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# The Future Impact of Same-Sex Marriage: More Questions Than Answers

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# ARTICLES

## Introduction: The Future Impact of Same-Sex Marriage: More Questions Than Answers

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One topic in the Symposium celebrating the one-hundredth anniversary of *The Georgetown Law Journal* is the future of same-sex marriage and what its ramifications will be for family law. As it happens, the immediate past century not only bookends the life of *The Journal*, but also coincides with enormous changes that affected family law and structure: in the social and political roles of women and sexual minorities, in urbanization and the decline of an agricultural economy, and in the ethnic composition of the population.<sup>1</sup> The advent of same-sex marriage is, in part, merely the most recent result of this set of transformational changes. If nothing else, the social history of the last 100 years

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\* Professor of Law and Associate Dean for Graduate Programs, Georgetown University Law Center. © 2012, Nan D. Hunter. I thank Lee Badgett, Gary Gates, Jenny Pizer, and Nancy Polikoff for their comments; all remaining weaknesses are my sole responsibility.

1. ANDREW J. CHERLIN, *THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY* 66–68 (2009); STEPHANIE COONTZ, *MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY OR HOW LOVE CONQUERED MARRIAGE 196–200* (2005); ELAINE TYLER MAY, *GREAT EXPECTATIONS: MARRIAGE AND DIVORCE IN POST-VICTORIAN AMERICA 49–53* (1980); *see also infra* Part I.

should make us cautious in predicting how the shifts that are afoot now will end up affecting structures of legal authority.

Forecasts are all the more precarious because they are freighted with consequence in the intense political battle over adoption of same-sex marriage laws. Advocates of same-sex marriage are counseled to stress that gay and lesbian couples want to use marriage to express their love and commitment and to downplay motivations related to access to material benefits.<sup>2</sup> Pollsters advise that public support for marriage equality increases when gay and lesbian couples are perceived as wanting to “join” marriage rather than “change” it.<sup>3</sup> By contrast, opponents have developed talking points emphasizing that equalizing the law would “redefine marriage for all of us.”<sup>4</sup> This environment invites spin from both sides, and diminishes the discursive space for consideration of research that does not fit neatly into either advocacy box.

The pressure to conform to party-line-style debate also detracts from the intellectual importance of studying the effects of same-sex-family formations on legal regulation and vice versa. The traditional legal architecture of marriage was built on the assumption of a different-sex couple at its heart, with the role of each partner heavily shaped by conventional gender norms and the expectation of procreation. As countless others have shown, what once were the social realities and legal rules of marriage have been revolutionized, not by gay couples, but primarily by change in the social and economic roles of women.<sup>5</sup>

The emergence of same-sex-couple relationships continues the need to revisit earlier assumptions. Although only about 3.5% of Americans self-identify as lesbian, gay, or bisexual,<sup>6</sup> the absence of a heterosexual pairing in a marriage or marriage-like relationship dramatizes the contingency of gendered norms in the domestic and sexual practices that comprise family life. And, at least for the moment, the issue of same-sex marriage is nothing if not drama.

Because this piece is written on the occasion of a centennial anniversary, I begin by sketching the historical context for patterns of household formation during the period that coincides with *The Journal's* centennial. Part I summa-

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2. *An Ally's Guide to Talking About Marriage for Same-Sex Couples*, MOVEMENT ADVANCEMENT PROJECT, 2–4 (2012), <http://www.lgbtmap.org/file/allys-guide-talking-about-marriage.pdf>. In fact, surveys have found that different- and same-sex couples express virtually the same mix of psychological, social, and economic reasons for marrying. See *infra* notes 132–33 and accompanying text.

3. See Rachel Laser, Lanae Erickson & Jim Kessler, *Moving the Middle on Marriage: Lessons from Maine and Washington*, THIRD WAY (Feb. 2010) [http://hunterforjustice.typepad.com/files/third\\_way\\_report\\_-\\_moving\\_the\\_middle\\_on\\_marriage.pdf](http://hunterforjustice.typepad.com/files/third_way_report_-_moving_the_middle_on_marriage.pdf).

4. See Timothy J. Dailey, *Issue Analysis: Comparing the Lifestyles of Homosexual Couples to Married Couples*, FAMILY RESEARCH COUNCIL, <http://www.frc.org/get.cfm?i=IS04C02> (last visited July 20, 2012); NAT'L ORG. FOR MARRIAGE, *Marriage Talking Points* (2011), [http://www.nationformarriage.org/site/c.omL2KeN0LzH/b.4475595/k.566A/Marriage\\_Talking\\_Points.htm](http://www.nationformarriage.org/site/c.omL2KeN0LzH/b.4475595/k.566A/Marriage_Talking_Points.htm).

