UNIVERSITY OF CALIFORNIA
SANTA CRUZ

(RE)MAKING FAMILY AND NATION: THE PRODUCTION AND MANAGEMENT OF CITIZENSHIP AND (NON)CITIZEN IDENTITIES IN LAW AND POLICY

A dissertation submitted in partial satisfaction
of the requirements for the degree of

DOCTOR OF PHILOSOPHY

in

PSYCHOLOGY

with an emphasis in FEMINIST STUDIES

by

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December 2015

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Abstract

(Re)Making Family and Nation

The Production and Management of Citizenship and (Non)Citizen Identities in Law and Policy

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In this dissertation, I use critical discourse analysis of congressional floor statements, Supreme Court case briefs, and related policy and legal texts to examine how gendered, racialized, sexualized, and classed representations of citizenship are articulated across three cases: immigration legislation, adoption proceedings involving an "Indian child," and legal debates about same-sex marriage. Employing a comparative approach focused on The Border Security, Economic Opportunity, and Immigration Modernization Act (2013), *Adoptive Couple v. Baby Girl* (2013), and *Hollingsworth v. Perry*/*United States v. Windsor* (2013), I trace the convergent discourses of law, history, sovereignty, and blood/biology in shaping the terms of national, tribal, and familial inclusion and exclusion. Feminist, critical race, and critical policy perspectives inform my queer intersectional framework for thinking about how seemingly distinct terms of debate may, together, naturalize economic, social, and political inequalities. Analysis reveals the ideological and material conditions upon which the normative forms of social and political organization, (non)citizen-subject identities, and terms of political redress are made possible. I begin by exploring how notions of history, blood/biology, and sovereignty undergird

(extra)legal productions of, and struggles for inclusion in, normative citizenship. Then, I track the relational figures – with particular focus on the "criminal (alien)," the "(queer) soldier," and the "single mother" – that anchor these conceptions of normative citizenship across the three debates. I conclude with an examination of one figure – the "child" – whose symbolic vulnerability and rescue undergirds policy positions ranging from the repeal of the Defense Of Marriage Act (DOMA) to support for the DREAM Act and constitutional challenges to the Indian Child Welfare Act (ICWA) and Native sovereignty.

Acknowledgments

I am very grateful for the many contributions to the completion of this dissertation. I would like to thank my family for teaching me how to ask questions and to always persist. I have tremendous gratitude to my committee for helping me persist: to Craig Haney, for believing in me throughout, and for showing me the meaning of social justice work; to Heather Bullock, for demonstrating how to be equal parts critical, community-minded, and accountable, and for her steady support; and to Felicity Amaya Schaeffer, for helping me carve out academic space(s), and for asking challenging questions in anticipation of my continued intellectual growth.

Throughout graduate school, teaching has provided inspiration, perspective, and levity. I am thankful to my students, who have pushed me to think more creatively and never lose sight of the productive entanglement of teaching, learning, thinking, reading, and writing. Along with the intellectual community of faculty and graduate and undergraduate students at UCSC, I greatly appreciate the many feminist scholars whose work has inspired my and countless others' thinking and writing.

This project is one of many things that would not have been possible without Harmony Reppond, whose love and support have not just kept me going but inspired me to be better – more understanding, thoughtful, and deliberate – in everything I do. Thank you for living each twist, turn, bump, and spin with me. I couldn't ask for anything more.

Chapter 1
Introduction

> Because of their sexual orientation – a characteristic with which they were born and which they cannot change...They may not marry the person they love, the person with which they wish to partner in building a family...it (withholding marriage) labels their families as second-rate. That outcome cannot be squared with the principle of equality...that is the bedrock promise of America...and the dream of all Americans (Respondents Brief, *Hollingsworth v. Perry*, pp. 53-54).

The above excerpt represents both a straightforward claim to equality for same-sex couples and a narrative that opens onto complex notions of sexuality, choice, and familial and national identity. While such arguments have been examined for their congruence with a set of established principles of citizenship, less attention has been given to their contributions to the (re)creation of citizenship itself. Looking across different sites of citizenship's organization – namely, the nation, the community/tribe, and the family – this dissertation interrogates the discursive processes by which boundaries and representations of citizenship are produced.

Feminist, critical race, and critical policy perspectives inform my queer intersectional framework for thinking about how discourses of law, history, sovereignty, and blood/biology converge to shape inclusions and exclusions in the nation, the (Native) community, and the family. In order to understand how diverse representations of (non)citizenship and (non)citizen identities are articulated in relation to one another, I provide a comparative analysis of three cases: immigration

legislation, adoption proceedings involving an "Indian child," and legal debates about same-sex marriage. Critical discourse analysis of congressional floor statements and Supreme Court case briefs, along with other relevant policy and legal texts, enables insight into how seemingly distinct terms of debate may, together, naturalize particular patterns of inclusion and exclusion.

In this introduction, I bring together feminist, queer, and critical race frameworks for thinking about law, history, sovereignty, and blood/biology as organizing technologies of the family, community, and nation. In doing so, I offer a conceptual framework for considering how these intersecting sets of discourses, and the state authority with which they are vested, shape the conditions of legitimacy for social and political organization, (non)citizen-subject identities, and the terms of political redress.

Citizenship

Citizenship has been described in terms of legal status, rights, and identity conferred by the nation-state as well as through practices of (voluntary) identification with a political collectivity such as an organization, community, or nation. Bosniak (2006) delineates four intertwined modes of citizenship: possession of formal national legal status or membership; possession and enjoyment of rights; practices of political and civic engagement; and collective experience of social belonging to a community. Most scholarly and popular accounts, she notes, differentiate between the ideals of inclusion, democracy, and universalism that characterize "inward-looking" citizenship – that is, the rights, responsibilities, practices, and sense of belonging of

people assumed to be members of the national community – and the purportedly necessary exclusivity of "outward-looking citizenship," or the practices by which national borders and boundaries are created and maintained.

Bosniak (1998; 2000; 2007) identifies the paradox of citizenship's commitments to both universality and exclusion, and observes that the distinction between citizenship's boundary questions and internal questions is in fact false. The "external" boundaries of the nation-state, she asserts, are continuous with an "internalized border" that justifies the marginalization of and denial of certain rights to noncitizen residents. These internal exclusions, in fact, comprise the mechanisms that differentiate the "citizen" from the "noncitizen." Ultimately, Bosniak questions both the premises of national exclusion and the normative claim of "citizenship-as-universality," or the progressive equality, democracy, and inclusiveness of citizenship.

Following these insights into the multidimensional character of citizenship, this dissertation attends to the complex interplay of "external" and "internal" citizenship and the co-constitution of "citizen" and "noncitizen." With a view of citizenship as an assemblage of shifting meanings that are often in contradiction, I track the repeated iterations of noncitizenship – along dimensions of legal status, rights, and (imagined) social belonging – through which the citizen may appear as a stable legal and social category (Mikdashi, 2013). Recognizing that law and policy are the mechanisms through which the formal and informal terms of citizenship are created, and the exclusions and inclusions from citizenship are negotiated, I follow

critical race and feminist legal scholars in approaching legal and policy discourses as both sets of state-sanctioned rules and sites of meaning-making. I investigate the language of law and policy as both indexing and productive of normative citizenship through "common sense" ideas about race, gender, sexuality, class, family, and nation.

In examining the processes by which external and internal boundaries of legal status, rights, and belonging are created, I extend the focus from the nation to the family and the Native community as sites of citizenship's construction. The nation, like the family and the Native community, is constituted through state-regulated kinship – which is, itself, organized by categories of gender, race, and (hetero)sexuality (Stevens, 1999). At each of these sites, the normative terms of recognition and belonging are produced against their negation – the gendered, racialized, and sexualized contours of noncitizenship – and determine the bounds of (non)citizen identities.

The nation, the tribe, and the family are not just connected through the categories of gender, race, and sexuality; through law and policy, they are symbolically and materially constructed in relation to one another. As I will explore further in the remainder of the introduction, the family has served as an imagined and real building block of external and internal boundaries of citizenship. Native communities, and specifically federally-recognized "Indian tribes," have been constituted as both internal and foreign to the nation-state; their legal exceptionality –

or the negation of their political and legal sovereignty – is what provides the nation-state its spatial and legal coherence and sovereignty.

The state-sanctioned terms of recognition and belonging in the nation, the tribe, and the family are often tied to languages of history, biology, (national) sovereignty/security, and, increasingly, privacy, choice, and responsibility. These normative discourses of citizenship converge to create multiple contingent and relational (non)citizen identities within and outside the boundaries of the nation, the tribe, and the family. I refer to the "figures" of (non)citizenship – the child, the deserving migrant, the "terrorist," the "Indian" father, the single mother, the "queer" (couple) – that emerge from uneven and overlapping discourses of citizenship and shape imagined and real possibilities for affiliation with the nation, the tribe, and the nation. By tracing how these figures are continually reconstructed in relation to one another, through multiple discourses of citizenship and non-citizenship, it is possible to see how processes of valuation and devaluation are also relationally articulated.

Two of these processes come into particular focus in this project: 1) the convergence of seemingly opposing legal and policy positions – those that perpetuate exclusions and those that act in the name of addressing exclusions – in buttressing the normative forms (e.g., the two-parent family), ideologies (e.g., personal responsibility), and discursive technologies (e.g., history and biology) of citizenship, and; 2) how these convergent discourses – e.g., of the "vulnerable" child, "deserving" migrant, or "responsible" same-sex couple – situate racial inequalities in the past and obscure or naturalize conditions of precarity, or "circuits of dispossession" (Fine,

2014) for those figured outside of innocence, deservingness, or responsibility. While the appellations for the excludable may differ (e.g., "criminal alien" versus "felon"), and the categories may be more or less expansive (e.g., same-sex couples as threatening to or strengthening of marriage), the result is a bolstering of the norms of racialized, privatized domesticity through which economic, social, and political inequalities seem natural. In the remainder of the introduction, I discuss some of the ways in which these forms, ideologies, and discursive technologies manifest in the (re)making of normative citizenship through the nation, the tribe, and the family.

Gender Nationalism: Vulnerability and Protection

Intersectional frameworks have elucidated how the family operates as a metaphor through which to establish racialized hierarchies within the nation and between nations (Collins, 1998; McClintock, 1995). The history of the U.S. nation-state is tightly bound up with establishment of "the family" as both distinct from the political/public sphere and the primary unit of governance. Separation of the family/private from the political/public enabled the separation of kinship from tribal sovereignty, although intimate networks were the basis of both "family" and politics in Indigenous communities. Concomitant with dispossession, Indigenous peoples were racialized through "insertion into a political economy shaped around a foundational distinction between public and private spheres" and a nuclear family ideal premised on relations of blood and biology (Rifkin, 2010, p. 11). The imposition of heteronorms reconfigured "kinship" as the failure to live up to these norms, and

indicative of racially inscribed deviance in intimacy, rather than legitimate political alternatives to the nation-state.

The constitution of Indigenous communities as internal yet foreign through logics of blood and heteronormativity render Indigenous intimacies – or "kinship" – as failed approximations of the nuclear family ideal. Rifkin describes how "kinship," with its attendant ideological and material coercion of Indigenous peoples into bourgeois modes of family and identity, underwrites US imperialism. Conjugal domesticity is naturalized by a kinship mapping with the nuclear family at its center, entrenching relations of reproduction and blood as the essence of a biologically mandated heteronormative system. Failure to create legibility within this system marks the stranglehold of an archaic culture, and the need for domestication and assimilation into a political economy of privatization.

The metaphorical significance of the family is expansive, as discourses of the domestic, heterosexual family have naturalized racial, gendered, and classed hierarchies in support of empire and the construction of national identity (Kandaswamy, 2006; McClintock, 1995). Kaplan (2005) uses "manifest domesticity" to describe how US national identity has been constituted through "ever-shifting boundaries between the domestic and the foreign, between 'at home' and 'abroad'" that, in turn, have been forged through social, economic, and political processes of empire (p. 1). "Family values" discourses, replacing languages of domesticity, have been deployed in uneven and contradictory ways across political debates about immigration and social welfare. In these debates, the nation is (re)produced through

particular ideas about and constructions of the family. “Family values” are invoked in service of heteropatriarchal calls for “intact,” two-parent families as the antidote to poverty. Simultaneously, discourses about foreign “threat,” the dilution of whiteness, and protection of the nation from “others” has driven much of the immigration rhetoric.

I consider not only how those rendered threatening to the nation are racialized and gendered, but also how the nation’s purported vulnerability to “risky” (im)migrant bodies is itself gendered, racialized, and sexualized (Grewal, 2003; Lowe, 1996; Oliviero, 2011). Taking up the Minutemen’s theatrical displays at the border as a spectacular illustration of more routinized meaning-making practices, Oliviero (2011) provides an account of how the feminized nation is constituted as vulnerable and in need of protection from risky (im)migrant bodies. However, the nation is paradoxically both vulnerable and invulnerable, threatened and imminently capable of offering paternalistic protection (McClintock, 1995; Oliviero, 2011; Yuval-Davis, 2000). While the nation is gendered through maternal stereotypes about parenting, its feminization by penetrating “others” must be overturned through reassertion of heteronormative masculine hostility (Oliviero, 2011; Yuval-Davis 2000). This reassertion remains an unfinished project, as its very necessity both galvanizes gendered political affect and marks the continued production of threats to the nation.

Constructing the Citizen and the Terrorist

Kaplan (1998) writes that external "threats" to the nation are fashioned through racialized and gendered discourses of violence and disease, and the nation conscripts heteronormative masculinity and the nuclear family into its own defense (Kaplan, 1998). Through the assumption of shared responsibility for protecting the "American way of life," the citizen becomes contingently tethered to the remasculinizing nation (Grewal, 2003; Mbembe, 2003). The citizen's freedom and rights, in turn, become possible through the containment of the migrant, "criminal alien," and terrorist (Reddy, 2005; Eng, 2010). With the proliferation of antiterrorism rhetoric, and as the terrorist comes to represent that which threatens the nation's borders, the "Middle Eastern, Arab, or Muslim"-appearing "alien" moves from "illegal" or "criminal" to "enemy" through their racialization as a "terrorist" (de Genova, 2007; Volpp, 2002). This dissertation attends to not just on how the "Middle Eastern, Arab, or Muslim"-appearing "alien" is produced as an "enemy," but also how a set of characters – the "(violent) criminal alien," the "criminal gang member," and the fraudulent or "dangerous" asylum seeker – are rendered threatening by virtue of their symbolic proximity to the "terrorist."

Following Byrd (2011), I also link the production of the figurative (male) "Indian (savage)," as the first "enemy" of the nation-state and impediment to civilization, with the contemporary "terrorist." As derivatives of nationalist fears, the Indian and the terrorist become representative of perceived threat to rights and territory. I focus, in particular, on how these threats are produced in relation to the "vulnerable" and/or "risky" woman and child(ren). Expanding on observations that

discourses call on the citizen to self-regulate risk through "choice," I trace how technologies of security and risk produce liminal subjects, such as the (migrant) mother of color and the queer patriot, as the bodies through which vulnerability and threat are made legible. While the vulnerable and innocent mother and child stand in for the risk posed to the nation by the "risky" male migrant and the putatively abandoning and abusive "Indian" father, the migrant mother of color and her children may also be case as social service (over)users. I explore discourses of fitness and contagion as reflections of the biological citizenship projects that undergird national and tribal exclusions.

Biology, Blood, and Bodies

Starting in the early twentieth century, the United States joined some European nation-states in initiating screening for bodily (i.e., racial) fitness as a new form of biosurveillance at the border of the nation-state (Ordover, 2003; Shah, 2001). Whereas quarantining practices had previously been used to contain disease and eradicate social and cultural difference among migrant populations, this represented a shift toward identifying and managing labor production through biopolitical technologies of "fitness" (Hannabach, 2013).

Hannabach (2013) observes that discourses of law and blood structure the bounds and conditions of citizenship. Metaphoric language of blood has been repeatedly mobilized in eugenicist immigration and citizenship law, naturalizing the exclusion of blacks and Asians from citizenship and labor, and the dispossession of Indigenous lands. Further, the containment of racial, gendered, and sexual difference

has been imagined through a medical model of disease prevention. Hannabach (2013) and Ordover (2003) argue that asylum and immigration law from the nineteenth century onward have been underwritten by discourses of law and blood that produce women of color as threatening to infect the nation and deserving, uninfected bodies. Biosurveillance practices are used to produce differentiating markers of worthy and unworthy bodies in the asylum and immigration system.

Asylum law continues to prefigure the nation-state as benevolent protector and arbiter of "real" versus fraudulent claims of persecution by a freedom-stifling home country. Hannabach (2013) suggests that biosurveillance operates as a technology of health and criminalization, as bodies deemed threatening are incarcerated while those deemed believable are granted asylum. If found to be insufficiently abused or grateful to be saved, the refugee's failure is upheld as justification for the system itself and the legal differentiation of threatening/risky and desirable/at risk bodies. I extend this discussion by connecting the discursive production of threatening figures to specific immigration and asylum policy proposals that would, for example, implement mandatory fingerprinting at land and sea entry/exit points and require the biographic and biometric information of asylees to be checked against federal terrorist databases.

Women's bodies, and specifically women of color, migrant, and queer bodies, represent a particularly dense site of contestation over biological citizenship and the boundaries of the nation-state. Based on the constitution of racialized sexuality as infected and contagious, immigration laws have excluded immigrant women and

regulated their reproduction (Luibhéid, 2002). While biopolitical containment is premised on the notion that women of color multiply "threat" through reproduction, policies of economic regulation are propelled by the notion that immigrant women of color will become "dependent" upon or take the state's resources (Kandaswamy, 2006; Marchevsky & Theoharis, 2000).

Economic Nationalism and the Racialized Familialization of Poverty

"Public charge" principles and administrative discretion continue to restrict undesirable immigration, just as it excluded Mexican (Bracero) laborers from legal immigration in the mid-twentieth century (Luibhéid, 1997; Ngai, 2004). Claims about "chains of migration," which have abounded since the aftermath of the 1965 Immigration Act, racialize potential immigrants (particularly mothers) as threatening and "our" family and nation as in need of protection (Rodríguez & Hagan, 2004). The distinction between past immigrants as self-reliant workers and current immigrants as dependent and/or threatening to "American values" betray racialized beliefs about who belongs in the nation. Discourses of "family values" and the purported expansion of legally recognized intimate forms via same-sex marriage obscure the consolidation of the conjugal couple/nuclear family in both immigration policy and (Indigenous) adoption case law and belie the separation of migrant and Indigenous families.

"Family unity" became a major principle of the immigration system in 1952, as the McCarran-Walter Act's (widely heralded as the first "colorblind" immigration law) education-, skill-, and family-based preferences were intended to maintain white supremacy (Ngai, 2004). With 50% of slots designated for immediate family

members of adult citizens and/or permanent resident aliens, immigration consistent with the principle of "family unity" was intended to enable Northern and Western European men to bring their wives and children to the United States (Cott, 1998; Luibhéid, 1997). Although family-based immigration has not fulfilled its white supremacist objectives, it remains a cornerstone of contemporary immigration policies. Imposition of the nuclear family ideal through preference for spouses and children of US citizens and permanent residents, along with a disregard for families that are separated by deportation, ensure a revolving low-wage labor force and privatization of social and economic costs.

Oliviero (2013) observes that family unity is both invoked as justification for and disregarded in the deportation of (im)migrant parents. The forced choice between family deportation – forced removal of children with their parents – and family separation becomes the naturalized consequence of women of color's reproduction and its threat to national identity (Hagan, Eschbach, & Rodríguez, 2008; Oliviero, 2013). I explore how the relatively rare legislative consideration of migrant children's circumstances, for instance in DREAM Act provisions, may actually exacerbate families' and communities' precarity by focusing solely on the innocent and deserving child. I connect this occlusion of structural inequalities in immigration policy to the "best interests of the child" (BIC) principle that has substantially influenced child welfare decisions since the 1960s. I explore how the application of this principle supports the attribution of poverty to failed individual responsibility and proposed solutions that restore the "intact" nuclear family.

These neoliberal policy frames obscure the social and economic inequalities that structure lived experiences and prevent the questions and solutions that may intervene in them. They dovetail with processes of neoliberal familialization, by which "the costs of social reproduction are being shifted from the public to the private spheres, in this case, from the state to the family" (Cossman, 2002, p. 169). While the bulk of responsibility for privatized care is transferred onto (poor, single) mothers in the form of unpaid labor, neoliberal policy discourses that emphasize individual responsibility, autonomy, self-sufficiency, and independence obscure the structures of inequality that shape (single) mothers' labor and their families' poverty (Cossman, 2002; Lara, 2011).

Discourses of family unity naturalize the displacement of economic and social responsibility for immigration and its effects onto immigrant families. Since the Family Reunification Act of 1986, petitioning family members have become increasingly responsible for the financial welfare of immigrants, as exemplified by the requirement that a sponsor demonstrate enough income and assets to support the sponsored immigrant and all members of the household at 125% of the federal poverty guidelines. The sponsor may be sued if she fails to provide "sufficient support," and must repay any means-tested benefits received by the sponsored immigrant. Thus, prospective immigrants are compelled to make themselves legible within a set of heteronormative social relations organized by nuclear family structures and, in turn, required to take on the debt of global capitalism.

Rather than providing a safe haven from public harm, the family is an important site for the reorganization of labor and capital and the privatization of social welfare (Eng, 2010). The production of low-wage, often temporary immigrant labor converges with the immigration system's routine creation and sustenance of a population of "deportable" and thereby indefinitely exploitable undocumented migrant laborers (de Genova, 2007). While often rhetorically separated, "legal" and "illegal" subordinated labor, which are made possible through the reproduction of (non)citizenship and the spectacle of the border, are endemic to and constitutive of capitalist accumulation.

Border (In)security

De Genova (2007) observes that the production of the "enemy alien" serves the production of "heightened insecurity," which may be the Homeland Security State's "most politically valuable end" (p. 436). While border security measures seem to protect the nation from foreign threat, de Genova observes, such defense projects in fact generate ideological sites of "radical insecurity" (Kaplan, 2003, p. 90). Kaplan (2003) notes that homeland security blurs the inside and outside and reproduces itself through the repeated production of a nation that is insufficiently protected from – and cannot escape – internal and external threat.

The production of border insecurity does not hinge simply on the delineation of deserving and undeserving, but rather a set of flexible technologies by which the (greatest) "threat" or "enemy" is constantly recreated. As de Genova writes, undocumented migrants and "terrorists" have been differently imagined by U.S.

security regimes; while the former is characterized by deportability, the latter is defined in relation to detainability. With the "War on Terror," however, the "deportable alien" and the "enemy/terrorist" have converged. This merging was enacted, in part, through a strategy of targeted policing, which conceptualized "fugitive apprehension" as the precursor to the official "Endgame" of "remov[ing] all removable aliens" (USDHS-ICE, 2003, p. ii, quoted in de Genova, 2007). Although targeted enforcement – manifest in ICE raids and localized border militarization – cannot (and does not aspire to) achieve the putative goal of mass deportation, it does provide the rationale for an ever-growing Homeland Security apparatus (de Genova, 2007). Detention of those targeted for removal enhances the equation of detention with "illegality," which enables the immigration regime's even more targeted use of "preemptive" surveillance and detection for those produced as *potential* "terrorists." Now employed by the Department of Homeland Security, border patrol officers are charged with the detection, containment, and detainment of immigrant, criminal, and terrorist threat. Thus, the border operates as a site of convergence for crime and immigration regulation, and overlapping carceral regimes (Bohrman & Murakawa, 2005; Hannabach, 2013).

Razack (2010) conceptualizes the border as a "space of exception," where neither domestic nor foreign law check the authority of the sovereign state and non-citizens are constituted as "extraterritorial" – neither inside nor outside the nation-state and therefore unprotected by human rights principles. Spaces of exception are structured through race, as the production of undeserving racialized subjects

naturalizes the suspension of rights in the name of national security. Individuals may be detained indefinitely based on mere suspicion of membership in a "terrorist group," as the "special" nature of national security provides a cloak of immunity in treating those who "threaten" the nation-state.

Rhetorical appeal to colorblind logics of protection and "rule of law" – i.e., punishment of those who crossed the border without papers – naturalize violence and obscure the ways in which "citizen" and citizenship have been produced through colonization and racism (Garcia, 1995; Razack, 2010). When the racialized figure of the "illegal" migrant is created through the law and made into a spectacle at the "theater of the border" (Oliviero, 2011), the constitutive racialization of the law and "democracy" itself becomes invisible. Consequently, the "rule of law" and protection of national "sovereignty" become floating signifiers available to operate in service of immigration "reform" and "national security" (de Genova, 2004).

The relationship between Indigenous peoples and the United States can also be understood through Agamben's conceptualization of the state of exception, wherein biopolitical strategies cohere with and support sovereign violence in the (re)production of the nation-state. Rifkin (2009) argues that national sovereignty is not foundational to US law and policy, but rather the consequence of an exception "that rests on nothing more than the absoluteness with which it is articulated and enforced" (Rifkin 98). Reiteration of Indigenous peoples' exceptionality legitimates their governance by seemingly limitless federal authority.

National Sovereignty

Multiple notions of sovereignty shape relations of inclusion and exclusion, as the nation and its polity are defined against the peoples that it partially and fully excludes. Federal treatment of Indigenous peoples and immigrants is shaped by the principle of sovereignty, which enables the state to exclude Indigenous political claims and immigrants en route to establishing the boundaries of its territorial, legal, and political power. Neither immigration power nor national sovereignty are grounded in Constitutional law, and thus must be continually reasserted through axiomatic state authority.

Immigration power – and the power to exclude potential immigrants – emerges from state sovereignty and the doctrine of plenary power (Hawthorne, 2007). Hawthorne (2007) cites the Supreme Court's ruling in *Chae Chan Ping v. United States* (1889) that "'[t]he power to exclude aliens] is an incident of every independent nation…If it could not exclude aliens it would be to that extent subject to the control of another power…[A nation must be able to defend itself against] vast hordes of…people crowding in upon us.'" Immigration power is not a simple matter of exclusion and inclusion; the sovereign power to (re)fashion borders emerges alongside biopolitical power to manage groups of people. The production and management of threatening and deserving non-citizens naturalizes the logic by which internal and external "security" projects must be repeatedly redoubled, the nation becomes exceptional, and citizenship is rendered desirable and elusive.

