and economic stability of Whites. This link clouds the issue of entrenched institutional and structural racism or discrimination that continue to keep the playing field unlevelled and the historic and cumulative gains by Whites as a result of slavery, exclusion, and colonialization. Secondly, there is a gross failure to acknowledge the racial coding of public policies and politics in the public sphere and the impacts it has on policy outcomes and remedies available at the local, state, and national levels.

In a 1997 national Gallup poll, over half (51%) of Americans believed that white men had been adversely affected by preference programs. When the results were divided by race, the results varied significantly with 63% of white males reporting that affirmative action had hurt white men. This was shared by only 26% of all Blacks polled.

In the same poll, 79% of whites believed Blacks to have an equal chance of getting jobs as whites, while only 46% of Blacks agreed. 44% of those interviewed across race and ethnicity believed that whites were highly prejudiced and 63% of those interviewed considered themselves to hold little or few prejudices.

Further, in a similar study on Affirmative Action that included racial stereotypes and biases, researchers discovered in relation to Affirmative Action 43% of all whites interviewed said Blacks were “irresponsible” and 31% identified Blacks as lazy⁶⁶.”

The above statistics and comments tie the representational and political meta-spaces together quite well. The public representation of racial and ethnic minorities and women present in the media and the public sphere directly shapes the opinions and terms of the grounds under which to argue for or against affirmative action. Framing Blacks and others as lazy and irresponsible makes them out to be undeserving or seen as attempting to “get a free ride on the American system,” as opposed to individuals situated within systems and structures that have historically worked against them attempting to get a fair and equal shake. This works out well for those seeking to dismantle affirmative action policies because the representation of poor blacks are often juxtaposed to middle class blacks, *The Cosby Show* versus

⁶⁶ Morin, Richard. 1997. “The hidden truth about affirmative action.” *Washington Post*, 21, September 1997.

single black mothers living in inner city neighborhoods. And Asians⁶⁷ as the designated “model minority” in most of the debates were juxtaposed to Latinos and Blacks. In this sense, failure is attributed to individual failings, rather structural or institutional barriers to achieving full equality and rights.

Spurred by proposition 209, affirmative action was a key platform issue for both Democrats and Republicans in the 1996 presidential election. President Clinton voiced his opposition to the initiative, his concerns for ending affirmative action outright and outlined a commitment to four standards of fairness: (1) no quotas in theory or in practice; (2) no illegal discrimination of any kind, including reverse discrimination; (3) no preference for people who are not qualified; and (4) as soon as a program has succeeded, it must be retired (Democratic National Committee, 1997).” Conversely, Republicans stated their support of proposition 209 in the 1996 Republican Platform and endorsed the Dole-Canady Equal Opportunity Act, which proposed to end discrimination by the federal government. The political and ideological divisions were clear in terms of support for proposition 209 at the state level and a move toward federal legislation that would have the same spirit and intent as the state-level proposition.

More importantly, Race was used as a wedge issue by Republicans to gain political support and create division among liberals and progressives with regard to

⁶⁷ During the debates on Affirmative Action, conservative Newt Gingrich argued that Asians were an example of how old-fashioned hard work and values still open the door to success in the USA. He also expressed concern that affirmative action was discriminating against Asian-Americans. For a more thorough discussion on the Asians and the Model Minority Myth see Tuan, Mia "Unraveling the "Model Minority" Stereotype: Listening to Asian American Youth." *Journal of Asian American Studies* 1:2 (June): 198-201

Affirmative Action and the California Civil Rights Initiative. A wedge issue is defined as issues used by candidates of one party to attract voters who usually support another party in effect driving a wedge between the opposition and its normal supporters (Cain and MacDonald, 1996). With regard to proposition 209 and the national election, Republicans targeted white male democrats and Independents. What was not anticipated was the debate and divisions that would result within racial and ethnic minority communities and among white progressives and liberals.

The issue of Affirmative Action codified in Proposition 209 put the Democrats and liberals in a difficult position. The Right had appropriated language used to secure rights and end discrimination based on race, gender, or ethnicity by the Civil Rights Movement and the Civil Rights Act of 1964 to argue that discrimination was wrong across the board even if the individual affected by the alleged discrimination was a white male. They relied heavily on the speeches of civil rights leaders to support their call for an end to Affirmative Action and other forms of discrimination based on race or gender.

By evoking potent social and political images such as the NAACP, the Civil Rights Movement, and Martin Luther King Jr., Conservatives were able to manipulate the goals and aims of the civil rights movement, understood as an end to racial discrimination and unequal treatment to their benefit. More significantly, they were able to disarm progressives and liberals who had not seriously examined the viability or desirability of a color-blind society.

To be sure, this is not the first time liberal concerns have been used towards conservative ends. As Manning Marable (2002) points out, on issues of equal

opportunity under the aegis of the Nixon-Ford Administrations of 1969-1977 the set of policies, which we identify as “Affirmative Action”, was implemented and codified in the Philadelphia Plan, which both strengthened and refined affirmative action (Hardisty 2000) The Plan required that federal contractors set specific goals for minority hiring. As a result the number of racial minorities increased from 1 to 12 percent. On the surface, the plan appeared to be step in the right direction in terms of remedying past racial discrimination, but in deed it helped to create class stratification among racial and ethnic groups thus weakening the possibility of collective action or organized resistance. Again, the lack of progress on the part of racial and ethnic minorities came not to be seen as a result of institutional or structural racism or the complete denial of rights, but the result of individual failings.

Critics of Affirmative Action used the gains by some racial and ethnic minorities and women to argue that situations for Blacks and others had vastly improved. They employed studies that asserted 40% of Blacks considered themselves members of the middle class, 42% owned their own homes, and a third of the population lived in suburbia (Thernstrom, 1999). The gross overstatement of gains experienced by Blacks post passage of the civil rights led Former California Governor Pete Wilson to argue “Those who benefit from Affirmative Action today are granted preferential treatment ‘based not on past discrimination, but simply by being born into a protected group.” Connectedly, conservative Ward Connerly (2003) argues, “It is really hard to defend affirmative action preferences. The only arguments you can use are either that we need diversity for the sake of diversity, or that America is still racist. You have to embrace one of those two.”

What critics of Affirmative Action failed to consider was the ways in which racism and racial biases had been institutionalized through the laws, public policies, institutions and structures that govern society over time. While Blacks were not experiencing discrimination characteristic of the Jim Crow Era, explicit racism had been replaced with institutional and structural racism that was difficult to prove and to trace (Winant 1994).

As Bell (1992) points out the slow advances made by Blacks during the 1960s and 1970s in terms of poverty, unemployment, and income have been reversed. This point is echoed by Lipsitz (1998) who asserts that at every stage over the past fifty years, whites have responded to civil rights laws with coordinated collective politics characterized by resistance, refusal, and renegotiation.

At the time of the introduction of proposition 209, the Glass Ceiling Commission reported that 97% of senior managers at the Fortune 1,000 corporations were white males while 57% of the country's workforce was either a female, a minority or both.

Proposition 209 was approved by California Voters in November 1996. 55% of voters supported the measure. The approval of the measure was hypothesized to be a mixture of racial division fueled by a fear of arbitrary exclusion prompted voter support for Proposition 209. With respect to race, Whites, who potentially are the affirmative action losers, were more likely to support the initiative compared to racial and ethnic minorities who are typically viewed as the beneficiaries of affirmative action policies (Alvarez and Butterfield, 1998).

DOING AWAY WITH RACE: THE CALL OF PROPOSITION 54

“If you can’t discriminate and you can’t give preferential treatment, we don’t believe that you even need to be gathering data and classifying people. I believe categorizing human beings is immoral, and I want to squeeze race out of the equation.”

--- Ward Connerly, 2003

“What is your race? African-American? Mexican-American? White? Native-American? Or the mysterious “Other?” If you are like most Californians, you’re getting tired of that question.....When you’re asked to check a government form with row after row of these rigid and silly little “race” boxes, have you ever wanted to say, “None of your business; now leave me alone?”....The advocates of racial categorization maintain that you have no right to privacy concerning your ancestry and racial background. They see no problem if your employer or school officials label you AGAINST YOUR WILL—often without telling you—or charge you with “racial fraud” if their “racial” definitions are different from yours.

--Ward Connerly, 2003

Unlike proposition 209, proponents of proposition 54 framed racial classification as an issue of privacy. Named the Classification by Race, Ethnicity, Color, or National Origin Initiative (CRECNO) or the *Racial Privacy Initiative*, proposition 54 would have prohibited the state and local government from collecting data on a person’s race, ethnicity, color, or national origin. By situating race as a privacy issue and relegating it to the private sphere, the authors of the legislation pulled on a familiar strand of liberal democratic theory that argues that race, gender or other markers of difference have very little bearing on political or material outcomes in the public sphere.

The relegation of race to the private sphere ignores what Carole Pateman (1988) describes as the complex multi-faceted structure of domination in modern [democracies] that are held together by civil and state law. She argues the

construction of difference, [sexual, racial, gender or otherwise], as political difference is central to civil society. Proponents and supporters of proposition 54 sought to deny this reality and relied heavily on the oversimplified relationship between the state and the individual or group to account for the realization of rights in modern democracies.

Fueled by the 2000 Census, which allowed Americans to classify themselves into at least 63 racial categories, proponents of proposition 54 argued that it would move California and the nation closer to realizing a color-blind society and their American-ness. In this context, race is replaced with nation. The only issue with this is that one's American-ness or citizenship has historically been tied to race or ethnicity in the United States in the public sphere. Since the founding of the new world, race, gender, and ethnicity have played a significant role in citizenship, rights, and freedom in the liberal democratic state. As Pateman (1988) notes, although the private and public spheres are opposed, they gain their meaning and significance from the other. What it means to be an individual and be civilly free is revealed in part by the subjection of groups within the private sphere. As such, the private and public spheres are interdependent.

In Whose Interest Was the Battle for Proposition 54 Waged:

Proponents of the referendum argued that winning Proposition 54 would benefit all Californians and the Nation by helping individuals to realize their "American-ness" and move us toward a more-color blind society where race wouldn't matter. Funds in support of Proposition 54 were funneled through the American Civil Rights Coalition, a conservative organization. The cadre of individual donors making up the bulk the financial support for proposition 54 reads like a list of who's who of the

economic elite with over 1.2 million dollars in contributions coming from this group, most of which, unsurprisingly were white men.⁶⁸ In fact, according to the San Francisco Chronicle, “1.3 million of the 1.7 million dollars in undisclosed contributions came from six contributors, each of which gave hundreds of thousands of dollars of their own money to ACRC to fund the initiative.” This make sense given the backlash against affirmative action has been led in part, by white men who believe their status and position in society have been comprised because of programs like Affirmative Action.

A surprising ally in support of proposition 54 was a number of multi-racial coalitions and organizations. Responding to frustration around living in a racially diverse society that recognizes individual races and identities, but not the mixture of two or more races or ethnicities, the group championed the Racial Privacy Initiative as a move away from “racial policing” through classification by the government. In fact, James Landrith, a white male⁶⁹ in an interracial marriage and of the Multi-Racial Activist⁷⁰, argued “these nasty little classification systems have been contributing to America’s ‘racial’ problem from the beginning of our nation’s history. [Racial Classification] is government-coerced segregation of the mind, body, and spirit (Landrith 2001).

⁶⁸ The American Civil Rights Coalition was sued by the state of California for violation of campaign finance rules for failure to disclose the names of contributors to the Campaign. ACRC argued that “donors believed that the disclosure of the contributions was an ‘invasion of their privacy’—an assault on their right to assemble without fear of retaliation.”

⁶⁹ Mr. Landrith says that he could identify as multiracial if he wanted to, but chooses not to because of the arbitrariness of race.

⁷⁰ The Multi-Racial Activist is a libertarian activist journal covering issues of interest to biracial/multiracial individuals, and interracial couples and family.

On the other side of the campaign, “*No on Proposition 54*” was funded and supported heavily by Civil Rights organizations such as the NAACP and the ACLU, health care organizations like Kaiser Permanente, and student organizations. These organizations and individuals contributed over 10 millions dollars to defeat the referendum. The “No on 54” campaign received a considerable boost with support for defeat by gubernatorial candidate Cruz Bustamante who contributed over 3.8 million dollars of his campaign funds to bury the initiative.⁷¹

Framing the Debate on Proposition 54

Detractors of proposition 54 argued that although color-blindness is an ideal goal, the reality of racism or the prominence of race in the institutions and structures that govern society make it a normative, rather than a pragmatic solution (Winant 2003). In an article in the San Francisco Gate, writers point to recent data on racial profiling in the States of New Jersey and Maryland and the attainment of home loans by Blacks in comparison to Whites. In both instances, racial and ethnic minorities fare worse in comparison to their white counterparts despite the federal and state mandates that prohibit discrimination. By linking race to political and public policy outcomes, it becomes increasingly more difficult to argue for a normative, constitutive model of equality that ignores the relevance of institutions and representation to the realization of rights in modern democracies.

The privacy advocated by supporters of proposition 54 fails to account for the lived experiences of racial and ethnic minorities or their day-to-day reality. While it is

⁷¹ Nasser, Haya. 2003. “California Candidates Seize Proposition 54 Issue.” *USA Today*. 8, 8, September 2003.

true that race is socially constructed, the meaning and signification of race in the U.S. context, makes it real and meaningful in terms of rights.⁷²

Next, while proponents of Proposition 54 framed the Initiative as a privacy issue, those in opposition chose to frame it as a health issue. In advertisements and literature about the initiative, detractors argued that Proposition 54 was “bad for health care, bad for public safety, and bad for education.” Rather than focus on classification as an issue of racial identity politics, detractors held that classification is what allows for the identification of groups most at risk for infectious diseases, closes the achievement gaps in public schools by creating systems of accountability; and provides law enforcement with the tools it needs to solve crimes. There was a clear deemphasizing of race by those arguing against Proposition 54. The public face of opposition to Proposition 54 included organizations like the Academy of Family Physicians, The American Academy of Pediatrics, the California Health Care Association, The American Heart Association, and the Breast Cancer Alliance. Groups like the NAACP, the National Urban League, ACLU, and others represented a second tier of organizing efforts that escaped mainstream media attention in the state, but emphasized the racialized element of the initiative to its constituents whom they believed would be directly impacted by its passage.

The decision to limit “race talk” in relation to proposition 54 was deliberate and based on lessons learned from the campaign against 209. One such lesson, Riku Sen

⁷² For a more through discussion on the permanence of racism, see Derrick Bell’s *Faces at the Bottom of the Well* (1992) where he offers a irrefutable proposition that Blacks will never gain full equality in [the United States]... because short-lived victories slide into irrelevance as racial patterns adapt in ways that maintain white dominance.

(2003) notes is that Whites and Asians think they lose out when policies are racialized. During the 209 struggle, for example, a television advertisement conflating an attack on affirmative action with the KKK may have offended, rather than won over white conservatives who opposed affirmative action, but hardly considered themselves white supremacists, Sen points out.