5. See *infra* notes 17–19 and accompanying text.

6. Gary J. Gates, *How Many People Are Lesbian, Gay, Bisexual, and Transgender?*, WILLIAMS INSTITUTE, UCLA SCH. OF LAW, 1 (2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf>. This percentage amounts to roughly nine million people. *Id.*

rizes data regarding adult–adult relationships in 1910 and 2010,<sup>7</sup> and draws on social histories of the early twentieth century to illuminate some of the changes afoot at that time. Parts II and III turn to the central function of the piece, which is to address the contemporary question posed during the Symposium: what will be the impact of same-sex marriage?

Part II focuses on the social meanings of marriage and on the social and sexual practices that render it distinctive. As an institution, marriage is portrayed as at once both hegemonic and fragile—rendered a decisive factor more than a thousand times in federal law alone,<sup>8</sup> yet also the subject of countless reflections on its possible demise. The recognition of same-sex marriage has changed its legal definition, which once included a husband and a wife as its constituent parties. But the change in legal definition so far has been partial, with most states continuing to ban same-sex marriage. The United States is likely to continue for a substantial period of time as a nation with two legal definitions of marriage. One effect of that bifurcation will be to test whether and to what extent social as well as legal meanings of marriage will change.

For the most part, I leave to others the documentation of the many similarities between same- and different-sex couples as they decide how to structure their domestic living arrangements. Instead I highlight three arenas of private life—household labor, sexual exclusivity, and the choice of whether to have children—for which substantial empirical evidence exists that the patterns of conduct between the two groups of couples differ. All three of these factors were once embedded in the law of marriage. None are today, but they continue to affect the cultural norms associated with marriage and thus the process of the construction of meaning. These factors merit examination because they provide the strongest support for arguments that the inclusion of same-sex couples could produce a “new normal” in even a few spousal behaviors and expectations.

The legal system is also playing catch up to changes brought about by same-sex relationships. New marriage laws are the most obvious change but not the only one. In Part III, I argue that recognition of same-sex couple relationships has caused two major additional changes in family law already and will likely directly or indirectly produce further significant change. State legislatures have created new legal status categories for partner relationships, and both statutory and case law changes have led to the recognition that a child’s two parents can be of the same sex. For the future, I identify three family-law contexts in which changes linked to same-sex marriage seem most likely: new mechanisms for the regulation of different-sex couple relationships, the impact

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7. Although there is a massive body of literature analyzing the effects of various adult-partner household forms on children, that subject is beyond the scope of what I address here. Similarly, this piece discusses only same-sex relationship issues as they have arisen in the United States.

8. For the most recent compilation, see Letter from Dayna K. Shah, Assoc. Gen. Counsel, U.S. Gen. Accounting Office, to Hon. Bill Frist, Majority Leader, U.S. Senate (Jan. 23, 2004), *available at* <http://www.gao.gov/new.items/d04353r.pdf> (regarding GAO-04-353R, Defense of Marriage Act).

of federal recognition of same-sex marriages, and the question of a distinctive marital status for couples (gay or straight) who raise children.

My focus throughout is on questions, rather than answers, about the future impact of same-sex marriage. As today's overheated arguments over same-sex marriage cool, it is my hope that advocates on both sides will realize the rich potential for new knowledge that can come from studying whatever effects this still "incomplete institution"<sup>9</sup> eventually has (or does not have) on American culture and law. I conclude with a call for agnostic empiricism as developments in gay and lesbian family law continue to influence how law regulates all family structures.

### I. GETTING FROM THERE TO HERE

One hundred years ago, American law accepted that different-sex marriage remained an institution headed by the husband<sup>10</sup> and that it was the exclusive venue for lawful and legitimate sexuality.<sup>11</sup> The Supreme Court triggered no legal or popular revolt when it rhapsodized marriage as "the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement."<sup>12</sup> But developments that were as provocative then as same-sex marriage is now were beginning to surface on the cultural landscape.