Indigenous nations are also subject to the sovereign power and biopolitical management strategies of the nation-state, as they are simultaneously considered

inside and outside US jurisdiction. The Commerce Clause described "Indian tribes" as distinguishable from both "foreign nations" and "States" (Article 1, Section 8, Clause 3 of the US Constitution), evacuating Indigenous sovereignty of its defining rights to self-determination, land, and political and cultural autonomy – previously established within international law – in making way for colonial conquest (Barker, 2005; Byrd, 2011). Production of Indigenous peoples and land as exceptional – "peculiar" yet not fully external or "foreign," and thereby neither inside nor outside – enables the impression of a bounded territory and the authority of domestic law.

The characterization of Native polities as "peculiar" marks the tension between the autonomy that is presupposed in U.S.-tribal treaties, on the one hand, and repeated attempts to envelop these "quasi-sovereign" political collectivities within U.S. sovereignty, state governance, and national space, on the other (Rifkin, 2009). This tension manifests in U.S. Indian policy that is neither domestic law nor foreign policy. In legal cases as recent as *U.S. v. Lara* (2004), tribes have been described as possessing an "inherent sovereignty" – that is, political and legal sovereignty that pre-existed (and potentially exceeds) the nation-state. However, this sovereignty may be trumped by the nation's "ultimate" or "overriding" sovereignty at any time.

Biopolitical management of Indigenous groups is enacted through racialized symbolics of dependence, as represented by the status "domestic dependent nation." This ascribed dependency, which emerges from the geographic status of being spatially "within" the nation-state, seems to prefigure the tribe's status as "domestic" – thereby occluding how this status was forcibly created through exception. National

sovereignty is a technology through which to manage the contradiction of asserting "domestic" authority over peoples whose political presence preceded the settler-state. Each time it is called upon, sovereignty redefines itself through its own production; that is, "sovereignty" is simply a placeholder for political dominance of Native peoples and lands.

This suggests that the metaphysics of sovereignty does not reflect separate political authority but, instead, an attempt to continually manage the identities and political statuses of Native collectivities. Indigenous collectivities are viewed not as self-governing polities but as groups to be managed such that they do not disrupt the geographic and geopolitical imaginary of the nation-state. I connect contemporary discourses of paternalist "protection" of Native children and tribes to settler colonial frameworks that constitute Indigenous kinship forms as deviant and delegitimize Indigenous political forms. While the trust obligation mandates federal "protection" of Native tribes, it occludes the continued failure to recognize Native kinship and sovereignty as inextricable pillars of Indigenous political formation. The dismissal of these connections enables gestures of "protection" that actively undermine tribal self-determination and Native sovereignty.

Citizenship as "Promise": Equality, Deservingness, and Inclusion

Rather than assert Indigenous difference or departure from European governance, Rifkin (2009) argues, national sovereignty must be disrupted through challenges to the state's authority to create and manage Native identities. He suggests acknowledging the ways in which "inherent sovereignty" represents the deep

contradictions that underlie the state's imposition of sovereignty, a legal term whose detachment from the constitutional law and congressional power exposes the violence that undergirds Indian policy, claims to Native land, and the assimilation of Native peoples into settler-state governance. Rather than interpret the law's reading of Native "peculiarity" as a misapprehension of Indigenous difference, attention to the ways that the "peculiar" has been staged through the imposition of normative domesticity enables insight into how Indigenous political and legal forms have been made regulatable ("dependent") through their simultaneous internality and externality to the nation-state.

This strategy for contesting the "natural" terms of national sovereignty suggests the possibility of autonomous political forms that confront the normative forms, ideologies, and discursive technologies of citizenship. However, the narrative of progressive inclusion and neoliberal forms of governance – which increase privatization and shrink public institutions, limit welfare provision, and promote global capitalism – compel strategies for legal and historical redress of exclusion that rely on its very terms (e.g., privacy, choice, responsibility, and deservingness). The characterization of citizenship as an individualized outcome of hard work, responsibility, and choice rather than the patterned (mal)distribution of life chances makes sameness and deservingness the terms of recognition and inclusion. Economic inequality is obscured through cultural rhetoric that blames poverty on family forms and marital practices. While Indigenous and migrant collectivities are racialized through insertion into and perceived deviance from a privatized domestic

"responsibility," recent judicial decisions have granted homonormative queer subjects entry into imaginaries of universal liberal freedom through rights to privacy and intimacy.

Neoliberal terms of citizenship belie the ways in which "Indigenous placements" have shaped structures of intimacy, kinship, and identity within a settler colonial state (Byrd, 2011). Settler colonialism has created an inherent contradiction, by which rights, inclusion, democracy, and the legal system depend on and perpetuate the systematic dispossession of Indigenous peoples. Contemporary debates about Indigenous sovereignty and Native children's welfare are inflected by the separation of sovereignty and kinship, as the state defines tribal membership through nuclear family-based blood relationships rather than political affiliation. As Indigenous social relations are reduced to markers of cultural difference, rather than the basis of autonomous political collectivity, Native sovereignty is folded into settler state structures. Claims to territory and tribal self-determination are erased, as colonized peoples become racial minorities within the settler state. The narrow options for redress follow from the language of rights, which articulate liberal inclusion as the remedy to state violence.

Immigration legislation performs an analogous obfuscation of structural inequalities through an emphasis on the "legal" and appropriate comportment of individual (im)migrants while justifying the state's axiomatic authority to determine citizenship through principles of sovereignty and rule of law. Since the 1965 Act, which framed U.S. immigration law through principles of democracy, progress, and

"colorblind" preference for skills and merit rather than race, immigration legislation has been cast through notions of equality, fairness, and individual deservingness (Luibhéid, 1997; Sandoval, 2011). Although national interest was and is at the center of immigration policy, formal equality enables the U.S. to overlook the geopolitical causes and effects of migration and render particular types of migration and migrants themselves "illegal" and something to be contained through internal and border security (Ngai, 2004). Neoliberal immigration discourses call upon immigrants to be autonomous, self-sufficient, and responsible citizens while reinstantiating the family as the purveyor of welfare and the condition of citizenship (Luibhéid, 2008). Claims to citizenship are evaluated through the prism of "family values" – financial stability, and coupled, monogamous, private families (Agathangelou, Bassichis, & Spira, 2008; Brandzel, 2005; Chávez, 2010).

The terms of recognition for queer citizen-subjects are similar, as judicial decisions since *Lawrence v. Texas* (2003) have extended rights to couples who properly inhabit privatized domesticity. Through the translation of sexuality into the neoliberal language of culture and choice absorption of homonormative queer subjects into the national cultural imaginary becomes possible (Eng, 2010). In taking up the "choice" and "responsibility" of family, same-sex couples transcend their own cultural difference and are written into colorblind, universalized citizenship.
Eng (2010) uses the concept of queer liberalism to describe how freedom and progress for the nation, and inclusion for some lesbian and gay citizen-subjects, are possible through the denial of the co-constitution of race and sexuality. Queer

freedom, he contends, is the most recent form of universal rights that emerges from the "disappearance" of race. With the "shrinking" of the public sphere in tandem with formal equality through colorblindness, political debates about disparities based on race, gender, class, and sexuality are recoded as private and individual issues (Berlant, 1997). These now individualized and privatized inequalities are protected from examination by principles of liberty and privacy, and interpersonal discrimination is at once beyond the scope of public intervention and structuring of public domains. Rather than the evisceration of legacies of racial inequality, colorblind and multicultural discourses mark the reformulation of increasing social and economic disparities in the terms of individualism, personal merit, responsibility, and choice (Pascoe, 1996; Puar, 2007).

Building on Berlant's (1997) account of the contraction of the political sphere into the "intimate public sphere" during the 1980s, Eng (2010) describes transnational adoption (by queer couples) as one of the processes by which race disappears into the private sphere of family as it is translated into neoliberal multicultural rhetoric of choice and opportunity. The adoptive couple's own difference is eclipsed by the "choice" to rescue racially or physically "vulnerable" children from their communities before cultural harm can be inflicted. Through parenting, otherwise abject or risky queer subjects not only become fit for representation but also mark the nation's march of progress. With the revitalization of the nuclear family, the child's vulnerability translates into national futurity and the deracination and domestication of cultural difference enhances U.S. neoliberal multiculturalism (Eng, 2010;

Melamed, 2006). I use these insights to consider how the terms of recognition are relational; that is, how reification of the nuclear family ideal, privatized domesticity, and individual "responsibility" as the markers of deservingness perpetuate racialized, gendered, classed, and sexualized hierarchies through which the inclusion of some is made possible precisely through the exclusion of others.

The Current Study

This project uses a comparative approach to think across three cases: immigration legislation, adoption proceedings involving an "Indian child," and legal debates about same-sex marriage. This approach, which will be discussed further in the methods section, enables consideration of multiple facets of each case as well as insight into how the cases, when viewed together, open onto broader questions of how the family and the nation are represented in legal and policy debates. In anchoring the analysis to three discursive sites at which the terms of (non)citizenship are (re)produced, I aim to expose cross-cutting patterns of meaning-making that may otherwise be occluded. The cases were chosen for the depth of their connections to processes of national, community, and familial inclusion and exclusion.

Adoptive Couple v. Baby Girl

In 2009, Veronica was given up for adoption by her mother to Melanie and Matt Capobianco, a white couple living in South Carolina. Her father Dusten Brown, a member of the Cherokee Nation, contested the adoption on the grounds that he was not properly notified in accordance with the Indian Child Welfare Act (ICWA). He won in trial court and on appeals to the South Carolina Supreme Court and was

awarded custody in December 2011. In October 2012, the Capobiancos appealed the case to the U.S. Supreme Court. In *Adoptive Couple v. Baby Girl* (2013), the Court heard arguments about whether the ICWA definition of "parent" includes unwed fathers who have not established paternity under state law (Sosinski, 2014) and whether the ICWA's protections apply when adoption would not break up an "Indian family" or interfere with "continued custody" of an Indian child. The court decided that even assuming that Brown qualified as a "parent" under the ICWA, the procedures required to end parental rights did not apply because he did not have custody of Veronica when the adoption was filed – there was no "Indian family" or "continued custody" to protect. The case was sent back to the South Carolina court, which finalized the adoption in July 2013.

The ICWA was passed in 1978 "to promote the stability and security of Indian tribes and families" in response to overwhelming evidence of disproportionate displacement of Native children from their homes into non-Indian adoptive homes and foster care. The policy grants tribes exclusive jurisdiction over child custody proceedings for children who live on tribal land and concurrent, but presumptive, jurisdiction over proceedings for non-reservation "Indian children" – who are under 18 and members of an Indian tribe or eligible for membership and the biological child of a tribal member (25 U.S.C., 1903(4)).

The Act stipulates that relinquishment of parental rights and consent to voluntary adoption of an Indian child must be executed before a judge and consent may be withdrawn at any time prior to a final adoption order. In the case of

relinquishment of parental rights, the ICWA states that efforts should be made to preserve the child's connections with the tribe through placement with relatives or within the tribe. Despite these stated intentions, anti-ICWA adoption agencies and lawyers have abstracted "continued custody" and "Indian family" from the text of the legislation to negate application of the ICWA in a number of states since the 1980s (Metteer, 1997). While the "existing Indian family" exception was seemingly rejected in *Mississippi Band of Choctaw Indians v. Holyfield* (1989), the U.S. Supreme Court upheld its principles in denying the reunification of Veronica and Dusten Brown.

Border Security, Economic Opportunity, and Immigration Modernization Act (S. 744)

The Border Security, Economic Opportunity, and Immigration Modernization Act (S. 744) was passed by the Senate on June 27, 2013 with a 68-32 vote. The broad aims of the legislation, as enumerated in the congressional findings that open the bill, are "securing the sovereignty" of the U.S., "secur(ing) a "more prosperous future for America," and "secur(ing) our borders" (S. 744, p. 7-8). In service of these goals, the Act proposes increased emphasis on "advanced skills," merit-based visas that are responsive to economic conditions, visas for advanced STEM field graduates, and narrowed family immigration – including the elimination of family preference visas for adult siblings of U.S. citizens. Its nonimmigrant visa program reforms include temporary visas for "specialty occupation" and "low-skilled" laborers and a guest worker visa program for agricultural laborers. Given the attainment of border and interior enforcement goals, including fence construction, increased border patrol, and

mandatory E-Verify participation, a “path to citizenship” would be available to undocumented migrants able to meet financial and behavioral requirements over the span of thirteen years. These policy options reflect two central priorities of immigration reform: “strengthening” the nation through admission of “desirable” immigrants, and “protecting” the nation from foreign threats.

Hollingsworth v. Perry and United States v. Windsor

Hollingsworth v. Perry (2013) represents the culmination of over a decade of legislative and judicial processes around same-sex marriage in California. In the wake of the Defense of Marriage Act of 1996, many states passed “"mini-DOMA" laws that restricted marriage to opposite-sex unions (Polikoff, 2008). In 2004, the mayor of San Francisco, Gavin Newsom, started issuing marriage licenses in defiance of Proposition 22 – which defined marriage as “between a man and a woman” – and in May 2008 the California Supreme Court, in In re Marriage Cases, ruled that Proposition 22 was inconsistent with the state constitution. Proposition 8, which sought to add a “limited exception” to the state equal protection clause and redefine marriage as between a man and a woman, was passed by 52% of voters in 2008 and upheld by the California Supreme Court in 2009.

Two couples filed a lawsuit against Proposition 8 in U.S. District Court, Perry v. Schwarzenegger (2010). In August 2010, Judge Vaughn Walker declared Proposition 8 unconstitutional and the State of California refused to defend the initiative and the ruling was stayed pending appeal. In February 2012, the Ninth Circuit Court of Appeals (Perry v. Brown, 2012) affirmed the District Court decision.

Upon appeal to the U.S. Supreme Court (Hollingsworth v. Perry, 2013), the case was dismissed on the grounds that the sponsors of Prop 8 did not have legal standing to defend the law in either the Supreme Court or the Ninth Circuit Court of Appeals. The Ninth Circuit was directed to vacate its decision, leaving the District Court's 2010 ruling intact.

United States v. Windsor (2013) rendered Section 3 of DOMA – which defined marriage as between one man and one woman for federal purposes – unconstitutional under the due process clause of the Fifth Amendment. After the Department Of Justice declined to defend the constitutionality of DOMA in 2011, Paul Clement and the Bipartisan Legal Advisory Group (BLAG) intervened to oppose the respondent Edith Windsor. In 2012, a New York District Court and the U.S. Second Circuit Court of Appeals ruled that Windsor was owed a refund of the estate tax that she was required to pay following the death of her spouse. The U.S. Supreme Court affirmed this decision.

Purpose of the Current Study

This dissertation asks how exclusionary and inclusionary projects of citizenship converge at the boundaries of and internal to the nation, the tribe, and the family. More specifically, it focuses on how the forms, ideologies, and discursive technologies of normative citizenship are created and maintained by "opposing" sides of legislative and legal debates. Each chapter of the dissertation traces discourses of law, history, blood/biology, sovereignty, and protection as they collude with, occlude, or naturalize conditions of economic, political, and social inequality. The focus of the

analysis narrows as the dissertation proceeds, from the intersections of history, law, and blood/biology, to the role of blood/biology in producing relational figures of citizenship (the "criminal alien," the deserving migrant, and the single mother), to one such figure – the child.

Chapter three examines the processes by which discourses of law and history converge with blood/biology to contour the terms of inclusion and political redress of exclusion – from formal citizenship, tribal political authority, and marriage – across the three cases. I explore, in particular, how law and history are co-constitutive and often work to legitimize or instantiate the "biological" relations of kinship or belonging. I argue that legal authorization of biology and blood as the "essence" of the nation, the tribe, and the family supports mythologies of progressive inclusion and colorblind equality while obscuring the racialized and gendered exclusions and exploitations upon which citizenship is made possible.

In chapter four, I trace the processes by which biological citizenship projects produce a set of racialized, gendered, classed, and sexualized figures whose bifurcation (risky and at risk) is used to justify increased security measures in the immigration and asylum systems, continued federal authority over Indian tribes and Indian children through the aegis of protection, and protection of marriage and the nation from the threat posed by single mothers and their children. Starting from the figures of the "citizen" and the "terrorist," I argue that the movement of redemptive figures – such as those rendered deserving through patriotic action (migrants who crossed the border "illegally" but embody devotion to family and nation, single

mothers of color who relinquish their children for adoption, and queer soldiers) – toward "citizen," and the movement of contaminated figures – such as the "criminal alien" – toward "terrorist," bolster repeated investments in border (in)security and economic nationalism.

In chapter five, I use a comparative lens to consider how discourses of racialized vulnerability and the "best interests" of the child orient attention toward the assimilation of children and away from the circumstances by which they become systematically vulnerable. Specifically, I suggest that recent applications of the Indian Child Welfare Act and immigration legislation – in their focus on parental behaviors and the nuclear family – enable state discourses that render the child's vulnerability an outcome of parental "irresponsibility," "harm," or "abandonment" rather than an index of inequitable economic, social, and political conditions. State advocates of same-sex marriage, meanwhile, evidence queer couples' deservingness of inclusion in the nation through their purported willingness to provide two-parent families for "needy" children. Together, this rhetoric locates the responsibility for poverty and violence in individual choices rather than social structures, uplifts parents – including queer couples – and nations that "rescue" vulnerable children, and bolsters anti-ICWA and anti-sovereignty efforts.

Chapter 2
Methods

Materials

In order to examine the three discursive sites of adoption involving an "Indian child," immigration legislation, and same-sex marriage, I analyzed primary legal and

policy texts – specifically, Supreme Court case briefs or congressional floor statements – of *Adoptive Couple v. Baby Girl*, the Border Security, Economic Opportunity, and Immigration Modernization Act (Senate Bill 744), and *Hollingsworth v. Perry* and *United States v. Windsor*. All of these texts were published between January 1, 2013 and October 31, 2013. This time frame was selected in order to provide accounts of materials published both before and after the Supreme Court decisions and Senate vote on immigration reform, all of which took place in June 2013. The debates represent the most proximate discursive framing of each issue.

Relevant U.S. Supreme Court briefs for *Adoptive Couple v. Baby Girl, Hollingsworth v. Perry*, and *United States v. Windsor* were culled from *Lexis Nexis Academic.* A total of 38 briefs (12 in support of the petitioners and 26 in support of the respondents) and 57 briefs (25 in support of the petitioners and 32 in support of the respondents), for the respective cases, were coded. 43 items of debate leading up to and on S. 744 were found in the Congressional Record Daily Edition for the 113th Congress (Senate only) through *ProQuest Congressional*, and 39 items were retained for inclusion in the project. The Congressional Record is the official version of legislative debate in the House and Senate. It includes extended discussion of new legislation and short speeches from Senators and Representatives. Remarks can be edited, expanded, and buttressed by articles and reports prior to release (Polletta, 1998). As such, congressional floor debates directly and purposively frame legislation for various audiences, including the public (Stryker & Wald, 2009).

Procedure

A qualitative software program, Tams Analyzer, facilitated the interpretive work via computer-assisted coding and analysis. Deductive and inductive line-by-line coding was used to develop a codebook, and deductive line-by-line coding was used to apply the codebook. Guided by the research questions, I performed deductive and inductive coding to identify representations of the forms, ideologies, and discursive structures that uphold normative citizenship at and inside the boundaries of the nation, the tribe, and the family. In the second stage of analysis, I performed line-by-line open coding by repeatedly reading through the data to identify a list of lower-level concepts (e.g., responsibility/love/protection; patriotic couple) that were then grouped into higher-level categories (e.g., nuclear family/deserving of child; Corbin & Strauss, 2014). I then used axial coding to make connections between the concepts and categories and flesh out themes (see Appendix A for the codebook). The primary themes that emerged during the analysis centered on: 1) protection and vulnerability; 2) (un)deservingness and threat; 3) history and progress; 4) race, blood, and biology; and 5) tribal, state, and federal sovereignty. Comparison across cases revealed discursive patterns and formed the basis of my analysis.

Analytic Approach

Critical Discourse Analysis & Materialist Feminist Policy Analysis. In this dissertation, I merge critical discourse analysis and materialist feminist policy analysis to "read" policy and legal texts for insight into the "common sense" ideologies, relational constructions of "us" and "them," and policy practices that

naturalize racialized, gendered, classed, and sexualized inequalities (Hancock, 2003; 2004; Joseph, 2014; Naples, 2003; Shah, 2011). Critical discourse analysis looks at the "discursive event" in a sociocultural context, centering the social and ideological structures through which actions are produced (Fairclough, 1995; Yates, 2009). The relationship between discourse, power, and ideology is centered and the "struggle over meaning" (de Goede, 1996, p. 320) is read for the ideological underpinnings of social reality.

Wodak and Meyer (2008) and van Dijk (1993b; 2001) call for those using critical discourse analysis to deconstruct and intervene in sociopolitical discourse and resist inequitable social structures. As such, critical analysis of legal and policy discourses requires examination of representations that are both present and absent. Ideologies that are produced as "common sense" or universal truths garner consent to inequitable distributions of power (de Goede, 1996). Thus, dominant ideologies and meanings are naturalized while others are erased. Ideological shifts are co-produced with changes in social and political context and reproduced in media and public discourse (de Goede, 1996; van Dijk, 2001).

While critical discourse analysis "studies the way social power abuse, dominance, and inequality are enacted, reproduced, and resisted by text and talk in the social and political context" (van Dijk, 2001, p. 352), feminist frameworks for policy analysis devote particular attention to the ways in which the discursive frames of policy debates are gendered, racialized, and classed (Naples, 2003). Drawing on Foucault's (1972) account of discourses as not just signifiers of, but also constitutive

of, the objects that they represent, Naples (2003) describes how materialist feminist policy analysis engages with the norms and assumptions that shape policymaking. This framework does not separate discourse from social structures, but rather views discursive figures, symbols, and representations as co-created with material realities. Thus, feminist materialist discourse analysis is a method through which policy frames can be examined as sites of convergence for mechanisms of power and knowledge and the (inequitable) social structures that they authorize and represent (Foucault, 1978; Naples, 2003).

Queer Intersectional Epistemology & Comparative Methodology. I draw from queer and critical race approaches to the comparative analysis of legal and policy texts for the processes by which terms of valuation and devaluation are produced. Starting from the premise that such terms are relational and contingent, I use a comparative methodology to examine the racialized, gendered, classed, and sexualized assumptions and norms upon which they rely (Hong & Ferguson, 2011). Examination of the processes through which the "natural" and normative are created exposes the terms of citizenship, inclusion, and exclusion as unnatural or "queer." Through this reading, it may be possible to unravel the normative logics that naturalize of racial, classed, gendered, and sexual inequalities (Brandzel, 2006; Gilmore, 2007; Spade, 2013).

By questioning the normative and natural terms of citizenship, the contradictory character of universal citizenship may be exposed (Foucault, 1982; Mikdashi, 2013). Further, the norms of race, gender, and sexuality that structure the

(non)citizen's relationship to the nation, the tribe, and the family, and the regulatory function that these norms perform, may be interrogated. Rather than a natural, stable category, citizenship is an assemblage that comes into being as a result of the reiteration of racialized, gendered, sexualized, and classed forms of noncitizenship. The questioning of citizenship opens conceptual space for alternatives, as the practices of valuation and devaluation that affix difference to hierarchy may be disrupted.

The three debates form a set of representations that enables insight into the processes by which the norms, ideologies, and discursive structures of citizenship are produced. Intersecting norms of citizenship, as well as the ideological underpinnings of U.S. laws and social policies, can be viewed through the discursive mechanisms by which categories of citizen, non-citizen/terrorist, migrant, mother, child, and combinations thereof are constituted. When read across cases, convergent discursive structures of law, history, and blood/biology enable analysis of not only the construction of normative citizenship but also the production of symbolic figures that mediate processes of inclusion and exclusion.

My analytic lens focuses particularly on the mutual constitution of discursive and material realities; for example, how discursive separation of the "family"/privatized domesticity from the state and the economy occludes material inequalities – economic, social, and political hierarchies along axes of race, gender, class, and sexuality. I use an analytic of precarity to expose processes of exclusion, containment, and (racialized) labor exploitation as the conditions upon which the

"family" and the "nation" are made possible. Precarity describes a "politically induced condition in which certain populations suffer from failing social and economic networks of support and become differentially exposed to injury, violence, and death" (Butler, 2009, p. 25). As a category of analysis, precarity illuminates the political, affective, and ideological processes by which social and economic conditions structure inequalities and regulate violence (Puar, 2011). For example, I seek to understand how dual notions of protection – vows to protect vulnerable groups and figures such as the tribe, the single mother, and the child in tandem with the call to protect a vulnerable nation from threatening others – occlude the ongoing precarity of these groups. Using critical discourse analysis and feminist materialist analysis through a queer comparative lens, this dissertation is ultimately concerned with the imbrications of language and structures of inequality.

Chapter 3
History and Biology: Fixing the Subjects of Law

> In closing, I am reminded of something that binds all of us together. If we actually look above where you are sitting, there are some words in Latin. If we look up there, we will see the Latin phrase "e pluribus unum," which means "out of many, one." It is a phrase that adorns our Nation's seal. It suggests that while we all come from many different places, in the end we are one Nation. (159 Cong. Rec. S4434, 2013)

From the unequivocating assertion that "in the end we are one Nation" emerge questions about the historical accounting by which the "one" arises out of "many," and how the story of the "many" is told. If citizenship is "continually being produced

out of a political, rhetorical, and economic struggle over who will count as 'the people' and how social membership will be measured and valued" (Berlant, 1997, p. 20), it is worth considering law as a primary site of such contestation. Further, the law may be explored as a site for the production and naturalization of "American values" and knowledge about the past, present, and future of the nation. While these values – namely, equality, democracy, and progressive inclusion – are premised on the abstract (white, property-owning male) citizen-subject, the "promise" (Berlant, 1997) of inclusion in democratic national citizenship disciplines populations who "cannot not want" (Brown, 2000; Spivak, 2012) the attendant rights and privileges. Paradoxically, Berlant notes, incorporation into the progressive arc of justice is premised on an extant Americanness – that is, an identity unmarked by racial, classed, gendered, sexual, or national difference that would impede one's ability to move along the this arc.