Major television advertisements in opposition to proposition 54 featured former Surgeon General C. Everett Koop who declared in his message that proposition 54 “was bad medicine” The messages of the “No on 54” campaign focused on the idea that diseases aren’t colorblind, even if people are. As a result, the heated debates and in-fighting characteristic of the ‘No on 209’ campaign was notably absent. The public perception was Proposition 54 was an initiative about health care outcomes rather than racial identity politics or preferences. This framing resonated with voters across racial and ethnic lines.

In the end, a majority of racial and ethnic minorities and an overwhelming number of Whites voted against proposition 54 by a nearly 2-1 margin (64% to 36%). In a exit poll survey conducted by the Los Angeles Times, 58% of Whites, 79% of Blacks and 70% of Latinos voted against the initiative Support was highest among older voters of all races at 69% for those 65 and older compared to 58% of 40-44 year olds.⁷³

⁷³ Nasser, Haya. September 8, 2003. *California Candidates Seize Proposition 54 Issue*. USA Today.

CONCLUSION: THE SIGNIFICANCE OF PROPOSITION 54 IN TERMS OF THE REALIZATION OF RIGHTS IN MODERN DEMOCRACIES

Despite the passage of proposition 209 in 1996, which outlawed affirmative action in the state, California voters rejected the idea that ignoring difference would bring the state closer to the realization of a color-blind society. By voting against Proposition 54, Californians rejected the liberal democratic notion that the realization of rights in modern democracies is the product of the relationship between the individual and the state, rather the failure of Proposition 54 suggests an acknowledgement that the realization of rights in the public sphere on the part of racial and ethnic minorities is complicated by historic inequality characterized by exclusion, racial projects that shift to maintain white hegemony, and resistance.

I have attempted to demonstrate that in the state of California, race and ethnicity play a critical role in terms of the realization and attainment of rights in the public sphere. Race also influences one's life chances, freedom, and opportunities in society. I have also shared the ways in which a complex theory of rights that is able to account for the way in which differences, in this case racial difference, impacts the realization of rights in modern democracies despite formal equality gained through legislation or public policies. Moreover, the state of California and Proposition 54 highlights the ways in which the political, structural, institutional, representational, and economic meta-spaces converge to shape rights and liberties in liberal democracies. It is not clear, however, whether or not voters understood a complex theory of rights, but I believe the defeat of the referendum suggests that voters understood in some way the

impact of race on rights and privileges in society. Such an inquiry would be beyond the scope of this study.

CHAPTER IV

Complex Subjectivity, the Promise of Neutrality, and the Attainment of Rights in Modern Democracies: An examination of Same-Sex Marriage in the Liberal Democratic State

INTRODUCTION

Marriage cannot be severed from its cultural, religious and natural roots without weakening the good influence of society....America is a free society, which limits the role of government in the lives of our citizens. This commitment of freedom, however, does not require the redefinition of one of our most basic social institutions. Our government should respect every person, and protect the institution of marriage. There is no contradiction between these responsibilities.

----*President George W. Bush, 2004*

Government should not affirm, through its policies or laws, any particular conception of the good life; instead it should provide a neutral framework of rights within which people can choose their own values and goods.

-----*Michael Sandel,⁷⁴ 1996*

Liberal democratic theory holds that the state must remain neutral with respect to values and the common good of society. Under liberalism the common good, is “optimal amount of preferences, each of which is given equal consideration, within the limits of respecting each person’s rights (Johnson 2003).” It requires that the individual be unencumbered by its social roles—as a mother, father, racial or ethnic minority, woman, man—because individuals are free to reject or accept the values associated with any of these roles (Sandel 1996). However, rights for Gays and Lesbians, most recently in the guise of marriage, test liberal notions of neutrality and

⁷⁴ For a more thorough discussion on this point, see Michael Sandel’s *America’s Search for a New Public Philosophy* in the *Atlantic Monthly*, March 1996

the unencumbered self by raising significant questions concerning the weight of societal values and norms to the realization of rights in the modern democratic state.

Laws against or in favor of Gays and Lesbians turn on interpretations of privacy as articulated by the Fourteenth Amendment. Those arguing against laws and protection for Gays and Lesbians often appeal to some set of moral values said to be guided by the history of the state and the preservation of bedrock social institutions. As such, they tend to call for a narrow interpretation of the fourteenth amendment through the exercise of judicial restraint. Conversely, those advocating for rights for Gays and Lesbians often promote a broad interpretation of privacy and appeal to liberal tenets of toleration and neutrality (Sandel 1989).

In last decade, those working to secure rights on the behalf of gays and lesbians have won significant victories. In early 2003, the Supreme Court in *Lawrence v. Texas*⁷⁵ issued a landmark decision invalidating the criminal prohibition of sodomy in the state of Texas overturning *Bowers v. Hardwick*.⁷⁶ Later that same year, the Massachusetts Supreme Court ruled in *Goodridge v. the Department of Health* that the commonwealth had failed to identify any constitutionally adequate reason for denying civil marriages to same-sex couples.⁷⁷

The Massachusetts court decision to extend the right to marriage to Gays and Lesbians signals the recognition of complex identities and groups in civil society. In

⁷⁵ See *Lawrence v. Texas*, 539 US 558, 123 S. Ct. 2472; 156 L. Ed. 2d 508

⁷⁶ See *Bowers v. Hardwick*, 478 U.S. (1986)

⁷⁷ For a more thorough discussion on this point, see the court's opinion in *Goodridge v. Department of Health* 440 Mass. 309, 798 N.E. 2d 941 (Nov. 18, 2003)

essence, the decision constituted Gays as bearers of rights under the law.⁷⁸ It embodies the liberal ideal that “a person belongs to himself and not to others nor to society as a whole.”⁷⁹ By constituting Gays as individuals under the law, the court recognizes the existence of a social group or individuals that until recently had fallen outside of the law and discourse.

In this chapter, I will use the issue of same-sex marriage to argue that liberal democratic state fails to deliver on its promise of political neutrality and that there exists a notion of “the good” that operates in society that makes it difficult for some groups and individuals to realize their full bundle of rights. Further, I will contend that under liberal democratic theory, individuals must be embodied as subjects under the law before they can make rights claims in the public sphere. I contend that even the most advanced liberal democratic theories fail to adequately account for the ways in which individuals and groups enter society or become recognized as bearers of rights.

I use a complex theory of rights to demonstrate that in the case of same-sex marriage, not only does difference impact the realization of rights in modern democracies, but also institutions and structures shaped by dominant cultural norms and values influence the attainment of rights as well.

⁷⁸ There is still reluctance by the courts to identify lesbians and gays as a suspect class under the law and in society. Designating gays and lesbians as a suspect class would elevate their status in society to that most closely often associated with race, gender, or ethnicity. Suspect class is defined as a class of individuals marked by immutable characteristic (as of race or national origin). A classification that does not impact a suspect class or impinge upon a fundamental constitutional right will be upheld if it is rationally related to a legitimate government interest.

⁷⁹ See *Goodridge v. Department of Health* 440 Mass. 309, 798 N.E. 2d 941 (Nov. 18, 2003)

I will proceed by examining the meaning of subjectivity, neutrality, and the good in the modern democratic state. Then, I will briefly discuss the meaning of marriage as a social contract and as an institution before turning my full attention to the issue of same-sex marriage as examined through the lens of *Goodridge v. the Department of Public Health*.

Complex Subjectivity and Rights in the Modern Democratic State

“The question of ‘the subject’ is crucial for politics because juridical subjects are produced through certain exclusionary practices that do not *show* once the juridical structures of politics has been established”(Butler 1999). The subject, loosely defined as the object, individual, or thing that is produced through discourses and relationships, is critical to the attainment of rights in the modern democratic state. The creation of a subject of rights under the law and in society is constructed through apparatus’ governed by the state that include various political institutions and entities all operating within a masculinist, patriarchal, and racialized framework. As Butler notes, the construction of the subject is political and legitimated through certain exclusionary practices and aims that naturalizes and conceals the juridical structures of the foundation as the grounds for exclusion or inclusion.

Under liberalism, before groups and individuals can make rights-claims in the public sphere, they must first be embodied as subjects under the law. As previously stated, the remedies available to marginalized groups and individuals in society depend in part on the political recognition of difference or differentiated subjectivity, and the demonstration that it is the cause for the denial of rights and privileges in the public sphere. This, however, poses problems for Gays and other similarly situated

groups because the recognition of differentiated subjectivity under liberalism is incommensurate with liberal doctrines of abstract individualism.

The notion of an abstract subject of rights under liberalism obscures what Foucault calls “dividing practices.” Dividing practices are those in which “the subject is objectified by a process of division either within himself or from others,” and in turn the processes of exclusion or isolation are normalized or made real. In this process of categorization and objectification, individuals are given both a social and a personal identity, either as an insider or outsider (Lorde 1984). To be sure, the creation or constituting of the subject in the modern democratic state is shaped, implicitly or explicitly, by dominant cultural norms and values with those individuals most closely aligned with dominant cultural norms and values constituting Insiders and those differentiated by race, class, sexual orientation, or gender constituting Outsiders. If it is true that the sexualized subject of rights and citizenship is undoubtedly heterosexual (Brandzel 2005) then the denial of rights is predicated on the exclusion of the sexualized⁸⁰ other in law and discourse.

Next, I would like to suggest that the sexualized subject of rights in the liberal democratic state is different from the gendered or racial subject of rights because it is possible for individuals identifying as Gay or Lesbian to be situated within other social hierarchies present in society as well. In liberal democracies, rights-claims tend to be dichotomous and rely on oppositional binaries such as male/female;

⁸⁰ Here, it is easy to confuse or to conflate the sexualized other with Gender rather than sexual orientation. I am reluctant to use Queer as the term to signify gay and lesbian subjectivity because of the complexity of the term. For a more thorough discussion of this point see Jacinth Samuels, *Dangerous Liaisons: Queer Subjectivity, Liberalism, and Race* in *Cultural Studies* 13(1) 1999 91-109

black/white; proletariat/bourgeoisie, all of which deny the complexity of social relations and identity in society. As a result, Gays and others situated within multiple hierarchies have difficulty advancing rights-claims or articulating a both/and framework that is not seen as threat or as undermining single-identity based claims.⁸¹

In this dissertation, I suggest that rights-claims made on the part of women of color, multi-racial individuals, gays, and others situated within multiple hierarchies are radically different from those made by Blacks or Women during the 19th and 20th centuries. Historically, women of color, gays, and others situated within multiple hierarchies have relied on legally recognized affinity groups to make rights-claims in the public sphere. In the case of women of color and multi-racial identities, it has been race or gender and for gays it has been gender. However, race and gender frameworks do not accurately reflect the experiences or account for the ways in which the intersections of race, class, sexuality, gender, and other markers of difference significantly alters rights-claims made in the public sphere. As Legal Scholar, Kimberle Crenshaw (1995) notes, the discourses often used to highlight gender and race biases in law and society are often oppositional and contradictory. Further, she goes on to say that in many instances, racism as experienced by people of color who are a particular gender—male-- tends to determine antiracist strategies, just as sexism experienced by women who are of a particular race—white tends to dominate the women's movement. The both/and status of individuals situated within

⁸¹ In the case of *Baker v. Nelson*, the court in its opinion chastised the plaintiffs for using the Equal Rights Amendment, a law intended in their eyes to protect women from sexual discrimination, to argue for same-sex marriage or rights for gays and lesbians.

multiple hierarchies leave them exposed and bereft of a discourse in which to situate themselves.

In a manner of speaking, rights-claims made on the behalf of these groups or individuals within the public sphere are constitutionally indefensible because they are not constituted as individuals under the law. In the instance of Gays and Lesbians, they are recognized as subjects under the law as heterosexual men and women operating under the cultural norms and values of a heteronormative state, not as queer, homosexual, or any other term that signifies same-gender loving or suggest that there is a sexual *Other* operating in the public sphere.

The reach of the issue of same-sex marriage is far and extends beyond the right to marry, rather at its core it is about redefining and renegotiating the terms of citizenship in the modern democratic state and making visible the moral assumptions embedded in the institutions and structures that govern our society. As such, what continues to be necessary is an analysis of power, history, and the liberal investment in maintaining the abstract of rights under law and in the public sphere. In the words of Foucault, we need to map the genealogy of these discourses to create opportunities for transgression and disruption.⁸² We must pull on the political imaginary to create a theory of rights that is firmly rooted in the lives and experiences of differently situated individuals that is embedded in the social and material reality of our society.

The Role of the State in Ensuring Rights in Modern Democracies

Leading political theorists and social scientists differ with respect to the role of the state in the attainment of rights in modern democracies. Some argue that the state

⁸² See Paul Rabinow's *The Foucault Reader* (1994).

is an autonomous entity whose actions are not reducible to or determined by forces in society (Lichbach and Zuckerman 1997) In this sense, the state is coherent, rather than fragmented and follows its own set of interests not to be swayed by internal interests or pressures. In this characterization, the state is separate from society and there is very little accounting for the impact of culture, identity, history, or other factors that shape the state.

In the above framing the state is viewed as the “fount of freedom” and as the protector against danger or intrusion from without and the domestic manager of difference and conflicts. As feminist theorist Wendy Brown (1995) notes, the state is associated with maintaining order and stability in society, not necessarily arbitrating difference or injuries against its citizens. Under the traditional lens of liberal democratic theory, difference and injury fall squarely within the private realm and the state works to maintain the sharp line between the public and the private spheres.

At once, the role of the state in relationship to the attainment of rights is both general and specific. General in the sense that its reach and scope is vast and covers the entire citizenry, and specific in that it purports to only be concerned with stability and order and ensuring the exercise of freedom by individuals. There is very little consideration for the ways in which difference or identity shapes one’s individual freedom and the role of the state in mitigating the impact of difference or identity on the realization of rights in society. Race, class, and gender, sexuality, culture, religion are seen as private motivators which drive individual choices or decision, rather than having currency in the public sphere that in turn shapes individual rights and autonomy.

In sharp contrast, others argue that the state is largely a product of a grand historical narrative and is one of many actors. Foucault (1978), for example, argues for a diffused state influenced by local interests and struggles for power. From a Foucauldian perspective, the state is understood as fragmented, weak and not reflective of the social and material dynamics that shape individual rights or freedom (Lichbach and Zuckerman 1997).⁸³ As such, he argues for the study of the nature of power and the apparatus' of the state [institutions, structures, and bodies], and the ideologies that accompany them. He urges us to focus on the study and the tactics of domination.

Wendy Brown (1995) concurs by noting 'what we call the state is at once an incoherent ensemble of power relations and a vehicle of massive domination. She goes on to say, the contemporary democratic state is modern and postmodern, highly concrete and an elaborate fiction, decentered and decentralized and despite the most unavoidable tendency to speak of the state as "it," the domain we call the state is not a think, a system, or subject, but a significantly unbounded terrain of powers and techniques.