A snapshot of data from 1910 illuminates the prevalent patterns up to that time.<sup>13</sup> Americans, especially women, married at much younger ages than they do now, and both women and men remained married. Of persons between the ages of fifteen and nineteen, 11% of women (but only 1% of men) had married; by the age of twenty-four, half of women and a quarter of men had married.<sup>14</sup> Of all Americans fifteen and older, 55.8% of men and 58.9% of women were

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9. Sociologist Andrew Cherlin used this phrase thirty-four years ago to describe remarriage. See Andrew Cherlin, *Remarriage as an Incomplete Institution*, 84 AMER. J. SOCIOL. 634 (1978). Cherlin argued that remarriage lacked a full repertoire of individual and group customs and social support structures, in contrast to first marriages. He saw the latter as being highly institutionalized, by which he meant that family members "rely on a wide range of habitualized behaviors to assist them in solving the common problems of family life. We take these behavioral patterns for granted until their absence forces us to create solutions on our own." *Id.* at 636–37.

10. See, for example, *Thompson v. Thompson*, 218 U.S. 611, 618 (1911), in which the Supreme Court construed a statute granting married women the right to bring suit without the participation of their husbands to be insufficient grounds for allowing a woman to sue her husband for physical assault, declining to infer that the legislature intended to bring about "radical changes in the policy of centuries" without explicit language so stating.

11. The husband held the "exclusive right to marital intercourse with his wife." *Tinker v. Colwell*, 193 U.S. 473, 484 (1904) (holding that a husband's claim for criminal conversation qualified as an injury to his personal rights and property and thus his damages award was not dischargeable in bankruptcy).

12. *United States v. Bitty*, 208 U.S. 393, 401 (1908) (quoting *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885)) (internal quotation marks omitted).

13. U.S. CENSUS BUREAU, THIRTEENTH CENSUS OF THE UNITED STATES: VOLUME I, POPULATION: 1910, at 509 tbl.3 (1915), available at <http://www2.census.gov/prod2/decennial/documents/36894832v1ch07.pdf>.

14. *Id.*

married at the time of the census.<sup>15</sup> In every age category, less than 1% of men or women were divorced.<sup>16</sup>

Social historians fill out the story beyond the numbers. They describe the period from 1910 to 1920 as one of enormous social ferment, manifest in part by the beginnings of a revolution in gender roles and in sexual practices outside marriage.<sup>17</sup> According to John D’Emilio and Estelle Freedman, two changes in American society at the turn of the twentieth century “stand out as emblematic of this new sexual order: the redefinition of womanhood to include eroticism and the decline of public reticence about sex.”<sup>18</sup> Young single women entered the paid workforce as never before, where they played a critical role in constituting a new urban sexual culture, shaped by a growing commercialization of pleasure, sexualized public spaces such as dance halls, and the influence of the sexual and social practices brought to the United States by waves of immigration.<sup>19</sup>

These visible challenges to traditional morality triggered a commensurate reaction: between 1910 and 1915, local governments in thirty-five cities created vice commissions, primarily to study strategies to curb prostitution.<sup>20</sup> A less visible challenge—a steadily rising divorce rate—had already begun.<sup>21</sup> The number of divorces per thousand marriages increased each decade from 1870 to 1950, but by far the largest single jump—seventy percent—occurred between 1910 and 1920.<sup>22</sup> Although not evident in the pages of a law review, there was a culture war over sexual mores underway when *The Journal* began publication.

Historians have also alerted us to the emergence roughly a century ago of “a sexual minority of sorts . . . in the making.”<sup>23</sup> In 1911, vice investigators in

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15. *Id.*

16. *Id.*

17. One remarkable aspect of the history of this period is the repeated use of superlatives to describe it. See COONTZ, *supra* note 1, at 196 (quoting a 1911 poem, “The time when mountains move has come”); NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 158–59* (2000) (referring to “the single extraordinary decade after 1910”); JOHN D’EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA*, at xx (1988) (describing the 1880-to-1930 period as the “transition to recognizably modern forms of sexuality”). See also Virginia Woolf, *Character in Fiction*, in VIRGINIA WOOLF, *SELECTED ESSAYS* 38 (2008) (“All human relations have shifted—those between masters and servants, husbands and wives, parents and children. And when human relations change there is at the same time a change in religion, conduct, politics and literature. Let us agree to place these changes about the year 1910.”).

18. D’EMILIO & FREEDMAN, *supra* note 17, at 233.

19. See COONTZ, *supra* note 1, at 197–200; COTT, *supra* note 17, at 132–46, 159–60; D’EMILIO & FREEDMAN, *supra* note 17, at 181–97, 214; MAY, *supra* note 1, at 82–87; CHRISTINE STANSELL, *AMERICAN MODERNS: BOHEMIAN NEW YORK AND THE CREATION OF A NEW CENTURY 1–2* (2000).