This chapter explores the processes by which biopolitical technologies of law, history, and blood/biology converge to (re)fashion the boundaries of national citizenship and sovereignty. Law can be said to represent one node of a narrative investment in fantasies of national progress. One technology of law's investment, Brandzel (2006) argues, is history. She dubs history a "reluctant conspirator" with law in the production of normative citizenship, and she both interrogates and attempts to suspend the impulse to turn to history as a determinant of the present. Locating this impulse not just in defenses of the "traditional," such as heterosexual marriage, Brandzel (2006) identifies the ways in which history becomes anchored as an

authoritative knowledge base in support of ostensibly competing positions on white voting rights in Hawai'i and same-sex marriage debates in the United States. I consider how struggles over the application of the 14th Amendment Equal Protection Clause in *Adoptive Couple v. Baby Girl* and the same-sex marriage cases reinstantiate notions of freedom and equality that rely on the forgetting of their racialized conditions of possibility. Similarly, I contend, immigration law is framed as a progressive (and repeated) investment in democratic inclusion while continuously refiguring normative citizenship.

Another conspirator with law in the production of citizenship, I would argue, is biology. Rose and Novas (2002) describe biological citizenship as how citizenship is "articulated in biological terms" (p. 38). They discuss the biological logics through which forms and meanings of citizenship have been constructed, and how biological conceptions of families, communities, and populations have continuously reshaped local, national, and transnational relations. A related concept, genetic citizenship (Heath, Rapp, & Taussig, 2007; Tallbear, 2003), enables insight into how presuppositions of genetic relations between individuals and within racial groups have informed the racialization processes that underlie eugenics projects and recognition of Indigenous groups. Following this work, I examine how biological and genetic concepts contribute to the production of "American DNA" as a cultural essence, and threat as a contagious substance, in immigration discourses. Analysis of *Adoptive Couple v. Baby Girl* debates through the lens of biological and genetic citizenship enables insight into how blood quantum is at once fixed as the

determining relation of Indian tribes and refuted in its purported violation of the 14th Amendment's Equal Protection Clause. Definition of tribal belonging through race is enabled by the separation of biology from culture, which supports the assimilation of Indigenous peoples into settler modes of governance. Biology and its negation also performs important rhetorical work in *Hollingsworth v. Perry*, as the necessity of biological relations between parents and children is contested and the (im)mutability of sexual orientation shapes the application of the Equal Protection Clause.

I argue that repeated legal and legislative instantiations of biology and blood, in both physical and metaphorical forms, as foundational to citizenship buttress visions of futurity and progress – through notions of colorblind equality and democratic inclusion – that are continuous with an ideologically pure national history. Notions of a genetically essential Americanness, blood as at once determinant of indigeneity and at odds with national citizenship, and biology as the structuring relation of the nuclear family naturalize the continued investment in national identity and the erasure of its racialized conditions of possibility – i.e., the consolidation of the "essence" of the family and the nation through the exploitation of race and its subsequent dissociation with imperial histories.

Part I. The Border Security, Economic Opportunity, and Immigration Modernization Act

Immigration law is one site at which the nation's history and futurity are continually vested with meaning. In order to figuratively move forward as a nation, the past must be agreed upon. An ideologically coherent, univocal and "pure" history – permeated by values that bear the "truth" of American founding and existence –

becomes the foundation for an imagined future continuous with an imagined past (Berlant, 1997). The persistence of this narrative in the present relies upon an all-consuming identification with the national fantasy – both past and future. The ideological work of producing past, present, and future as continuous is visible in debates about the Border Security, Economic Opportunity, and Immigration Modernization Act (S. 744), which is framed as both a "modern" revision of American principles of democratic inclusion and a break with naïve recent immigration legislation.

In support of a white, "pure" national fantasy to which return is possible given the appropriate legal measures, contemporary immigration discourses make "pop" historical references to past (European) migration defined by hard work and the pursuit of freedom (Oliviero, 2011). Immigration is narrated as the substance of American ideals of autonomy and self-determination: "America began as an idea in the hearts and minds of a persecuted minority that longed for freedom and the opportunity to decide for themselves what their destiny would be. That idea was brought here by immigrants who crossed the oceans and devoted themselves to the formation of a free society unlike any the world had ever known" (159 Cong. Rec. S5229, 2013). This origin story reduces the history of immigration and the nation-state itself to a matter of determination and personal character rather than colonization, genocide, slavery, and exclusion.

A future continuous with this "pure" past – "This isn't just about our history, it is about our future" (159 Cong. Rec. S460, 2013) – is produced through tenets of

the American Dream, which casts love for the nation and hard work as the foundations of futurity. Past immigrants are held up as exemplars of the values that may sustain future lawful immigration. Senator Thune describes how his grandfather came to the United States "in search of the American dream, in search of a better life for [his] children and grandchildren" – he worked on the railroad, saved money to purchase a hardware store, and "raised three sons in the middle of the Great Depression" (159 Cong. Rec. S5254, 2013). Thune's father became a collegiate basketball player, "defended his country in combat" during World War II, and then returned to a small town in South Dakota to "rais[e] his family." Thune concludes, "This country was built by immigrants like my grandfather, and our future both economically and as a continued example of freedom throughout the world will be maintained by future generations of immigrants who come here with the respect for the rule of law and hopes of starting a better life" (159 Cong. Rec. S5254, 2013).

Representation of the United States as a "nation of immigrants" enables production of the immigrant through colorblind rhetoric as "someone who desires America" (Berlant, 1997, p. 195). Sentimental ideals of freedom and democracy, bolstered by positioning of the United States' founders as its original immigrants, obscure settler colonial conquest of the "homeland" and histories of dispossession and labor exploitation. Through outstretched arms propped up by its own desirability, the nation homogenizes immigrant groups and erases the violence that precipitates and accompanies migration.

While the continued existence and desirability of opportunity and freedom are (re)established, identification of structural constraints permits the United States to maintain its mythological generosity. Assertions that "a lot has changed since my grandfather came to the United States" (159 Cong. Rec. S5254, 2013) – enable the question to pivot not on how US policy structures opportunity but on how generous the nation can afford to be in light of its unparalleled "promise that success should not be an accident of birth but, rather, a just reward for hard work and determination" (159 Cong. Rec. S4028, 2013). Thus, enforcement and the "rule of law" become the conditions of possibility for meritocracy and exceptionalism.

While language difference operates as a biological marker of racialized immigrant threat, as I will discuss further in the next chapter, it also signals the fortitude of former (white) immigrants: "The courage of Senator Leahy's family, the courage of my grandparents, to pick up and move and come to a place where many of them did not even speak the same language *is part of our American DNA*. That is what makes us different, and that is what makes us better..." (159 Cong. Rec. S5112, 2013; emphasis added). Senator McConnell tells the story of how his wife "came here at age 8 in the cargo hull of a ship because her parents did not have the money for a plane ticket" and "did not speak a word of English" upon entering third grade, yet "would be sworn in as a member of the President's Cabinet" a "few short decades" later (159 Cong. Rec. S5316, 2013). Whereas lack of English skills constitutes the contemporary (im)migrant as threat, it symbolizes the commendable pursuit of the American dream among past immigrants. The "pop history" wherein white former

immigrants pulled themselves out of poverty through work and family produces calls for contemporary immigrants to become self-sufficient and responsible (Oliviero, 2011). Motives that align with pursuit of the American dream draw connections between then and now, us and them: "They are coming for opportunity. They are coming for freedom. They are coming for a better life for their children, the same reason our ancestors came here" (159 Cong. Rec. S4733, 2013).

Juxtaposed stories of Roxanna, "an immigration success story" who was born in the United States – with appreciation for "the freedoms and opportunities available to her" – after her parents emigrated from Cuba in the 1950s, and her husband, who "left Mexico [15 years ago] for the same reasons Roxanna's parents left Cuba-to try, to try really hard to build a better life," make visible the pull of these ideals (Cong. Rec. S4623, 2013). After moving to Nevada and beginning construction work – "work[ing] tremendously long hours when he got here, doing odd jobs for not very much-a few dollars a day" – he met and married Roxanna but never received a change in immigration status. Ten years later, he may be separated from "his American wife."

Recounting Roxanna's letter to him, Senator Reid offers that the couple "pay[s] taxes" and "have never caused any harm to anyone or been in trouble with the law. We don't stand on corners asking for money. We work very hard to make ends meet…We have friends and family here that we love and [who] love us" (Cong. Rec. S4623, 2013). The implication is that there are others who do not work hard but rather entreat others for assistance and are thereby undeserving of "a chance [at] a

pathway to citizenship and the peace of mind to live our lives as meaningful citizens of this great country. Her country, my country, our country" (Cong. Rec. S4623, 2013).

While the right type of immigration "brings to our shores amazing people, new generations of leaders who found companies and work hard so their children and their children's children will do better" (159 Cong. Rec. S5951, 2013), the future return to American ideals becomes possible only by "learning from our mistakes" (159 Cong. Rec. S460, 2013) of the recent past. The last "big" immigration bill, the Immigration Reform and Control Act of 1986, is held up as a cautionary tale, at once enumerating the scope of Americans' generosity and its potentially disastrous consequences – i.e., "amnesty" without enforcement. In order to "preserve the value of American citizenship," the "path we take today" – which "will shape our country for years to come" – must reflect these recent lessons (159 Cong. Rec. S460, 2013).

The "Essence" of Citizenship

Technologies of blood, biology, and race underwrite productions of responsible citizenship and national history and futurity. While immigration law no longer contains explicit language of racial purity or "blood" connections, contemporary immigration discourses deploy "DNA" and "heritage" to describe not only lineage (as a "nation of immigrants"), but also a foundational American "essence" – "who we are as a people" (Cong. Rec. S4080, 2013). American national identity is symbolically genetic – "In the DNA of most of us who live in America is some little chromosome that said there is a courage to move and a courage to come,

and I think it makes us better" (159 Cong. Rec. S5951, 2013) – and defined by qualities of industry, determination, and desire for America. In Senator Durbin's words, these qualities become constitutive of the person and nation: "I think there is something in the DNA of those people who get up and come here who are determined to improve their lives. These people turn out to be the entrepreneurs and the teachers and the leaders of our Nation because they were not content staying in someplace where they did not achieve their goals. They wanted to come to America" (Cong. Rec. S309, 2013). Desire and hard work comprise the template for this "American" genetic material, and thereby define those deserving of inclusion in the nation.

With the codification of commitment to family and nation as "American DNA," a new racial logic emerges. Whereas other countries were organized by a "common ethnicity or common race," Senator Rubio asserts, the United States "was actually founded on the notion...that [it is] the God-given right of every single human being to go as far as their talent and work will take them" (Cong. Rec. S4080, 2013). Rubio continues, explaining that this "notion" of meritocracy moves through these high-achieving migrants and becomes the substance of American national identity – i.e., American exceptionalism. He narrates the history of the United States through that of immigration, declaring that "a collection of go-getters from all over the world who have come here and built this extraordinary country" that has had an "unbelievable" influence on "human history" and "modern day" (Cong. Rec. S4080, 2013).

Immigration, as a meritocratic "secret sauce" that courses through the veins of Americans, is put forth as the antidote to a "shrivel[ing]" society (159 Cong. Rec. S4733, 2013). Senator King observes that the United States is exceptional in its blueprint, as "except for the African Americans who were brought here against their will and the Native Americans who were here when the Europeans arrived, everybody else here came by virtue of immigration." He proffers immigration as the counter to the "negative demographic timebomb" – i.e., "more deaths than births of White Americans" – as it will "add to our population…[and] to the ideas and creativity" (159 Cong. Rec. S4734, 2013). This suggestion represents a hybrid economic-white supremacist argument, whereby immigration recuperates the value of racial purity. It appears that African Americans and Native Americans are excluded from American exceptionalism, while "White Americans" are both unmarked and a disappearing breed.

Meanwhile, appeals to fairness and colorblindness obscure the historical and contemporary role of U.S. empire in shaping immigration patterns. Senator Grassley cites President Reagan in asserting that "illegal" immigration to the United States originates in all countries, and therefore is not "a problem between the United States and its neighbors" (159 Cong. Rec. S460, 2013). The United States, therefore, is simply the happenstance inheritor of the immigration "problem," and endeavors "only to establish a reasonable, fair, orderly, and secure system of immigration into this country and not to discriminate in any way against particular nations or people" (159

Cong. Rec. 460, 2013). As Senator Grassley insists, the response takes shape around neutral principles of sovereignty and rule of law.

Through principled and fair legislative and administrative action in the present, the national future will become continuous with and enable a return to an ideologically coherent past. "Future generations of Americans will be thankful for our efforts to humanely regain control of our borders and thereby preserve the value of one of the most sacred possessions of our people: American citizenship" (159 Cong. Rec. S460, 2013). Common blood and DNA unites the body politic, and is that which must be protected from external and internal threat. However, blood relations may also come to represent that which threatens a singular national identity, as in the definition and attempted eradication of Indigenous social and political entities.

Part II. Adoptive Couple v. Baby Girl

The Supreme Court has variously described tribal sovereignty as "of a unique and limited character" (*United States v. Wheeler*, 1978), "quasi-sovereign" (*Santa Clara Pueblo v. Martinez*, 1978), and "*sui generis*" (*Morton v. Mancari*, 1974). Although tribal legal systems have been recognized as "in many ways foreign to the constitutional institutions of the Federal and State Governments" (*Santa Clara Pueblo v. Martinez*, 1978), Congress can abridge or dissolve tribal authority over their members and land at any time (Metteer, 1997; Rifkin, 2009). Paradoxically, it is the "unique" status of quasi-sovereignty – which recognizes particular "attributes" of sovereignty and indexes the tribal "nation" as a "distinct community" – that renders Indigenous collectivities subject to plenary federal legal authority (Byrd, 2011).

Characterized as "domestic dependent nations," tribes are neither inside nor outside the nation-state and "may place itself under the protection" of a "more powerful" nation "for its safety" (*Worcester v. Georgia*, 31 U.S. at 561, cited by Metteer, 1997). The U.S. federal government, in turn, assumes a paternalist protective relationship to the tribes, which has been codified as a "trust obligation." Although the "trust obligation" ostensibly emerged from recognition that the state courts took an "overly paternalistic" stance toward state-tribal relations, the resultant arrangement reinforces federal oversight of Indigenous peoples' "chance to develop the initiative destroyed by a generation of oppression and paternalism" (*Mescalero Apache Tribe v. Jones*, 411 U.S. at 145, 152 (1973) (quoting H.R. REP. No. 1804, at 6 (1934)), cited by Metteer, 1997) and "greater participation in their own self-government" (*Morton v. Mancari*, 417 U.S. at 541, cited by Metteer, 1997).

Insofar as self-government consists of the right to create and sustain Indigenous culture(s), the Indian Child Welfare Act (ICWA) was enacted "to protect [Indian tribes'] resources and future" (124 Cong. Rec. 38, 102, 1978) by implementing "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs" (25 U.S.C. § 1902). Indeed, numerous tribes recognize the Act's instrumentality in retaining "their most 'vital' resource" (Arizona et al. Brief). However, the state's definition of culture

as distinct from race has enabled persistent challenges to tribal self-determination and Indigenous sovereignty.

Contestations of the Indian Child Welfare Act deploy colorblind rhetoric in urging the nation to move beyond race. It is suggested that classification based on "race" violates the 14th Amendment's Equal Protection Clause and holds "Indians" back from full citizenship. Race is something to be overcome through assimilation into the (white) national imaginary. Such notions of race as an obstacle to inclusion exemplify the tenets of neoliberal multiculturalism and rewrite U.S. history as one of progressive inclusion, obscuring the ways in which biological definitions of racial identity have been used to structure both the lure and the denial of sovereignty to Native peoples. This paradox is quite visible in Indigenous adoption cases, as adoption advocates simultaneously uphold and deny race and biology as markers of identity and belonging.

In *Adoptive Couple v. Baby Girl*, petitioners define Veronica's tribal membership as "3/256 blood quantum," even though the Cherokee Nation has no blood quantum requirement for membership. Given the lack of "cultural ties" to the Cherokee Nation, they assert, the application of ICWA would constitute "differential treatment predicated solely on 'ancestral' classification," which violates Equal Protection principles (Petitioners Brief). However, it is the very definition of her "Indianness" through blood/race rather than belonging that enables invocation of the 14th Amendment and denial of tribal sovereignty.

Definition of her "Indianness" through blood rather than belonging enables a dichotomy between "biology/blood" and "culture." Insofar as "culture" represents Indigenous communities' interrelationships and identities, the dichotomy of biology and culture stands in for another binary – race and sovereignty. The separation of race and sovereignty was enumerated by the Supreme Court in *Morton v. Mancari* (1974), which determined that hiring preference given to "Indians" within the Bureau of Indian Affairs did not violate the Due Process clause of the 5th amendment because it advanced "Indian self-government." As I will explore in more detail in a chapter five, the petitioners use this case and a nuclear family model to argue that recognition of the relationship between Veronica and Dusten Brown – whose connection to each other and the tribe is based solely on biology – would not further "Indian self-government." This argument relies upon an artificial distinction between biology and race, on the one hand, and culture and sovereignty, on the other.

As Brandzel (2006) demonstrates, a "false dilemma" between definition as a "political entity" or a "racial group" erases entwined histories of racism and colonization and obscures the relationship between racial discrimination and political marginalization in many Native sovereignty cases. Once established, these dichotomous terms – blood and culture, race and sovereignty, racism and colonialism – structure legal engagement with the ICWA. The respondents and their amici contest the charge of racial preference by asserting that tribal membership – "political status with a federally recognized Indian tribe" (ACLU Brief) – rather than race or ancestry constitutes the trigger for statutory protection by Congress. The ACLU brief cites

Morton v. Mancari (1974) in arguing that legislation benefitting "quasi-sovereign" Indian tribes and their members is "'rooted in the unique status of Indians as 'a separate people' with their own political institutions'" (*United States v. Antelope*, 430 U.S. at 646, cited by Members of Congress Brief) and therefore subject to rational basis review rather than strict scrutiny.

Citing the definitional sections of the ICWA, the respondents and their amici assert that ICWA applies to an "Indian child" "'not because they are of the Indian race but [, rather,] because they are [voluntarily] enrolled members of a federally recognized tribe'" (*United States v. Antelope*, 430 U.S. at 646, cited by Members of Congress Brief). Status as an "Indian child" – who is enrolled in a federally recognized tribe or eligible for enrollment and has a biological parent who is enrolled – triggers application of ICWA, regardless of the child's family composition or parental engagement. Reduction of tribal membership to race both explicitly undercuts "a tribe's right to determine its own membership, a key element of tribal sovereignty and tribal self-determination" (Native American Bar Association Brief) and reifies colonial ideologies of blood, biology, and race as markers of difference.

While such an invocation of the 14th amendment reflects the presumption that race and culture are separable, in fact cultural belonging has been defined through race for hundreds of years by the United States government. Simultaneous definition through and negation of blood quantum belies the ways in which Indian "culture" has been produced through measurement technologies of race and blood. As Barker (2011) notes, administration of land and citizenship during the allotment period

proceeded from blood quantum, as percentage of Indian blood and English fluency coalesced with other factors in a determination of "competency" and thus fitness for a particular type of land title. Through the registration of tribal members for the census rolls, which became the basis of eligibility for federal and tribal programs, blood "served as the mechanism for the racialization of a culturally authentic, rights-invested 'Indian member' whom both federal and tribal governments would claim jurisdictional power over" (Barker, 2011, p. 90).

With the Indian Reorganization Act's (1934) requirement that an Indian tribal member prove 50% blood quantum, and contemporary tribal membership rules that derive from the census rolls, technologies of blood, biology, and genetics – currently seen in the growing use of DNA testing – continue to define Indigenous cultural authenticity (Barker, 2011; TallBear, 2003). As these technologies have undergirded tribal membership and national citizenship, they have concomitantly underwritten Native dispossession and assimilation via concepts of cultural difference. Byrd (2011) writes that Indian policy has determined the contours of political legitimacy and incorporated Native peoples into recognized political forms through a cultural differences model. Through alternate assimilation and abjection of difference, the settler-state reiterates its own "ultimate" jurisdiction over Native peoples, who are of a unique culture but ultimately subject to the mandates of citizenship in the nation-state, the existence and boundaries of which are self-evident (Rifkin, 2010). While settler recognition of "inherent sovereignty" gestures toward Indigenous social and political structures that preceded the settler state, it also inscribes Native peoples and

polities within a system of settler law that requires them to assume state-created identities – as racial "Indians" through blood relations, as U.S. citizens through heteronormative structures of "family," and as polities disaggregated from networks of social interdependence (Byrd, 2011; Rifkin, 2010).

Race, Culture, and Equal Rights Frameworks

Continued definition of "Indianness" through blood logics denies the ways in which Indigenous peoples' racialization and cultural difference have been co-constituted. Moreover, reduction of tribal belonging, or indigeneity, to "race" has resulted in the flattening of histories of colonization and racism (Byrd, 2011; Povinelli, 2002). The ensuing "false [legal] dilemma" between definition as a political or racial group not only erases the entwined histories of racial discrimination and political marginalization experienced by Indigenous peoples, but also transposes "the remediation of colonization of American Indians" into liberal multiculturalist frames that propose "further inclusion into the nation-state," as if responding to processes of racialization through notions of equal rights (Byrd, 2011, p. xxiii). As they are debated in US courts, sovereignty struggles and the ICWA more specifically, conform to the shape of equal rights frameworks.

At the time of its passage and since, the ICWA has been narrated as "a long-gestating effort to put a stop to several very old practices that had come to be understood as mistakes" (Professors of Indian Law Brief). Representatives of Congress locate the removal of "Indian children" from their families and communities and into boarding schools and adoptive homes in the "assimilation or

termination phases of American policy" (Members of Congress Brief). The effects spilled over into the 1970s, the brief recounts, when "an astonishing number of Indian children were being placed for adoption in non-Indian families." By anchoring the violence against Indigenous children and communities in past practices that can be ameliorated in the present through the imposition of "minimum Federal standards for the removal of Indian children" (25 U.S.C. § 1902), the ICWA renders widespread child removal an historical "mistake" that can be rectified by the law. In tandem with the abstraction and negation of race in the name of equal protection, this maneuver denies racist histories while ensuring colorblind futures.

As this discussion has made apparent, supporters of the adoptive couple use blood and "race" to undercut Veronica's ties to the Cherokee Nation through appeal to the 14th Amendment, while simultaneously denying the biological connection between Veronica and her father. In the same-sex marriage debates, biology is contested as both the organizing principle of the family and the hallmark of "immutable" difference warranting equal protection of the laws.

Part III. Hollingsworth v. Perry and United States v. Windsor

The prospective inclusion of same-sex couples in marriage and its attendant rights and recognition is filtered through the prism of biology. Investments in biology are visible on both sides of the debate, as petitioners seek to protect "biological" marriage – i.e., marriage between heterosexual partners who may reproduce genetically related children "naturally" – and respondents maintain that biological difference – or an "immutable trait" – defines classifications based on sexual

orientation as suspect and therefore deserving of strict scrutiny. In order to warrant strict scrutiny, Prop 8 must infringe upon a fundamental right under the Due Process Clause or effect differential treatment along the lines of a suspect classification. The United States Supreme Court has established four criteria that must be satisfied for recognition as a suspect classification: 1) a history of discrimination; 2) a trait that "bears no relation to ability to perform or contribute to society"; 3) an immutable trait, and; 4) political powerlessness. Racial status, national ancestry and ethnic origin, and alienage have been recognized as suspect classifications, and while the District Court in *Perry v. Schwarzenegger* (2010) found legislative classifications on the basis of sexual orientation to be suspect, the Ninth Circuit – in line with previous decisions, including *Lawrence v. Texas* (2003) and *Romer v. Evans* (1996) – elected not to do so. If sexual orientation is not considered a suspect classification, a rational relationship between the disparity of treatment and a legitimate government purpose – i.e., a rational basis for the classification – renders the action immune from an equal protection challenge.

The constitution of legal principles through technologies of biology and history underwrites the equal protection struggle, as petitioners assert that "biological" marriage is a fundament right ordained through its rooting in "history." Their argument outlines two reasons to deny the application of strict scrutiny to legislative classification that restricts marriage to heterosexual couples: a) sexual orientation is not a suspect classification because it not immutable (biology) and its characteristics have bearing on the ability of the group's members to contribute to

society; and, b) same-sex marriage is not a fundamental right under the Due Process Clause. Petitioners argue that sexual orientation is not a suspect classification because it does not satisfy the third criterion of immutability – that is, unlike race, gender, and national origin, is not "irrevocably fixed at birth" (Family Research Council Brief). Using psychological research, including Lisa Diamond's work on sexual fluidity, they vest the assertion that sexual identities constitute a "choice, not an intrinsic part of [their] nature" (Benkof, Lopez, & Mainwaring Brief) with the authority of both science and biology. In contradistinction to "biological traits such as race," sexual orientation has not been treated as "immutable" under the 14th Amendment.

Biology and reproduction underwrite the naturalization of "procreative" or "child-centered" marriage, which is "deeply rooted in the history of the Nation" (Liberty Council Brief). This form of marriage is set against the "adult-centered" version – based on love, happiness, commitment, and economic protection – ostensibly represented by same-sex marriage. Petitioners contend that Prop 8 would converge with the *Loving v. Virginia* (1967) findings – that Virginia's anti-miscegenation law constituted "invidious racial discrimination" and that the "fundamental freedom" to marry is protected by Due Process – in preserving the right to marry as tied to "the unique procreative capacity of opposite-sex unions" (Center for Constitutional Jurisprudence Brief). Same-sex couples and opposite-sex couples are differently situated with respect to the "fundamental purpose" of marriage – "channeling of the unique procreative abilities of opposite-sex relationships into a societally beneficial institution." The "additional purposes" of marriage – love,

commitment, and personal fulfillment – are insufficient to "explain why marriage is 'fundamental to our very existence and survival'" (*Loving v. Virginia*, 388 U.S. at 12) and "has existed in every known society throughout history" (Reply Brief of Petitioners). Because they are not similarly situated to the included group(s), same-sex couples' entitlement to the fundamental right to marriage is not protected.

