which renders what is perishable permanent. Because politics both memorializes human uniqueness and preserves community, "democratic citizenship at its very core for Arendt is about death transcendence" (p. 96). So long as stories remain, immortality does not require sexual reproduction but politics and the power that flows from it. For Feit, however, Arendt's critique excludes *all* forms of sexuality from politics, and we must therefore look further.

Nietzsche rejects Arendt's determination to separate citizenship and sexuality. Like Rousseau, he connects sexual and cultural reproduction, but in unusual terms. His protagonist "Zarathustra becomes pregnant with new ideas as a result of withdrawing into a feminine space—solitude—which indicates that a 'lesbian' reproductivity is at work here." Moreover, the affinity that biologically unrelated individuals have for these ideas makes them Zarathustra's descendants (p. 126). Because many individuals will not accept death as a part of life as it is, they attend to those who promise immortality. This promise, however, ironically contains a death wish within itself as individuals valorize the otherworldly over actual life. Biological reproduction to counter life's finitude produces "a culture of death in the effort to combat death" (p. 131). Children may constitute a legacy, but for Nietzsche, these "children" may also include ideas to which the thinker gives birth. The thinker then functions as a father who disseminates his ideas in the hope that they take root and grow. Good citizenship for Nietzsche includes reproduction, but involves "his queering of reproductive and kinship metaphors" (p. 156) at the expense of heteronormativity. Therefore, he implicitly promotes pluralist citizenship.

For Feit, Arendt is a more promising resource for democratic citizenship than is Rousseau. The action that begets political immortality is open to all, whereas sexual reproduction may not be. Arendt is limited, however, by the fact that only a minority of actors achieve political immortality. For Nietzsche, on the other hand, words and deeds are central to one's living identity, regardless of whether their memory persists after death. A lesson exists here for queer culture, Feit suggests. Queer critics of same-sex marriage fear that it will cause queer culture to disappear. The individuals who constitute this culture, however, should not look to citizenship as a means of death transcendence. Instead, they should engage in self-creation, or should speak and act to fulfill their own identities, regardless of any possible legacy for other generations. As citizens and self-creators, heterosexuals and gays may be equally sterile if they fail to value this sort of activity. If death awareness impels us "to engage our morality in an ethically productive way" (p. 177), however, democratic citizenship may become less anxious and both more pluralist and more vibrant.

Democratic Anxieties is a provocative contribution to scholarship concerning sexuality and politics, pluralism, and democratic citizenship. Feit builds on a tradition in political theory that focuses on the tension between the claims of the family and the claims of citizenship. This tradition is well exemplified in Susan Moller Okin's critique of Rousseau (*Women in Western Political Thought,* 1979). The first tension is between the impulses of the natural individual and the requirements of citizenship as illustrated by Rousseau's protagonist Emile. An additional tension is that between intimate love and the welfare of larger entities, whether nation or humanity. Finally, tension exists between the demands of the family and those of the ideal republic.

Like Okin's, Feit's analysis of Rousseau suggests that an exclusive focus on sexual reproduction can draw citizens away from living out their citizenship. Although biological offspring perpetuate the collective sovereign, death anxiety and a desire for immortality may feed this focus at the expense of the development of one's living identity as both individual and citizen. It also excludes those to whom sexual reproduction is not open. In *Emile,* moreover, the education of Sophie as the ideal wife in the patriarchal family shows that women—and others thus inculcated—are primed to prioritize intimate love and family over the claims of the wider world and of citizenship. Arendt pushes to the opposite extreme on Feit's interpretation, excluding the private or what she terms "the social" from citizenship altogether. Nietzsche, on the other hand, fruitfully combines private and public, individual and citizen. On Feit's metaphorical interpretation, Nietzsche teaches us that through self-creation, all may engage with the world productively, whatever their sexuality.

In the final section of his last chapter, Feit engages with Judith Butler's examination of responses in the United States to the terrorist attacks of September 11, 2001, as these bear on a possible democratizing effect of death awareness. Although I understand the connection with Feit's theme, I found this treatment distracting. Perhaps if this material had been interwoven with the body of the book, it might have been more successful. Nevertheless, *Democratic Anxieties* stands out as a fine approach to the connections between sexuality and political theory as these bear on democratic citizenship.

An Argument for Same-Sex Marriage: Religious Freedom, Sexual Freedom, and Public Expressions of Civic Equality. By Emily R. Gill. Washington, DC: Georgetown University Press, 2012. 288p. $29.95.
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— Mario Feit, *Georgia State University*

Same-sex marriage has been a contentious political issue in the United States, with opposition to it frequently articulated on religious grounds. More specifically, the rights of lesbians and gay men seem to be pitted against the rights of religious individuals. Emily Gill's book is a welcome and persuasive attempt to move beyond this apparent stalemate between contending rights. Combining liberal

theory and public law, as well as lesbian and gay studies, Gill argues that the First Amendment's establishment and free-exercise clauses call for the legalization of same-sex marriage. The current restriction of marriage to opposite-sex couples amounts to an unconstitutional establishment of religion—namely, heterosexuality—and furthermore restricts the free-exercise rights of lesbians and gay men. Only by legalizing same-sex marriage would the liberal state follow through on its commitment to remain neutral among various religious and nonreligious orientations. In other words, to push for same-sex marriage is a *religious* claim, not one that runs counter to religious freedoms, and therefore should meet with the *same* protections as other religious rights claims.