20. D’EMILIO & FREEDMAN, *supra* note 17, at 210.

21. Frank F. Furstenberg, Jr., *History and Current Status of Divorce in the United States*, 4 CHILD. & DIVORCE 29, 30 (1994); Betsey Stevenson & Justin Wolfers, *Marriage and Divorce: Changes and Their Driving Forces*, J. ECON. PERSP., Spring 2007, at 27, 28–29; PEW RESEARCH CTR., *The Decline of Marriage and the Rise of New Families*, 38 (2010), <http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf>.

22. MAY, *supra* note 1, at 167 tbl.1.

23. D’EMILIO & FREEDMAN, *supra* note 17, at 227.

Chicago found “men who ‘mostly affect the carriage, mannerisms, and speech of women [and] who are fond of many articles dear to the feminine heart.’”<sup>24</sup> At the same time in New York City, wearing a red necktie signaled a man’s homosexuality to others in the know.<sup>25</sup> Like their heterosexual counterparts, these new urban gay sexual cultures were heavily influenced by sexual practices in immigrant communities.<sup>26</sup> Venues for homosexuality were also interwoven with the venues of prostitution.<sup>27</sup> Much of that era’s legal reaction to the markers of urban homoeroticism took the form of municipal laws prohibiting “public indecency” which police used in their attempts to suppress or at least manage cross-dressers and other visible sexual deviants.<sup>28</sup>

Today there is a new rhythm to the pattern and sequencing of relationships in the American life cycle. Marriage occurs at later ages than it did in 1910,<sup>29</sup> and it is usually preceded, and often followed, by cohabitation.<sup>30</sup> In the 2010 snapshot, 51.3% of Americans aged fifteen and older were married, and 11.1% were either divorced or separated.<sup>31</sup> Of American women in the prime marrying ages of twenty-five to forty-four, more than 40% were either divorced (13%), cohabiting (11%), or single (18%).<sup>32</sup> The number of unmarried-partner households increased 41% between 2000 and 2010, four times greater than the 10% overall increase in household population.<sup>33</sup> Unmarried different-sex partners comprised 4.6% of all households in 2000, rising to 5.9% of the total in 2010.<sup>34</sup>

The typical lock-step life sequence in 1910 of single to married and possibly to widowed, has diffused into a starburst pattern of stages moving from single to cohabiting to married and often to divorced, frequently followed by a new round of unpartnered to cohabiting and possibly to remarried.<sup>35</sup> The centrality of marriage has diminished, rendering it the most popular—but not the only—

24. *Id.* at 227–28.

25. GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE AND THE MAKING OF THE GAY MALE WORLD 1890–1940*, at 52 (1994).

26. *Id.* at 72–76.

27. WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 21–22 (1999).

28. *Id.* at 29–31.

29. CASEY E. COPEN ET AL., U.S. DEP’T OF HEALTH & HUMAN SERVS., *FIRST MARRIAGES IN THE UNITED STATES: DATA FROM THE 2006–2010 NATIONAL SURVEY OF FAMILY GROWTH*, in 49 NATIONAL HEALTH STATISTICS REPORTS 5–6 (Mar. 12, 2012).

30. CHERLIN, *supra* note 1, at 98; Judith A. Seltzer, *Families Formed Outside of Marriage*, 62 J. MARRIAGE & FAM. 1247, 1249–50 (2000); Stevenson & Wolfers, *supra* note 21, at 32–33.

31. U.S. CENSUS BUREAU, *AMERICA’S FAMILIES AND LIVING ARRANGEMENTS: 2010*, at tbl.A1 (2010), available at <http://www.census.gov/population/www/socdemo/hh-fam/cps2010.html>. As stated, this is the “snapshot” view, not a longitudinal compilation. Thus, for example, some of those counted as married are persons who had divorced and then remarried.

32. COPEN, *supra* note 29, at 12 tbl.1. The figures for men are similar: in the same age group, 8% are divorced, 14% are cohabiting, and 24% are single. *Id.* at 13 tbl.2.

33. U.S. CENSUS BUREAU, *HOUSEHOLDS AND FAMILIES: 2010*, at 3 (2012), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf>.

34. *Id.* at 15.