Foucault's and Brown's vision of the state is a slippery slope. In attempting to proffer an alternative frame for which to map histories, the realization of rights, and power in modern democracies, they sidestep the role of the state in governing societies. While it is true there must be a fair degree of negotiation between the universal and the local, there must also be a clear understanding of the role of the

⁸³ See Wendy Brown's *States of Injury* (1995) for a more thorough discussion of this point. See also Thomas Hobbes' *The Leviathan* (1660) where he describes the all powerful state or sovereign power.

state in protecting individual liberties and freedom. The question then becomes how this gets carried out, which is the local part of the equation, what I believe Foucault and Brown are talking about in their renderings of the state. As such, we must understand the State as both coherent and fragmented in order to understand the ways in which we avoid anarchy, i.e. if the state is fragmented and fictitious then why should anyone obey the laws, and coherent in that the individual relies on the state to resolve disputes or infringements against individual rights or exercise of freedom.

Next, feminists and critical legal scholars have continued to note the masculinist and racist nature of the state. The masculinism of the state refers to those features of the state that signify, enact, sustain, and represent the masculine power as a form of dominance (Brown 1995). This dominance, Brown contends, expresses itself as the power to describe and run the world and the power of access to women. Said differently, it is the power to define the core and determine the terms under which women can go about attaining rights and securing freedom⁸⁴. In the instance of Gays and Lesbians, I would like to extend this frame by noting the heterosexism of the state, whereby “the state has constructed heterosexuality as a prerequisite to citizenship, [the attainment of rights], and as a unspoken norm of membership and national belonging,” (Brandzel 2005).

Connectedly, Brown problematizes the issue of relying on an apparatus, the State, which has consistently acted in a masculinist, patriarchal, or heterosexist way to protect and ensure the rights of women and for the purposes of our discussion Gays. She goes on to note there is danger in “looking towards the state as provider,

⁸⁴ See Carole Pateman’s *The Sexual Contract* (1988)

equalizer, protector and liberator,” (Brown, (1995). Critical Race scholars raise similar suspicions by noting that the is state is racially coded and entrenched, thus making it difficult to rely upon when disputes arise or when there is a need for protection against harm or injury.

For the purposes of this dissertation, I believe Max Weber’s (1930) definition of the state is useful. Weber asserts that the state is a [set] of compulsory organizations claiming control over territories and the people within them. True to this framing of the state, Alfred Stepan⁸⁵ (1978) concurs by observing that the state must be considered as more than government. It is the continuous administrative, legal, and bureaucratic and coercive systems that attempt not only to structure relationships between civil society and public authority in a polity, but also to structure crucial relationships within civil society as well.” In this way, the state does not become everything. It is one of many factors that shape rights and freedom along with other organizations and agents that “pattern social relationships and politics (Skocpol 1985).”

⁸⁵ See also: Alfred Stepan, *The State and Society* (1978); Juan J. Linz and Alfred Stepan (eds.), *The Breakdown of Democratic Regimes* (1978)

The concept of the “Good” in the Modern Democratic State

The [state] requires a cultural frame in which to define itself and advance its claims, and so does opposition to it. We cannot look at the bricks of the state, taken to be its institutions and structure, without understanding the mortar.⁸⁶

----Clifford Geertz 1980

With regard to the issue of same-sex marriage the concept of the Good is of extreme importance. In the modern democratic state, the Good has never been explicitly marked or rendered visible. This is highly problematic in terms of the attainment of rights because there is a denial of dominant cultural values and norms present in society and the ways in which these values and norms inform and shape individual rights and freedom. For example, the idea that the nuclear family is the norm or valuable has informed social and public policies that demonize single mothers (Gordon 1994 Ross 2005)⁸⁷ and limit their autonomy and exercise of freedom. Current social policies that emphasize marriage as a way to curb poverty or decrease the number of out-of-wedlock births hint at a notion of the Good that is not only motivating, but also driving action at the state and federal levels.

For the purposes of discussion, I define “The Good” as dominant cultural norms and values present in any given society that prevail or rise to the top above others. The Good is historically constituted and can be traced through the laws, customs, and traditions present in liberal democracies (Guttman 2003). While this definition stands in direct conflict with those offered by ancient philosophers like Aristotle, who for

⁸⁶ Geertz 1980: 19 Geertz 1983: 142-143

⁸⁷ See Loretta Ross’ *A Feminist Perspective on [Hurricane] Katrina*. October 10, 2005

example believed that the Good was objective or independent of wishes [desires] and Plato who believed that the Good was something abstract to be aspired to as an end in itself, I contend that the Good as it relates to rights in modern democracies is subjective and connected to deeply entrenched societal values and norms.

Over the last decade, conservatives have been bold in articulating a particular “good” for and in society. They have attempted to define the good in relationship to morality and the “common good.” In fact, in the 2004 presidential election, the Republican incumbent George W. Bush ran on a platform of restoring morality and family values to the White House.⁸⁸ Family values understood as a moral concept to define the structure and role of a family and its members. Appeals to family values are rooted in tradition and historical precedence. In its current usage, “family values” is employed as a code word to imply a social position that firmly reinforces conventional gender roles, heteronormativity, and the patriarchal family structure. Under liberalism, one could view this emphasis on morality as one of many sets of values competing for attention in the public sphere, but historically and increasingly the privileging of “family values” has come to constitute the dominant hegemonic confluence of an exclusionary and non-neutral state.

Next, what comes to constitute the Good in society necessarily entails a counter-definition of what is considered bad or undesirable within the same context. This point is made more poignant by Eve Sedgwick (1990) who asserts that the categories distinguishing between good/bad, desirable/undesirable, acceptable/unacceptable

⁸⁸ The 2004 Republican Party Platform: A Safer World and a More Hopeful America was aligned with the social conservatives in the party. It called for federal amendments to ban abortion and gay marriage. It also emphasized family values and marriage. See: <http://www.gop.com/media/2004platform.pdf>

“actually subsist in a more unsettled and dynamic tacit relation according to which, first term B is not symmetrical with, but subordinated to term A; but second the ontologically valorized term A actually depends for its meaning on the simultaneous subsumption and exclusion of term B; hence, third, the question of priority between the supposed central and the supposed marginal category by the fact that term B is constituted as at once internal and external to term A (Sedgwick 1990).

As such, the Good is a highly contestable category and constantly up for (re) negotiation in the public sphere. In the case of same-sex marriage, heteronormativity and the traditional male-headed, two-parent (male and female) family is the norm or the Good being articulated in the public sphere. Homosexuality and alternative family structures is the undesirable. When we link this to the attainment of rights, it is clear that in this instance of same-sex marriage the Good triumphs over the right.

The public discourse on same-sex marriage seems to be framed around the definition of the Good proposed above. For example, in his call for a ban on same-sex marriages, President Bush argued that marriage cannot be severed from its cultural, religious, and natural roots without weakening the good influence of society. Our government, he goes on to say, should respect every person and protect the institution of marriage. There is no contradiction between these responsibilities. Implicit in Bush’s comments is a definition of the Good and the desirable that is linked to heterosexuality, the nuclear family structure to the exclusion of Gays and Lesbians.

Connectedly, in public polls conducted in 1996, 2000, and 2003⁸⁹ respectively, a majority of Americans surveyed believed same-sex marriage to be incompatible with “family values” and their own religious beliefs. In the latest survey conducted in 2003 by the Pew Research Center for the People 63% of respondents agreed with statement “allowing gays and lesbians to marry would undermine the traditional American family.”⁹⁰

In the case of same-sex marriage, the concept of the Good present in the public sphere and the representation of gays and lesbians as deviant or amoral directly shapes the attainment or denial of rights. In the media and in dominant culture, Gays and Lesbians tend to be portrayed as hypersexualized and promiscuous. In fact, Eskridge (1996) identifies promiscuity among gay men as a reason why Americans are reluctant to grant them equal marriage rights. The repercussions of this framing is two fold: (1) Gays and Lesbians resist this portrayal by attempting to assimilate to dominant cultural values and norms via marriage and commitment ceremonies; child bearing and rearing; and/or monogamy or attempts to become asexualized, thus denying the complexity of Gay and Lesbian identity and culture and (2) it renders invisible heteronormativity and the dominant cultural norms and moral judgments that are impacting the framing. Connectedly, it obscures the fact that promiscuity among heterosexuals exists or occurs in a way that has yet to make lawmakers

⁸⁹ See Brewer and Wilcox’ The Polls—Trends: Same Sex Marriage and Civil Unions in Political Science Quarterly Volume 69, No. 4, Winter 2005 pp. 509-516

⁹⁰ However, it is important to note that in public opinion polls with individuals under 30, there is widespread support for same-sex marriage. The Center for Information and Research on Civic Learning and Engagement (CIRCLE) reported in a 2004 survey that close to 60% of respondents interviewed believed that gays and lesbians should be able to legally marry.

question the validity or sanctity of marriage. This point is made by Ross (2002) when she notes, “straight male promiscuity is not seen as a reason to deny marriage rights to heterosexual men and the [representation in the media and the public sphere] of gays as promiscuous is a symptom of the majority culture’s sexualization of gays.” Hence, it becomes clear that promiscuity while at issue is not *the* issue; rather the morality of sex between two women or two men is the cause for concern.

As Sandel (1989) argues, despite the more sophisticated and enlightened liberal view that denies the role of values, norms, and morals in the public sphere, laws against homosexuality depend in part on the morality or immorality of the practices. As such, he argues that there is a need for consideration of the role of substantive moral discourse in political and constitutional argument. In the instance of Gay rights and same-sex marriage, morality, the norms of society, and dominant culture has always factored in to their ability to attain rights in the liberal democratic state.

Next, I would like to turn my attention to the meaning of marriage in the liberal democratic state as a backdrop for understanding the issue of same-sex marriage and the struggle for Gays and Lesbians to attain rights and privileges in the liberal democratic state.

Marriage: Contract, Institution, or Both in the Modern Democratic State

As of late, marriage has appeared on the public agenda at both the federal and state levels in terms of the creation of public policies to promote marriage and the nuclear family structure as well as a mechanism for securing rights and autonomy by Gays and Lesbians. In the 2004 presidential election, the undeniable use of marriage as a wedge issue and as a tool to mobilize moral conservatives to the polls by Republicans

was clear. During the election cycle, 11 states, four of which were identified as “battleground states” voted on whether or not to ban same-sex marriage in the state. The measures passed overwhelming with some states reporting close to 80% of voters voting against same-sex marriage.⁹¹

In the modern democratic state, marriage has been defended as both an institution and a contract. As an institution, marriage is seen as a conduit by which individuals are able to gain full citizenship and recognition in society. In the liberal state, marriage is defined through state laws and public policies that attempt to shape the parameters and boundaries of the institution. The evolution of marriage as a political institution was not natural⁹² and happened over time through government sanctions and policing of the citizenry. The federal government created a standard of marriage based on dominant cultural desires and in opposition to marginalized practices like polygamy. As Brandzel (2005) notes, as an institution, “marriage was constructed as heterosexual, monogamous, and intraracial through discourses of morality, righteousness, and the need to control sexuality.” As such, the institution became exclusive to heterosexuals and relies on the citizenry to maintain its boundaries as always existing and natural.

In the liberal democratic state, both the private and public spheres of society define the institution of marriage. In the public and private spheres, marriage is intimately tied to the maintenance of gender roles and expectations; economic mobility and

⁹¹ See www.cnn.com/ELECTION/2004/pages/results/ballot.measures/

⁹² Brandzel (2005) notes of marriage law and public policies “Marriage was informal in the colonial era, states began to assume authority over it by instituting laws outlining whom one could marry, how to dissolve marriage, and the repercussions (particularly financial ones) of these actions.

resources; and social status and citizenship. The public “face” of the institution of marriage is shaped by dynamics occurring in the private sphere or the decisions individuals make regarding how they value and understand the institution. As such, marriage is a social institution⁹³ comprised of relationships, both intimate and familial.

Next, Carole Pateman in *the Sexual Contract* (1988) argues that marriage has been seen as a contractual relationship since at least the fourteenth century. The appeal to framing marriage as a contract is that under liberal democratic theory a contract is entered in to by equal parties who negotiate the terms that are mutually beneficial. It also as Pateman notes, presupposes the idea of the individual as owner. This stands in sharp contrast to marriage as in institution where the roles of individuals, men and women, are determined within the context of a society that structures relationships in patriarchal and heterosexual ways. Marriage in the early republic gave men ownership over women. This point is echoed by Brandzel (2005) when she notes women’s ability to immigrate, emigrate, and/or naturalize has been linked to marital status thus linking women’s citizenship and autonomy to her husband. As such, she goes on to say, marriage was one of the primary tools for controlling women’s access to the public sphere.

⁹³ According to Joseph McGrath and Janice Kelley in *Time and Human Interaction: Toward a Social Psychology of Time* (Guilford Press, 1986), social institutions are the broadest organizers of individuals' beliefs, drives, and behaviors. Evolving to address the separate needs of society (e.g., the military institution out of the need for defense; the family out of the social needs for procreation, socialization, and intimacy), social institutions are free-standing social units with their own inner dynamics and rhythms. Like separate musical scores, each has its own melodies, harmonies, and rhythms. The more powerful a given institution is in any given society, the more likely its times influence everyday life.

For the purposes of this dissertation, I suggest that it is necessary to view marriage as both an institution and contract. As a social and political institution, marriage carries with it certain values, traditions, and history that have currency and weight in the public sphere. Within the institutional context, it is important to understand marriage as a custom that has become important, if not defining, feature of society. As such, it is not difficult to imagine that there will be resistance to changing its structure and feature because its reach is beyond the creation of intimate relationship in the private sphere of life.

Viewed as a contract, marriage can be both limiting and liberating. It is limiting in the sense, it is still operating within a patriarchal and heterosexual frame whereby negotiating the terms of the contract is within a societal context that understands the definition of marriage in a way that values men over women. It is liberating in the sense of offering the most possibility for divorcing marriage from the values, morals, and traditions that it has come to represent and extending the contract to same-sex partners. In any case, marriage as both a contract and institution tends to inscribe heteronormativity and patriarchal order of society; this is a truth that cannot be sidestepped or denied.

Anxiety over the challenge to the institution of marriage by Gay and Lesbians in 1996 prompted Congress to pass the Defense of Marriage Act. Citing the full faith and credit clause⁹⁴ of the Constitution, the Act defined marriage as the lawful union between a man and a woman and defined spouse as the person of the opposite sex

⁹⁴ The full faith and credit act of the U.S. Constitution allows a state to determine for itself whether it must recognize same-sex marriages or unions recognized by other states and jurisdiction.

who is a husband and a wife. The Act, in swift response to the state of Hawaii's move to legalize same-sex marriage,⁹⁵ goes against more than one hundred years of American law which presumes that marriages validated in one state would be validated in another. The Language of D.O.M.A. states:

No state or territory, or possession of the United States, or Indian tribe, shall be required to give affect to any public act, record, or judicial proceeding of any other State, possession or territory respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state, territory, possession, or tribe, or a right or claim arising from such relationship.⁹⁶

Defenders of D.O.M.A. at the local, state, and national levels argued that the Institution of marriage needed to defended and protected from activists courts, judges, and “the homosexual lobby” that has “created the shaky ground that has prompted this legislation.” Proponents of D.O.M.A. appealed to the tradition and history of marriage in the liberal democratic state by noting “while marriage had always been unequivocally, irrevocably heterosexual, recent case law had challenged this presumption,” (Brandzel 2005). In one fell swoop, Congress acting on the behalf of the state, spoke loudly regarding the status and rights of gays and lesbians in society. It made a clear and discernable distinction between individuals based on difference and sexual orientation and then preceded to restrict and deny rights based on that distinction.