It would be fair to characterize Gill's book as divided in half: The first three chapters prepare some of the theoretical grounds for the subsequent reinterpretation of the establishment and free-exercise clauses (Chapters 4 through 6). For example, Chapter 2 contains a compelling consideration of the liberal effort to practice neutrality among rival religious or ethical orientations. Gill demonstrates that liberal neutrality cannot be absolute (p. 47), and that the liberal state thus must aspire to "civic equality [which] not only may require a qualified noninterference with belief or identity and practice, but also may require public action that may prevent the creation of two classes of citizens" (p. 48). Chapter 3 follows logically, as the author here presents how same-sex marriage registers in a starkly different ethical light to its traditionalist or feminist/queer opponents, as well as its traditionalist or liberal supporters. While she herself falls into the latter camp, her fairness in describing each of these voices on its own terms is impressive—even as she still offers disarming critiques, especially of traditionalist opponents' "sectarian" logic and limited understanding of human complementarity (pp. 68–70). Chapter 3 thus drives home the point that the liberal state cannot take a position on same-sex marriage that pleases all sides. On the contrary, it will have to embrace a form of liberal non-neutrality regarding same-sex marriage within which the state then practices liberal neutrality (pp. 43–44).

In Chapter 4, Gill draws on Supreme Court rulings on the establishment clause—on Justice Sandra Day O'Connor's endorsement test (pp. 113–24) and Justice Anthony Kennedy's coercion test (pp. 124–33)—to make her case for same-sex marriage. The two sections are somewhat dissimilar in that the author considers both controlling and dissenting opinions for the endorsement test. Ironically, while she identifies with the endorsement test, and only turns to the coercion test as a backup (p. 125), her presentation of the latter is thus clearer than that of the former. Confoundingly, she establishes support for same-sex marriage from both the prevailing and dissenting legal interpretations of the endorsement test. Applying O'Connor's definition that the state may not treat some as insiders and others as outsiders to the question of same-sex marriage makes sense (p. 115).

Gill also employs a dissent by Justice Antonin Scalia, however: "If Scalia believes that religion may be favored as an institution as long as we do not prefer one religion over another, marriage might logically be favored as an institution as long as we allow diversity among the types of couples who may marry" (p. 123). Why would she take Scalia at his word that he favors religious diversity in seeking to uphold a display of the Ten Commandments in courthouses? Given her earlier discussion of neutrality depending on context, Gill should understand that this in reality favors the majority religion. More importantly, she later notes how Scalia worries about the possible legalization of same-sex marriage in his dissent to *Lawrence* v. *Texas* (p. 176), which clearly means that he would *not at all* make the analogical jump from religious freedom to the freedom to marry. Gill could have perhaps presented a case for a counterintuitive consequence of analogical thinking; absent such justification, an impression remains of her argument stretching the analogy too far. Such problems could have been avoided, and the section on the endorsement test strengthened, by focusing on O'Connor's and complementary rulings.

Gill's free-exercise argument in Chapter 5 rests on three pillars: Martha Nussbaum's and Andrew Murphy's understanding of conscientious belief, and her own interpretation of select Supreme Court opinions on the free exercise of religion. For Gill's argument, it is critical not to restrict conscientious belief to "what we think of as conventionally religious values"; furthermore, we should not mistakenly assume "that *only* religion as conventionally understood is special" (p. 157). Justice John Harlan broadens free exercise along these lines when he deems "purely moral, ethical and philosophical sources" as comparable to religious ones in justifying conscientious objection (p. 197). Gill links these familiar, if broadened, conceptions of free exercise with the idea that both religion and sexuality are "forms of intimate self-expression" (p. 164) and that same-sex couples are driven by "the truth that only life with another particular person will fulfill life's ultimate meaning" (p. 168). That same-sex marriage is only a "benign variation" of marriage (p. 169) not only warrants its legalization but furthermore shows how the author is sensitive to refraining from going too far with the redefinition of protected conscientious belief.