In other words, the "fundamental right to marry" is not contravened but rather defined by its restriction to opposite-sex couples. Citing Amendment 2, a state constitutional amendment in Colorado that would have prevented the recognition of homosexuals as a protected class and that the court found to be unconstitutional in *Romer v. Evans* (1996), the petitioners maintain that Proposition 8 does not "target a solitary group of people for special disability" but, rather, simply enforces the definition of marriage as "limited to the union of one man and one woman" (Liberty Council Brief). Prop 8 does not infringe upon a fundamental right because "there is no fundamental right to same-sex marriage…as it is not deeply rooted in the history of the Nation" (Liberty Council Brief). This circular argument makes visible history's "conspiracy" (Brandzel, 2006) with the law, as the law is said to protect that which exists "in history." Importantly, this argument occludes the ways in which history itself has generated repeated exclusions, providing narrow accounts of the past and reproducing the future in its image.

Defenses of "traditional" marriage are anchored not only in history but also in biology, as "man-woman marriage" furthers children's interest in being raised by their biological parents; parents' and society's interest in defining parenthood through

biology; and the "natural family" as the reflection of gender complementarity, the source of "husband" and "wife" identities, and the origin of rights and status in relation to the state. Foundational to this set of purported social contributions is the biological parent-child bond, which serves as the basis for a child's connection to the extended family and society (African American Pastors Brief). Amici cite the United Nations Convention on the Rights of the Child (art. 7(1)) in asserting that a child has the right to "know and be cared for by" her/his biological mother and father (Catholics for the Common Good Brief).

The biologically mandated nuclear family becomes the center of heteronormative modes of social and political organization, and its "naturalness" occludes the racialized processes by which it has been imposed. The petitioners' supporters take these relations as self-evident, observing that "children replenish communities, and communities benefit when children are reared by their biological parents because parents best assist children to grow to become well-functioning citizens" (Helen Alvare Brief). In simple terms, "the parent-child relationship is ideal when a child is the offspring of both parents, with a role model of each sex in the family." As indicated here, the one man-one woman arrangement is "natural" not only in its "unique...ability to produce children" but also in its gender complementarity, by which "biological parents…image the identity of each sex to the children" (Indiana et al. Brief; African American Pastors Brief). Because human nature is "imperfect," however, marriage law is necessary to reinforce the "natural"

connections between "safe sex, responsible procreation, and optimal child rearing" (African American Pastors Brief).

Biology underwrites legal principles, and the law lends legitimacy to biology. Petitioners note that the Supreme Court has privileged natural parents' interests in their children and the bond between biological parents and children. Extension of marriage to same-sex couples would undermine the role of marriage as an indicator of the "biological relationship between parent and child," which the Court upheld in *Nguyen v. I.N.S.* (2001) in upholding naturalization rules that "presume a child's biological relationship to married parents but not to unmarried parents" (Indiana et al. Brief). It is this preference for biological parents, the Indiana et al. Brief argues, that justifies protection of the heterosexual couple – "the only union that can naturally produce children" – and the child's "bonding interest" (Coalition for the Protection of Marriage Brief) through marriage. While marriage as an "important indicator of the biological connection between parent and child" is not weakened by the provision of parental rights to adoptive and other non-biological parents, it is threatened by the extension of marriage to same-sex couples, as at least one parent would not have a genetic connection to the child(ren) (Indiana et al. Brief).

As sexual orientation is not a suspect classification and same-sex marriage is not a fundamental right, rational basis review is warranted and a legitimate rather than compelling state interest is sufficient. Rational basis review would reveal that same-sex couples do not further the state's interest in child welfare, protection, and well-being. "'When, as in this case, the inclusion of one group promotes a legitimate

governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and nonbeneficiaries is invidiously discriminatory'" (*Johnson v. Robinson*, 1974, cited by Judicial Watch, Inc. Brief). Thus, while the law that barred interracial marriage was "racist and irrelevant-to-marriage" (African American Pastors Brief), the failure to recognize "all adult relationships" does not violate the Equal Protection Clause.

The Terms of Progressive Inclusion

Respondents argue that classification based on sexual orientation should be considered "suspect" and warranting strict scrutiny, as homosexuals as a group have experienced a history of discrimination, are "politically powerless," are definable based on "obvious, immutable, or distinguishing characteristics," and the characteristics of sexual orientation have no relationship to the government's policy aims or the ability of the group to contribute to society. Respondents' amici rely on biology and history to narrate equal protection claims, calling for strict scrutiny based on assertions that: a) sexual orientation should be considered a suspect classification, as it is immutable and same-sex couples are similarly situated with respect to marriage and contributions to society; and, b) marriage is a fundamental right.

Gesturing to a "broad medical and scientific consensus," respondents' amici declare that "gay and lesbian individuals share a common 'immutable' characteristic" (Constitutional Law Scholars Brief) because it is fundamental to identity, not a result of "voluntary choice" (APA Brief), and not changeable. Moreover, this characteristic has no bearing on the group's ability to contribute to society; citing *Perry v.*

Schwarzenegger (2010), respondents contend that "'same-sex couples are identical to opposite-sex couples in the characteristics relevant to the ability to form successful marital unions'" – that is, same-sex couples establish "happy, satisfying relationships" and "deep emotional bonds and strong commitments to their partners'" (Finding #48, Pet. App. 235a). Thus, same-sex couples may similarly fulfill the "primary purpose" of marriage – the creation of "stable households" (Pet. App. 221a-223a) cemented by long-term commitment and "economic partnership" (Pet. App. 220a-221a).

Thus, while biology establishes "natural" and immutable difference, commitment to family – legible through displays of domesticity – establishes sameness as the criterion of citizenship. The Family Equality Council relates children's descriptions of these similarities: "My parents – my two moms – go to work every day, like other parents. They cook dinner and mow the yard. They take care of the house. Volunteer in the community. Pay their bills. Do the thousands of little things that keep a household running. And they love me, unconditionally." The brief describes the children's families as "typical American families. Their moms and dads are raising their children to love their country, stand up for their friends, treat others the way they would like to be treated, and tell the truth. They care about the same things all parents do - hugs and homework, bedtime and bath time. They want bright, secure, and hopeful futures for their children." The domestic routines are front and center, as [name] invites us to see: "The truth is my family really is not that different than everyone else's. We watch movies together, play board games, my dad

cooks for me, and my other dad drops us off at school" (Family Equality Council Brief).

Based on the sameness of same-sex couples and opposite-sex couples with respect to "the characteristics relevant to the ability to form successful marital unions," and "history" as an assertion of legitimacy and progress, respondents urge the court to protect "marriage as a fundamental, personal right" (*Perry v. Schwarzenegger*) against overreach by the legislature or voters. They maintain that the right to marriage, per se, is constitutionally protected, and that marriage is "central to the liberty of individuals and a free society" (Mehlman et al. Brief). In addition to liberty, which is the principle that protects access to marriage as a fundamental right that cannot be denied absent due process, this argument is framed through choice and dignity.

Respondents' amici cite historian Nancy Cott to establish the "freedom to marry" as a "basic civil right" through its negation – slaves' lack of the right to marry pre-Civil War. Amici note that "when the slaves were emancipated, 'they flocked to get married'" (*Perry v. Schwarzenegger*, J.A. 400-403, cited by Family and Constitutional Law Professors Brief) to underscore the "liberty for intimacy and free decision making" (J.A. 397) created by marriage. Thus, the liberty of marriage derives its meaning through reference to the lack of liberty experienced by slaves, and ex-slaves' pursuit of the ability to *choose* marriage as "a paradigmatic exercise of human liberty" and "'an expression of one's freedom'" (*Perry v. Schwarzenegger*, Tr. 206, cited by Mehlman et al. Brief) "[One] ex-slave who had also been a Union

soldier ... declared, 'The marriage covenant is the foundation of all our rights'" (*Perry v. Schwarzenegger*, Tr. 202-203, cited by Mehlman et al. Brief). Marriage is thus central to the liberty of individuals and a free society, and the denial of civil rights to slaves is equated to the denial of marriage to "gay men and lesbians" (Mehlman et al. Brief).

Access to this right for same-sex couples is framed as the next (and last) step in a continuous process of democratizing, although not fundamentally altering, marriage. It is situated along a historical continuum that is punctuated by *Loving v. Virginia* (1967), *Turner v. Safley* (1987), which secured marriage rights for prisoners, and the overturning of inequitable gendered laws such as coverture. Respondents narrate a progressive arc by which "marriage has 'shed its attributes of inequality'" – including race-based restrictions and gendered inequalities – and "has been altered to adjust to changing circumstances so that it remains a very alive and vigorous institution today" (*Perry v. Schwarzenegger*, J.A. 435, cited by Perry et al. Brief). The omission of groups from marriage is deemed an oversight, as "there are situations where 'times can blind us to certain truths' and it is necessary for 'later generations' to identify that 'laws once thought necessary and proper in fact serve only to oppress.'" (American Companies Brief, citing *Lawrence v. Texas*, 539 U.S. at 579).

The intentions and effects of marriage restrictions facing "numerous racial and religious minorities" (BALIF Brief) or "disfavored groups" "throughout history" become synonymous, and the processes by which "whole classes of people" experience oppression and degradation "by depriving them of the full ability to

exercise a fundamental right" (AAA Brief) are flattened. The American Anthropological Association brief equates anti-miscegenation laws, which "established state-sponsored stigmatization on the basis of race," with Proposition 8, which "does the same on the basis of sexual orientation." Similarly, the defenses of such laws – through appeals to nature and religion and invocations of potential harm to children – are narrated as equivalent.

> However much opponents of marriage for same-sex couples may insist "this time it is different," there remains an appalling familiarity to the refrain that allowing same-sex couples the same human dignity as everyone else will threaten social order, degrade individuals, and harm children. We suffered through the same awful dirge when slave owners sought to preserve the ban against slave marriage and segregationists opposed interracial marriage (Howard University Brief)

Given analogous intentions and effects – individuals are prevented from "having the choice of whom to marry" (Howard University Brief) – the solution is the same. Amici compare same-sex marriage to interracial marriage and marriage involving a prisoner, stating that "if the contract of marriage cannot constitutionally be denied to a couple because of the legally irrelevant accident that one is of a different race than the other" (Wallace et al. Brief), or "if a prisoner has the right to marry the person of his or her choice" (WERLDEF Brief), then two people of the same sex should be able to marry.

These connections are made through the rhetoric of liberty, dignity, and choice as set out in the *Lawrence* decision. To counteract the deprivation of liberty absent due process of law, amici assert that the Court must reaffirm the protection of an individual's liberty to make "choices central to personal dignity and autonomy" (American Companies Brief; National Women's Law Center Brief). The obstruction of individual choice violates the liberty interest, and "the liberty protected by the Constitution *allows homosexual persons the right to make this choice"* 539 U.S. at 567 (emphasis added, cited by National Women's Law Center Brief).

As others have noted, the transposition of liberty and freedom into language of "choice" of family and dignity reflects how the terms of universal citizenship and progress disavow the racialization of intimacy upon which they rely. Respondents liken respectable queer intimacy to heterosexual conjugal domesticity as the basis for claims to universal liberal citizenship. Universal citizenship is predicated on practices of choice, and the legitimacy of such practices is proffered as evidence that a particular group is deserving of inclusion in the sphere of universal rights: "our common humanity – our common instinct to love and to have kin – and what should be our common freedom under the United States Constitution to marry the person we love" (Marriage Equality USA Brief). This choice to "marry the person we love," and liberal frameworks of rights and choice more generally, mark the privatization of sexual politics; rather than call for an expansive political or social justice, such discourses fix the rights of the sovereign individual as the horizon of possibility.

Ascendance of the queer liberal subject under the aegis of constitutional rights to privacy and liberty "requires not only domestication of gay and lesbian intimacy but its differential distribution as a racialized property right" (Eng, 2010, p. 26). Insistence that Prop 8 violates the right to "private, consensual, homosexual conduct between adults" (U.S. Conference of Catholic Bishops Brief) brings into sharp relief the racial politics of *Lawrence v. Texas* (539 U.S. 558, 2003). Eng (2010) writes about how the *Lawrence v. Texas* (2003) decision recoded the right to engage in sodomy as the right of a couple to intimacy within the bedroom, bestowing recognition and rights only upon those queer subjects who properly inhabit privatized conjugal domesticity. He questions for whom this liberty is accessible, particularly in light of how race was pivotal to the events of the case – the couple was found because Eubanks, one of the three men at Lawrence's apartment, called police and falsely reported "a black male going crazy with a gun," which led to the arrest of Garner and Lawrence – yet was made invisible as the case went to trial and in its retellings. Eng contends that there is a constitutive forgetting of race "at the heart of queer liberalism's legal victory" and its "(re)inhabiting of conventional structures of family and kinship" (Eng, 2010, p. 25). The abstraction of privacy and choice as the legal principles of queer freedom belies the processes by which race is exploited in the constitution of white bourgeois intimacy (Eng, 2010; Lowe, 2006).

Moreover, as Franke (2004) has suggested, "dignity" arguments grant recognition to deserving groups over and against other, less-deserving groups. As the next chapter will explore, the assertion of same-sex couples' dignity, liberty, and

deservingness of choice comes at the expense of those who are unable to make such choice or are outside the bounds of deservingness. The insertion of DOMA and Prop 8 into a linear history of discriminatory laws – such as miscegenation laws, racial segregation, and "earlier, religion-driven views regarding the place of women in society"– that have been "universally repudiated" (Anti-Defamation League Brief) further eschews the circumstances of racial and gendered oppression and its ongoing manifestations. The narrative arc of history and progress, and specifically the assertion that various groups have experienced oppression "at various times in history," enables the "story of the extension of constitutional rights and protections to people once ignored or excluded" (BALIF Brief, citing *United States v. Virginia*, 518 U.S. 515, 557 (1996)) to be continuously reiterative.

Despite, or perhaps because of, this arc, inclusions into "the concepts of liberty and choice inherent in the right to marry" (*Perry v. Schwarzenegger*, Pet. App. 289a) has not – in the elimination of anti-miscegenation laws and implementation of no-fault divorce laws – and will not – in the elimination of barriers to same-sex marriage – "deprive[] the institution of marriage of its vitality" (Pet. App. 219a). Respondents' amici insist that "striking down Proposition 8 would not redefine marriage" or undermine the institution itself, but only provide access to "a fundamental right that this Court has recognized as 'essential to the orderly pursuit of happiness.'" (*Meyer v. Nebraska*, 262 U.S. at 399, cited by Family and Constitutional Law Professors Brief). Just as "modern American society" has recognized that banning interracial marriage does not "protect" society and interracial marriage does

not undermine the institution of marriage, "there is no credible evidence that allowing couples of the same sex to marry would threaten either American society or the institution of marriage itself" (Howard University Brief).

Perhaps unexpectedly, petitioners redirect queer liberalism's terms of universal freedom – negative rights and choice – in appropriating *Lawrence v. Texas* (2003) and *Romer v. Evans* (1996) for their promotion of individual rights. They contend that Prop 8 is justifiable in that it does not interfere with the negative rights – freedom from government interference – stipulated in *Lawrence v. Texas*; rather than criminalize private behavior, Prop 8 simply enables the state to recognize and reward committed, heterosexual relationships in order to advance its own interests (ACRU Brief). If *Lawrence v. Texas* (2003) and *Romer v. Evans* (1996) have in common their "protection of individual freedoms" – to intimacy and political expression, respectively – then their precedent does not oblige the state to expand marriage but, rather, reaffirms the state's freedom to "prevent the further redefinition of marriage" (Lighted Candle Society Brief).

Conclusion

With the prospect of marriage becoming ever more expansive, the institution is strengthened as the relations of exploitation and inequality that comprise it are rendered invisible. As sexual and intimate forms that were once thought incompatible with and even antithetical to "family values" become folded into it, technologies of history and progress are complicit with continued regulation of forms that are rendered illegible by languages of choice and dignity. Across the debates,

technologies of history and biology are used toward different and ostensibly competing ends. Each "side" produces a unique framing of a biological or genetic essence, and fashion progress and futurity as a return to a pure past or a continuation of a progressive arc of justice. As such, biology and history are continuously deployed to fix and flatten subjects of the law by making invisible legacies of colonization, slavery, and empire through which the rights and freedom of such subjects can be imagined.

Chapter 4
Beyond the Citizen and the Terrorist: Protecting the Nation from "Threat"

> A lot has changed in the world since my grandfather came to the United States. We face new threats from abroad that attempt to use our porous borders to harm this Nation and to destroy our way of life. In addition to these new national security challenges, we depend on a more dynamic system of commerce, trade, transportation, and communication. Our government is also larger and now offers a broad social safety net to a growing and aging population. To maintain our system of government, while encouraging future generations of immigrants to come here, our immigration policy must provide a clear path for those who wish to come legally while enforcing the rule of law. (159 Cong. Rec. S5254, 2013)

The management of "new threats," or risky (im)migrants – signaled in the epigraph by a call to enforce the "rule of law" – is necessary to protect "our way of life." According to this narrative, racialized, gendered, and sexualized others represent risk to "our system of government" and its "broad social safety net," or

mythically generous welfare state. This chapter considers how discourses of risk/threat and protection buttress the creation and maintenance of the nation's material and symbolic boundaries. I argue that discursive technologies of law and blood/biology converge with discourses of protection and sovereignty and neoliberal notions of choice and responsibility to create racialized and gendered bodies as "bad" and "good," "threatening" and "deserving," "vulnerable" and/or "risky" (non)citizen-subjects.

The uneven and varied construction of (non)citizens – along dimensions of legal status, rights, and belonging – betrays the contradictions of universal or uniform citizenship. Deserving groups are created in conjunction with practices of governance, as the nation coheres in defense of the vulnerable against the populations that threaten. Multiple and fluid productions of vulnerability and threat enable the reiteration of violence in the name of protection. Rather than signaling contradiction or confusion, I maintain, figures that toggle between vulnerability and threat enable rapidly shifting boundaries between "us" and "them" and proliferating forms of management and "security." Going one step further, I suggest that law and policy creates and relies upon figures – e.g., the "single mother," the ("criminal") migrant, and the "queer" (soldier) – that seem to be spatially and temporally fixed (as the products of a transparent history) yet simultaneously escape, transcend, or eclipse their own definitions.

Starting from evidence that the immigration system, Indigenous sovereignty, and marriage are predicated on notions of protection (of the nation and deserving

(im)migrants, tribes, and couples and their children, respectively), I trace the fluid processes by which those who pose a "threat" to the nation are differentiated from those who are vulnerable and thus in need of protection. I suggest that the figures take on meaning in relation to one another. For example, the "illegal alien" and the "Indian" father become "violent" threats to "vulnerable" single mothers and their children. "Gay and lesbian" soldiers become assimilable through their figurative ability to protect the nation from threat, and same-sex couples become valuable through their purported willingness to protect the "vulnerable" child.

Within these symbolic networks, the figurative mother (of color) is dialectically positioned between the citizen and the terrorist, the tribe and the nation, the family and its dissolution. As such, she plays an important role in defining the other and establishing risk in relation to the nation-state and the body politic. The nation is reinstantiated through the abjection of new threats and the embrace of groups that were once threatening and are now deserving by virtue of patriotic action – those who crossed the border "illegally" but embody devotion to family and nation, single mothers of color who relinquish their (Native) children for adoption, and queer soldiers – ensures a slippery set of binaries tethered to shifting terrains of citizenship. These alternating constructions of threat and vulnerability enable the nation-state to repeatedly emerge as both protector and in need of protection. The reiterative process by which "new threats" are identified and contained – practices of biocitizenship – necessitates new biotechnologies for detection and detainment of risks to "our nation's security."

Part I. Compassionate Protectionism and U.S. Exceptionalism in Immigration Legislation

Contemporary immigration discourses create and sustain US exceptionalism through ideologies of protection, offering safe haven to "people in foreign lands [who] want to be a part of this great Nation" (159 Cong. Rec. S460, 2013). In offering democracy and fulfillment to "your tired, your poor, your huddled masses yearning to breathe free" (159 Cong. Rec. S3829, 2013), the nation becomes simultaneously compassionate and desirable. The "beacon of hope in the world" (159 Cong. Rec. S460, 2013), a "shining light…that attracts so many to our shores with hopes and dreams of a better future" (159 Cong. Rec. S4363, 2013), the nation is likewise reiteratively hopeful and desirable for American citizens, who may "feel privileged that people love our country and want to become Americans" (159 Cong. Rec. S460, 2013).

Paradoxically, discourses of protection underwrite the vulnerability of the nation and American citizenship even as they stabilize U.S. exceptionalism. Senators contend that Americans' compassion is so extreme that it has actually slipped into its opposite – a lack of compassion for (would-be) immigrants. Americans' generosity, which emerges from their foundational moorings as a "nation of immigrants," warrants vigilance about the legislation. Even as the "rule of law" ensures exceptionalism and draws "legal" immigrants to the United States, the rule of law itself becomes tenuous in the face of prospective naturalization for the "11 million people who came here illegally" (159 Cong. Rec. S4771, 2013).

Vulnerability due to a "porous" border joins economic vulnerability posed by (would-be) (im)migrants to threaten the nation and the "American people," who had been promised that border and interior enforcement – including fences and a 90% apprehension rate – would precede the extension of Registered Provisional Immigrant (RPI) status. The American people are injured by the prospect of naturalization and deserve to have their compassion upheld and the "rule of law" preserved. Moreover, those who immigrated the "right way" deserve not to have their time, energy, and financial "sacrifice denigrated to the point that it means nothing or less than nothing" (159 Cong. Rec. S4007, 2013). Senator Lee tells the story of a teacher in American Fork, Utah, who wrote a letter to him about the "profound unfairness" of "rewarding those who have broken the law while we are punishing people who, like me, a schoolteacher, came here on a nonimmigrant visa and have spent years of their lives and thousands of dollars trying to do it the right way" (159 Cong. Rec. S4007, 2013). She will be forced to leave when her nonimmigrant visa expires in 2017.

While Senator Lee opposes citizenship for those who are undocumented, others offer terms of earned belonging and "waiting in line," so as not to allow "people who have done this the wrong way" to "leapfrog anyone" (159 Cong. Rec. S343, 2013). In order to protect those who are vulnerable and maintain US exceptionalism, the line must be drawn between those deserving of citizenship and others who "threaten" the vulnerable nation.

The Vulnerable Mother and the Threatening "Criminal Alien"

Biological citizenship, and specifically discourses of contagious disease, intersects with processes of gendering, sexualization, and racialization to structure the equation of migrants and asylum seekers with the "(violent) criminal alien." Through associations with domestic violence, child abuse, sexual assault, and sex trafficking, the "violent" male migrant – who "lives among us" – is racialized as a sexual threat to the vulnerable "American" mother and child, imagined through whiteness and heterosexuality, who are in need of protection. The rhetorical movement of "migrant" and "asylee" into "criminal alien" is used in service of proposals to deny welfare benefits to migrants and implement biosurveillance technologies, such as fingerprinting, that would enhance the "capture" and incarceration of purportedly fraudulent asylum seekers.

As de Genova (2007) argues, while Arab and Muslim migrant men are rendered internal enemies and thereby indefinitely detainable and without rights, antiterrorism discourses interpellate undocumented migrants not as "terrorists," per se, but even more precariously positioned as rightless, exploitable labor through the association of "illegal alien" and "enemy alien." Thus, the undocumented migrant is positioned between the citizen and the terrorist and, as such, a liminal figure whose demonstrated fitness promises either liberation or detainment. Regulatory power is produced from the management of difference, as the undocumented migrant's potential ascendance – through self-regulation of risk – reinforces the terms of citizenship.

These logics are reflected in the S. 744 debates, with a minority of actors casting migrants as irredeemable "law-breakers" whose prospective "amnesty" would betray Americans' trust and "ensure further endangerment of the American family unit which is the foundation of American society" (159 Cong. Rec. S5008, 2013). By most accounts, however, those who crossed the border without papers may redeem themselves through devotion to family and nation. "DREAMers," who will be taken up more fully in the next chapter, are quintessentially innocent and deserving, as it was not their choice to come cross borders and the United States is "the only country they know" (159 Cong. Rec. S5245, 2013; 159 Cong. Rec. S4071, 2013). Their parents, however, are alternately relatable and "strange." On the one hand, parents who only wish to provide for and protect their families have been failed by the "broken" immigration system and thereby forced to pursue "illegal" crossing. The desire for a "better life," a desire that is constitutive of the "American way of life" (159 Cong. Rec. S5114, 2013), ties soon-to-be Americans to the nation. Specifically, parents are rendered legitimate by virtue of their intentions to "make their...children's lives better" (159 Cong. Rec. S4363, 2013). Connections between "them" and "us" – "we [who] would do anything to give our kids a better life" (159 Cong. Rec. S5114) – dialectically produce the terrorist, who does not have, but rather threatens, family.

This paradigm is illustrated by the "replacement" of Secure Communities – which formalized the integration of law enforcement, immigration, and carceral systems and institutionalized routine biosurveillance measures – with the Priority Enforcement Program, which would renew focus on "actual threats to our security,"

directing deportation efforts toward undocumented immigrants convicted of crimes. President Obama introduced the Priority Enforcement Program along an expanded Deferred Action for Childhood Arrivals (DACA) program and a new Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program in November 2014.

In his introduction, Obama (2014) suggested that mass deportation "isn't realistic" and is "not who we are as Americans" – because immigrants "work hard…in tough, low-paying jobs" "support their families," and "worship at our churches." They are "part of American life" and "their hopes, dreams, and patriotism are *just like ours*" (emphasis added). As Obama put it, the program shifts to "Felons, not families. Criminals, not children. Gang members, not a mom who's working hard to provide for her kids." Here, "mom" and "children" epitomize innocence and vulnerability in their opposition to "felon," "criminal," and "gang member." The mother's symbolic capacity to earn belonging differentiates her, and other undocumented migrants, from the "(violent) criminal alien." It is worth noting that the bifurcation of categories renders them antithetical to one another – the suggestion is that a "felon" cannot also be part of a "family" and a "gang member" cannot also be a "mom."