⁹⁵ In 1996, the Hawaii court ruled that refusing marriage licenses to same-sex couples is sex discrimination that violates the equal protection clause of the Hawaii Constitution. See *Baehr v. Miike* 80 Haw. 341; 910 P.2d 112; 1996 Haw. On December 11, 1999, the decision was reversed and remanded without a published opinion. See 92 Haw. 634; 994 P.2d 566; 1999 Haw.

⁹⁶ Defense Of Marriage Act 5/96 H.R. 3396

Privacy and the Public/Private Distinction and Gay Rights

The right to privacy has been evoked in the public sphere and through the law to both limit and protect individual freedom and liberties. In the case of abortion, for example, the constitutional right to privacy guarantees a woman the right to decide for herself whether or not to terminate her pregnancy (Sandel 1989). With regard to abortion, the courts interpretation of the right to privacy is broad and restrains the moral opinion of the state over the freedom of the individual. With regard Gays and Lesbians, the courts have until recently held a narrow interpretation of the right to privacy and used it to limit the rights of Gays and Lesbians in the public sphere (Goldstein 1988).

Framing rights-claims around the constitutional right to privacy asks the court to remain neutral with regard to competing moral interests and beliefs present in society. However, with regard to Gays and lesbians, the right to privacy, in this instance defined as the right to consensual sexual relations without interference from the state or others,⁹⁷ is directly tied to the identity and recognition of gays in the public sphere. Further, the recognition of Gays and Lesbians as subjects under the law and as citizens challenges gender roles and expectations; notions of masculinity and femininity; as well as the sexual division of labor (Ross 2002). In this way, the public and private spheres are intimately linked and inform the rights and liberties of individuals and groups in civil society. Examples of this contradiction can be found in the *Bowers v. Hardwick* case and *Don't Ask Don't Tell* policies in the Military⁹⁸

⁹⁷ *Bowers v. Hardwick*, 478 U.S. 186 (1973) 191-194.

⁹⁸ Implemented under President Bill Clinton, Don't ask, Don't tell is the common term for the current U.S. military policy which implements Public Law 103-160, codified

which denies Gay Lesbian identity in the public sphere and intimates that there is shame or something that is morally corrupt in being Gay or Lesbian. In recent years,⁹⁹ advocates for rights for gays and lesbians have turned down the volume on the privacy argument in favor of one that stresses individual liberties and rights under the liberal framework.

Sexing Rights: Same-Sex Marriage in the Modern Democratic State

Over the last two decades the issue of Gay rights, most recently in the guise of marriage, has been a highly debated and divisive topic for politicians, legislators, legal scholars and ordinary citizens. Whereas once the struggle for Gay rights took a back seat to racial and gender equality during the civil rights era, in the millennium the rights of Gays and Lesbians tend to be at the center of legal and moral discussions around individual rights, autonomy, equality, and freedom in the liberal democratic state. Many have argued that the issue of Gay rights would be resolved in the legislature rather than the courts as was the case in *Bowers v. Hardwick*, but the issue of same-sex marriage has created national interest and conflicting rulings at the state level that promise that the issue will have to be tended to at the federal level.

at 10 U.S.C. Sec. 654. The policy prohibits gays and lesbians from disclosing their sexual identity or sexual orientation and prohibits the military from investigating an individual's sexual orientation. It also prohibits individuals in the military from talking homosexual relationships, including marriages or other familial attributes, while serving in the United States armed forces. For a more thorough discussion on this point see: *Gay Rights, Military Wrongs; Political Perspectives on Lesbians and Gays in the Military* (Garland Reference Library of Social Science, Vol 1049) by C. Rimmerman (1996).

⁹⁹ See *Baker v. Vermont* 170 Vt 194, 215 n 13

In many ways, the question of same-sex marriage is reminiscent of the 1967 case of *Loving v. Virginia*,¹⁰⁰ which overturned a Virginia law prohibiting marriage between Blacks and Whites. On appeal, the Supreme Court ruled that the Virginia statute violated both the equal protection and the due process clause of the Fourteenth Amendment. The court argued that the Virginia's miscegenation statutes rest solely upon the distinction according to race and therefore violates section one of the Fourteenth Amendment, which holds that any state should not deny any person within its jurisdiction equal protection under the law. Similarly, laws that deny Gays rights and equal protection, depend almost exclusively on distinction according to sexual orientation.

In this section, I will proceed by attempting to explain why advocates chose the issue of same-sex marriage as *the* issue to assert rights-claims in the public sphere. Next, I will provide a brief overview of the critique of same-sex marriage. Then, I will turn my focus to the history of same-sex marriage in the liberal democratic state

¹⁰⁰See *Loving v. Virginia*, 388 US 1; 87 S. Ct. 1817; 18 L. Ed. 2d 1010; 1967. However, unlike the *Loving* case, there were no Massachusetts statutes explicitly prohibiting the marriage of same-sex couples or anyone for that matter. In June 1958, two residents of Virginia, Mildred Jeter, an African-American, and Richard Loving, a white man, were married in the District of Columbia pursuant to its laws. Upon returning to Virginia and establishing themselves in Caroline County, the two were jailed for violating Virginia's ban on interracial marriages. On January 6, 1959 the Loving pleaded guilty and were given a suspended one -year sentence on the condition that they leave the State and not return for 25 years. In November 1963, the Loving's filed a motion in United States District Court to vacate the judgment alleging that the statutes violated their rights under the Fourteenth Amendment. The court denied the motion to vacate the sentences. The Supreme Court of Appeals upheld the constitutionality of the anti-miscegenation statutes and after, modifying the sentence, affirmed the convictions. The decision was overturned on Appeal on June 12, 1967.

and end with a discussion of the landmark case of *Goodridge v. the Department of Public Health*.

Why the issue of Marriage:

Public opinion polls increasingly show that the American public is far more supportive of antidiscrimination laws that protect Gays and Lesbians against housing and employment discrimination than they are of same-sex marriage (Brewer and Wilcox 2005). Close to 70% of respondents in a study conducted by the Pew Research Center agreed that gays and lesbians should not be allowed to marry or afforded the same rights as “traditional” marriage. Like the Equal Rights Amendment, Same-Sex marriage challenges dominant societal and political norms and values. As political scientist Jane Mansbridge (1986) cautions “Americans have always favored ‘rights’ in the abstract, but they support the principle of equal rights insofar as they think it is compatible or [does not stand in contradiction] to the status quo.”

The reason for choosing the issue of same-sex marriage as *the* issue for which resources and mobilization efforts are directed by Gay and Lesbian organizations and advocates are many. The first and probably most compelling reason for the focus on marriage is that in the modern democratic state, marriage is viewed as a legitimate and fundamental institution that has and continues to shape citizenship and rights (Cott 2000). Additionally, there is a clear appeal to the rationality of the court and the reliance of the state’s promise to remain neutral with regard to competing conceptions of the good or the promotion of one set of value of others in society. And unlike many of the other landmark cases such as *Bowers and Lawrence*, which appealed to issues

of privacy or community organizing efforts around health crisis issues like HIV or AIDS,¹⁰¹ marriage could not be separated out or dismissed as something specific to or only affecting the gay and lesbian community.

Connectedly, appeals by advocates in favor of same-sex marriage rest on liberal notions of fairness and equality under the law. To the extent that the state recognizes marriages between heterosexual couples, there is very little reason to deny the same recognition to gays and lesbians. As David Mayo (2000) argues, the claim of gays and lesbians to a right to marry is a substantive moral right that rests on the moral procedural right to be treated fairly.

Secondly, the permitting of same-sex marriage recognizes the sexual other in the public sphere. Public and social policies have constrained gay and lesbian identity by refusing to acknowledge the sexual other in the public sphere. Policies like the “Don’t Ask, Don’t Tell” military policy enacted by President Clinton places homosexuality within the realm of the private sphere of intimate relations, rather than as an identity with distinct norms, values, and culture.

Lastly, in its most radical moment, same-sex marriage may “dismantle the structure of gender in every marriage” and broaden or displace the center of the discourse on marriage. If for example, as Brandzel (2005) points out, “marriage has supported and reified a hierarchical relationship between man and woman as husband and wife and as a breadwinner and homemaker, then same-sex marriages will trouble these equivalences.” Further, she goes on to say, “if marriage has been a central

¹⁰¹ In the early 1980s HIV was considered a “gay disease” and some religious conservatives argued that it was punishment for being gay. This framing of HIV perpetuated homophobia and affected the treatment and attention paid to the epidemic in the public sphere.

vehicle by which the state has gendered, racialized, and sexualized its citizenry, then same-sex marriage will certainly disrupt this process.”

Leftist critics of same-sex marriage argue that rather than liberate gays and lesbians, marriage will force gays and lesbians to assimilate into the dominant culture and destroy the possibility for social justice (Ettelbrick 1989); and it “would most likely benefit those gays and lesbians who are well off and would exacerbate inequalities within the gay and lesbian community,” (Duclos 1991). Ettelbrick, for example, argues that same-sex marriage would undermine more important goals of LGBTQ movements, specifically “the affirmation of gay identity and culture in the public sphere.” Far from empowering gays, in Ettelbrick’s view same-sex marriage would make them invisible, constrain them, and force their assimilation into the mainstream. Further, she goes on to argue it reinforces the view that marriage is the only legitimate form of family.

While all of aforementioned critiques are certainly valid, they are certainly lost when placed within a rights-based framework that holds regardless of outcomes, perceived benefits, or disadvantages, there is no compelling reason to deny individuals rights granted to others in society. Further, under liberal democratic theory and in the modern democratic state, choice is paramount whether or not it hurts or harms the group as a whole. As Mayo (2000) eloquently writes, “ even if claiming one’s right to same-sex marriage would compromise desirable social reforms, this would not show that doing so was unjustified. In fact, he goes on to say, “even if claiming one’s right to same-sex marriage would result in the violation of

someone's rights, it might still be justified so long as the persons claiming that right were not themselves violating the rights of others.”

History of Same-Sex Marriage in the Modern Democratic State

While the issue of same-sex marriage has been the subject of hot debate since the decision in *Goodridge v the Department of Public Health* was handed down in 2003, there were several previous cases that laid the groundwork. In the early 1970's fueled by the feminist movement and challenges to gender role expectations, same-sex couples began to challenge marriage laws. *Baker v Nelson*, marks the first time a same-sex couple, in this instance two men, had attempted to obtain a marriage license with an intent to wed. The plaintiffs in Baker argued that the denial of their “fundamental right” to marry was the equivalent to sex discrimination. The court swiftly rejected their claim by noting the common usage of the term marriage in law and society was the union of a man and a woman. The now familiar argument of marriage as a social institution intended for procreation and the rearing of children was also invoked as intuitive reason enough why their claim should be denied, after all biologically two men could not procreate.

Next, *Singer v. Hara*¹⁰² represents a second attempt by gays and lesbians to win the right to marry. In 1974, two gay rights activists filed a lawsuit against the state of Washington arguing that the prohibition of same-sex marriage violated the Equal Rights Amendment of the Washington Constitution. They argued that they were denied their petition to marry because of sexual classification. The court, unmoved, replied by noting that since both gay men and lesbians were equally denied, there was

¹⁰² *Singer v. Hara*, 11 Wash.App. 247, 253-55, 522 P.2d 1187, 1191-92

no disparate treatment. Further, it noted that the petitioners' claim had been rejected not because of their sex, but because of their type of relationship. The court held that in the case of the Equal Rights Amendment:

Individuals are protected from denial of existing rights or responsibilities solely because of their sex. No new rights are created and laws, which differentiate between the sexes, are not invalid when they are based on unique characteristics of one sex rather than upon membership in such sex per se. The limitation of marriage to persons of different sex does not offend due process or equal protection clause.¹⁰³

Similarly, around the same time of the *Singer* case, two women filed suit in the state of Kentucky because a court clerk had denied them a marriage license. In the court of appeals, the Kentucky Court held that “no constitutional issues were involved because marriage by definition involves a man and a woman. Further, they held that the prohibition of same-sex marriage was invidiously discriminatory. The court distinguished between the *Loving v. Virginia* case by noting there is a clear distinction between a marital restriction based on race and one based on the fundamental difference in sex.

While widely unknown outside of the gay and lesbian community, these cases delivered devastating blows for the possibility of same-sex marriage. In the cases, morality, tradition, and dominant cultural norms and values influenced the decision of the courts. It would not be until 1993, in *Baehr v. Lewin*¹⁰⁴ that the issue of same-sex marriage in the states would be revisited.

¹⁰³ *ibid*

¹⁰⁴ *Baehr v. Lewin* 74 Haw. 530, 852 P.2d 44 (1993). For a thorough discussion on this case see Richard Nunan, *Legal Aspects of Gay and Lesbian Studies* Volume 97, Number 1 (Fall 1997) *Newsletter on Philosophy and Law*

In the landmark case that set into motion federal acts and legislation such as the Defense of Marriage Act, the Supreme Court of Hawaii ruled that the state had failed to demonstrate an adequate reason for restricting marriage to heterosexual couples. The court held “A state statute barring same-sex marriages is presumed unconstitutional unless the state can show that (a) the statute’s sex based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgement....of constitutional rights.” In this case, the defendants had failed to demonstrate either of these points, thus making the ban on same-sex marriages unconstitutional in the state. It is important to note that one-year after the *Baehr* ruling, the governor of Hawaii signed into law a bill which prohibits same-sex marriage in Hawaii by defining marriage as existing only between two people of the opposite sex.

In 1997 two lesbians couples and one gay couple brought a lawsuit to obtain a marriage licenses and to subsequently have their marriages recognized by the state of Vermont. The Supreme Court of Vermont ruled that current state law unfairly discriminated against gay and lesbian couples. As a result, the court ordered the state to create legislation to correct the problem. The ruling was vague, however, on how this oversight would be corrected. The ruling held that the legislature would expand the right to marry to include couples of all sexual orientations or would set up a parallel “domestic partnership” status that would allow gays and lesbians to receive the same rights as heterosexual couples. To date, gays and lesbians are not allowed to marry, but obtain civil union certificates in the state.