35. CHERLIN, *supra* note 1, at 7–8 (2009); Stevenson & Wolfers, *supra* note 21, at 33 fig.4.

option, one that is renewable multiple times.<sup>36</sup> Cohabitation and divorce are now integral parts of the system of household formation rather than aberrations, and the legal system reflects and fosters this social reality through such mechanisms as constitutional protection for sexual liberty and for access to the process of divorce.<sup>37</sup> For some different-sex couples in some states, domestic-partner laws offer a new nonmarital but formal legal status.<sup>38</sup>

For same-sex couples, Census Bureau collection of data did not begin until 1990.<sup>39</sup> As of 2010, there were 646,464 same-sex couples in the United States.<sup>40</sup> In California, data from the first half of the 2000s indicate that roughly half of lesbian and gay adults live in couples: from 37% to 46% of gay men and from 51% to 62% of lesbians are in cohabiting partnerships, compared to 62% of heterosexuals.<sup>41</sup>

Nationwide, 22% of same-sex couples have formalized their relationship by registration under an official status recognized by state law.<sup>42</sup> Of couples whose state of residence offers such a status, 47% have formalized their relationship.<sup>43</sup> If the California data are accurate as to the rate of couple formation, we can extrapolate that approximately 10% of lesbians and gay men nationwide have formalized a relationship, including approximately 25% of persons whose state of residence provides an official status to same-sex couples. Lesbians are more likely than gay men to marry or enter into another formal legal status.<sup>44</sup>

Marriage holds significantly more appeal for same-sex couples than do other statuses. Same-sex couples are more likely to marry in the first year after marriage is open to them than they are to enter into other status categories in the first year after those become available.<sup>45</sup> In states where same-sex marriage has

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36. It is challenging to report data on relationship patterns in the United States in a way that accurately captures a complex reality. For example, as media reports have hyped, the marriage rate is now at an historic low. See Stevenson & Wolfers, *supra* note 21, at 29. It is also true, however, that the divorce rate peaked more than thirty years ago, and is now lower than it has been since 1970. *Id.* Among currently unmarried Americans, 46% say they would like to marry, 29% are not sure, and 25% do not want to marry. PEW RESEARCH CTR., *supra* note 21, at 23. Glorification and ambivalence both characterize the American cultural view of marriage.

37. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003); *Boddie v. Connecticut*, 401 U.S. 371 (1971).

38. See *infra* notes 110–15 and accompanying text.

39. Dan Black et al., *Demographics of the Gay and Lesbian Population in the United States: Evidence from Available Systematic Data Sources*, 37 *DEMOGRAPHY* 139, 140 (2000).

40. Gary J. Gates & Abigail M. Cooke, *United States Census Snapshot: 2010*, WILLIAMS INSTITUTE, UCLA SCH. OF LAW, 2 (2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010-Snapshot-US-v2.pdf>.

41. Christopher Carpenter & Gary J. Gates, *Gay and Lesbian Partnership: Evidence from California*, 45 *DEMOGRAPHY* 573, 573 (2008).

42. M.V. Lee Badgett & Jody L. Herman, *Patterns of Relationship Recognition by Same-Sex Couples in the United States*, WILLIAMS INSTITUTE, UCLA SCH. OF LAW, 6 (2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Herman-Marriage-Dissolution-Nov-2011.pdf>.

43. *Id.*

44. *Id.* at 7.

45. *Id.* at 12.



been legal for at least three years, 37% to 65% of same-sex couples are currently married.<sup>46</sup>

As the social changes that enabled the emergence of a LGBT rights movement have accumulated, *The Journal* has published important contributions to legal scholarship addressing state regulation of sexuality. An article by alumnus Nancy Polikoff on lesbian-mother families became one of the most influential pieces in the history of *The Journal*, having been cited more than four-hundred times, including in more than a dozen judicial opinions.<sup>47</sup> Writing from a distinctly different philosophical perspective, Stephen Macedo sought to build a conservative “reasoned, public, secular” argument against equality for gay people, including in the realm of domestic partnerships and marriage.<sup>48</sup> After examining these arguments, he concluded that there is no persuasive basis for discrimination.<sup>49</sup> If there is a theme to the articles on LGBT rights published in *The Journal*, it is that of serious engagement with the moral and philosophical principles being contested.<sup>50</sup>