While greater interior and exterior enforcement measures are justified through appeal to the threat posed by the "(violent) criminal alien" and the "gang member," opportunities for citizenship are advanced, in part, by a desire to determine who is "among us" (159 Cong. Rec. 4751, 2013; 159 Cong. Rec. 5316, 2013). Such desires

are part and parcel of a risk management technology that calls on the citizen to aid in the surveillance, identification, and detainment of risky bodies (e.g., the terrorist). Liminal figures such as undocumented immigrants, or non-violent "criminals," must self-regulate their risk through personal responsibility and "choice." Mothers (of color) are in such a position, as they are represented as alternately threatening and threatened – the bodies upon which risky others are defined and risks themselves.

Mothers (of color) as Liminal Figures

Suturing a constellation of racial, gendered, classed, and sexual meanings, the mother (of color), although often unnamed, is visible in her reflections of "good" or "bad" – the husband, the "terrorist," and/or "American" economic well-being. While the migrant single mother is constituted as risky in her potential "dependency" on public resources, "American" mothers and their children are in need of protection from "those who mean to do us harm." Two primary modes of signification construct "women" within the debates around the bill: as the bodies upon which the other's risk is cast, and as risky bodies born of failed self-regulation.

The family's safety and togetherness provides the foil for imagined risk, as women and children, imagined through whiteness, are constituted in dialectical relation with the "violent criminal" as the "most vulnerable among us" (159 Cong. Rec. S4499, 2013; 159 Cong Rec. 4756, 2013; 159 Cong. Rec. S4785, 2013). Senator Portman and others identify the threat to women's "fundamental security" when registered provisional immigrant status is extended to those who have committed offenses under the Violence Against Women Act (VAWA), such as domestic

violence, child abuse, sexual assault, and sex trafficking. Formal citizenship should be extended to "those who share our values of respecting and protecting human life" and those "who have come to this country to build a better life for themselves and their families, not those who would abuse them" (159 Cong. Rec. S4756, 2013).

Based in these sexualized and racialized representations of migrants, Senator Cornyn's proposed RESULTS amendment would disqualify from RPI status and make eligible for deportation those who have been convicted of a criminal offense under VAWA, assault with bodily injury or drunk driving. Additionally, it would increase penalties for "transnational criminal organizations" that move "people, drugs, and contraband across the southern borders" (159 Cong. Rec. S4564, 2013). Again, these measures are designed to protect "innocent young women" – this time, Central American women who fall prey to human traffickers and "involuntary sexual conduct." Senator Cornyn relates "the humbling experience" of meeting a young woman from Guatemala whose parents paid for her to be smuggled into the United States and ended up being "prostituted" and put into "involuntary servitude where she was afraid to escape lest she be deported and have to leave the country." The "porous border" must be fixed in order to prevent "these predators to prey on innocent young women," to counter the vulnerability she felt when in "human slavery" and forced to "submit to the demands of this sexual predator" (159 Cong. Rec. S4564, 2013).

Whereas "American" and "innocent young" women and children's vulnerability becomes metonymic for the nation's vulnerability, and renders legible the risky other, single (im)migrant mothers of color are threatening to the nation. The

migrant mother's liminal status is in some ways a symptom of incommensurate "family values" discourses and deportation practices. Eng (2010) and Reddy (2005) observe that family reunification policies, while seemingly benevolent, create a vast supply of racialized and gendered low-wage non-citizen labor. Family reunification policies account for the largest number of visas for "unskilled" laborers, while effectively concealing the economic conditions that propel their migration and capital's reliance upon immigrant labor. With the further narrowing of family reunification, as represented by the removal of adult siblings from the family preference categories, the nuclear family becomes reconsolidated and required to manage its own economic and social "costs."

Even when the 4.5 million people who comprise the family immigration "backlog" are extended rhetorical invitation in the name of "fairness," they join the other 25 million "mostly lower skilled" immigrants who reportedly will enter the U.S. over the next 10 years to threaten "lower wage jobs" and public welfare (159 Cong. Rec. S4077, 2013). A number of measures are aimed at mitigating the threat posed by "chain migration members" or potential "public charges," including financial threshold requirements and denial of federal benefits such as health care, nonemergency Medicaid, SNAP, and TANF to undocumented and recent immigrants (159 Cong. Rec. S4077, 2013; 159 Cong. Rec. S307, 2013). Withholding of benefits during the proposed ten years of provisional status, three years of permanent resident status, and at least five years thereafter is imagined as working toward disciplining poor single mothers and expelling the "criminal element" from communities.

The "(Violent) Criminal Alien": Biological citizenship and Biosurveillance

Through their association with the "terrorist," the "(violent) criminal alien," the "criminal gang member," and the fraudulent asylee are rendered a "threat to national security or public safety" (159 Cong. Rec. S5004, 2013) and used to naturalize three sets of restrictive asylum and entry-exit system policy proposals. Each of these figures – the man/father who is violent toward his family and thus could be violent toward the nation, the "dangerous" asylum seeker, and the drug dealer/gang member who may slip across the border and into our midst at any moment – is present yet invisible, threatening to expand into available space and infect the nation in ways analogous to contagious disease.

Animated by the racialized hauntings of the Boston marathon bombing and 9/11, the proposals center on practices of biosurveillance that detect threat through fingerprints and other biometric measures. Required fingerprints upon entry and exit at land and sea ports are endorsed for their potential to detect those who have overstayed their visas or have arrest warrants. Calls for face-to-face interviews with "people who want to be citizens" rely on the conflation of DREAM Act and DACA recipients with "one of the hijackers who was supposed to be the terrorist" (159 Cong. Rec. S4774, 2013). Mohammed al-Qahtani, a Saudi Arabian citizen who was the supposed "fifth hijacker" of United Airlines Flight 93, which was believed to be headed for Washington D.C., was detained by a customs official after landing in Orlando on a flight from Dubai. In addition to a sense of suspicion, the official reported questioning al-Qahtani's stated intentions to stay in the U.S. for six days on a

tourist visa given that he possessed a one-way ticket and only $2800 in cash. Based on this anecdote, Senator Lee concludes that "it is very clear from experts in the 9/11 Commission that face-to-face interviews make a huge difference" and would help evaluate whether DREAM Act and DACA "claims of legality are legitimate" (159 Cong. Rec. S4774, 2013).

Similarly, reforms to asylum policy that would require biographic and biometric information to be checked against federal terrorist databases and enable asylum officers to dismiss "clearly frivolous [asylum] claims" are made legible through affective appeal to the "terrorist attack" in Boston (159 Cong. Rec. S4767, 2013). Focused mostly on Ibragim Todashev, a Chechen American man who was granted asylum in 2008 and permanent residence in 2013 and was killed by police while being interviewed about his connections with the Boston bombing, Senator Collins alleges that a "flawed asylum process allowed a dangerous man to get into our country on false pretenses and to stay" (159 Cong. Rec. S4767, 2013). Rather than be granted asylum and a green card, she claims, Todashev should have been deported when he fell out of compliance with the requirements of his J-1 visa.

Mirroring Hannabach's (2013) observation that asylum law produces narratives of "American salvation" (p. 25), Collins remarks that the United States "has always been a country of refuge for the persecuted, a protector of life and individual freedoms" (159 Cong. Rec. S4766, 2013). Stabilizing this image is an undercurrent of vulnerability, as the system is always "open to exploitation by those who mean us harm" (159 Cong. Rec. S4766, 2013). Again, legal technology dovetails

with biosurveillance technology to differentiate between worthy bodies – those who "can show a credible fear of persecution in their home country" – and abusers who would do harm to "the American public" (159 Cong. Rec. S4767, 2013). Bifurcation of the asylee into deserving and undeserving recreates hierarchies of good/bad and citizen/terrorist through the convergence of biological citizenship and incarceration.

"Criminal gang members" likewise become the target of biosurveillance requirements through their equation with the terrorist. Though "not legally terrorist organizations," Senator Grassley observes, criminal gangs "can be just as dangerous as terrorists (159 Cong. Rec. 4760). Along with Senator Kirk, he proposes an amendment that would enable exclusion based on membership in a "criminal street gang," which "survive[s] by robbing their community of safety" (159 Cong. Rec. 4760). Whereas the underlying bill allows people to enter the United States through simple disavowal of gang membership, this amendment would require proof that the person is either not in a gang or does not pose a threat to society – through involvement in drug trafficking, human trafficking, and prostitution.

The "(violent) criminal alien" represents the rhetorical movement of the "illegal alien" toward the "terrorist." Arguing that the those engaged in "illegal drug and illegal alien" "criminal activities" "have become "virtually inseparable," Zack Taylor, Chairman of the National Association of Former Border Patrol Officers, declares that "criminal aliens" "live among us" and pose a "clear and present danger" to "the American people" (159 Cong. Rec. S5008, 2013). As a "significant percentage" of "illegal aliens" are "violent criminals," Taylor contends, employer

sanctions must be accompanied by denial of welfare, public housing, and identification such as driver's licenses that "would enable the criminal element to continue concealing their presence in our communities." He moves quickly between the "illegal alien" and the "terrorist," imagining that in containing the "threat to public safety" through increased ICE presence and other interior security measures, potential terrorists may likewise be "identified and removed or incarcerated" (159 Cong. Rec. S5008, 2013).

Again contrasting those who cross the border wanting "nothing but a chance to work" with people who "have come across the border and engaged in drug trafficking or criminal violence" and thereby "deserve special penalties," Senator Cornyn implicates innumerable potential terrorists "from 100 different countries" (159 Cong. Rec. S4564, 2013). As (im)migrants from Mexico become (symbolically) familiar, those from Central American countries (i.e., El Salvador, Guatemala, and Honduras) – who comprise either 40% or 60% of recent migrants, depending on the source – spur anxieties. Citing a New York Times article, Senator Cornyn states that 400 of the 700 people that the Border Patrol detained "in one day in the Rio Grande Valley Sector" "were from countries other than Mexico-400 of them" (159 Cong. Rec. S4551).

Whereas Mexican (im)migrants "seek to be reunited with family and do the jobs Americans will not do," "other than Mexicans" include "terrorists who enter the United States via the southern border" (159 Cong. Rec. S4392, 2013). People from "anywhere around the world" can "penetrate our southern border" with enough

money, and "other than Mexican" immigration numbers reportedly rose by 67% between 2012 and 2013 (159 Cong. Rec. S4563, 2013). The influx of people "from countries other than Mexico," including China, becomes a national security issue as their home countries are "are state sponsors of terrorism" (Cong. Rec. S4563, 2013).

Senator Cornyn's RESULTS amendment would criminalize the act of crossing the border "with the *intent* to aid, abet, or engage in a crime of terrorism" (159 Cong. Rec. S4563, 2013; emphasis added). The rhetorical movement of the "migrant" and the "asylee" into the "criminal alien" and the "terrorist" is used in service of proposals that would enhance the "capture" and incarceration of purportedly fraudulent asylum seekers. To accompany military technologies such as drones, night vision goggles, motion detectors, and aircraft detection devices, immigration legislation proposes the hiring of veterans and reserves as Border Control agents to detect "terrorists" through "target assessment" and "human intelligence." The success of these military technologies, used in Iraq and Afghanistan, at "keeping America safe" justify their use at the border (159 Cong. Rec. S4735, 2013). The nation looks to protect itself, and U.S. exceptionalism, through economic and border securitization in tandem with contingent invitation and perpetual "becoming" of deserving groups.

Protecting the Nation and "Earning" Citizenship

While the production of a common external enemy consolidates an imagined national community, a rhetorical drawing in of racialized groups within the nation-state bolsters exclusionary immigration policies (Agathangelou et al., 2008; Ordover,

2003). Since at least 1917, immigration discourses have gestured toward protection of "American" jobs and workers – and particularly their financial ability to reproduce the next generation – from "unfit foreigners" (Ordover, 2003, p. 15). The caring veneer of this rhetoric, Ordover observes, is belied by its eugenic paternalism, which breaks with other eugenicist discourses that biologize poverty as a symptom of genetic inferiority. Indeed, in 1917 and now, the desire to protect low-income Native workers from the "threat" of cheap immigrant labor settles into a comfortable tension with immigration's tenuous promise of increased economic activity. This tension is rhetorically resolved by the conclusion that only the "fittest" immigrants should be invited into the nation-state.

Eugenic paternalism manifests in gestures of concern for racially marginalized domestic groups about the consequences for "poor people in America, particularly African Americans" (159 Cong. Rec. S4573, 2013). Senator Sessions relates the story of "two African-American gentlemen in their 40's" who cut the grass at his home in Mobile as evidence that there are no jobs Americans refuse to do. Senator Rubio recounts his father's journey from an 18-year-old "legal immigrant" from Cuba who "couldn't speak English," washing dishes for 50 cents an hour, to his own business and "the American dream" (159 Cong. Rec. S5142, 2013). His father's ascendance, however, would not be possible with the "$5000 [Affordable Care Act] penalty on hiring that U.S. citizen" – which would particularly harm "hispanics who are U.S. citizens or Hispanics who are legal immigrants who followed the rules," African Americans, "young people," and "union" and "working-class" households. He

concludes that the bill's proposed enforcement of the Affordable Care Act would "penalize [employers for] hiring African Americans, U.S. citizens or legal immigrants and, instead, will incentivize hiring those who are here illegally" (159 Cong. Rec. S5142, 2013).

Even as Senator Rubio declares that "nobody in this body wants to see African-American unemployment go up. Nobody wants to see Hispanic unemployment go up, youth unemployment go up, union household unemployment go up, legal immigrant unemployment go up" (159 Cong. Rec. S5142, 2013), and Senator Sessions gives lip service to "millions living in poverty" (159 Cong. Rec. S4379, 2013), bills that would increase the minimum wage (S. 460, 2013) and limit tax writeoffs for executives (S. 1476, 2013) remain in committee. Nevertheless, the drawing in of racial "others" performs symbolic work in solidifying the boundaries of legitimacy.

Mirroring this opportunistic, paternalist concern with low-income workers, broader economic forecasts seem to suit particular policy preferences. A "path to citizenship" will alternately lift wages due to curbed exploitation of undocumented migrant laborers or depress wages due to increased competition for jobs. Some insist that bringing 11 million people "out of the shadows" and helping them "get right with the law" would ensure that "every U.S. resident pays his or her fair share" and bring economic benefit (159 Cong. Rec. S4624, 2013). Others insist that enforcement and 100% border security must precede even the first stages of eventual naturalization.

Notwithstanding these differing policy preferences, all agree that allowance of "deserving" groups is contingent upon establishing a "fair" system through implementation of the "rule of law." Protection of deserving citizens-to-be must be tempered in order to preserve "one of the most sacred possessions of our people: American citizenship" (159 Cong. Rec. S460, 2013). This rhetorical maneuver reflects both zero-sum logic – "they can't all get the promise of coming to America" – and efforts to naturalize the rubric of deservingness. Would-be immigrants' fulfillment of "tough but fair" measures iteratively establishes the terms of becoming and the value of "American citizenship" as property (Williams, 1991). The notion that citizenship must be protected emerges from fraught tenets of liberalism, namely that sovereignty, democracy, and citizenship are pre-given rather than aggregates of persistent racial and colonial violence.

Even efforts to contest allegations of "amnesty" can unwittingly legitimate its underlying terms. In echoes of Bush's attempts to deny that a 2006 plan for eventual naturalization for some undocumented migrants given the satisfaction of prerequisites amounted to "amnesty," Senators insisted that undocumented workers eligible for RPI status would prove their worth and earn citizenship through payment of back taxes and fees, continuous employment, and demonstration of English language skills and "lawful" behavior. Others extended this logic, offering the same prerequisites as counters to the sociopolitical moment of "de-facto amnesty." As de Genova (2007) notes, even those undocumented migrants who may be eligible for eventual naturalization would necessarily undertake even greater vulnerability and scrutiny in

the intervening years, and those who do not qualify would, at best, become disposable labor. It may be that this long period of surveillance and discipline is not only the precondition but also the price of citizenship.

Senator Reid characterized this period and its performative mandates – including "learning English" – as both redemptive and assimilative, ensuring immigrants' "full" contribution to "their communities and to this country" (159 Cong. Rec. S3538, 2013). "Learning English" is continually upheld as the paramount assurance of assimilation, the key to being "part of America and its future" (159 Cong. Rec. S4036, 2013), as well as a predictor of "success." Statistics "that people who come with about 2 years of college and speak English almost always do very well, but people who come without high school diplomas don't do as well" (159 Cong. Rec. S4008, 2013) justify the privileging of English fluency in the merit-based point system. Maintaining that "learning English is not just important for assimilation, it is important for economic success" (159 Cong. Rec. S4082, 2013), Senators Fischer and Sessions proposed amendments to make English proficiency a prerequisite to RPI status or a green card, respectively, and Senator Grassley balked at the lack of insurance that "those who come out of the shadows will cherish or use an English language" (159 Cong. Rec. S4093, 2013).

Beginning with the literacy test and including a battery of IQ tests implemented at Ellis Island in the early 20th Century, standardized tests have been used as a proxy for assimilability, lending scientific legitimacy to thinly veiled eugenic immigration projects (Ordover, 2003). Deportations and exclusions made on

the basis of "feeble-mindedness" were intended to stem inevitable national degeneration. The proposed English requirement, and the current civics portion of the naturalization test, bears not so dissimilar logic, as knowledge of the language, history, and governing principles of the nation-state are seen as indicators of prospective assimilability. The classist assumptions that underlie this requirement are that language use indicates the possibility for success and serves as a biological marker for intelligence. With the selection of educated middle- and upper-class migrants, these assumptions become self-reinforcing.

Rhetorical separation of "deserving" from "undeserving" migrants is figured as the resolution to tensions between the "promise" of universal citizenship and protection for the "huddled masses," on the one hand, and the exclusionary tenets of immigration law, on the other. Rather than lessening contradictions, however, these discursive strategies highlight the constitutive paradox of citizenship and the continuity of citizenship's "external" and "internal" boundaries. While protectionist discourses enable the nation to emerge as salvific, they are only possible through the shape-shifting production and exclusion of those who exist within the nation yet outside its scope of protection. Similarly contradictory protectionist ideologies animate ICWA cases, as Indigenous communities' "inherent sovereignty" and inside-outside legal and political status manifests in alternate productions of "Indian" vulnerability and threat.

Part II. Paternalist and Nativist Protectionism in Adoptive Couple v. Baby Girl

As outlined in the ICWA (25 U.S.C. § 1901), and envisioned as the antidote to widespread removal of Native children from their families and communities, the United States has a "protective" or "special relationship" with federally recognized tribes. The tribes, in turn, have a "parens patriae" – parent of his or her country – responsibility for the welfare of "Indian children." With this responsibility come rights to tribal jurisdiction over domiciled Indian children, transfer of state court proceedings to tribal court, and right of notice and intervention in child custody proceedings in state courts.

Insofar as discourses of protection buttress a hollow "inherent sovereignty" and conceal the settler state's ultimate sovereignty, the ICWA's manifestation of the "trust responsibility" represents and engenders a complex makeover of sovereign violence. It is notable that the nation-state is variably fashioned as protector of Veronica, her mother Christy Maldonado, and the Cherokee nation in *Adoptive Couple v. Baby Girl*. Moreover, what little force ICWA asserts in "protecting" tribes from further violence collapses when confronted with the specter of a disintegrating white nuclear family model.

Positioning the child's and the mother's rights in opposition to those of the Cherokee nation, the recasting of "parent" and parents' rights through state family law reflects the convergence of nationalist paternalist and pseudo-feminist nativist strains of protectionist discourse. On the one hand, use of the Existing Indian Family (EIF) doctrine and definition of "parent" based on South Carolina law demonstrates that, when competing forms of paternalist protection collide, state sovereignty trumps

tribal sovereignty. This dominance is justified through a particularly disingenuous gesture toward protection of "unwed Indian fathers," who deserve more than the "condescending and patronizing" granting of paternal rights, as he in this case would not be "expected or required to act promptly as responsible fathers as are non-Indian unwed fathers" (Adoptive Parents Committee Brief). On the other hand, the "non-Indian" birth mother's rights are protected through pseudo-feminist rhetoric of mothers' liberty and choice.

Protecting the Mother

Transforming the issue from tribal sovereignty to individual rights, the adoptive couple and their supporters decry ICWA's violation of the birth mothers' right to the "profound and deeply personal decision to place her child with a loving adoptive family" (Birth Mother Brief). The Court, and by extension the nation, is charged with protecting Maldonado and similarly situated mothers from the violation of their "personal, fundamental, and lawful choices." Liberal feminist rhetoric of women's choice and liberty take on a nativist hue in their support for the movement of Native children into white families. In this, they reverberate with the discursive underpinnings of eugenic social policies – such as forced sterilization and birth control, denial or restriction of public assistance) – that impede reproduction by women of color. While mothers' rights may, on the surface, seem to disrupt dominant practices of coercion, misrepresentation, or otherwise forceful denial of mother of color's claims to their children, they are in this case facilitating the transfer of a child away from a low-income mother of color and their Indigenous community.

The transfer is justified, in part, by Maldonado's status as an "unwed," poor, "non-Indian" woman, which in its retelling renders her part of an undifferentiated but uniquely vulnerable group of "women in poverty, or near-poverty, already struggling to raise other children" who are abandoned by an irresponsible or delinquent man (Birth Mother Brief). A decision to disregard the ICWA's bearing on the case, the petitioners argue, is necessary to protect the due process rights and liberty interests of "child-bearing women who choose adoptive placements, over single parenthood, for their children," as well as "the interests of Indian children in securing a stable and loving home" (Petitioners Brief). In light of the limits of protectionist discourse – most apparently, that it does not extend to anti-poverty policies that would help mothers maintain custody of their children – it seems necessary to question the equation of a "stable and loving home" with adoption into a white, wealthy family.

Repeated constitution of adoption as a choice against single motherhood hints at the subtext of these assertions – the nativist supposition that poor, single women of color are unfit parents who, for the sake of (national?) well-being, should not be "forced" (or encouraged, for that matter) into caring for their children. While the specter of single motherhood emerges in opposition to relinquishment for adoption, and seems to contain traces of "family values" discourse about the eroding nuclear family, the figure of the "Indian father" is that which lends "force" to the choice. Indeed, Maldonado's brief assails the South Carolina Supreme Court's decision to honor ties between Veronica and her father and his community as mandating a "unwed women['s]" forced choice between raising the child "as an impoverished

single parent" or terminating the pregnancy rather than risk "control" by the abandoning and potentially abusive father (Birth Mother Brief).

In eerie resonance with languages of reproductive justice, the petitioners merge notions of maternal choice with racialized stereotypes of a controlling father and overbearing tribe in arguing that the ICWA "shamefully signals to vulnerable mothers of Indian children that their fundamental reproductive and parenting choices are in the hands of men and tribes" (Petitioners Brief). Accusations of abuse substantiate attempts to delegitimize Brown's paternal rights and even paternity under South Carolina state law. Invoking the federal "good cause" exception (1975) to state paternity identification requirements on the basis of domestic violence or other physical harm inflicted by the father against the mother, the Adoption Attorneys imply that Brown's withholding of financial support constituted "invisible abuse" (Adoption Attorneys Brief).

The Supreme Court is charged with correcting the "oversight" of the South Carolina Supreme Court, which is likened to neglectful action that "exposes pregnant women to domestic abuse and homicide" (Adoption Attorneys Brief). In analogizing Dusten Brown's purported ultimatum of marriage or no financial support to severe physical and psychological terror, and even death, inflicted on many (pregnant) women in the United States, the petitioners' amici not only equate the two forms of abuse but also imply that the denial of parental rights is the unequivocal response to "financial manipulation."

Beyond the elision of actual violence against women, this rhetorical construction criminalizes Native men and families. Moreover, it pits Indigenous and national forms of intimacy and belonging against one another in a manufactured struggle over "single mothers" and their children: "unwed single mothers of children with any Indian blood…will be forced to parent their unwanted child…in the name of preserving the non-existent Indian family" (Adoptive Parents Committee Brief). Veronica and her mother must be protected by the nation against the tribe and larger Indigenous community whose "non-existen[ce]" haunts the nation-state's tenuous geographic and geopolitical formation.

With the assertion that "if we do not make all of our children proud to be an American… we will lose the only thing that unifies us as a people," tribal belonging becomes incompatible with national belonging and Indigenous sovereignty is rendered a threat to United States sovereignty (CERF Brief). The nation-state – in its capacity as parens patriae – steps into a protective role when parents do not "fulfill their obligation to act on a child's behalf" and ensure the child's well-being. However, protection of the child's "welfare, comfort, and interests," vis a vis custody decisions, is contingent upon the child's "allegiance to the government of the country of its birth" (National Council for Adoption Brief). Although the ICWA interprets the child's best interests as aligned with those of the tribe, this formulation presumes a zero sum game in which identification with the tribe or Indigenous community threatens to wrest the child from the nation and rupture national cohesion. Inasmuch

as Veronica's seizure threatens national unity, her envelopment promises to heal the nation.

The merging of families stands in for the unification of the nation. Stories of how much Maldonado recognizes and appreciates the importance of the Capobiancos – "Momma" and "Daddy," who comprised Veronica's "entire" world" by the time she was transferred to Brown's home – demonstrate the quotidian inevitability of the adoption (Birth Mother Brief). Exchange of stories about Veronica's development – "her first tooth, when she began to crawl, when she took her first steps, when she said her first words" – become the currency of connection between "the families," who celebrate Christmas and birthdays together (Birth Mother Brief). There is a tightening of racial and national solidarity when Veronica's birth mother and adoptive parents can join ranks and present a united front in support of her "best interests." Linkages between the Christy Maldonado and the Capobiancos symbolize cross-racial alliances that consolidate multicultural liberal sentiments of family and nation.

Christy Maldonado's vulnerability is produced through Dusten Brown's "threat," and her "choice" to relinquish Veronica to the Capobiancos is held up as a responsible form of risk management. Her vulnerability, and the collective economic threat that single mothers (of color) may pose to the nation, is resolved through reabsorption into normative structures of the family and the nation. The two-parent nuclear family similarly resolves or incorporates queerness, as young gay and lesbian soldiers' "difference" becomes a commodity in national security efforts and same-sex

couples' "responsible" choices validate marriage as a risk management strategy for "vulnerable" groups.