The Great Purple Hope: Goodridge v the Department of Public Health

Years from now, *Goodridge v. the Department of Public Health* will be considered one of the seminal cases and turning points for the LGBTQ movement in terms of attaining rights and recognition in the public sphere. Unlike the cases before it, *Goodridge* arose in a political climate wrought with questions over morality, family values, and the government's role in promoting a particular set of values and norms. The blanket of conservative thinking that had resurfaced at the end of the Clinton Presidency¹⁰⁵ under President George W. Bush had become political currency used to promote a vision of a "common good" that among other things emphasized the patriarchal and heterosexual family structure.¹⁰⁶

The decision handed down by the Massachusetts Supreme Court in the *Goodridge* case affirms the priority of the right over the good in the liberal democratic state. The Court ruled, "Barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution." In the decision the court observed the Massachusetts Constitution "affirms the dignity and equality of all individuals and forbids the creation of second-class citizens." In the *Goodridge* case, the plaintiffs relied on the promise of neutrality under liberalism and hoped that the state would deliver.

¹⁰⁵ Although a democratic president, President Clinton signed into legislation some of the most conservative public policies including the 1996 Welfare Reform Bill and the Don't Ask, Don't Tell legislation.

¹⁰⁶ See Ronald Walters' *White Nationalism, Black Interests* (2003) on this point regarding the rise of conservatism in the state.

In the *Goodridge* Case, the Court did deliver on its promise to remain neutral on competing conceptions of the good present in society and ruled to the benefit of the plaintiffs. Many hailed the Massachusetts ruling as a major victory for gay rights and hoped that the decision would have a rippling effect across the country. However, within months after the ruling, fourteen states had adopted constitutional measures prohibiting same-sex marriage bringing the total number of states in the union to ban same-sex marriage to seventeen. In the state of Massachusetts, opposition and mobilization against the ruling was swift. Shortly after the ruling, a proposal was crafted by conservative legislators to ban gay marriage and as early as 2006 the state could see a vote that could possibly reverse *Goodridge*.¹⁰⁷

Although the victory of *Goodridge* is not lost, certainly there are questions raised concerning whether or not gays and lesbians in the state will be able to exercise their rights fully without interference. More importantly, whether or not the victory is a hollow or symbolic one that does not significantly alter the rights of gays and lesbians in the public sphere. I suggest that the answers to these questions can be found by exploring the *Goodridge* case through the lens of a Complex Theory of Rights.

With regard to the *Goodridge* Case, a *Complex Theory of Rights* would require us to look beyond the simple interaction between the state and individual for an explanation of the attainment of rights in the liberal democratic state and toward an

¹⁰⁷ The initiative to ban same-sex marriage in the state of Massachusetts despite the *Goodridge* ruling has been led by the Massachusetts Family Initiative (MFI). MFI delivered 170,000 signatures to the secretary of state, moving one step closer to having the initiative placed on the ballot. The initiative received another boost when Reilly, a democratic legislator in the state certified the ballot question as being permitted under the state constitution. For more information see: www.boston.com/news/local/massachusetts/articles/2005/09/07/reilly_certifies_gay_marriage_ballot_initiative?mode=PF

explanation rooted in the interaction between various markers of difference and the structures and institutions that govern society. Further, it brings into focus the politics that may be undergirding concerns or squabbles over same-sex marriage in the public sphere. Going beyond the simple interaction between the individual and the state, it becomes clear that what is at stake is related to some sort of conception of the good or normativity present in society. In the case of same-sex marriage, it is the protection of the heterosexual family as defined by the presence of a man and woman; neatly delineated and proper gender roles; and protection against perceived sexual deviancy.

The constitutional question before the Court in *Goodridge v. The Department of Health* was “whether consistent with Massachusetts Constitution the commonwealth could deny those protections, benefits, and obligations to two individuals of the same sex who wish to marry. Further, whether as defendants claim the government action that bars same-sex couples from civil marriage constitutes a legitimate exercise of the State’s authority to regulate conduct, or whether, as the plaintiffs claim this categorical marriage exclusion violates the Massachusetts Constitution.”¹⁰⁸

¹⁰⁸ Many have argued the state has a legitimate government interest in protecting marriage. They contend that primary purpose of marriage is pro-creation and the state has a compelling interest in the promoting birth. This narrow definition of marriage is problematic on two accounts: (1) it assumes that all individuals marry in order to procreate. Thus, making marriage a utilitarian arrangement to meet the ends of the state, and (2) It denies the fact that many married people choose not to have children or for medical reasons cannot conceive. Such a narrow definition of marriage leaves open the door for nonsensical claims that one is not truly married until one produces a child from the union. To date, proof of child has never been required to validate marriage. The court noted in the “modern age,” heterosexual intercourse, procreation, and child are not necessarily conjoined.

Key to the *Goodridge* ruling was the Court's decision to cast marriage as a civil, secular institution. It noted that in *Commonwealth v. Munson*,¹⁰⁹ statutes of the Colony, Province, or Commonwealth have regulated the requisites of a valid marriage and that no religious ceremony or stated beliefs had ever been required to substantiate a Massachusetts marriage.¹¹⁰ It concluded that the right to marry means little if it does not include the right to marry the person of one's choice.¹¹¹ By casting marriage as a civil institution and right created by the government, the court was able to maintain its neutrality and remain silent concerning the ethical, moral, and religious issues surrounding Gay marriage. Further, it was able to respect the autonomy of the individual to choose and pursue her own good. As such, the court's obligation and duty was to define the liberty of all, not to mandate a moral code.¹¹²

With regard to the question of whether civil marriage enhances the 'welfare of the community' the court concurred with the defendants by noting that civil marriage anchors an ordered society by encouraging stable relationships and bestowing benefits and privileges to those who choose to marry. The rights granted to married couples that meet the minimal requirements are some 1, 059.¹¹³

The court remarked that the marriage ban works a deep and scarring hardship on same-sex couples for no rational reason. Further, it argued that the decision does not disturb the fundamental value of marriage in our society. That same-sex couples are

¹⁰⁹ *Commonwealth v. Munson*, 127 Mass. 459, 460-466 (1879)

¹¹⁰ *Goodridge v. Department of Health* 440 Mass. 309, 798 N.E. 2d 941 (Nov. 18, 2003)

¹¹¹ *Ibid*

¹¹² *Ibid*

¹¹³ *Ibid*

willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws.¹¹⁴

To the issue of whether or not the state had a compelling interest in protecting the institution of marriage by defining it as the union between a man and a woman, the Court ruled the defendants had not sufficiently established that excluding gays and lesbians from the marriage would enhance the welfare of the state. The court, argued instead, that the decision to deny gays and lesbians the right to marry violated the due process clause of the fourteenth amendment and worked an undue burden upon gays and lesbian couples.

While the state of Massachusetts can be applauded for its clear interpretation of its Constitution in favor of individual rights and autonomy, the decision in *Goodridge* is overshadowed by conflicting decisions made at the federal level and in most other states concerning same-sex marriage and the still lively moral debates around homosexuality. For example, the Defense of Marriage Act, which defines marriage as the lawful union between a man and a woman, still weighs heavy on the *Goodridge* decision and is the grounds for which conservative groups have sought to overturn the decision. The Act also gave the states discretion in deciding whether or not to recognize a union recognized by other states or jurisdictions. Again, this goes against over 100 years of law and tradition that assumes that marriage validated in one state would be valid in the others.

¹¹⁴ Ibid

D.O.M.A. as way of undermining the *Goodridge* case is an excellent example of the political and structural meta-spaces of complex theory of rights because it demonstrates the ways in which dominant social and political institutions influence or constrain individual rights and liberties in the modern democratic state. For example, although the State of Massachusetts chooses to define marriage broadly to include gays and lesbians, the federal tax law and code still defines marriage as existing only between a man and a woman. At the federal level, the material benefits supposedly captured in the *Goodridge* case, had all but been diminished for gays and lesbians because the union is not recognized under federal law. I suppose the next lawsuit could be against the IRS after gay and lesbian couples have tried to file joint federal tax returns.

Next, a complex theory of rights holds that there is a notion of the good operating in society that makes it difficult for gays and lesbians to realize their full bundle of rights in the modern democratic state. In this chapter, I have demonstrated that the good in relationship to marriage has been defined as the union of a man and a woman and the privileging of the heteronormative and patriarchal family structure. To the extent that this is the case, the attempt of gays and lesbians to broaden the center or to at least provide a competing moral or value frame is met with resistance because heterosexuality and homophobia are embedded in most, if not all of the institutions and structures that govern society. Attempts to attain rights or make rights-claims in the public sphere must be understood within this context.

Conclusion

The significance of difference to the attainment of rights and the exercise of freedom in the modern democratic state is made transparent through the examination of the issue of same-sex marriage. In this chapter, I have argued that before individuals or groups can make rights-claims in the public sphere they must first be embodied as subjects under the law. In essence, the *Goodridge* case constituted gays and lesbians as bearers of rights under the law and in the public sphere. However, this recognition has not yet translated to political and social equality in the public sphere for gays and lesbians.

Moreover, I have suggested that the ability to attain one's full bundle of rights in the society is not only a result of the relationship between the state and the individual, but the dynamic interaction between markers such as race, class, gender, sexual orientation and the institutions and structures that govern society or shape individual rights and liberties. I have also worked to demonstrate that there is a concept of the Good that is shaped by the laws, customs, and traditions present in any given society that work to limit individual rights and freedom.

CHAPTER V

Violence Against Women and Gendered Citizenship in the Modern Democratic State: The impact of differential experience and social location on the realization of rights in liberal democracies.

Introduction:

It is nevertheless true that the personal is political and there's no area in which that is more true than violence.

Patricia Ireland, Former President of NOW

Given the racist and patriarchal patterns of the state, it is difficult to envision the state as the holder of solutions to the problem of violence against women of color. How can one expect the state to solve the problem of violence against women, when it constantly recapitulates its own history of colonialism, racism, and war?

Angela Davis 2002

In the modern democratic state, women's citizenship and rights are shaped not only by her ability to pursue her own ends and values, but also by her ability to do so without harm or injury. In fact, it has only been in the last twenty years that women's experiences of violence in the public and private spheres of society have come to be recognized as an impediment to her freedom and autonomy (Bern 2001). Laws against sexual harassment and coercion to landmark legislation such as the Violence Against Women Act of 1994 point to the ways in which full citizenship and the attainment of rights are predicated upon gender differences.

The mainstream anti-violence movement has relied upon essentialized notions of gender and sex to contextualize women's experiences of violence in the modern democratic state (Crenshaw 1995, Smith 2002). They have framed claims to

protection and rights to resources around the understanding that the root causes of violence against women are patriarchy and sexism. As such, the subject of violence as well as the beneficiaries of protection in the state is without regard for race, sexual orientation, ethnicity, or any other distinguishing markers outside of gender.

Women of color have long taken issue with the definition of violence perpetrated against women as solely a gender issue as well as the over reliance on the state for protection against violence by women (Crenshaw 1995 Smith 2003). Women's experiences of violence and relatedly their ability to exercise their rights is shaped not only by gender hierarchies present in society, but race, ethnicity, class, sexual orientation, hierarchies as well. Further, these hierarchies intersect (Crenshaw 1995) and mutually construct one another (Collins 2000) to inform individual rights and liberties in the modern democratic state.

In this chapter, I explore how gender has impacted the realization of rights in the modern democratic state and how the intersections of race, class, and other markers of difference alter rights-claims or what women define as equality or freedom in the public sphere. I employ the issue of violence against women to demonstrate the ways in which race and class qualitatively alters the right-claims presented by women in the public sphere. Further, I will mark the ways in which a complex theory of rights is better able to explain why despite formal equality, women have yet to achieve full social and political equality.

I will proceed by defining the gendered citizen in the modern democratic state. Then, I briefly discuss the impact of difference and social location on the attainment of rights in the public sphere by women of color. I will discuss the ways in which

race, class, sexual orientation, and ethnicity shapes and informs women's experience of violence and her ability to attain her full bundle of rights in the public sphere. Specifically, I will use the Violence Against Women Act of 1994 to argue that despite the legislation's significance it failed to account for the impact of racial, ethnic, and sexual differences in women's experience of violence and the historic role of the state in victimizing communities of color.

Defining Gendered Citizenship in the Modern Democratic State

Much has been written about what constitutes a woman's right in the modern democratic state. The struggle to attain and secure rights on the part of women has been closely tied with not the protection of rights, a kind of negative freedom, but by the denial of rights or privileges based on gender or sex (Lister 1997). As such, a woman's right is defined contextually within the masculine public sphere and towards securing protection and freedom long extended to men in the liberal democratic state (Brown 1995).¹¹⁵

The contemporary U.S. Women's Movement has tended to define rights civilly and root rights claims in the language of equality, autonomy, access, and the economy (Brown 1995, Donovan 1996). Rights-claims focus on the unequal status of women in the public and private spheres; access to spaces and opportunities long denied; and the economic position and well being of women in comparison to their male counterparts (Rubin 1975, Hartmann 1981). The framing of rights-claims on the part of women is usually "*We have a right to or A life free from.*" A few ready examples of what I am talking about can be found in early and current women's rights

¹¹⁵ See Wendy Brown's *Finding the Man in the State* in *States of Injury* (1995)

campaigns or efforts that emphasize ideas or tenets like “Women have the *right* to vote, a *right* to hold property, a *right* to work, a *right* to privacy, a *right* to earn equal pay for equal work, or women are entitled to a life free from violence, coercion, or harm. Historic and current legislation ranging from the Nineteenth Amendment to the Violence Against Women Act of 1994 are instances of claims made on the part of women to secure the full bundle of rights guaranteed to all, but not delivered in the liberal democratic state.

In the modern democratic state, the exclusion of women has been pivotal to the historical theoretical, and political construction of citizenship (Lister 2001). The exclusion of women was not accidental or a result of oversight, but integral and intentional to both the liberal and republican traditions of freedom. Hence, women’s claims to rights in the public sphere is simultaneously a recognition of the impact of gender on the realization of rights in the public sphere, meaning that the rights one is able to enjoy in society is mediated by gender or sex, and the backdoor request on the part of some feminists that this recognition be denied in order for women to achieve full autonomy and freedom in society.¹¹⁶ In both instances, the masculine subject of rights is left in tact.

Recent feminist critiques of citizenship have only modestly brushed upon the topic of the impact of difference on the realization of rights in the modern democratic state. Most critiques have focused on the gendered subject of rights without regard for racial, class, or ethnic differences that exist between and among women that dramatically alters rights-claims or what women deem as valuable or movement

¹¹⁶ See Josephine Donovan’s *Feminist Theory: The Intellectual Traditions of American Feminisms* (1996)

towards equality in the public sphere (Yuval-Davis 1997). Efforts to resolve this tension tend to get lost in discussions around the universal and the particular, i.e. the promise of the universal to measure the claims for inclusion on the part of women versus the disintegration of the category woman into differentiated parts that cannot be measured or quantified. As Iris Young (2000) puts it, it is distinction between universality as partiality where the adoption of a general point of view that leaves behind particular affiliations, commitments, and desires is favored and universality of moral commitment where there is a commitment to the equal moral worth and participation and inclusion of all persons.