Surprising for an argument that develops an analogy to religion is Gill's statement early in her book "that the analogy between antimiscegenation laws and the same-sex marriage ban is appropriate" (p. 21). Moreover, she in fact relies on the antimiscegenation analogy as part of her argument for showing that current marriage law creates unjust hierarchy: "[T]he same-sex marriage ban maintains a caste system that privileges heterosexuality over nonheterosexuality" (p. 21; see also pp. 24 and 81). If, however, the

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antimiscegenation analogy already justifies same-sex marriage, why then pursue a contentious analogy between sexual identity and faith? At the least, it would have been helpful for Gill to clarify the relative strengths and weaknesses of both the antimiscegenation and the religion analogies to explain trade-offs of respective approaches. Better yet, the author should have delineated why specifically she does not pursue an analogy she otherwise accepts. I surmise that this might have to do with the question of essentialism, which an analogy to race might raise more forcefully (p. 22). In particular, protection of religion does not depend on claims to biological essence; instead, religious identities are simultaneously experienced as involuntary and voluntary—and protected regardless (pp. 165–66).

In a way, Gill is too modest here about the merits and advantage of her argument: It has the potential to redefine our understanding of what is at stake in arguing for lesbian, gay, bisexual, and transgender rights and same-sex marriage.

***Gitlow v. New York*: Every Idea an Incitement.** By Marc Lendler. Lawrence: University Press of Kansas, 2012. 184p. $34.94 cloth, $17.95 paper.

Speech & Harm: Controversies over Free Speech. Edited by Ishani Maitra and Mary Kate McGowan. New York: Oxford University Press, 2012. 256p. $99.00 cloth, $35.00 paper.
doi:10.1017/S1537592713001461

— Steven B. Lichtman, *Shippensburg University*

Although free expression is a central value in most democracies, it is hardly an uncomplicated ideal. One of the puzzles that freedom of speech presents is whether, and how, its tangible impact can be measured.

As a practical matter, what does speech actually do? In the American free-speech tradition, to borrow Harry Kalven's phrase (*A Worthy Tradition,* 1988), this question is a central tension. Many judicial initiatives to place purportedly necessary limits on speech have hinged on the actual or potential effects that speech produces. The common-law "bad tendency" test, the "clear and present danger test" announced by Oliver Wendell Holmes (*Schenck* v. *United States,* 1919), and the present-day fusion of clear and present danger with Learned Hand's "incitement test" (*Masses* v. *Patten,* 1919) all predicate their restrictions on speech by focusing on the actions and reactions of listeners, and the broader social harm that those reactions may engender.

The obvious long-standing problem, however, is that most of those reactions are purely speculative. The above-mentioned systems of speech restrictions are often premised on what other people *could* do or *might* do in response to provocative speech. This abstract imprecision, combined with governmental instincts to crack down on any expression it does not like, can have a delegitimizing effect not only on specific speech restrictions but also on the broader theory that speech can cause actual injury.

In their own distinctive ways, two new books are meditations on this tension. Both Marc Lendler's *Gitlow v. New York* and the anthology of essays *Speech & Harm,* edited by Ishani Maitra and Mary Kate McGowan, explore the implications of effects-centered approaches to speech, and do so in intellectually invigorating fashion.

Lendler's monograph is the latest offering in the excellent Landmark Law Cases and American Society series from the University Press of Kansas, and it achieves the high standard realized by many of the books in this series. It tells the story of prominent Communist Ben Gitlow, a onetime member of the New York State Assembly who in 1919 was arrested and charged with violating New York State's Criminal Anarchy Law by publishing a pamphlet entitled "The Left-Wing Manifesto." Although Gitlow himself did not write any of the material in the "Manifesto," and although none of the material urged readers to commit any crimes, New York State argued that by having his name on the masthead of a publication that might have tempted a reader toward subverting the government of the United States, he was indeed liable for its publication.

The United States Supreme Court's eventual decision to uphold Gitlow's conviction occupies something of an odd place in the canon of American constitutional law. The *Gitlow* decision is seen as an important component of the line of free-speech cases decided by the Supreme Court in the aftermath of World War I, and it is invariably reproduced in textbooks designed for constitutional law courses at both the undergraduate and law school level.

Yet as a jurisprudential milepost, *Gitlow* is often overshadowed by its immediate predecessor cases from 1919—*Schenck* v. *United States* (which established the "clear and present danger test") and *Abrams* v. *United States* (featuring a memorable dissent from the test's author, Oliver Wendell Holmes)—as well as by cases that come after it, such as *Whitney* v. *California* (1927) and its legendary concurrence from Louis Brandeis. Justifiably famous for its seminal announcement that the First Amendment's free-speech clause applies to the states, *Gitlow*'s doctrinal approach to freedom of expression is often lost in the analytical shuffle.

Among this book's biggest achievements—and there are many—is how skillfully it fills in this record. Lendler's chapter on the development of free-speech law is brief, but in this economy of words, he is able to comprehensively trace the line from William Blackstone and "bad tendency" to the modifications put in place by the World War I cases and their progeny. Building on the work of scholars such as Leonard Levy (*Origins of the Bill of Rights,* 2001) and David Rabban (*Free Speech in its Forgotten Years, 1870–1920,* 1997), Lendler manages to analyze the nuances of this evolution at a high scholarly