Part III. Protecting "Vulnerable" Groups from the Deterioration of Marriage

In *Hollingsworth v. Perry*, both the petitioners and respondents reproduce marriage as the horizon of political possibility through the pursuit of state protection – of the "ideal family form" and the "family unit with two married parents," respectively. Protection of the "ideal family form," petitioners and their supporters contend, is rationally related to state interests in "maintaining in the public mind the links between sex, marriage, and children" (Helen Alvare Brief). Respondents argue that the state's interest in "responsible procreation and childrearing" would be furthered by recognition and promotion of "stable," "committed, monogamous relationships" (Adoption Advocates Brief).

The "marital family" is not only the foundation of "our communities and our Nation" (Mehlman et al. Brief), but it is also indispensable to civilization, progress, and a "free, democratic society" (Helen Alvare Brief). While the "states are the original and most fundamental sovereigns of our Nation," the family not only creates a structure of governance but "buffer[s] the individual from the state" (Indiana et al. Brief). Taking up the vulnerability and incumbent protection of the "sovereign people" of California, the petitioners' amici foretell the demise of "principles and practice of self-governance" and the "democratic process" (Center for Constitutional Jurisprudence Brief; Judicial Watch, Inc. Brief). California, as a sovereign state, is guaranteed the right to control its own family law and cannot be ordered to provide

recognition or approval of sexual relationships (Catholics for the Common Good Brief). Because the California State Constitution ultimately answers to the people of California, they have a right to respond to "judicial overreach" and clarify existing law (Indiana et al. Brief; Judicial Watch, Inc. Brief).

Beyond portending the destruction of "civilization" along with the family, these formulations carry an explicit pronouncement of gendered and racialized harm and a corollary incitement to mitigate the harm that "vulnerable" groups pose to themselves. "Adult-centered marriage" would bring greater harm to "the most vulnerable Americans – those without a college education, the poor, and minority groups" – who purportedly have lower marriage rates and marital quality, higher divorce rates, and more "nonmarital births" (Helen Alvare Brief). Poor single mothers are rendered particularly vulnerable to the "weakening" of marriage, which "bind[s] a father to his children and their mother" (Judicial Watch, Inc. Brief). The alternative is single motherhood, which would redirect the threat toward the nation in the form of "intergenerational poverty." Systematic disruption of marriage for "vulnerable" populations, petitioners conclude, manifests in a "marriage gap" that becomes the antecedent of poverty.

In response to the false dichotomy set out by the petitioners – between procreative/child-centered and non-procreative/adult-centered (based on love, happiness, commitment, and economic protection) marriage – the respondents seek to bridge the two versions through the language of sameness. Respondents declare that "lesbians and gay men seek to marry for the same reasons that opposite-sex couples

do" – stability for children, commitment to one another, and creation of new community (SF Brief). Accordingly, same-sex marriage will "build and strengthen families and…all of our communities" (Reverends Brief). In closing the gap between these two versions, opponents of prop 8 reaffirm the equation of marriage with parenting and the presence of two parents with stability and well-being.

The convergence of these ostensibly opposing positions through the language of sameness signals the ideological power of queer liberalism. While the individual afforded freedom is bound by the practices of delimited choice, the state may also exercise its choice in validating and rewarding particular forms of intimacy. In the case of persons who are perceived as failing to adequately manage their own risk through the performance of "responsible" choices – for example, the single mother – the state may choose to deny protection. In response, rights claims are made palatable to the state through discourses of profitability and the privatization of risk. While proponents of Prop 8 insist that the "retreat from marriage" (Helen Alvare Brief) propels low-income unwed mothers and children to join with migrants in making demands for TANF benefits, food stamps, and Earned Income Credit (EITC), opponents underscore that two-parent families would stabilize the "private safety net" (Massachusetts et al. Brief) and ensure fewer "demands on welfare and unemployment programs" (Mehlman et al. Brief). In a different but related vein, respondents in *U.S. v. Windsor* argue that DOMA strains the federal government unnecessarily by requiring provision of EITC and other tax benefits to same-sex couples who are excluded from marriage (CREW Brief).

Same-sex marriage discourses further consolidate norms of white, two-parent, privatized citizenship. Rhetorically, this is accomplished against poor, racialized single mothers' embodiment of failed self-regulation, personal responsibility, and self-care. Same-sex marriage not only funnels social justice aspirations through the prism of rights but also upholds a queer freedom made possible by the deportability of the migrant and detainment of the terrorist. In one emblematic instantiation of the material and symbolic incorporation of same-sex couples over and against the threatening Muslim other, anti-DOMA activists call for an extension of military benefits to same-sex partners. The nation-state is urged to protect "young gay and lesbian veterans of the long wars in Iraq and Afghanistan," whose sacrifice for the nation warrants compensation in the form of spousal benefits and access to the military base (LA County Bar Association Brief). In one of the most literal manifestations of the national family, the "military family" becomes that which protects and therefore must be protected.

Young queer soldiers and their partners are rendered deserving through multiculturalist and Orientalist frameworks that call for "difference" in order to combat "exceedingly complex" threats to national security (Former Federal Intelligence Officer Brief). Invoking bombings of American embassies in Kenya and Tanzania by "agents of al Qaeda" "two years after DOMA's enactment," as well as 9/11, those in support of DOMA's repeal imply that extension of military benefits to same-sex couples would contribute to a "diverse workforce" with "broad perspectives" and therefore help them be more equipped to face "foreign enemies"

who “speak languages far different from our own, practice customs far different from our own, and do not wear uniforms readily identifying themselves as combatants.” Rhetorical maneuvering juxtaposes queer “difference” and “foreign” language, customs, and nations, but renders the former as that which can neutralize or assimilate the latter (Former Federal Intelligence Officer Brief).

While queerness becomes valorous in its relation to patriotic duty, migrant “illegality” reaches the depths of its abhorrence when juxtaposed with soldiers’ commitment to the (social) contract. Citing a Yale Law Review article, Senator Sessions compares the refusal of families to “go home” when they are “supposed to” to the willingness of “our soldiers” to “go to Iraq in harm’s way” when they are told to do so (159 Cong. Rec. S4783, 2013). Whereas soldiers commit to one year or more “in harm’s way,” migrant families do not oblige when “they are asked to go home,” despite “every moral obligation” and “legal obligation to go home.” He asks, “What do you mean, someone comes to America for one year should not be made to follow the commitment and the contract we signed? We make our soldiers do it.” (159 Cong. Rec. S4783, 2013).

Soldiers’ value once again emerges precisely alongside the disposability of migrant life, as an amendment to the immigration bill would require DHS to recruit veterans and reserves to serve as ICE and Customs and Border Control (CBP) agents. Veterans are uniquely qualified to “identify and apprehend undocumented aliens, smugglers, and terrorists” by virtue of their familiarity with “security equipment and technologies” and “human intelligence skills” (159 Cong. Rec. S4565, 2013). They

would bring experience with electronic sensor systems and aircraft detection devices and training in target assessment and dissemination of intelligence needed to "ensure that our borders are stronger than ever" (159 Cong. Rec. S4565, 2013).

Conclusion

The border is imagined, variously, as protecting the poor (single) mother or protecting the nation from her. Promising to keep the "criminal alien" at bay, border and interior enforcement measures offer paternalist protection to (imagined as white) mothers. The terrorist or criminal alien is produced in dialectical relation with the at-risk "American" (white) woman, and as the simulacrum of the "War on Terror" cathects queer patriots into the national imaginary.

As threat and vulnerability shift in response to social and political contingencies, the nation-state's and the couple's economic risk is mitigated while the single mother of color is deemed too risky to be left alone. Economic initiatives that deny benefits to "chain migration members" aim to safeguard the nation from the immutable "dependency" of migrant mothers of color. Similarly, the "abandoned" single mother of a Native child is threatening in her poverty. However, she is not beyond redemption; in exchange for gifting her child to a white couple, she is symbolically reincorporated into the nation. Likewise, the poor single mother who is rendered particularly vulnerable by the "weakening" of marriage may be rescued from masculinized and racialized "threat."

Legal discourses produce racialized and gendered bodies as vulnerable, threatening, and/or risky and the as-yet-innocent Native child, deserving migrants,

and same-sex couples as contingently assimilable. As the nation coheres in defense of the vulnerable against the populations that threaten, it guarantees only its own exceptionalism. Imploring single migrant mothers and same-sex couples to regulate their own risk through responsible "choices," the nation emerges as protector of vulnerable groups. Newly constituted threats and ever-shifting forms of national vulnerability (to Indigenous sovereignty, movement across the "porous border," and economic demands) require continued vigilance and new technologies of control.

Chapter 5
The "Orphan" Child: Politics of Vulnerability and Circuits of Precarity

The Children in Families First (CHIFF) bill (2014) would have injected 240 million dollars into the transnational adoption industry, created a special office for transnational adoptions, and incentivized the global uptake of US adoption protocol. Animated by the figure of the abandoned orphan, and dubious assertions that 200 million children are "stuck and forgotten, living in orphanages," the CHIFF website features racialized images of "the most vulnerable children in the world" who "need families." Exhortations to speak for "voiceless" children and intimations that American national identity is at stake – "there is one issue on which all Americans agree, every child needs a family" – support an Evangelical adoption movement that calls on Christians to rescue hundreds of millions of "orphans." Introduced by Senator Landrieu and co-sponsored by Democrat and Republican Senators, the bill enjoys great support from Evangelical adoption groups and adoption advocacy organizations such as the National Council for Adoption, American Academy of Adoption Attorneys, and the Center for Adoption Policy.

The voices of adoptees and birth families have been conspicuously absent from discussions of the CHIFF bill. Paradoxically, it is this very "voiceless"ness that adoption advocates mobilize in their calls for orphan rescue. As the CHIFF website implores, "these children can't speak for themselves, they need you." The Evangelical adoption movement and its narratives of child rescue have attracted some attention in US mainstream media. In *The Child Catchers: Rescue, Trafficking, and the New Gospel of Adoption*, Joyce (2013a) argues that the clamor from prospective adoptive parents was spurred by U.S. Evangelical leaders' efforts to expand their social activism beyond abortion and gay rights starting in the mid-2000s. She critiques the ensuing "orphan crisis" as a moral panic fabricated to increase demand – by compelling Evangelical Christians to rescue the hundreds of millions of "orphans" through adoption – and facilitate movement toward "better, cheaper, faster" adoptions (p. 233). Contesting the statistic of 200+ million orphans in the world, Joyce (2013b) argues that Evangelical adoption agencies, with the help of "child finders," have used falsified papers, improper exchanges of money, and coerced relinquishment to create "a boom-and-bust market for children that leaps from country to country." According to this version of events, the failure to meet increasing demand for adoptable children leads to extralegal activities that further diminish supply as programs close. Coupled with a domestic "squeeze," decreased opportunities for transnational adoption encourages movement into Indigenous communities (Joyce, 2014).

While this narrative challenges the exploitation that inheres in coercive adoption systems, it glosses over the convergent interests of Evangelical adoption

movements, adoption advocacy organizations, and anti-sovereignty groups in mobilizing children's vulnerability and "best interests" to dismantle the Indian Child Welfare Act (ICWA) and undermine Native sovereignty in the United States. Both the rescue narratives and critiques of them obscure the geopolitical and historical circumstances that intersect with Indigenous adoption. Moreover, the attribution of Indigenous adoption to supply and demand, or a "shortage" of potential adoptees, elides the continuity of present anti-ICWA battles with longstanding anti-sovereignty movements and violent intervention in Indigenous communities.

In this chapter, I consider how the construction of the "vulnerable (orphan) child" through discourses of racialized vulnerability in legal and policy debates not only reproduces narratives of rescue but also obscures persistent economic, social, and political inequalities. Specifically, I suggest that the text of the ICWA and the Border Security, Economic Opportunity, and Immigration Modernization Act (Senate Bill 744, 2013) – in their focus on the behavioral and relational characteristics of the nuclear family – enable state discourses that render the child's vulnerability an outcome of parental failure to inhabit a white, middle-class nuclear family ideal rather than an index of the structural conditions by which opportunities for social, economic, and political self-determination and livelihood are foreclosed among Indigenous and migrant communities.

Vulnerability, Precarity, and the Child's "Best Interests"

Discourses of racialized vulnerability and deviance from the nuclear family ideal have bolstered US state projects of assimilation, including movement of Native

children into boarding schools from the late nineteenth century and the widespread state-sanctioned removal of children from their extended families and into foster care and adoptive homes – epitomized by but not limited to the Bureau of Indian Affairs' (BIA) Indian Adoption Project (1958-1968) – starting in the mid-twentieth century. Even after formal recognition of the violence of this removal, and the "white, middle class standard(s)" for determining the child's best interests that subtend it, reproduction of the nuclear family ideal in US family law has required that Indigenous families overcome presumptive racialized deviance through demonstration of parental "fitness" (House Report, p. 24; Barker, 2005).

The best interests of the child (BIC) legal standard emerged in seventeenth and eighteenth century case law and developed in tandem with US family law conceptions of the child. Its application became increasingly discretionary in the 1960s and, alongside social scientific theories that touted "psychological parenting," the benefit of "intact," "stable" families and the ineffectualness of non-custodial parents, was used to support adoption as a poverty alleviation tactic starting in the 1970s (Kohm, 2008). This coincided with the publication of the Moynihan report (1965) and the rise of the "dependency" frame in social policy discourse, which highlights the breakdown of the "American family" and suggests that public assistance provision to single mothers (of color) will encourage state dependency (Smith, 2007). The BIC standard and its underlying principles have influenced recent legal and policy debates about the ICWA and immigration through the figuration of poverty and the absence of a "stable," two-parent family as evidence of the child's

vulnerability. Because it treats the effects of poverty and racism as particularities of children's lives and subject to judges' discretionary evaluation, the BIC legal standard enables constructions of children's racialized vulnerability to become detached from the conditions of precarity that shape their families' and communities' lives.

Although the ICWA seemingly attempts to shift the framework for determining a child's "best interests" by recognizing ties with extended family members and tribes, its application is inflected by U.S. law's privileging of the nuclear family. The racialized vulnerability of the "Indian child," which is rhetorically derived from her father's "irresponsible" behaviors and her tribe's poverty, is said to be resolved through "rescue" by an adoptive couple rather than attention to the economic, social and political conditions of her vulnerability. The vulnerability of "DREAMers," who arrived in the United States before age 16 and have met certain educational and behavioral requirements, is likewise constructed through and against their parents' transgressions. Humanitarian discourses of DREAMers as deserving and innocent "Americans in waiting," (Keyes, 2013, p. 123) and their symbolic incorporation into the US nation, bolster the logics by which their parents and other undocumented migrants are rendered deportable and obscure the geopolitical conditions that may encourage migration.

While conditions of precarity are overshadowed, discourses of the child's racialized vulnerability enable constitution of the adoptive couple as the rescuers of "needy" children. Recent same-sex marriage debates have featured descriptions of lesbian and gay couples as most willing to adopt children with "special needs,"

including children of color and children living in poverty. Their deservingness is evidenced by the choice to rescue racially or physically "vulnerable" children from their communities and bring them into the stability of a two-parent family. Symbolic assimilation of queer parents and their adopted children, in turn, marks the nation's continued progress. The predominant focus on parental behavior in state narratives once again obviates attention to the conditions, such as poverty, that shape the lives of children, families, and communities.

An analytic of precarity enables examination of the political, affective, and ideological processes by which certain populations are disproportionately subject to inequitable social and economic conditions and "differentially exposed to injury, violence, and death" (Butler, 2009, p. 25; Puar, 2011). Attention to the processes by which discourses of vulnerability and rescue shape rhetorical and material fields of vision enables movement beyond a uniform critique of adoption to questions about the continued precarity of lives "already lost," and the capacity and progress of those "worth protecting" (Butler, in Puar, 2012).

Using a comparative lens centered on ideologies of vulnerability and rescue, I seek to account for the elision of economic, social, and political conditions of precarity within three sets of legal and legislative debates: adoption involving an "Indian child;" the Development, Relief, and Education for Alien Minors (DREAM) Act, and; same-sex marriage. I consider how discourses of racialized vulnerability and the "best interests" of the child, in tandem with the reconsolidation of the nuclear family and focus on parental behaviors in recent applications of the ICWA and

immigration legislation, orient attention toward assimilation of children and away from the historical circumstances by which children become systematically vulnerable. I suggest that the focus on parental behaviors supports the retemporalization of violence into the past and reinstantiates the equation of racialized vulnerability with parental "irresponsibility" through notions of "harm" or "abandonment." Such rhetoric locates the responsibility for poverty and violence in individuals rather than social and political processes, and uplifts parents – including white, middle-class queer couples – and nations that "rescue" vulnerable children.

Part I. The ICWA and Adoptive Couple v. Baby Girl: Constructing Vulnerability

A growing number of adoption cases involving an "Indian child" have featured questions about whether an unwed "Indian father" and the tribe to which he belongs may invoke the ICWA in contesting the "non-Indian mother's" placement of the child with a non-Indian family. Supporters of adoption have pulled on the Existing Indian Family (EIF) exception and state-law definitions of parental rights to claim that the father who has not established financial support of the child and "cultural ties" to the tribe has no right to intervene in the proceedings. The ICWA's (unwitting) reification of US family law's understanding of the child's best interests through the nuclear family ideal, I suggest, has enabled attempts to invalidate application of the ICWA through configuration of the father's "abandonment" as evidence of the child's racialized vulnerability and necessary rescue.

Most immediately, the ICWA was framed as a response to overwhelming evidence of disproportionate displacement of Indigenous children from their homes

into non-Indian adoptive homes and foster care. Congressional testimony leading up to the passage of the ICWA cited research conducted in 1974 in concluding that "white, middle class standard(s)" for determining the child's best interests – namely, that children should have primary bonds with one or two caretakers – guided social workers' decisions to remove children raised in community or extended family settings (House Report, p. 24). The Act grants tribal jurisdiction over child custody proceedings for "Indian children," seemingly codifying the premise that the child's best interests are coextensive with the tribe's interests and vital to Native sovereignty. This principle was reaffirmed in *Mississippi Band of Choctaw Indians v. Holyfield* (1989), in which the court concurred with an Arizona state court that "it is in the child's best interest that its relationship to the tribe be protected" (*In re Appeal in Pima County Juvenile Action* S-903, 130 Ariz., at 204, 635 P.2d at 189).

The stated intentions of the ICWA are to protect parental and tribal relationships through a higher standard for the termination of parental rights, including an active effort to rehabilitate the parent such that removal is prevented (unless there is reason to believe that "continued custody" would result in harm to the child). In recognition that the tribe possesses rights that are distinct from those of the parent, the Act stipulates that the tribe must receive notification of an involuntary proceeding and can intervene in a case involving foster care placement or termination of parental rights at any time. Should parental rights be terminated, preferred placements for the child include the extended family, other members of the tribe, or other Indian families. In spite of the formal language and intentions of the ICWA, I

suggest that the Act and its recent interpretations unwittingly reproduce the "intact" nuclear family ideal through use of the Existing Indian Family (EIF) exception and state-law requirements for parental rights.

In the ICWA, an "Indian parent" is defined as a biological or adoptive parent of an Indian child – under 18 years of age and either a member of a recognized tribe or eligible for membership and the biological child of a member – excluding an unwed father whose paternity "has not been acknowledged or established" (25 U.S.C. § 1903(9)). Because this final clause remains undefined, anti-ICWA efforts have filled it in with state-law requirements for the establishment of paternal rights, most of which center on financial support of the mother and child. Restriction of "parent" to that recognized by state law preempts Indian fathers' and tribes' rights to notice of and participation in custody proceedings. Only the "parent" – and not the tribe or extended family – may offer or withdraw consent to adoption, and notification to the tribe is only required when the proceeding is involuntary. Thus, if the mother voluntarily relinquishes for adoption the child of an unwed father who is not recognized as a "parent" under state law and thereby under the ICWA, the tribe may not be notified of the adoption proceeding.

Just as the tribe's notification may be contingent upon state-law classification of "parent," it may also hinge upon the child's connection to an "existing Indian family." The "existing Indian family" (EIF) exception, which derives from the abstraction of "continued custody" and "Indian family" from sections of the legislation that focus on measures to prevent the termination of parental rights and

foster care placement, has been used to negate application of the ICWA in a number of states since the 1980s (25 U.S.C. § 1912 (d, e); Metteer, 1997). In *In re Adoption of Baby Boy L.* (1982), the court denied the Kiowa Tribe of Oklahoma the right to intervene in the adoption proceeding because the child – whose non-Indian mother gave consent for an adoption that was later contested by his father, an enrolled member of the Kiowa Tribe – was not part of an "existing Indian family unit" and the ICWA therefore did not apply. Subsequent cases, including *In re Bridget R*. (1996), affirmed that "cultural ties" are not furthered by applying the ICWA in cases "where Indian parents have no significant social, cultural, or political relationship with the tribes" (1507). Although the term "existing Indian family" does not appear in the text of the ICWA, its precedential authority has converged with state-law requirements for paternal rights to enable the reorientation of ICWA cases toward the relational and behavioral characteristics of the nuclear family.

In *Adoptive Couple v. Baby Girl*, the petitioners called for adherence to state criteria for paternal rights – which, in South Carolina, would have required Brown to either have been married to Christy Maldonado, Veronica's mother, or have provided financial support to Veronica starting six months prior to her birth. Whereas Brown and his supporters contend that the establishment of paternity under state law – which was confirmed by a DNA test – is sufficient, the petitioners argue that the ICWA "presumptively excludes unwed biological fathers" and "clearly requires something more than a DNA test" (GAL Brief). They differentiate between affirmation of paternity – which "imposes potential obligations on fathers to pay child support" –

and the establishment of paternal rights (Petitioners Brief). While the former "would sweep in sperm donors and rapists" (Petitioners Brief), the latter distinguishes "a committed father who has voluntarily offered not only financial assistance but active parenting support" and is consistent with both "traditional notions of family law" and "the purposes of ICWA to protect existing familial rights" (GAL Brief).

The GAL brief emphasizes the "mismatch" between the purposes of the ICWA and use of the Act to "remove" Veronica from her "adoptive home." While the ICWA intended to stem "abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes" (*Holyfield*, at 32) in the 1970s, the current situation followed from Brown's "abandonment" of Veronica – i.e., "his own actions and inactions" – and not "any abusive child welfare practices." His behavior, according to the GAL brief, "deprives him of any parental claim to that child, regardless of his race or ancestry" and bestows her mother with the "unilateral authority" to pursue an adoptive placement.

Notions of an "intact" nuclear family and parental fitness also underwrite the petitioners' use of the EIF exception to question whether Brown's lack of "continued custody" of Veronica and Veronica's lack of "cultural ties" to the Cherokee Nation disqualify them from classification as an "Indian family" warranting protection by the ICWA. The EIF exception has found support under the aegis of rescuing "vulnerable" children from putative racial injustice. Invoking the exception, the petitioners argue that the extension of ICWA to non-custodial Indian families will result in the "tearing" away of "innocent" Indian children from loving families – "simply because

they may have a measure of Indian heritage" (Adoptive Parents Committee Brief). In contravention of the Act's assumption that a relationship with the tribe is in the child's best interests, they contend that Veronica's best interests are subordinated to those of the tribe due to "a fraction of Indian blood" (GAL Brief).

By defining Veronica's tribal membership in terms of blood, the petitioners not only pit her best interests against those of the tribe but also set up a charge of racial discrimination. In cases where parents do not have a significant relationship with the tribe, they assert, application of the ICWA would not "preserve Indian culture, because no culture exists in the first place" and would therefore constitute differential treatment based on ancestral classification (Bridget R. at 1507, cited by Adoptive Parents Committee Brief; Petitioners Brief). Here, "culture" is defined in terms of the nuclear family and its physical proximity to the tribe. According to this legal reasoning, racial preference without an "existing Indian family" – i.e., a two-parent family residing on a reservation – does not further Indian self-government and thereby violates the Equal Protection clause of the 14th amendment.

Reinscription of the white nuclear family model's exclusive focus on parental behavior may sever not only immediate family but also extended familial and tribal networks. With invocation of the state-law definition of parental rights and the EIF exception, the tribe's involvement is contingent upon the parent's behavior; in order for the tribe to receive notification of the proceeding, the parent must both establish parental rights and cultural ties to the tribe and engage in "unfit" behavior that warrants the initiation of involuntary adoption proceedings. Embedded assumptions

that attach racialized vulnerability to failure to inhabit the nuclear family ideal naturalize the separation of families and communities.

This reconsolidation of the "intact" nuclear family ideal supports applications of the ICWA that relegate racism to the past, thereby occluding contemporary effects of dispossession and exploitation. The ICWA was framed as the antidote to the 1974 Association of American Indian Affairs' (AIA) finding that 25 to 35 percent of Indian children had been removed from their families and placed in foster care or adoptive homes. The Act acknowledges the "white middle class standard(s)" that guided removal and placement decisions prior to enactment of the ICWA, and seeks to revise the "standards for defining mistreatment" and remediate the decisions of social workers who have been "ignorant of Indian cultural values and social norms" (House Report, 10-11). In proposing these solutions, the text of the legislation reiterates racialized assumptions that "family breakdown" contributes to the "cycle of poverty" and declares that "there is no end to Indian poverty in sight," thereby retemporalizing colonial and racist violence while anchoring poverty in the culture itself. This opens up space for anti-ICWA allegations of "reverse racism" – that differential treatment based on "race" violates the Equal Protection clause of the 14th amendment – and assertions that, in the wake of congressional recognition of past mistakes, it is now Indigenous children's racialized vulnerability (to poverty) that must be combated.