In the introduction, I led with an originary tale of rights which argued that in society there exists two groups, one group who has rights from the beginning, for the sake of argument let say this group consists of property holding, heterosexual, white men and the other group consists of women, racial and ethnic minorities and other similarly situated persons who upon entering society go about securing rights already bestowed upon members of the first group. As such, we can imagine that meaning of citizenship for each group will be different. If we use this example for thinking about the gendered nature of citizenship, we can conclude that men and women have always had different relationships to citizenship and rights whereby women are at a distinct disadvantage because the very definition of citizen in the early republic was exclusive to men. As Lister (1997) notes, women's gradual achievement of civil, political, and social rights often followed a different pattern than men. To date, I cannot recall a point in history where heterosexual, white men have had to fight for a right

guaranteed to women and racial and ethnic minorities, although, I can certainly recall the reverse.

Feminist theorists have lifted, what Lister (1997) refers to as the veil of gender-neutrality that has tended to obscure the masculine subject of rights under liberalism. By lifting the veil, there is an acknowledgment of the historical existence of women as non-citizen and exposure of the differential relationship between men and women with regards to rights and citizenship in the modern democratic state. Liberalism clear insistence of an abstract subject of rights fails to take into account the historical exclusion of women and how this exclusion impacts rights-claims in the public sphere.

Feminist accounts of the origins of the exclusion of women from civil society lead back to the sexual division of labor and the sharp distinction between the public and private spheres under liberalism (Pateman 1988).¹¹⁷ The sexual division of labor defined as work performed by women, which usually takes place in the private sphere, such as, child care and household activities and the worked performed by men usually in the public sphere in exchange for commodities. This division of labor, many liberal feminists argued made women dependent upon men and devalued, since work performed in the private sphere was outside the meaningful sphere of public economic production (Freidan 1963). This critique of the sexual division of labor, I contend, formed the cornerstone of gendered citizenship in the United States.

¹¹⁷ In *The Sexual Contract* (1988) Carole Pateman argues that civil society is divided into two opposing realms, each with a distinctive and contrasting mode of association. The political sphere brings the public world of civil law, civil freedom, and equality, contract, and the individual into being.

By calling attention to and disputing the sexual division of labor and by extension the public/private split, feminists were able to articulate the status and position of women that was separate and distinct from that of men. Also, it revealed the patriarchal and masculinist nature of the public sphere and proffered that it might be hostile towards women (Pateman 1988, Brown 1995). However, rather than emphasizing the impact of gender on the realization of rights, liberal feminists, as a strategy chose to emphasize the moral equality of individuals found in the liberal tradition.

Following the liberal tradition, early feminists argued that men and women were naturally and ontologically the same. Indeed, feminist pioneer Sarah Grimke argued that it was pernicious to look upon a woman a female first and a person second. “Nothing, she argued, has tended more to destroy the true dignity of woman, than the fact she is approached by man in the character of a female (Donovan 1996).”

From a rights perspective, feminists working within the liberal framework argued against difference and believed that the realization of rights within the modern democratic state would come by stressing the inalienability of natural rights and appealing to *claims* of political neutrality found under liberal democratic theory. As Drucilla Cornell (1998) notes, following Kant, we should privilege the freedom of every member of society as a human being. For women, it is this freedom that had been historically denied. Hence, rights-claims made in the public sphere on the behalf of women were based on the belief that women as a group had been denied their full bundle of rights and the reliance of the state to deliver on its promise of neutrality in helping women to secure those rights.

Needless to say the road to equality for women has been paved with lawsuits, protests, and resistance. Within the liberal framework, women have relied in earnest on the state to secure rights and freedom in the public sphere. The thought being that securing rights and liberties in the public sphere would translate to social and political equality across the board. As Wendy Brown (1995) notes, nineteenth-century feminists appeals to the state include campaigns for suffrage, protective labor legislation, temperance, birth control, and marriage law reform. She goes on to say that in the twentieth century the list was expanded to include equal opportunity, equal pay, equal rights, comparable worth; reproductive rights and public day care; reform of rape, abuse, marriage and harassment laws; and in the last decade, labor legislation concerned with maternity, as well as state regulation of pornography, surrogacy, and new reproductive technologies (Brown1995). As such, in thinking about gendered citizenship, the care and treatment of these issues have come to be equated with the realization of rights in the modern democratic state for women.

The problem, however, with this framing of rights-claims made on the part of women under liberalism in the public sphere is threefold: (1) it fails to account for the accumulated privilege of men gained through the historical and ideological exclusion of women from the public sphere; (2) it overemphasizes the relationship between the group and state for realizing rights; and (3) it denies the ways in which social location, experience, racial, ethnic, and class differences impacts one's understanding of freedom and equality. I will examine each of these points in turn.

The appeal to equality and sameness by feminists under liberal democratic theory fails to account for the accumulated privilege gained by men through the historical

and ideological exclusion of women from the public sphere. Under liberalism, it is assumed that once women enter society or are embodied as subjects under the law, they are moral and political equals with men. However, the laws, institutions, discourses, and structures present in society are all “inextricably bound, however differently, with the prerogatives of masculinity and manhood in a male dominated society,” (Brown 1995). As such, women are at a distinct disadvantage because the terms under which to advance or assert rights-claims in the public sphere are male-centered. For example, the nineteenth amendment guaranteed women suffrage, but did not account for the ways in which men had come to dominate the public sphere so much so that the representation of women in politics was so dismal that the likelihood that the status of women would change because women gained the right to vote was highly unlikely.

Connectedly, women must rely on the recognition of their subordination by the state to assure remedies, attain rights, or collect for injuries. On the first level, they must be embodied as subjects under the law and must gain full recognition as free and equal persons. On a separate, but related level, there’s a demand for equitable treatment whenever gender difference is a consideration to ensure one’s equal ability to “make use of the basic liberties guaranteed to all citizens and would require fair access to opportunities, resources, or capabilities,” (Cornell 1998).

Under liberalism, the burden of proof is not on the state, but women or the disenfranchised group to prove unequal or disparate treatment, i.e. the state is not a protector of rights until it realizes or believes a right has been violated. This would be fine if the originary tale read like some version of Rawls’ *Theory of Justice*, whereby

everyone is cloaked behind a veil of ignorance, but pragmatically it poses problems for women and other similarly situated groups attempting to realize their full bundle of rights in society. The historical and material experiences of groups cannot be erased upon entering the public sphere. These experiences shape and inform not only rights-claims, but also the standpoint from which these claims are made (Williams 1991).¹¹⁸ Liberalism fails to account for the many positions and standpoints from which right-claims are articulated in the public sphere (See Collins 2000, Dill and Zinn 2003).

Next, the over emphasis and over reliance on the relationship between the state and the individual under liberalism is problematic for women because it fails to account for other dynamics present in the public sphere and civil society that might be impacting the realization of rights or ability to attain full equality. Chief among these dynamics is a concept of the good present in society that defines women's roles and capacities in society; institutions and structures present in society that are male dominated or male centered; and the representation of women present in dominant culture. As such, gendered citizenship or the realization of rights on the part of women relies heavily on our ability to manage not only the relationship between women and the state, but also the dynamics that influence the outcomes of rights-claims in civil society.

A prime illustration of what I am talking about can be found in the pursuit of the passage of the Equal Rights Amendment by feminists and women's rights advocates.

¹¹⁸ For a more thorough discussion on this point see Patricia Williams' *The Alchemy of Race and Rights* (1991) where she articulates how critiques of rights in the modern democratic state are shaped by the historical experiences and legacies of individuals and groups in society.

Introduced in every session of Congress between 1923 until 1972, The ERA¹¹⁹ called for equality of rights under the law for women and for protection or enforcement of these rights by the state. To date, the ERA is the clearest demonstration of women's demand for equality and their full bundle of rights under the liberal framework. It embodies the spirit and tone of liberal democratic theory that individuals are moral and political equals in the public sphere. At the deadline for ratification on June 30, 1982 only thirty-five of the required thirty-eight states had ratified the amendment. Thus, it was never passed. The failure of the ERA,¹²⁰ I argue, is due in large part to the aforementioned dynamics that extend beyond the simple relationship between the state and the individual under liberal democratic theory.

The ERA, although purporting to secure equal rights and freedom for women challenged the patriarchal and masculinist state by calling into question the role of women and men in society. As Drucilla Cornell (1998) notes patriarchy connotes the state-enforced and culturally supported norm of heterosexual monogamy as the only appropriate organization of family life. This norm, she goes on to say, as it has been traditionally defined tends to cast the father as the head of the line and define women mainly by their reproductive capacity in the private sphere and as such women are

¹¹⁹ The ERA was last introduced in the 108th Congress (2003-2004) with no imposed deadline for ratification. The text of the legislation reads: Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex. Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article. Section 3. This amendment shall take effect two years after the date of ratification.

¹²⁰ For a provocative and thorough discussion on the Equal Rights Amendment, see *Why We Lost the ERA* (1986) by Jane Mansbridge. Mansbridge also makes the point the failure of the ERA was also a result of the framing of the reach and scope of the Amendment by proponents and the passage of the Title VII of the Civil Rights Act of 1964 which captured elements of the ERA.

denied the right of self-representation. This norm, Cornell speaks of, I argue has come to constitute a sort of good in civil society and to the extent that the ERA or similar efforts challenge this good, there is conflict and the possibility that efforts will fall short. This point is supported by Jane Mansbridge in her ground breaking book *Why We Lost the ERA* (1986), when she notes in relation to the failure of the ERA that the American public did not want any significant change in gender roles, whether at work, at home or in society at large. At once, we can begin to see a more complex explanation of the realization of rights in the modern democratic state begin to emerge with regard to women where there are many factors that influence whether groups or individual with attain full autonomy and freedom.

Lastly, the denial of the impact of social, experiences, racial, ethnic, and class difference by liberal feminists under liberalism is problematic because it fails to account for the ways in which women's relationship to the state and the public sphere is intimately shaped by their social status and position. For example, *Roe v. Wade* guarantees a woman's right to choose an abortion, but failed to consider how the right to choose is mitigated by access to economic resources and information. It also failed to consider the ways in which women of color's reproductive autonomy and freedom in the country had been shaped by colonial legacies of forced sterilization and enslavement (Roberts 1997 Smith 2003). Further, when legislation¹²¹ was introduced

¹²¹ Three years after *Roe v. Wade* was decided, Congress passed the first "Hyde Amendment" to the fiscal 1977 Medicaid appropriation. Introduced by anti-choice Congressman Henry J. Hyde, the Hyde Amendment barred the use of federal Medicaid funds for abortion except when carrying the pregnancy to term would endanger the life of the woman. A 1984 study conducted by researchers from The Alan Guttmacher Institute showed that 44 percent of women on Medicaid who

and subsequently passed to prohibit the use of government funds for abortion, which I argue disproportionately affected the rights and autonomy of poor women and women of color, white feminists failed to use their resources and efforts to counter the attacks.¹²²

The Impact of Difference and Social Location on the Attainment of Rights in the Modern Democratic State

Women of Color have long challenged the hegemony of feminisms constructed primarily around the lives of white middle-class women. Since the late 1960s U.S. women of color have taken issue with unitary theories of gender... Speaking simultaneously from “within and against” both women’s liberation and antiracist movements, we have insisted on the need to challenge systems of domination, not merely as gendered subjects, but as women whose lives are affected by our location in multiple hierarchies.

--Bonnie Thornton Dill and Maxine Baca Zinn 2003

The challenge posed in understanding the impact of difference and social location on the attainment of rights in the modern democratic state is that rights-claims made in the public sphere by women or by racial and ethnic groups tend to be centered around essentialized notions of gender and race respectively. This is problematic because often times, political and discursive practices relating to race and gender often silence or erase the experiences of women of color. Under liberalism, the gendered subject of rights becomes even narrower when the experiences of women of color are taken under consideration.

obtained abortions that year paid for them with money earmarked for living expenses, such as food, rent, and utilities.

¹²² For a more thorough discussion on this point see, Silliman et al, *Undivided Rights: Women of Color Organize for Reproductive Justice* (2004).

For this discussion, Dill and Zinn's theory of multi-racial feminism is of critical importance. In *Theorizing difference from Multi-racial Feminism*¹²³ (2003), Dill and Zinn argue that "gender is constructed by a range interlocking inequalities or what Patricia Hill Collins calls 'a matrix of domination.' The idea of the matrix, they go on to say, "is that several systems work with and through each other" to shape individual subjectivity in the public sphere. Further, they assert individuals experience race, class, gender, and sexuality differently depending upon their social location in hierarchies of race, class, gender, and/or sexual orientation. As such, the matrix of domination is able to recognize and accounts for the different ways that individuals enter the public sphere and the discourse on rights, as simultaneously race, class, sexed, or gendered subjects.

Like a complex theory of rights, multi-racial feminism emphasizes the relationship between social structures and institutions present in society and women's exercise of autonomy and freedom. Multi-racial feminism acknowledges and is able to account for the ways in which women of color are able to maneuver through racist, patriarchal, or classist institutions and structures to "shape and define their own lives." This is especially true in terms of defining women's rights and what is considered equality or justice in the public sphere, where women of color have created institutions and organizations of resistance to advance rights-claims that are reflective of their experiences and political agendas. Examples of these organizations include the Combahee River Collective, the National Black Feminist Organization, The National Black Women's Health Project, Black Feminist Caucus of the Black

¹²³ Dill and Zinn highlight six components of multi-racial feminism in the article, but for the purposes of the discussion I have chosen to highlight only a few.

Radical Congress, The National Asian and Pacific American Women's Forum, INCITE, National Latina Institute for Reproductive Health, and the National Women's Alliance.¹²⁴

With regard to the realization of rights in the modern democratic state, difference and social location are extremely relevant because what one deems valuable as a right is directly informed by race, class, gender, ethnicity or sexual orientation. The position produced out marginality automatically entails a vision of justice and equality that is broader and in some instances more complete than those positioned at the center of discourse and knowledge production (Harstock 1997, Collins 2000). During the second wave of feminism, for example, the primary concern of feminists or gender activists was that of economic equality and the attainment of civil rights. Much of the literature coming out of the period on women's position in society centered around the sexual division of labor, the impact of capitalism on women's lives (Hartmann 1981), and the political economy of "sex" (Rubin 1975). Other issues included reproductive autonomy and freedom and violence against women.

To illustrate my point regarding the relevance of difference and social location to rights-claims made in the public sphere, I would like to take the issue of "the right to work" as articulated by liberal feminists. Liberal feminists believed that a woman's right to work outside of the home was key to dismantling the sexual division of labor and achieving full equality in the public sphere. The claims made in the public sphere under the rubric "the right to work" were related to issues of equal pay for equal

¹²⁴ All of these organizations are women of color led and were created out of or in recognition of the marginalization of women of color in mainstream movements for social and political change.

work, access to jobs and careers long held by men, child care, and harm from sex discrimination in the work place. While it is certainly reasonable to assume that attaining these rights in the public sphere would affect the daily lives of *all* women, the “right to work” rights-claims in the public sphere tended to reflect the experiences of middle-class white women.