Imperialist discourses of rescue animate descriptions of adoptive parents who are "discouraged from opening their hearts and their homes to children in need" and children "most in need of permanent loving homes" who are instead "forced" into the

"custody of strangers" (Adoptive Parents Committee Brief; CAICW Brief). In a haunting sleight of hand, "forced" removal is that which forsakes adoptive parents' "fundamental rights to parent the child they had raised and supported since birth" and compromises the child's best interests. The Adoptive Parents Committee brief maintains that application of the ICWA to this case would violate Veronica's "fundamental right to remain in a home where she is loved, well-cared for, and lives with parents…who provide her with a secure environment in which to learn and grow." Beyond constructing Veronica's interests as antithetical to those of the Cherokee Nation, this argument betrays an underlying conviction that US paternalism has facilitated dependency and thereby failed to protect "Indians" from their own cultural deficiencies.

The Capobiancos' supporters claim that the ICWA precludes Veronica's constitutional right to be "one of the sovereign people of the United States" rather than a "resource" of the tribe (CERF brief). These unconstitutionalities are traced to the *Dred Scott* decision, which deemed "that Indians are not fully domesticated people capable to act as full citizens of the United States subject to the same responsibilities and constitutional rights as all other citizens." Federal promotion of tribal sovereignty, they contend, has "failed the great majority of Indians" and "forced" Indian children to "live in poverty" solely because of their race (CERF Brief). These consequences are evident in the case, as Brown can provide only "essentials" and the tribe only "free lunches and free medical care," whereas the Capobiancos can send Veronica to private school (GAL Brief). Such wealth

disparities, it is argued, should be considered in the determination of her best interests and should ultimately lead to the dismantling of federal protections of tribal sovereignty (CERF Brief).

Anti-ICWA Campaigns: Rescuing the "Indian Child" from a "Culture of Poverty"

In July 2013, Maldonado and her attorneys filed a lawsuit alleging unconstitutionality of portions of the ICWA (Knapp, 2014). Joined by other women in similar situations, the lawsuit focused on ICWA provisions that, it argued, interfered with a birth mother's right to choose who raises her newborn when the child's father is not in the picture. Along with subsequent ICWA cases, including that of "Deseray" and one involving a six-year-old Yup'ik child in Alaska, this move is indicative of burgeoning anti-ICWA efforts among converging anti-sovereignty groups, prospective adoptive parents, and adoption attorneys (Cross, 2013).

Anti-sovereignty groups, which emerged in the 1960s in response to Indigenous rights legislation, call for equal rights for white people who are "oppressed" by Indian law. More recently, groups with an interest in the casino industry and natural resources such as wildlife, oil, and gas have joined anti-sovereignty campaigns. The ICWA has become a focal point for such groups, some of whom sparked an effective media and fundraising campaign on behalf of the Capobiancos. Paul Clement, who represented the guardian ad litem assigned to Veronica, has buttressed anti-ICWA and anti-sovereignty arguments – against Indian casinos, specifically – with assertions of race-based violation of non-Indians' rights

(Briggs, 2013). Recent attempts to upend ICWA rely on accusations of (reverse) racism toward white adoptive parents.

In a press release after Veronica was returned to the Capobiancos, the CAICW wrote about the case as exposing the "horror" that the ICWA "has been inflicting on children across the United States" (Veronica: One of Many Multi-Heritage Children Hurt by ICWA, 2013). They vowed to spend time "educating legislators about the harm caused by ICWA to multi-racial families across the nation." Parallel allegations of discrimination against white parents animated major US adoption reform efforts in 1996 and 1997, which together produced a multicultural shift in adoption policy and enacted a racialized and classed transfer of "responsibility" and wealth (Ortiz & Briggs, 2003). In successive sections (1807 and 1808), the Small Business Job Protection Act of 1996 (1996) incentivized public adoption of children of color by white families and replaced "race matching" with colorblind adoption processes. Section 1807 provided a $5,000 tax break for adoption from foster care, and $6,000 for adoption of a "special needs" child – including children who may be difficult to place due to membership in a "minority group" or "ethnic background." Section 1808, known as the Interethnic Placement Act (IEPA), strengthened the Multi-Ethnic Placement Act's (1994) prohibition on public and federally-funded adoption agencies' consideration of race, color, or national origin when making adoptive placements.

Proponents of the IEPA attributed the disproportionate number of black children "languishing" in the system to racial discrimination against white adoptive

parents (Briggs, 2012). The Small Business Job Protection Act of 1996 (1996) institutionalized the "colorblind" transfer of children of color through language of disability and reverse racism while erasing the conditions of possibility for their vulnerability – namely, the racialized pathologization of black mothers and low rates of family reunification. Thus, just as the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA; 1996) eliminated Assistance to Families with Dependent Children (AFDC) and made it all but impossible for low-income mothers to support their families, the transfer of poor children to wealthy families became subsidized.

The Adoption and Safe Families Act (ASFA; 1997) furthered state-sponsored efforts to privatize care for poor children of color, establishing adoption payments for states that increase the number of children adopted from foster care. Since 1980, the federal government had provided adoption assistance to states and required states to, in turn, promote adoption of "special needs" children whose birth parents are AFDC-eligible. Currently, states can earn $4,000 for each adoption of a foster child that exceeds the state's baseline, plus $6,000 for additional adoptions of children with special needs (Fostering Connections to Success and Increasing Adoptions Act, 2008). Taken together, the elimination of AFDC, the IEPA, and the ASFA support the movement of "vulnerable," poor children of color into wealthy white families under the aegis of protection from cultural pathology.

Echoing this logic, anti-ICWA campaigns call for the rescue of vulnerable children from state racism and a "culture of poverty" fueled by government

dependency. Elizabeth Morris, who founded the CAICW, argues that welfare policies breed dependency on the federal government and create reservations that are violent and unsafe for children. The CAICW urges particular help for multi-racial children who have been "forcefully removed from safe, loving homes" and placed with potentially "unsafe strangers." Similar ideological patterns underwrite state accounts of the vulnerability and rescue of DREAMers, the narration of which obscures the conditions of possibility for their migration and the ongoing precarity of sending families and communities. The Indigenous or migrant adoptee is uniquely situated in this terrain of vulnerability and precarity, as she is produced as still assimilable – in other words, not beyond rescue from her culture (of poverty). Upon rescue, her assimilation is synonymous with the nation's uplift and further entrenchment of notions of parents' "harmful" or "irresponsible" choices.

Part II. DREAMers and "Family Values": Galvanizing the Nation

The Border Security, Economic Opportunity, and Immigration Modernization Act (Senate Bill 744) departs from previous immigration legislation to formally incorporate notions of the child's "best interest(s)" in matters of detention and deportation of parents. Although DREAM Act 2013 does not include BIC language, it is said to comport with the best interests considerations and has been advocated for on such terms by organizations such as Human Rights Watch (Ginatta, 2010) and First Focus Campaign for Children (Bruce, 2014). State-sponsored discourses of the DREAM Act, first introduced to the Senate in 2001, construct children's interests as detached from, and their deservingness as antithetical to, those of their parents. Such

rhetorical maneuvers underwrite the symbolic ascendance of DREAMers and the erasure of the social, political, and economic circumstances of their arrival, as well as immigration policy's routinized separation of families.

The symbolic differentiation of children's innocence from their parents' transgressions is visible in the ideological underpinnings of Senate Bill 744, which includes special provisions for DREAMers: given completion of at least two years of college or four years of military service, an English test, biometric and biographic data submission, and background checks, they may apply for Lawful Permanent Residence after five years of Registered Provisional Immigrant (RPI) status. DREAMers, who were brought to the United States by their parents "through no fault of their own" and pursue higher education or military service, exemplify deservingness; they are educated, patriotic, and high-achieving. Immigration legislation constitutes DREAMers as both innocent of their parents' transgressions and inherently "productive future members of society," and conditions their futurity on the terms of innocence and productivity – arrival in the United States before age 16, and completion of college education or military service (Volpp, 2012). Advocates of the DREAM Act 2013 impart a distinct moral obligation to protect these deserving children. Senator Leahy exhorts: "I don't know how anybody who professes to care about family values, who professes to care about other people, can sit down with these young people – the DREAMers – and not be moved and not want them to have the same advantages our children and our grandchildren have" (159 Cong Rec S4008, 2013). This narration signals the symbolic incorporation of

DREAMers into the national imaginary while belying the complicated terrain of "family values" discourses and practices in immigration policy.

Senator Reid tells the "compelling" story of James, "a veteran who sacrificed his time and his health to keep this nation safe from harm," and Sharon, who "supported" James through three stints in Iraq and the resultant brain injury that forced his retirement (159 Cong. Rec. S4071, 2013). Having emigrated from Mexico as a teenager, Sharon is a DREAMer who "speaks fluent English" and now has three sons with James, her husband of 13 years. Her maternal and his patriotic sacrifice oblige the nation's paternal protection of the children and disabled husband's caretaker. On a trip to Washington, D.C., James reportedly stated "I did what my country asked me to do. Now I'm asking my country to keep us together for the sake of humanity and freedom." A subsequent reprieve from deportation ensures that Sharon, "a wonderful mother and wife," meets the needs of her children and husband, and the nation thereby "keep[s] his family safe and together" (159 Cong. Rec. S4071, 2013).

While the prospective uplift of vulnerable DREAMers – who are American "in all but name" – may galvanize the nation, it does not promise great results for the DREAMers themselves. Educational achievements that are necessary for RPI and Permanent Resident status may be obstructed by undocumented status and DREAMers, like Deferred Action for Childhood Arrivals (DACA) grantees, would not have guaranteed access to Permanent Resident status and are subject to prosecutorial discretion (Johnson, 2014). A study by Batalova and McHugh (2010)

found that while 2.1 million undocumented immigrants may be eligible for the 2010 DREAM Act, fewer than 40% would likely obtain Legal Permanent Residence. Additionally, the legislation denies those with RPI status access to many federal student loans, eligibility for cost-sharing reductions under the Affordable Care Act, and federal means-tested public benefits under nonemergency Medicaid, Children's Health Insurance Program (CHIP), Supplemental Nutrition Assistance Program (SNAP), Supplemental Nutrition Assistance Program (SNAP), Temporary Assistance for Needy Families (TANF), and Supplemental Security Income (SSI).

Additionally, the construction of DREAMers' deservingness against their parents' risky and harmful behaviors may naturalize the separation of families. Parents', and specifically mothers' "bad" behaviors – e.g., "illegal" entry or visa overstay – operate as the foil for children's innocence and promise (Volpp, 2012). Senator Murray tells the story of two sisters who were brought to the U.S. when they were 3 and 7 years old and "raised by a single mother…after their father left the family behind" (159 Cong. Rec. S4369, 2013). Their mother did her best, but the girls were forced to grow up quickly and "depend on themselves." One sister's dream of becoming a pediatric cardiothoracic surgeon has been stalled due to the "broken" immigration system – as Senator Murray says, "despite the fact that [these] young women…want to contribute to our nation, our current system won't let them" (159 Cong. Rec. S4369, 2013). Symbolic incorporation of the two young women into the nation is performed over and against their mother, who serves as the foil for both their unwitting border crossing and their commitment to personal and national betterment.

In dialectical relation to the deserving and potentially rescuable migrant child, the migrant mother is constituted as culturally unassimilable. Ideologies of cultural difference and women's dependence have configured the undocumented mother of color, in particular, as a social service (over)user and shaped much of the rhetoric of family immigration since the 1990s. Migrant mothers are depicted as crossing the border to have US citizen children and taking undeserved public money from the (white) American taxpayer. As parents of DREAMers and DACA grantees are not eligible for reprieve from deportation, many mixed-status families are forced to choose between family deportation and family separation. Family separation is justified by notions of parents' "choice" of residency and their responsibility for the "harm" inflicted upon their children (Hagan et al., 2008; Oliviero, 2013). Thus, the sentiment that these deserving children should not be punished for their parents' "choices" to cross the border intersects with severe material consequences, including "constructive deportation" and foster care placement, faced by many children whose parents have been deported.

The separation of children from their parents reflects incommensurate "family values" discourses and the deportation regime's devaluation of families, or the slippage between the rhetoric and practices of colorblind immigration policy. Principles of family unity and family reunification have underwritten US immigration legislation since the Immigration and Nationality Act of 1965. Continuing this pattern, Section 1115 of Senate Bill 744, "Protection of Family Values in Apprehension Programs," calls for "due consideration" of "family unity" and the

"best interests" of the child when implementing "migration deterrance programs at the border" – i.e., when deciding whether to deport or prosecute an undocumented migrant. However, these principles are not translated into concrete procedures, and immigration and child custody determinations are left to state discretion.

While section 2107(b) identifies parents' removal or involvement in immigration proceedings as "compelling" reasons for states not to file a petition to terminate parental rights, and requires states to notify parents of the intention to file a petition, it reinforces the 15 month timeline for the termination of parental rights outlined in the ASFA, which is intended to facilitate the movement of children in foster care into adoptive placements. Like past immigration legislation, Senate Bill 744 defers to states' discretion in the termination of parental rights and state law's consideration of undocumented adult relatives as placement options for children separated from their parents. Historically, state courts' refusal to grant placement to undocumented relatives has contributed to the routine separation of children from their families.

These measures extend a longstanding double-edged rhetoric of "family unity" in immigration legislation. Language of "family unity" and other "expressions of legislative concern" (Hawthorne, 2007, p. 814) have naturalized the nuclear family model in immigration policy while privatizing economic and social costs and deflecting attention from the deportation and separation of families. Senate Bill 744 may further the incidence of children's separation from their families by removing adult siblings of US citizens from the family preference categories and restricting

applications for "RPI dependent" status to a spouse or child – who is unmarried and below 21 years of age – of a person with RPI status (Sec. 2101(5)).

Moreover, exceptions for DREAMers reinforce the logics by which "undeserving" undocumented immigrants may be "rightfully" subject to deportation. As the quintessential "good" migrants, the DREAMers occupy something of a model minority status, which ensures their distance from the "bad" migrant and their not-quite-as-yet positioning in relation to the unmarked (white) American (Yukich, 2013). The DREAMers, in their innocence, are differentiated from those who knowingly crossed the border without papers and are nevertheless in line for a "path to citizenship." Violence toward those outside the bounds of deservingness is justified insofar as it nullifies "threat" and protects national well-being (Grewal, 2003).

In fixing a "good citizen" ideal underlined by educational aspirations and love for the nation, DREAMers' futurity becomes an index of national progress while erasing the economic, social, and political conditions that undergird migration. Determinations of deservingness render "illegal" (im)migration the outcome of "irresponsible" individual choices rather than the consequence of sustained geopolitical relations of inequality. Meanwhile, the terms of DREAMers' ascendancy – the just reward for completion of two years of college or four years of military service – fold children's innocent vulnerability into the nation's futurity while obscuring the ongoing precarity of lives "already lost" (Butler, 2009). In state discourses of the child's adoption into the family or nation, persistent focus on the (orphan) child's vulnerability detracts attention from the maldistribution of poverty,

labor exploitation, and violence by which the production of vulnerability becomes routinized. The futurity of the rescuing couple and nation, in turn, is imagined through the child's cultural ascendance.

Part III. Adoption and Queer Normativity: Rescue and Redemption

Same-sex couples are among those whose freedom has been written through the rescue of vulnerable children. In recent legal discourses, responsible "choices" – home ownership, financial stability, and coupled, monogamous families – are proffered as evidence of same-sex couples' deservingness of full citizenship (Brandzel, 2005; Chávez, 2010). One increasingly valuable marker of queer value is "possession of a child;" as the child embodies pure or ideal citizenship, adoption "becomes a way for previously despised gay and lesbian subjects to narrate themselves as deserving, moral, and responsible" (Eng, 2010, p. 101; Hong, 2012, p. 95). In taking up the "choice" and "responsibility" of family, same-sex couples transcend their own cultural difference and are written into universalized citizenship.

Queer freedom and its relation to the vulnerable child were at the center of *Hollingsworth v. Perry* (2013), which represents the culmination of over a decade of legislative and judicial processes in California.[37] Proposition 8, which sought to add a "limited exception" to the state Equal Protection clause and redefine marriage as between a man and a woman, was passed by voters in 2008 and upheld by the California Supreme Court in 2009. Two couples filed a lawsuit and prevailed in District Court. Upon appeal to the US Supreme Court, the case was dismissed on the

grounds that the sponsors of Proposition 8 did not have standing to defend the proposed law, leaving the District Court decision intact.

As in same-sex marriage cases since *Goodridge v. Department of Public Health* (2003), both sides of *Hollingsworth v. Perry* reify the nuclear family as an important site of state governance insofar as it shoulders the responsibility for privatized social and economic costs (Briggs, 2012). While proponents of Prop 8 insist that the "retreat from marriage" propels low-income unwed mothers and children to join migrants as "public charges" in need of TANF, SNAP, and Earned Income Credit benefits, opponents underscore that two-parent families would stabilize the "private safety net" and ensure fewer "demands on welfare and unemployment programs" (Mehlman et al. Brief). They laud marriage's capacity to create a "private safety net" that "limit[s] the public's liability to care for the vulnerable" and reduces reliance on the state (Massachusetts et al. Brief). Similarly, the respondents in *U.S. v. Windsor* (2013) argue that extension of marriage to same-sex couples would not only decrease economic risk, but also produce increased tax revenue. Marriage is promoted as the optimal strategy for "minimiz[ing] public expenses for indigents," or relieving society of the burden to care for those who are unable to support themselves (Historians Brief).

While both sides of *Hollingsworth v. Perry* reproduce the two-parent ideal, they diverge in imagining its optimal forms. Petitioners persistently imagine the relations of blood and biology that anchor normative structures of heterosexual coupling, procreation, and homemaking, whereas respondents deploy histories of US

adoption policy in arguing that biological connection is not central to the functioning of the two-parent family. The capacity of marriage to protect the vulnerable child operates as a dense ideological node of this debate.

According to petitioners, the expansion of marriage would weaken its primary purpose of protecting innocent children from the effects of their heterosexual parents' "irresponsible" procreation. Opposite-sex marriage enhances the state's interest in "linking responsible procreation with child rearing" by encouraging "unintentionally conceiving" couples to "stay together for their children" (Judicial Watch, Inc. Brief). As the argument goes, heterosexual couples are uniquely prone to "casual or temporary" relationships that prove detrimental to children's well-being. Petitioners' amici draw a distinction between marital and parental law, acknowledging that state support and encouragement of more "optimal" or "ideal" family forms does not preclude allowance of adoption and parenting by less "deserving" couples (U.S. Conference of Catholic Bishops Brief). Because same-sex couples are more "responsible" in procreation, however, they do not need the state to safeguard their families' and children's well-being. Given a fundamental purpose of "responsible procreation," it follows that marriage rights be drawn not around parental rights but around opposite-couples, who are the only ones who can conceive "unplanned" children.

Marriage manages the "consequences" of procreation, offering "social pressures and incentives" for biological parents to remain together and care for their children (Indiana et al. Brief). Such an interest is underscored by the fear of what will

befall “unintended children, among the weakest members of society” and children born to “unmarried mothers” (Matthew O’Brien Brief). Upholding fatherhood as the foundation to a cohesive family, petitioners’ supporters assert that “gender-differentiated parenting is important for human development and that the contribution of fathers to childrearing is unique and irreplaceable" (Social Science Professors Brief). These assertions are backed by scientific and statistical authority, and even President Obama’s Statement at the Apostolic Church of God (June 15, 2008):

> We know the statistics--that children who grow up without a father are five times more likely to live in poverty and commit crime; nine times more likely to drop out of schools, and twenty times more likely to end up in prison. They are more likely to have behavioral problems, or run away from home or become teenage parents themselves. And the foundations of our community are weaker because of it.

Citing a widely refuted study of parenting by sociologist Mark Regnerus, the Social Science Professors brief asserts that the outcomes are best for children “raised by biological parents in an intact marriage.” It endorses Regnerus’s conclusion that stepchildren and children living with single mothers fare less well than children living with two biological parents. Since “every child in a ‘planned’ gay or lesbian family has at least one nonbiological ‘step’ parent, therefore, it is unsurprising that now-adult children of women living with a same-sex partner “look markedly different on numerous outcomes” – including receipt of public assistance, unemployment and cohabitation rates, and educational achievement – as compared to “children who grew

up in biologically (still) intact, mother-father families" (Social Science Professors Brief). The single mother's irresponsible choices underwrite children's vulnerability and operate as a foil for the responsible choices of citizen-subjects who inhabit normative modes of privatized family. Lest they succumb to the effects of their own "irresponsible" choices – i.e., poverty and fatherlessness – the "least well-off" and "most vulnerable of couples who unintentionally conceive children" must be protected through state-sanctioned marriage (Judicial Watch, Inc. Brief).

Opponents of Prop 8 and the Defense of Marriage Act (DOMA) advocate on behalf of two sets of vulnerable children – those who are currently experiencing stigmatization and psychological harm derived from "illegitimate" status and would benefit from increased "stability" if their parents were allowed to marry, and those who have been or will be rescued by same-sex couples – in asserting the superiority of two parents. Citing an article by sociologists Judith Stacey and Timothy Biblarz, the Adoption Advocates brief concludes, "the real, relevant factor in determining good parenting is not biology or gender – but stability. The 'best scientific evidence' indicates that having two committed parents, regardless of who they are and how they became the child's parents, is 'generally best' for the children." The evidence that "stability improves child outcomes" bolsters the conclusion that recognition of same-sex marriages "are likely to improve the wellbeing of children of same-sex parents by providing enhanced family stability" (ASA Brief).

The Adoption Advocates brief contests petitioners' assertions that two biological parents are best for children, offering the "history of successful adoptions"

as contrary evidence. “Every child adopted out of, or languishing in, the public foster-care system represents a failed biological family unit. And every successful adoption saves such a child from a lifetime without a permanent family.” As “decades of methodologically sound social science research” provide evidence that child well-being results from “stability in the relationship between the two parents, stability in the relationship between the parents and child, and greater parental socioeconomic resources,” it follows that “married adoptive parents” may provide a comparably “stable” home (ASA Brief). While respondents appeal to adoption in denying the importance of biological ties in the creation of “stable and supportive” homes, they reinforce findings of differences between “stable two-parent families” and those headed by single parents.

In advancing conjugal domesticity as the salve to poverty and its effects, respondents equate single motherhood with “instability” and naturalize the precarity of communities that are organized by alternative modes of intimacy. In an illustrative passage, the American Psychological Association (APA) brief “acknowledge[s] the association between child adjustment and access to economic and other resources” – i.e., more wealth is correlated with “safer neighborhoods” and healthier food and air – en route to confirming the universality of “factors that are linked to positive development of children” in all two-parent families. Rather than dwell on the effects of poverty, respondents in both cases call for “allowing same-sex couples to enjoy the same benefits of marriage as opposite-sex couples” in service of the “[state’s] interest in protecting children” (California Brief). Existing California law, which already

supports parenting by same-sex couples and values both social and biological ties when determining parental rights, and histories of adoption are deployed to substantiate protectionist arguments.

Same-sex marriage advocates narrate the history of US adoption through unpunctuated progress, with descriptions of a "deepening commitment to providing permanent families for all children in need of them and a recognition that qualified parents of all types can provide loving, nurturing, and stable homes for those children" (APA Brief). Transracial adoption and adoption by gay or lesbian parents are held up as examples of the broadening classification of adoptive parents. Citing the Small Business Job Protection Act of 1996, the Adoption and Child Welfare Advocates brief concludes that "devoted parents can provide good homes for adopted children with no regard to whether they are of the same race." The construction of children's tremendous "need" reduces the imagined possibilities to child "rescue" and configures "race" as a past violence and a contemporary bureaucratic obstacle.

The emergence of lesbian and gay adoption in the 1970s is framed as a naturalized response to "continuing unmet need for permanent families for children whose biological families had failed them" (Adoption Advocates Brief). In the forty years since then, "vast" empirical evidence has proven that children raised by same-sex couples fare just as well on measures of psychological and behavioral well-being as those raised by opposite-sex couples. Moreover, lesbians and gay men are "exceptionally" willing – even more so than "heterosexual adults" – to adopt children

with "special needs." After all, the "'security and advantages of two parents'" can have tremendous benefits for the "'neediest children'" (Adoption Advocates Brief).

Of course, queer parents' fitness was far from given in the 1970s: From Anita Bryant's Save Our Children campaign in 1977 to Proposition 8 and the Arkansas gay adoption ban in 2008, anti-LGBT activism has played on fears about harm to the vulnerable child. Nevertheless, accounts of transracial and queer adoption encourage the conclusion that white, middle class (queer) couples are saving the most vulnerable and needy children (of color). To display this need, the respondents' amici mobilize statistics of 400,000 children total in the public foster care system, 100,000 of whom are "lingering" in hopes of adoption. The idea of children lingering in foster care conjures up the IEPA's mythologies of black children "languishing" in the system due to discrimination against white adoptive parents (Briggs, 2012). Rescue of vulnerable children from a culture of poverty enunciates queer freedom through the forgetting of its racialized conditions of possibility.

Queer couples are redeemed in becoming the "more willing" or most benevolent adoptive parents, and their receipt of the right to marry is as much a delayed recognition of an a priori right of the citizen as a marker of political, social, or economic justice. As the nation is strengthened in its "special recognition" of families that "the state helps create through adoption" and the "over 40,000 children in California being raised by same-sex parents," the state's authority in granting rights, regulating the terms and boundaries of citizenship, and enacting discursive and material violence becomes further entrenched (Adoption Advocates Brief; California

Brief). The discursive production and "rescue" of "vulnerable" children by same-sex couples reinforces the erasure of the economic and legal precarity experienced by many collectivities whose intimate forms are not afforded state recognition or legitimacy, including single parents with children and extended families.

Conclusion: Attending to Vulnerability, Addressing Precarity

In closing her book *Somebody's Children: The Politics of Transracial and Transnational Adoption*, Briggs (2012) notes that "the production of adoptable children is an index of vulnerability, particularly of single mothers" (p. 282). Single mothers of color, as well as communities that have been racialized through perceived deviance from the nuclear family ideal, have long faced the reality or prospect of having their children taken from them. While deep histories of racist violence produce the conditions by which the child becomes "vulnerable," accounts of the child's vulnerability and rescue may reinforce the superiority of white, middle-class adoptive couples – indexed in neoliberal trappings of choice and opportunity – and the racialized deviance of relinquishing families and communities. I have attempted to make visible the ways that discourses of racialized vulnerability, as they shape "child's best interests" inquiries, retemporalize violence and occlude the economic, social, and political conditions that undergird patterns of vulnerability. As racialized populations are rendered deviant from ideals of conjugal domesticity, the adopted child's symbolic ascendance reinforces the futurity of the receiving family and nation.