Women of color’s historic relationship to work in the public sphere and in society might effectuate a different list of right-claims with regard to “the right to work” in the public sphere that would be reflective of their lives and experiences and have a clear race and class analysis that would understand women’s different relationship to work¹²⁵ Histories of forced labor through enslavement, domestic servitude, and the fact that many women of color worked outside of the home (sometimes in the homes of white families) during the period when white women were demanding the right to do so, calls into question the gendered lens of citizenship within liberal democratic state under which women make claims in the public sphere. To this point, feminist historian Elsa Barkley Brown notes:

Middle class white women’s lives [and their concerns] are not just different from working-class White, Black, and Latina women’s lives. It is important to recognize that middle-class women live the lives they do precisely because working class women live the lives they do. White women and women of color not only live different lives, but white women live the lives they do in large part because women of color live the ones they do.... White middle class women moved from a primary concern with home and children to involvement in voluntary associations when they were able to have homes and children cared for by the services—be they direct or indirect—of other women. White middle-class women have been able to move into the labor force in increasing numbers not just differently from other women but

¹²⁵ For a more thorough discussion on this point, see *Sister Circle: Black Women and Work*, specifically Bonnie Thornton Dill’s “Our Mothers Grief.”

precisely because of the different experience of other women and men.¹²⁶ (Brown 1992, p. .

With regards to rights, Black women, Latina, and Native-American women enter the public sphere and the discourse on rights and citizenship in ways dramatically different from white women. Women of color enter the discourse on rights and citizenship as not only gendered subjects, but also raced and classed subjects as well. Again, all reflective of histories of enslavement, exclusion, and conquest that denied the human dignity and worth of individuals and groups based on race or ethnicity in the early republic. With regard to work, women of color understood on a fundamental level that work could not only be liberating, but oppressive as well. Liberal democratic theory fails not to only adequately account for difference in the public sphere, but leaves little, if any room, for the accommodation of individuals situated within multiple hierarchies within the groups. Difference and social location alters rights-claims made in the public sphere made by groups and individuals. However, under liberalism that is a tendency to deny these differences and dichotomize groups and claims in the public sphere.

Next, I would like to turn my attention to the issue of violence against women as a way of understanding right-claims made in the public sphere by women and the ways in which the intersections of race, class, gender, and sexual orientation shape women's experiences of violence and ultimately rights in the liberal democratic state.

¹²⁶ See also Grace Chang's *Disposable Domestics* (2000) where she provides a powerful analysis of women of color's relationship to work in the modern democratic state.

Engendering Violence in the Modern Democratic State

For the purposes of this dissertation, I define violence against women as a broad social justice issue that happens in public and private and across race, class, gender, sexuality, ethnicity, religion, ability, and other markers of difference. Further, I understand violence as harm or injury that affects an individual's sense of emotional, economic, physical, and mental wellbeing.¹²⁷ Under this broad umbrella, I will focus on domestic violence, sexual assault, and stalking as defined under the Violence Against Women Act of 1994.

The passage of the Violence Against Women Act in 1994 catapulted the issue of violence against women into the mainstream like no efforts before it had. The landmark legislation marked a turning point for addressing domestic violence, sexual assault, and stalking¹²⁸ in the United States. It not only allocated funding for violence prevention efforts, but also outlined legal and judicial consequences for perpetrators. The Act was a culmination of organizing efforts at the local, state, and federal levels by violence against women advocates¹²⁹ to recognize the ways in which gender

¹²⁷ Defining violence against women as a social justice issue allows us to examine the structural and institutional causes of violence against women as well identify societal supports for violence. And like many women of color violence against women activists, I understand racism, classism, ethnocentrism, sexism, ageism, heterosexism, and ableism as acts of violence. Collectively and separately these forms of oppression hinder collective and individual progress. See also INCITE!, women of color against violence principles of unity (2006).

¹²⁸ Stalking was not in the 1994 version of the Violence Against Women Act. It was added in the reauthorization bill in 2000.

¹²⁹ For a discussion on the history and the development of the violence against women's movement see: Women's Movements and State Policy Reform aimed at

impacts the rights, citizenship, and mobility of women in the modern democratic state.

VAWA was passed as title IV, of the Violent Control and Law Enforcement Act¹³⁰ and its first four years provided 1.6 billion dollars to enhance the investigation and prosecution of violence crimes perpetrated against women. The Act was authorized as a valid exercise of congress' power to enforce the fourteenth amendment to 'remedy state action that denies individuals the equal protection of the laws. Congress found that the state justice systems routinely treat violent crimes motivated by gender less seriously than other crimes." Since its passage, the bill has been reauthorized twice.

VAWA, I contend, highlights the problem of gendered citizenship in the modern democratic state. While the legislation grew out of the demands in the public sphere by feminists and gender activists, the framing of the issue was primarily constructed around the experiences and lives of middle-class white women. The movement preceding the Act tended to frame violence against women as a result of cultural and structural systems of gender-discrimination—a patriarchal system that includes other forms of violence and discrimination against women (Berns 2001)¹³¹." As such, it is not surprising that redress or remedies in the public sphere in terms of legislation and public policies with respect to violence would reflect the social location and

Domestic Violence Against Women: A comparison of the Consequences of Movement Mobilization in the U.S. and India by Diane Bush, *Gender and Society* Vol. 6. No. 4 (Dec 1992)

¹³⁰ VAWA and the 1994 crime bill in general was supported by Congressional Democrats and President Clinton

¹³¹ Bern also notes that there was a split occurring among advocates with regard to the causes of violence against women with some advocates choosing to emphasis the "psychological" and "clinical" causes and remedies for violence against women.

positionality of middle-class white women. In the 1994 legislation, the recognition of race, class, ethnicity, and sexual orientation as factors that intimately shape women's experience of violence was noticeably absent.¹³² In fact, it would not be until the reauthorization of VAWA 2005, nearly 11 years later, that the impact of race, culture, and ethnicity on women's experience of violence would be taken seriously under the act.¹³³

In the modern democratic state, the center of gendered citizen is the white, heterosexual, middle class woman. As such, rights-claims in the public sphere tend to reflect her interests, concerns and political agenda. I would also suggest that there is a constant de-emphasis of race, class, sexuality, ethnicity, or other markers of difference in the public sphere because it troubles the core of gendered citizenship in liberal democracies. A prime illustration of what I am talking about can found by examining the issue of sexual harassment in the liberal democratic state.

The case that established sexual harassment as a practice of sex discrimination by the United States Supreme Court was *Vinson v. Taylor*.¹³⁴ Vinson, a Black woman had filed a suit against her former employer, Meritor Bank, under Title VII of the Civil Rights Act of 1964, claiming that during her employment at the bank she had

¹³² See Violence Against Women Act of 1994

¹³³ The push for the inclusion of special provisions of VAWA 2005 to reflect the experiences of women of color was made by the People of Color Caucus, Sisters of Color Ending Sexual Assault, Representative Hilda Solis, and the National Women's Alliance. This inclusion was met with resistance and was debated in communities and in congress. In fact, there was a Manager's Amendment submitted by House Judiciary Committee Chair James Sensenbrenner (R-WI). The amendment proposed to strip away language from the reauthorization of VAWA Act that provides for adequate services for racial and ethnic communities.

¹³⁴ See *Meritor Bank v. Vinson*, 477 U.S. 57 (1986)

been subjected to sexual harassment by her direct supervisor. Vinson argued that over her nearly three years of employment at the bank she had been forced to have sex with her direct supervisor in order to keep her job. The law against sexual harassment is the first law to be written on the basis of women's experience and the first to recognize that sexual abuse can violate an individual's rights under the fourteenth amendment.¹³⁵

Vinson's claim to protection under the law was based solely on sex or gender discrimination in the public sphere. While sufficient, it failed to account for the role race and the historic construction of Black women's sexuality as having shaped her experiences of violence and the ways in which access to her body may have been assumed by her white male perpetrator (A.Y. Davis 1983 Roberts 1997 Collins 2000 A. Davis 2002).¹³⁶ Sexual harassment activists and lawyers chose to frame the issue as strictly gender-based. As Barkley Brown (1997) notes "the National Organization for Women, feminist legal scholar Catharine MacKinnon, and others spoke forcefully, but in doing so often persisted in perpetuating a deracialized notion of women's experiences."

Another example with regard to the issue of sexual harassment and in the difficulty in accommodating a multiply situated gendered citizen under the law and

¹³⁵ See Catharine A. MacKinnon's *Sexual Harassment of Working Women: A case of sexual discrimination* and the Reader's Companion to Women's U.S. Women's History (1998), ed Wilma Mankiller.

¹³⁶ Also see NO! a documentary on Black women and sexual violence by Aishah Shahidah Simmons which provides a historical context for Black women's experiences of rape and sexual assault during slavery and its impact on Black women's sexuality and rights today.

the public sphere can be found in the Hill-Thomas hearings of 1991 where Anita Hill, a Black woman publicly announced that she had been sexually harassed by Clarence Thomas, a Black man up for an appointment to the Supreme Court of the United States.

Much has been written about the Hill-Thomas hearings exploring the dynamics of race, class, and gender in relation to power in society . What has not been explored, as much is how Hill's position as a Black woman, situated within multiple hierarchies, radically alters her rights-claims in the public sphere. When Hill makes her claim of sexual harassment against Thomas, she is not constituted as an individual under the law. Her protection under the law is either as woman or as an African-American. Consequently, Hill's *both/and* status as a Black woman leaves her exposed and bereft of a discourse in which to situate herself. In a matter of speaking, her position is constitutionally indefensible. She had to not only had to prove discrimination based on gender, but on race as well. Her status as a Black woman severely limits the remedies and protection available to her under the law.

The Hill case illustrates the difficulty in articulating publicly and through discourse a theory of rights that extends beyond single identity markers and is able to grasp the impact of social associations, history, competing narratives, and political investments on right-claims in liberal democracies. Hill's claims are further complicated by the historic representation of Black women in society¹³⁷ and the fact that her claim was against a Black man. As Crenshaw (1995) notes, the discourses

¹³⁷ See Patricia Hill Collins' *Black Feminist Thought* (2000).

used to highlight gender and races biases in laws and society are often oppositional and contradictory.

For many, there was no language to speak to the “history routinely ignored or played down¹³⁸ concerning the representation and status of Black women in society and how it shaped the hearings and the outcome of the Hill-Thomas trials. Feminists who championed Anita Hill did so because they saw it as a gender issue and challenge to Patriarchy.¹³⁹ Detractors of Hill portrayed her as race traitor and refused to see her Blackness in concert with her gender. As Crenshaw (1995) notes, racism as experienced by people of color who are a particular gender—male—tends to determine antiracist strategies, just as sexism experienced by women who are of a particular race—white tends to ground the women’s movement . What became painfully clear in the aftermath of the trial was that many in the Black community were perplexed as to how to address issues of accountability or violence against Black women without airing dirty laundry or revealing cleavages. Further, white feminists, as Barkley Brown (1997) notes were unable to deal with the racialized and class-specific discussion when it emerged. The Anita Hill example highlights the ways in which limited political and discursive practices relating to the simultaneous recognition of the impact of race, class, and gender alters rights-claims and remedies in the public sphere. In the case of sexual harassment, both Vinson and Hill were constructed as what Barkley Brown (1997) refers to as a “generic or universal women

¹³⁸ For a more thorough discussion on this point see Toni Morrison’s *Race-ing Justice Engendering Power: essays on Anita Hill, Clarence Thomas, and the construction of social reality* (1992).

with no race or class.”

Employing a complex theory of rights, the intersections of race, class, gender, sexual orientation, and ethnicity are simultaneously recognized as shaping women of color’s rights and autonomy in the public sphere. The additive models that layer race, gender, sexuality, or other markers of difference are inadequate (Dill and Zinn 2003) for understanding the complexity of violence in the lives of women. Further, the historically constituted meta-spaces of a complex theory of rights intersect with these markers to inform and shape women’s mobility, access to resources and how she experiences of violence. Crenshaw (1995) concurs by noting women of color are differently situated within these [meta-spaces] and when rights-claims are made, legislation enacted, or reforms undertaken on the behalf of women, “women of color are less likely to have their needs met than women who are racially privileged.

Conclusion

In this chapter, I outlined the tenets of gendered citizenship to argue that gender impacts the realization of rights in the public sphere. Further, I employed the issue of violence against women to problematize the gendered citizen in the modern democratic state to demonstrate the ways in which race, class, gender, sexual orientation, and other markers of difference shape women’s experience of violence and ultimately rights in the public sphere. I also demonstrated the ways in which social location and difference shapes what women define as valuable and as a right in the public sphere.

CHAPTER VI

CONCLUSION

Revisiting the Central Questions of the Research

This dissertation started out with a set of provocative questions: (1) What is the impact of race, gender, sexuality, and other markers of difference on the realization of rights in the modern democratic state; (2) Does even the most complex account of multi-cultural identity under liberal democratic theory accurately account for the impact of difference on the realization of rights in liberal democracies; and (3) Why doesn't formal equality, say the right to vote, translate into social and political equality for some groups and individuals. These questions form the central inquiry of my investigation and provide me the opportunity to theorize a rights framework that extends beyond the static relationship between the individual and the state. In this chapter, I present a summary discussion of the dissertation's findings and explore avenues for future research. I also explore the implications of my findings for public and social policy outcomes; community and mobilization organizing efforts; and for understanding rights-claims made by groups and individuals in the public sphere.

Contribution to the field

The main contribution of this dissertation to the field of political philosophy is that it suggests the need for a more complex understanding of the dynamics that influence individual rights, autonomy, and freedom in the modern democratic state. I proffer a complex theory of rights that I believe is able to fairly and accurately account for the impact of identity and culture on the realization of rights by individuals and groups in

liberal democracies. This dissertation begins with an originary tale of rights in modern democracies, which is intended to re-frame the discussion on rights to take into consideration how individuals and groups enter society. It also attempts to chip away at claims of neutrality and equality set forth in liberal democratic theory.

The impact of race, class, gender, sexuality, and other markers of difference on the realization of rights in the modern democratic state

One of the central aims of this project was to discern whether or not race, class, gender, sexuality, or other markers of difference had a direct influence on the attainment and realization of rights in civil society. The findings based on the three case studies suggest that there is a significant correlation between an individual's race, class, gender, sexual orientation, or any other distinguishing characteristic and the rights and privileges she is able to enjoy in the public sphere. In all of the cases studied, formal or civil equality, did not necessarily translate into social and political equality for groups. In fact, in the cases focusing on racial and ethnic minorities and gays, formal gains of legislative or civil equality were often met with resistance and attempts to negotiate the terms of equality by whites or heterosexuals respectively.

The study also found that remedies available to marginalized groups depended in part of the political recognition of difference and the demonstration that it is the cause for the denial of rights and privileges in the public sphere. This was found to be true for all three of the case studies in that each group studied had the burden of proving that they were fit for citizenship and demonstrate that they were denied citizenship rights was because of their race, gender, or sexual orientation. The study also

demonstrated that the subject of rights under liberal democratic theory fails to accurately account for the differences that exist between individual and groups.