Specifically, I suggest that the "child's best interests," as a legal standard and racialized ideal, reinforces a nuclear family ideal that takes symptoms of racism and

poverty as evidence of parental abandonment and harm. Its workings are evident in the discursive overlaps of same-sex marriage and ICWA cases, as supporters of the same-sex couples and the Capobiancos both appeal to the "best interests" of children "most in need" in advocating for adoption when biological parents are "unfit" – i.e., have failed to account for their own dispossession through assumption of "responsibility." Whereas adoptive parents are pitiable and deserving of the "gift" of a child, the delivery of which may have been obstructed by "racial preference," queer adoptive parents may symbolically redeem their own contaminated identity in rescuing the salvageable child (Briggs, 2006).

In conclusion, I point to how the language of vulnerability and rescue obscures ongoing processes of precaritization, and also how its usage signals the points at which circuits of precarity and futurity cohere. With attention to the logics of valuation and devaluation that underwrite seemingly disparate imperialist narratives, questions may be asked about how the once vulnerable and now rescued child's ascendance propels the couple and the nation into capacity and progress, and how particular lives are figured as "worth protecting" while others are always "already lost" (Butler, 2009). As Hong and Ferguson (2011) write, we must "interrogate the desire to be valued…within a system that punishes devaluation with death" (p. 14). Just as importantly, I think, we must question the political rationalities by which valuation and devaluation, and the circuits of precarity that they underwrite, seem unquestionable.

Chapter 6
Conclusion

In tracking the reiterative norms of citizenship and representative forms of (non)citizen identities across the cases, this project has made visible the convergence of oppositional and dominant discourses of citizenship. In the three cases, the (white, heterosexual) two-parent nuclear family ideal is depicted as the key to the nation's future. While particular symbolic figures are represented as either threatening to the family (e.g., the "Indian" father) or redemptive for the nation (e.g., the "queer" patriot), others are cast as alternately deserving and undeserving or vulnerable and threatening. The "migrant" may either be threatening to the nation (e.g., a "criminal alien"/"terrorist") and thereby excludable or a testament to family values (e.g., "hardworking" and "patriotic") and therefore deserving of inclusion. While the "(single) mother" is most often vulnerable and in need of protection (from the "criminal alien," the "Indian" father, or the "deterioration" of marriage), the migrant mother of color and her children may also pose an economic threat to the nation.

The nation itself is represented in relation to these constructions of vulnerability and threat, as it is alternately protecting and in need of protection (from Indigenous sovereignty, the "criminal alien"/"terrorist," and economic demands from the mother and child). These representations of the family and the nation, in turn, undergird particular legal and policy positions such as increased border "security," restriction of marriage, and opposition to tribal self-determination. In citizenship's refashioning of its own terms at and within the boundaries of the nation, the tribe, and the family, its contradictions are continually exposed. Thus, it may seem that the language of citizenship cannot escape itself. Indeed, Bosniak (2007) concludes that

citizenship must either be interrogated for its exclusionary ends or abandoned altogether.

Following work that aims to "queer" citizenship (e.g., Brandzel, 2005; 2006; Mikdashi, 2013), this dissertation suggests the former. It has given sustained attention to the tensions of universal and exclusionary forms, practices, and dimensions – such as belonging, rights, and identities – of citizenship. This methodology exposes the mechanisms by which the "natural" and "normal" are produced, and renders citizenship queer through examination of the tensions between its universal ideals and exclusionary realities. While universal citizenship and the abstract citizen rely on the denial of their racialized, gendered, sexualized, and classed underpinnings, processes of exclusion at the boundaries of the family, the tribe, and the nation hinge on the definition of separable groups.

The queering of the categorical logics by which figures of (non)citizenship are made separable reveals their necessity to racialized, gendered, sexualized, and classed regimes of citizenship (Mikdashi, 2013). This approach is directed at the practices of valuation and devaluation that affix difference to hierarchy, and aims to expose the constitutive contradictions of the contingent, shifting assemblage of citizenship. Challenges to the ideological underpinnings of normative citizenship are deeply concerned with the material consequences of processes of valuation and devaluation. As the dimensions of citizenship (i.e., status, rights, and identities) are arrayed in uneven ways, the conditions of (non)citizenship differ across differently positioned groups and over time. In order to combat shifting logics of (de)valuation, challenges

to neoliberal ideologies – which mask material inequalities and racial and class hierarchies through a rhetorical distancing of the economy from the state and the family – must disrupt the very terms by which value is produced (Cacho, 2012; Duggan, 2003; Hong & Ferguson, 2011).

While facilitating the reproduction of normative citizenship, shifting ideologies, institutions, and practices also make possible the inhabitation of citizenship's contradictions. Of particular note are the ways that conceptions of Indigenous sovereignty disrupt the dominant sovereignty of the nation and its citizenship regime. As Simpson (2007; 2014) writes, sovereignty is at once authoritative and tenuous, certain and precarious. The failure of sovereignty can be seen in the violence of struggles over Indigenous territories and practices of self-determination, and in the alternate assertions of state authority with measures that ostensibly keep it in check (e.g., democracy and state, tribal, and individual autonomy). State recognition of Indigenous polities enables a limited form of political sovereignty (i.e., "inherent sovereignty"), which is both possible at all and limited through its very recognition.

As principles of sovereignty are embedded in the law, the turn to the law for Indigenous sovereignty struggles seems unavoidable. Yet the turn to the law may ensure the continued erosion of Indigenous political autonomy, as state recognition of tribal sovereignty authorizes state creation and management of Native identities and political formations (Barker, 2011; Rifkin, 2009; Simpson, 2007). Thus, both Simpson (2014) and Rifkin (2009) advocate for a "refusal" or deconstruction of

sovereignty as a technology of governance through which the state generates its own legitimacy.

Rifkin (2009) proposes a political strategy by which the "logical and legal emptiness of sovereignty" (p. 112) may be exposed, and the state of exception that has come to define Native peoples and territories may be seen as a mechanism of settler governance. Rather than calling for recognition of cultural difference, refusal demands acknowledgment of political authority and questions the apparatus of recognition itself (Simpson, 2014). It is not about making space for Indigenous peoples within settler governance, but rather refusing the dominance and basis of the system of settler governance. This refusal acknowledges that the state's "ultimate sovereignty" is based in violence toward Native peoples and lands, and thus that sovereignty, the space of exception, and the state's political authority are actually empty referents.

The challenge to sovereignty as a legal technology of settler management of Native land and identities takes place through "occupy[ing] the contradiction embedded in a formulation like 'inherent sovereignty' in ways that neither endorse the category as continually reformulated within U.S. Indian policy, disown it as the imposition of an alien norm, nor translate Indigenous traditions into its terms" (Rifkin, 2009, p. 113). The focus is on how the state creates Native peoples as exceptional or "peculiar," and thus in need of regulation by domestic law. Attention to the processes of exceptionalization and regulation – i.e., through the imposition of a nuclear family ideal – exposes the incompatibility of U.S. Indian policy and claims

to Native land with Constitutional law and congressional power, and therefore the extralegality of assimilation of Native peoples into state jurisdiction.

The exposure of sovereignty as nothing more than an empty signifier, and the racialization of Native peoples as a forceful practice of settler dominance, enables interrogation of "the location of Native peoples at the threshold between law and violence, between 'ordinary domestic legislation' and imperialism" (Rifkin, 2009, p. 115). In refusing the politics of recognition, and asserting political autonomy, Indigenous polities both assert their own "nested," competing sovereignty (within and separate from settler governance) and refute the narrative of progressive democracy – of the United States as a "nation of immigrants" (with one "exception") – and thus their own "peculiar"-ity (Simpson, 2014, p. 12; Rifkin, 2009). While the form and content of this "refusal" is particular to Indigenous sovereignty movements, it may gesture toward the possibility of inhabiting citizenship's contradictions. While the content of this inhabitation will necessarily shift along with the dominant logics of citizenship, it may start with a questioning of the "common sense" ideologies that undergird normative forms of social and political organization, (non)citizen-subject identities, and the terms of political redress.

In addition to demonstrating that the two-parent nuclear family ideal continues to form the basis of governance and exclusionary national projects, this analysis has revealed the symbolic role of the single mother, the child, and the (threatening) male (migrant/Indian father) in anchoring material conditions of inequality. The importance of these figures to the seemingly disparate political terrains of

immigration policy, Indigenous sovereignty and tribal self-determination, and marriage policy indicates their rhetorical force. Rather than the result of a regrettably imperfect yet aspiring universal, progressive citizenship, it appears that the exceptionality of these figures is produced at the intersections of race, gender, class, and sexuality.

It is important to consider how the boundaries of citizenship are created and managed such that inclusion is the only imaginable political option, and an option that forecloses social and economic justice for those inside and outside its boundaries. This analysis has illuminated the ways in which discourses of law, history, biology/blood, and sovereignty converge such that those seeking social change find themselves debating the deservingness of individual (non)citizens rather than the social, political, and economic conditions that make such a debate inevitable.

In highlighting the ideological consistencies across ostensibly opposing policy and legal positions, I suggest that the terms through which we address exclusions collude with the logic of the exclusions themselves. If we turn to the law, or history as accounted for within the law or policy, for an ever-expanding scope of justice or inclusion, we fail to question the mechanisms by which conditions of racialized precarity are constitutive of our legal and policy systems. We neglect to interrogate the ideal of white, two-parent, conjugal domesticity and its role in the creation and forgetting of racist, colonial systems of governance. We also gloss over the ways in which this ideal, in tandem with the production of racialized, gendered, sexualized, and classed figures of vulnerability and threat, continues to structure the distribution

of deservingness, poverty, and wealth through the immigration system, Indian policy, and the institution of marriage. It appears that we can, and must, ask a different set of questions.

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Appendix A

Codebook: Adoptive Couple v. Baby Girl

Code	**Subcode**	**Example**
For Petitioners		
1) Nuclear Family/ Deservingness	Father or tribe is not family	“Baby Girl's Hispanic mother had sole custody of Baby Girl and unilateral authority to place her for adoption with petitioners because Father voluntarily abandoned Baby Girl and, under both state law and the Constitution, an unwed biological father's abandonment of his child deprives him of any parental claim to that child, regardless of his race or ancestry” (Reply Brief, Guardian Ad Litem).
	Adoptive couple is responsible, loving, protective	"In stark contrast to Biological Father's "vanishing act," Pet. App. 42a, petitioners financially supported Birth Mother, spoke to her weekly, and traveled from South Carolina to Oklahoma to visit her during her pregnancy, id. at 5a. Petitioners were in the delivery room when Birth Mother delivered Baby Girl, Adoptive Father cut the umbilical cord, and the couple cared for Baby Girl as their child from that moment forward--until they were ordered to hand her over to Biological Father (a complete stranger, because of the choices he had made)” (Birth Mother Brief).
	Adoptive couple is professional, educated, wealthy	“No child should be forced because of their race to live in poverty. The ICWA has forced this result on many children. This is a sub-issue in this case because of the differences in the standard of living of the adoptive couple that wish to adopt this child and the financial status of the natural father and his parents that can provide essentials but not nearly as much opportunity to this little girl” (CERF Brief).
2) History/Progress		The Congress and the Executive branch continue to treat Indians and Indian tribes as ‘political’ rather than as racial entities allowing the permanent racial discrimination created in Dred Scott to survive into the 21st century. See Morton v. Mancari, 417 U.S. 535 (1974) …Any child that can be classified as ‘Indian’ is treated as a ‘resource’ of the Indian tribe and not as an individual human being entitled to have their best interest's determined by the court. 25 U.S.C. §

		1901(3). Congress in ICWA is indefinitely preserving their territorial authority over 'Indians' by allowing Indian tribes to classify any child an 'Indian' they claim is eligible for tribal membership. This classification prevents a child claimed by a tribe from having the same constitutional rights and protections all other children born in the United States receive" (CERF Brief).
3) U.S. Paternalism/ National Identity	Protection of mother, child	"Conferring superior rights on unwed fathers and tribes would also perniciously interfere with the fundamental rights of child-bearing women who choose adoptive placements, over single parenthood, for their children. Preferential rights also would disadvantage abandoned Indian children in desperate need of secure and stable homes. And allowing substantive parental rights to originate under federal law starkly displaces the historical police power of States to protect vulnerable women and encourage the adoption of abandoned children" (Petitioners Brief).
	"Race" and "blood" as threatening	"Adoptive parents will be discouraged from opening their hearts and their homes to children in need, simply because they may have a measure of Indian heritage. Painfully aware of the heartbreak that has resulted from such misguided applications of ICWA as this, families who want to adopt a child into their homes will understandably shy away from adopting any child with even the possibility of Indian blood out of the very real fear that a previously uncommitted father or tribe can emerge at any time and break the bonds they have formed with the child" (Adoptive Parents Committee Brief).
	Protection of state sovereignty	"Principles of federalism are also at stake. The recognition vel non of parents and their custodial rights has always been a matter of state law. Properly interpreted, ICWA bolsters the protection of existing parental rights that are established and recognized by the States; ICWA does not create new parents, new parental rights, and new Indian families. Due respect for the federal-state balance commands that ICWA be read to avoid such an extraordinary intrusion on state law by the federal government" (Petitioners Brief).
For Respondents		
1) Cherokee		"The "existing Indian family doctrine" is

Nation/ Tribal Identity/ Sovereignty		fundamentally at odds with a tribe's right to determine its own membership, a key element of tribal sovereignty and tribal self-determination. A tribe sustains its cultural and political identity through the power to define and maintain membership criteria. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978). A state court that presumes to assess the "Indianness" of a child for purposes of applying ICWA is intruding on a core element of tribal self-determination, and is acting in a manner wholly inconsistent with the overarching purposes of ICWA" (ACLU Brief).
2) Nuclear Family/ Deservingness	Father is patriotic	"Finally, Birth Father is a dedicated father, served honorably in the United States Armed Forces and by all accounts is devoted to the well-being of Baby Girl" (Psychologists Brief).
	Father is responsible, loving, protective	"Upon learning that Baby Girl had been transferred to South Carolina for adoption, "he immediately instituted legal proceedings to gain custody"; "paid large sums of money in attorney fees"; began escrowing child support upon his return from Iraq, even though not required to do so; and successfully demonstrated that he is a "loving and devoted father" to his other daughter" (United States Brief).
3) History/Progress		"While California tribes have struggled for recognition, protection, land, and basic living necessities, there was one piece of legislation passed in 1978 which reversed the momentum of termination and renewed their spirit: the ICWA. It brought a promise that tribal members would not be deprived of their children, and that their children would remain in the tribal community, thus protecting the future of the tribe. This promise is being called into question in the case now before the Court" (California Indian Tribes Brief).
4) U.S. Paternalism/ National Identity	Nation (should) protect(s) tribe	"In enacting ICWA, Congress recognized that "[t]he United States, as trustee for Indian tribal lands and resources, has a clear interest and responsibility to act to assist tribes in protecting their most precious resource, their children." Id. at 50 (quoting Senate Report at 52)); 124 Cong. Rec. 38103 (1978)" (Tribes of Minnesota Brief).

Codebook: Hollingsworth v. Perry

Code	**Subcode**	**Example**
For Petitioners		
1) Undeservingness	Heterosexual couple as more fit	"In sum, a substantial body of evidence exists documenting that both mothers and fathers make unique contributions to a child's development. Same-sex parenting structures, by definition, exclude either a mother or a father. Certainly same-sex couples, like other parenting structures, can make quality and successful efforts in raising children. That is not in question. But the social science evidence, especially evidence founded on conclusions from population-based samples, suggests that there remain unique advantages to a parenting structure consisting of both a mother and a father, political interests to the contrary notwithstanding" (Social Science Professors Brief).
2) History/Progress	Tradition	This Court has never treated sexual orientation as a suspect class, and it should not do so now. Proposition 8 does not infringe upon any fundamental right, because there is no fundamental right to same-sex marriage. See Washington v. Glucksberg, 521 U.S. 702, 720, 721 (1997)…Baker v. Nelson, 409 U.S. 810 (1972)…No one can assert that there is a fundamental right to marry a member of the same-sex as it is not deeply rooted in the history of the Nation nor is it implicit in the concept of ordered liberty. "Until a few decades ago, it was an accepted truth for almost everyone that ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex." Hernandez v. Robles, 855 N.E.2d 1, 8 (N.Y. 2006)" (Liberty Counsel, Inc. Brief).
	Historical Comparison	"The ruling in *Loving* was *not* revolutionary the way striking down the traditional male-female definition of marriage would be in the present case...the anti-miscegenation statutes in Virginia were *at war* with the *core purposes* of marriage - especially the fostering of responsible procreation and child rearing by biological parents - because those Virginia statues prevented children from being raised in the optimal setting: a family headed

		by married biological parents." (African American Pastors Brief)
	Democracy/Popular Opinion	"Judicial reluctance to circumscribe state sovereignty should therefore be at its apex when doing so cuts short vigorous democratic debates and uses of political processes...Federal courts should not stultify democratic principles by declaring a winner of the marriage debate." (State of Indiana et al. Brief)
3) U.S. Paternalism/ National Identity	Protection of nuclear family	"And here is the central problem with that: it would diminish the social pressures and incentives for husbands to remain with their wives and biological children, or for men and women having children to marry first. Yet the resulting arrangements--parenting by divorced or single parents, or cohabiting couples; and disruptions of any kind--are demonstrably worse for children. So even if it turned out that studies showed no differences between same--and opposite-sex adoptive parenting, redefining marriage would destabilize marriage in ways that we know hurt children" (George et al. Brief).
	Protection of "vulnerable" Americans	"In the United States, especially over the last 50 years, the links between sex, marriage, and procreation have weakened considerably in both law and culture, with repercussions for adults, children, and society as a whole. Marriage is understood less as the gateway to adult responsibilities, centered most often upon the needs of children, and more as the "capstone" or reward for establishing a "soulmate" relationship with another adult. The harmful consequences of this diminished and adult-centered understanding of marriage have not been equally distributed across society. Rather, the most vulnerable Americans--those without a college education, the poor, and minority groups--have suffered more: they marry less, divorce more, experience lower marital quality, and have far more nonmarital births. Both adults and children suffer, as does the social fabric generally, with the "marriage gap" acting as a major engine of social inequality, which persists intergenerationally" (Helen Alvare Brief).

	Protection of state sovereignty	“The regulation of State-created rights and duties regarding marriage "has long been regarded as a virtually exclusive province of the States." Sosna v. Iowa, 419 U.S. 393, 404 (1975). Deference to State policymaking in this area vindicates both federalism and separation of powers” (National Association of Evangelicals Brief).
For Respondents		
1) Nuclear family/ deservingness	Superiority of two-parent family	“Decades of methodologically sound social science research, especially multiple nationally representative studies and the expert evidence introduced in the district courts below, confirm that positive child wellbeing is the product of stability in the relationship between the two parents, stability in the relationship between the parents and child, and greater parental socioeconomic resources. Whether a child is raised by same-sex or opposite-sex parents has no bearing on a child's wellbeing” (ASA Brief).
	Same-sex couple is sovereign, normal, natural/innate	“When amici talk to these children, they hear the same theme over and over again: their families are typical American families. Their moms and dads are raising their children to love their country, stand up for their friends, treat others the way they would like to be treated, and tell the truth. They care about the same things all parents do - hugs and homework, bedtime and bath time. They want bright, secure, and hopeful futures for their children” (Family Equality Council Brief).
2) History/Progress	Historical comparison	“The trial evidence also demonstrates that not every historical characteristic of marriage is core to the purpose or definition of marriage. Over time, marriage has ‘shed its attributes of inequality’--including race-based restrictions and gender-based distinctions such as coverture--and ‘has been altered to adjust to changing circumstances so that it remains a very alive and vigorous institution today.’ J.A. 435” (Perry et al. Brief).
	Popular Opinion	“By roundly repudiating Bowers, the Court reaffirmed an essential constitutional principle: that enforcing majoritarian morals, standing alone, offers no rational basis for a law that disfavors unpopular groups…And while that is reason

		enough to affirm, it is worth recognizing that in this case--as with religious and moral justifications for slavery, segregation, and bans on interracial marriage--law and history intersect. For when it comes to LGBT (Lesbian, Gay, Bisexual and Transgender) rights and marriage equality, history is repeating itself: Religious and moral objections to marriage equality are dissipating quickly as societal attitudes fundamentally recalibrate" (Anti-Defamation League Brief).
3) U.S. Paternalism/ National Identity	Protection of families and children	"Rather, amici have concluded that marriage is strengthened, not undermined, and its benefits and importance to society as well as the support and stability it gives to children and families promoted, not undercut, by providing access to civil marriage for same-sex couples." (Mehlman et al. Brief)
	Stigma, national and familial uplift	"Permitting same-sex couples to marry would also alleviate the stigma suffered by their children. According to a research review conducted by the American Psychoanalytic Association, '[c]hildren of same-sex couples are accorded a stigmatized status of being 'illegitimate.'' But the same research review also concluded that '[t]o the extent that legal marriage fosters well-being in couples, it will enhance the well-being in their children who benefit most when their parents are financially secure, physically and psychologically healthy and not subjected to high levels of stress.'" (AAA Brief).

Codebook: Border Security, Economic Opportunity, and Immigration Modernization Act

Code	**Subcode**	**Example**
1) Deservingness/ Undeservingness	"Desirable" immigrants	"We know our generous policies have resulted in a substantial flow of people into the country, and our challenge today is to create a lawful system of immigration that serves the national interests and admits those people into our country who are most likely to be successful, to prosper, and to flourish, therefore, most likely to be beneficial to America" (159 Cong. Rec. 3998, statement of Sen. Sessions).

	"Threats" to "American" workers	"Who is it going to hurt the most? If you look right now, today, under the Obama economy, who is being hurt the most by the Obama economy? Those who are the most vulnerable among us. Hispanics today have a 9.1-percent unemployment rate. Hispanic U.S. citizens, Hispanic legal immigrants will be directly harmed by this outcome. African Americans have a 13.5-percent unemployment rate right now under the Obama economy. It has gone up under President Obama. African-American workers will be hurt by this statutory penalty on hiring U.S. citizens and legal immigrants. Teenagers face an unemployment rate of 24.5 percent. Teenagers, in particular, if you look at jobs, for example, in the fast-food industry, are so often the first or second job a young teenager gets as he or she begins to climb the economic ladder. If Congress passes a bill that puts a major economic penalty on hiring a U.S. citizen or legal permanent resident, he or she may never get that job" (159 Cong. Rec. 5141, statement of Sen. Cruz).
	"Threats" to national security	"Nonetheless, proponents of legalization hold to the belief that the vast majority of people who cross our border are people seeking employment. Most times that is true; however, not everyone who crosses the southern border is a resident of Mexico who seeks to be reunited with family and do the jobs Americans will not do. The number of individuals from noncontiguous countries, otherwise known as 'other than Mexicans,' should be a concern. As of April 2, 2013, the 'other than Mexican' numbers on the southwest border were up 67 percent from fiscal year 2012 to fiscal year 2013. We know some of the 'other than Mexicans' include terrorists who enter the United States via the southern border" (159 Cong. Rec. 4392, statement of Sen. Grassley).
	"Earn"ing	"The second thing is to say that those who are here, if they want to be legal, have to earn their way to legal status. How do they earn it? First they go through a criminal background check. We do not want anyone here who is a threat to our Nation or to the people who live here. They will be asked to leave. In fact, they will be forced to leave. But for those who pass the criminal background check, they will need to pay a fine, they have to pay their taxes, and then they can stay and work in a probationary legal status while we

		make the borders safe. Ultimately, they have to be able to speak English, learn our history and civics, and then go through a lengthy process before they are granted-even possibly granted-citizenship" (159 Cong. Rec. S310, statement of Sen. Durbin).
2) History/Progress	Economic gains and modernization	"The other point economically is the fact we are going to see a better legal immigration system. That is what our country was built on. Everyone came from another country, when you look at the history of our country…So I am here standing on the floor of the Senate on the shoulders of immigrants, a grandfather who worked in the mines and another grandparent who worked in a cheese factory. Those are my immigrant roots. We all have them. We have to remember what this bill is about, and we have to remember that 90 of our Fortune 500 companies were actually formed by immigrants-200 formed by children of immigrants-and 30 percent of our U.S. Nobel laureates born in other countries" (159 Cong. Rec. 5122, statement of Sen. Klobuchar).
	"Amnesty"	"I believe we all want to cherish and hold up and continue the proud tradition of this country which is founded on immigration. One of the many things that make America unique is that we are a nation of-all of us-immigrants…But, of course, historically, that has been a system of legal immigration. It is so worrisome to me and so many others that over the last 30 years in particular, it has really evolved into a wide open, relatively little enforcement system of illegal immigration that flourishes and abounds and grows as our traditional legal immigration system gets less and less workable for the folks trying to follow the rules" (159 Cong. Rec. 308, statement of Sen. Vitter).
3) U.S. Exceptionalism/ National Identity	Freedom, hope, and the American Dream	"In America, it doesn't matter where one comes from or what one's last name may be. If given the opportunity and the chance, a person can succeed, and that is what sets us apart from so many other countries. That is what makes us a shining light, a beacon to the rest of the world, and it is that light that attracts so many to our shores with hopes and dreams of a better future" (159 Cong. Rec. 4363, statement of Sen. Coats).

	National Vulnerability	"All the attention is paid to the border, and it should be, because the border is not just an immigration issue, it is a national security issue. That means the same routes that are used to smuggle in immigrants can be used to smuggle in weapons and terrorists and other things-and drugs…Our sovereignty is at stake in terms of border security. Border security is not an anti-immigration or anti-immigrant measure, it is an important national security measure. But it is also an important defense of our sovereignty. We must protect our borders" (159 Cong. Rec. 4083, statement of Sen. Rubio).
	Compassion	"It is because we are compassionate that we have to ask these difficult questions. It is because we are compassionate that we have to propose amendments we think are necessary in order to make the programs upon which our society's most vulnerable have come to depend on more sustainable" (159 Cong. Rec. 4008, statement of Sen. Sessions).