Does even the most complex account of multi-cultural identity under liberal democratic theory accurately account for the impact of difference on the realization of rights in liberal democracies?

My findings suggest that even the most advanced theories of difference under liberalism does a poor job of providing an integrative and historical understanding of how difference among and between groups shape rights-claims, privileges, and the distribution of resources in the public sphere. Rawls original position and theory of overlapping consensus fail to tend to the pragmatic and core concerns of marginalized groups with regard to securing their full bundle of rights in the modern democratic state which continues to be the lack of social and political equality. In an effort to harmonize claims by groups within the liberal framework, difference is relegated to the private sphere thus leaving the masculine subject of rights in tact.

Further, oppositional frameworks like Critical Race theory, while useful for beginning the conversation about the impact of difference on rights, remain at a theoretical level that demands further exploration and extension into the more concrete and practical implications of this awareness.

Why doesn't formal equality, say the right to vote, translate into social and political equality for some groups and individuals?

Employing a complex theory of rights, this study concludes that there are a variety of factors that influence the realization of rights in the modern democratic state. Chief among them are: (1) A notion of the good operating in society that is connected to

deeply entrenched societal values and norms and that privileges the dominant culture; (2) the structures and institutions that govern society are enmeshed in race, class, sexuality, and ethnic hierarchies; (3) the accumulated advantages gained through historic practices of exclusion, conquest, and enslavement; (4) the representation of the dominant group and subjugated groups in the public sphere through texts, the media, and discourse; and (5) whether or not individuals or groups are recognized as bearers of rights under the law.

Further, the findings suggest that formal equality, whether legislated or through voting is only as effective as the climate or context in which this equality is bestowed. In the case of same-sex marriage, for example, although the Massachusetts Supreme Court ruled in favor of the plaintiffs, the victory was overshadowed by conflicting decisions at the federal level and the still lively moral debates around homosexuality in the public sphere. Shortly after the *Goodridge* ruling, a proposal was crafted by conservative legislators to ban gay marriage in the state and as early as 2006 the state could see a vote that could possibly reverse *Goodridge*.

Case Studies

The case studies chosen for the study did an adequate job in helping to answer my central questions of concern. I was able to examine the struggle for the attainment of rights at different levels of government—local, state, and federal, and to demonstrate how these various branches had played significant roles in shaping individual rights and freedom in the liberal democratic state. Further, the cases demonstrated attempts to realize full freedom and autonomy through practices of direct democracy, the

California Referendum Initiative; appeal to the courts, the issue of Gay Marriage; and the creation of public policies and landmark legislation, the Violence Against Women Act. The findings of my research suggest that at all levels of government, race, class, gender, sexual orientation and other markers of difference shape the realization of rights in the modern democratic state.

The dissertation also revealed that each Group studied has its own unique history in relationship to citizenship and rights, its relationship to the state, and the internal conflicts and quarrels. The case studies are fastened together by their capacity to demonstrate the limitations of liberal democratic theory with regard to the accommodation of difference in the public sphere; interrogation of liberal claims of neutrality and equality; and shed light on the reason why despite legal equality, social and political equality remain elusive for some and not others in the liberal democratic state.

Chapter III: The Mixture of Race and Rights in Modern Democracies

My findings suggest that although the meaning of race has shifted and has increasingly become noted as constructed, race still remains a fundamental organizing principle of social relationships in modern democracies. In the state of California, my study found that race is likely to determine the quality of education a child will receive with schools with high concentrations of Latinos, Blacks, or English Language Learners 11 times more likely to employ under-credentialed teachers; the infant mortality rate with highest levels of infant mortality among poor Black and Latinos covering the Crenshaw neighborhood of South Central Los Angeles; and the likelihood that you will become incarcerated under the notorious three strikes law

with Blacks and Latinos comprising 66% of those in prison although collectively they make up only 44% of the population in the state.

Using ballot referendum Proposition 54 initiated by California Regent Ward Connerly, I argued that race was significant to the realization of rights in modern democratic state. I thought it beneficial to provide a context for the discussion by providing an overview of race and racialization processes in the liberal state. From the discussion, I concluded that the process of racialization is key to formulating any critical understanding of the intimate relationship between race and rights in modern democracies. In its ideological form, the process of racialization provides context for the organization of social structures, hierarchies, and institutions present in society. Taken as always occurring, the process of racialization becomes the means by which we are to contextualize nation and empire building; enslavement and conquest; and ultimately rights and freedom.

Despite the passage of proposition 209 in 1996, whites and racial and ethnic minorities rejected the idea that ignoring difference would bring the state closer to the realization of a color-blind society. My study suggests that by voting against proposition 54, Californians rejected the liberal democratic notion that the realization of rights in modern democracies is the product of the relationship between the individual and the state. Employing a complex theory of rights, the failure of proposition of 54 suggest an acknowledgment that the realization of rights in the public sphere on the part of racial and ethnic minorities is complicated by historic inequality characterized by exclusion, racial projects that shift to maintain hegemony, and resistance.

Chapter IV: Complex Subjectivity, the Promise of Neutrality, and the Attainment of Rights in Modern Democracies: An Examination of Same-Sex Marriage in the Liberal Democratic State

In this chapter, I used the issue of same-sex marriage to argue that the liberal democratic state fails to deliver on its promise of political neutrality and that there exists a notion of ‘the good’ that operates in society that makes it difficult for some groups and individuals to realize their full bundle of rights in the modern democratic state. I also suggested that under liberal democratic theory, individuals must be constituted as the subjects of rights under the law before they make rights-claims in the public sphere.

In the *Goodridge* case, the court did deliver on its promise to remain neutral on competing conceptions of the good in society and ruled to the benefit of the plaintiffs. However, this victory, I suggest should be contextualized and understood in light of the public discourse surrounding same-sex marriage in the modern democratic state. The study suggests, that the decision in *Goodridge* was overshadowed by conflicting decisions made at the federal level and in most other states concerning same-sex marriage and the still lively moral debates around homosexuality. For example, within months after the ruling fourteen states had adopted constitutional measures prohibiting same-sex marriage bringing the total number of states in the union to ban same-sex marriage to seventeen. In the state of Massachusetts, opposition and mobilization against the ruling was swift. Shortly after the ruling, a proposal was crafted by conservative legislators to ban gay marriage and as early as 2006 the state could see a vote that could possibly reverse *Goodridge*.

Lastly, my findings also suggest that by employing a complex theory of rights, we can understand the ways in which dominant social and political institutions constrain individual rights and liberties in the modern democratic state. Further, I conclude that there is a notion of the good that defines marriage as the union of a man and a woman and that privileges the heteronormative and patriarchal family structure. I have also demonstrated that there is a concept of the good present that is shaped by the laws, customs, and traditions present in any given society that work to limit individual rights and freedom. To the extent that this is the case, the attempt of gays and lesbians to broaden the center or to at least provide a competing moral or value frame is met with resistance because heterosexuality and homophobia are embedded in most, if not all of the institutions and structures that govern society. Attempts to attain rights or make rights-claims in the public sphere must be understood within this context.

Chapter V: Violence Against Women and Gendered Citizenship in the Modern Democratic State: The impact of differential experience and social location on the realization of right in liberal democracies.

My last case study explored the nature and meaning of gendered citizenship in modern democracies through the lens of violence against women. It suggested that the intersections of race, class, gender, sexuality, and other markers of difference alter rights-claims in the public sphere. My findings suggest that liberal democratic theory fails not only to adequately account for difference in the public sphere, but leaves, little if any room, for the accommodation of individuals situated within multiple hierarchies within groups. I also demonstrated under liberalism there is a tendency to deny intra-group differences and dichotomize groups and claims in the public sphere.

In this chapter, I also explored the gendered nature of citizenship and found that with regards to rights, Black women, Latinas, and Native American women enter the public sphere and discourse on rights and citizenship in ways dramatically different from white women. I suggest that women of color enter the discourse on rights and citizenship as not only gendered subjects, but also raced and classed subjects as well.

With regard to the Violence Against Women Act, my findings suggest that the initial legislation and policy reflected the social location and positionality of middle-class white women. As such, I conclude that the center of gendered citizenship is the white, heterosexual, woman, and rights-claims in the public sphere tended to reflect her interest, concerns, and political agenda. I also suggest that there is a constant de-emphasis on race, class, sexual orientation, ethnicity, or other markers of difference in the public sphere because it troubles the core of gendered citizenship in the liberal democracies.

Lastly, I used a complex theory of rights to examine the ways in which women's experience of violence are intimately shaped by race, class, gender, sexuality and other markers of difference. I link these markers to the institutions and structures present in society to understand how women of color resist subordination and subvert power; advance rights-claims in the public sphere; and expose the limits of political neutrality.

Towards a Complex Theory of Rights in the Modern Democratic State:

As demonstrated throughout this study, liberal democratic theory does an inadequate job of addressing the impact of difference on the realization of rights in the modern democratic state. Under liberalism, difference is relegated to the public

sphere in favor of an abstract subject of rights. Attempts by political theorists to resolve the conflict of difference and liberal claims of neutrality and equality have failed because there is a refusal to acknowledge the ways in which race, class, gender, sexuality, ethnicity, and other markers of difference has shaped individual rights and autonomy since the founding of the republic.

In chapter I, I provided an allegory of the story of rights in the modern democratic state. The story of rights I offered differed from the one that has traditionally been told and emphasizes the moral and political equality of all individuals. In the traditional telling of the story, all individuals are equal partners in the moral dialogue when it comes to asserting and defending rights-claims in the public sphere.

In the re-telling of the story, I ask the reader to consider the possibility of two distinct classes of people. The first class consists of those who have rights from the beginning (property holding, heterosexual, white men) and as members of the group go about ensuring the state or others do not infringe upon those rights. Conversely, the second class consist of those who enter the into the group with essentially no rights and use the mechanisms and laws set up by the founding members to secure or advance rights claims. In the dissertation, I use this allegory to shape the discussion on rights, to lay the foundation for a complex theory of rights, and to provide a historical context for the ways in which groups previously excluded enter into society and the set of circumstances under which they must engage.

In this dissertation, I laid out a complex theory of rights that attempts to account for the impact of identity and culture on the realization of rights in the modern democratic state. As stated previously, a complex theory of rights is not meant to

displace liberal democratic theories that emphasize individual autonomy or the role of the state in ensuring individual liberties and freedom, but to call for the recognition of historic racial, ethnic, gender, sexual orientation, ethnic, and cultural inequalities that limit the exercise of autonomy and freedom in modern democracies.

Using the theory and through the case studies, I have demonstrated that there are indeed many factors that shape the realization of rights in the liberal democratic state: (1) A notion of the good operating in society that is connected to deeply entrenched societal values and norms and that privileges the dominant culture; (2) the structures and institutions that govern society are enmeshed in race, class, sexuality, and ethnic hierarchies; (3) the accumulated advantages gained through historic practices of exclusion, conquest, and enslavement; and (4) the representation of the dominant group and subjugated groups in the public sphere through texts, the media, and discourse; and (5) whether or not individuals or groups are recognized as bearers of rights under the law.

The idea that there is a notion of the good operating in society that is connected to deeply entrenched societal values and norms and that privileges the dominant culture is present in all three of the case studies. In the instance of proposition 54, the historical process of the racialization of the systems, structures, and laws is indeterminably linked to the realization of rights in the modern democratic state whereby whiteness is viewed as the good or the desirable in the state. With regard to sexual orientation, it is the traditional nuclear family with the man as the head of the household and the woman as caretaker.

Implications of the Research: Pulling together the pieces of the puzzle

Privileging difference in the discourse on rights is key to increasing our understanding of inequality and disparities in the modern democratic state. I have demonstrated in this dissertation that difference plays a critical role in the attainment and realization of rights in the public sphere. However, the failure of liberal democratic theory to take difference seriously constrains struggles for equality and freedom in civil society. In this dissertation, I have also maintained that the modern democratic state is marked by historic inegalitarian practices of exclusion, conquest, and enslavement, which in turn, have shaped the institutions and structures that govern society. As a result of these findings, there are three major implications that follow from these findings that will help us understand why formal equality does not translate into social and political equality for some groups and individual in the public sphere.

By understanding the significance of difference to the realization of rights, we can begin to create public and social policies that are truly reflective of the lived experiences of groups and individuals situated differently within society. Further, we can begin to investigate the ways in which social and public policies are shaped by historic legacies of racism, classism, homophobia, ethnocentrism, and sexism operating in the public sphere. Connectedly, if we understand that difference has shaped rights and privileges from the very beginning of the republic, we can understand rights-claims made in the public sphere on the behalf of marginalized groups for recognition as a means of bringing this historic reality into focus.

Finally, this study sheds light on the “politics of rights” in the modern democratic state. The “politics of rights” refers to the means and strategies individuals and groups employ to advance rights-claims or to have their needs met in the public sphere. In all three of the case studies, each group identified strategies and campaigns they believed would bring them closer to the realization of rights in the public sphere. For example, the “No on 54” campaign focused on the health care implications of the initiative and down played the racial implications; a move considered necessary if they were to avoid an outcome similar to Proposition 209. Similarly, the issue of marriage was chosen by gay and lesbian advocates because of the meaning of marriage in the modern democratic state. Unlike other issues, marriage could not been seen as only impacting gays and lesbians.

The “politics of rights” is significant because it also sheds light on what or who gets left out in terms of the framing of rights-claims in the public sphere. As stated previously, in the modern democratic state, rights-claims tend to be dichotomous and polarized—men/women, rich/poor, heterosexual/homosexual. However, framing rights-claims in this way denies the complexity of identity and the multiple ways under which individuals and groups enter the public discourse on rights. For example, in the instance of violence against women, by framing violence against women as solely a gender-based issue ignores the experiences of women of color and gays and lesbians in relationship to violence.

Future Research Agenda

This dissertation moves toward developing a better understanding of the impact of

race, class, gender, sexual orientation, and other markers of difference on the realization of rights in the modern democratic state. Liberal democratic theory does an inadequate job of accounting for the role of difference in relationship to rights and the ways in which difference has shaped freedom and autonomy since the founding of the republic.

Investigating the ways in which race, class, gender, sexual orientation, and other markers of difference impact rights-claims in the public sphere is difficult because of the ways in which racism, sexism, homophobia, and other forms of oppression shift and adapt to maintain hegemony. As such, I believe the complex theory of rights developed in this dissertation can be used to map the shifts and explore the ways in which groups and individual struggle to attain their full bundle of rights in the modern democratic state. Future research could apply a complex theory of rights to new cases and other issues such as immigration, education, welfare, and the environment.

Finally, it would be interesting to examine in more detail the “politics of rights” to determine what strategies are most effective and what is necessary to bring about success in terms of the realization of rights in the modern democratic state i.e. rainbow coalitions, access, resources, or the group’s ability to move closer to the core.

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