Bringing *The Journal*'s tradition up to date, Professor William Eskridge offers in this Issue an important new analysis of how family law has evolved during the preceding century.<sup>51</sup> Professor Eskridge points out that the many reforms of the last century have had simultaneously deregulatory and regulatory effects on family law. He identifies the negative push behind those changes as being away from mandatory, monopolistic laws, centered on marriage and designed to advance the natural-law goal of instantiating the marital, procreative, heterosexual family as the only legitimate model. The pull forward, and the new model he proffers for analyzing family law, is toward a quasi-contractual regime of few mandates but many nudges, embedded in a system of default rules and opportunities for override of rules if the parties so desire. This framework accommodates a matter-of-fact understanding that social and economic changes lead to alterations in the legal structures for domestic arrangements, implicitly rejecting a naturalized definition of marriage. Let's de-escalate the rhetoric surrounding same-sex marriage, he suggests, and experiment more creatively with some of the options open to us in a guided-choice world.

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46. New Hampshire, 37%; Connecticut, 49%; Massachusetts, 65%. *Id.* at 19.

47. See Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood To Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990).

48. See Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261, 263 (1995).

49. *Id.* at 292–93.

50. See, e.g., Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871 (1997); Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of “Public Morality” Qualify as Legitimate Government Interests for The Purposes of Equal Protection Review?*, 87 GEO. L.J. 139 (1998); Laura K. Klein, *Rights Clash: How Conflicts Between Gay Rights and Religious Freedoms Challenge the Legal System*, 98 GEO. L.J. 505 (2010).

51. William N. Eskridge, Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881 (2012).

I concur with Professor Eskridge's central insight as to the push-and-pull dynamic in the development of family law and I emphatically endorse his recommendation for more openness and less polemics in policy making. My greatest caution is that the evolutionary process that he describes is far from over. The emerging contours that Professor Eskridge outlines may change in any of a number of directions in far less time than it will take *The Georgetown Law Journal* to celebrate its bicentennial.

## II. CHANGE AND CONVERGENCE

The point noted earlier as currently in popular dispute—will lesbians and gay men change marriage or join it—is actually an old question, or rather an old set of questions. Will the new group modify the norms and practices associated with a long-standing institution? Or will the dominant meanings linked to the institution and the experience of being married efface the distinctive practices of the group formerly excluded from it? Perhaps there will be a selection effect: those individuals most likely to marry will be those with the strongest desire to participate in the cluster of norms and practices associated with the traditions of marriage. And there is the simple numerical reality to consider: if every same-sex couple in the United States married tomorrow, they would constitute one percent of all marriages.<sup>52</sup> How much effect on social meanings could such a small group have?<sup>53</sup>

An obvious threshold question in this debate is whether same-sex couples will marry at the same rate as others.<sup>54</sup> At present, slightly less than seventy percent of the adult population has been married at some point in their lives.<sup>55</sup> Among Americans sixty-five and older, more than ninety-five percent have been married.<sup>56</sup> To date, only seven jurisdictions (not necessarily representative of the U.S. population at large) offer marriage to same-sex couples, and in no location has it been available for even ten years.<sup>57</sup> In Massachusetts, where the rate of marriage for same-sex couples is highest, experts estimate that the same-sex-couple marriage rate will equal the rate for different-sex couples in the near future.<sup>58</sup>

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52. See Gary J. Gates, SAME-SEX SPOUSES AND UNMARRIED PARTNERS IN THE AMERICAN COMMUNITY SURVEY, 2008, at app. tbl.1 (2009), available at <http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/same-sex-spouses-and-unmarried-partners-in-the-american-community-survey-2008/>.

53. See M.V. LEE BADGETT, WHEN GAY PEOPLE GET MARRIED: WHAT HAPPENS WHEN SOCIETIES LEGALIZE SAME-SEX MARRIAGE 94–96 (2009).

54. For the most current data, see *infra* notes 120–23 and accompanying text.

55. See U.S. CENSUS BUREAU, *supra* note 31.

56. See *id.* This can be expected to decrease as younger cohorts with higher rates of lifelong singleness age into the sixty-five-and-older group.

57. Same-sex marriage is currently available in Connecticut, the District of Columbia, Iowa, Massachusetts, New Hampshire, New York, and Vermont. See Badgett & Herman, *supra* note 42, at 3. In the United States, it was first legalized in Massachusetts in 2004. See *id.*

58. See *id.* at 2.

Despite increasing research on lesbian and gay relationships, however, much is still unknown. During what has become the typical contemporary life cycle, individuals experience multiple stages of singleness, cohabitation, marriage or status registration, divorce or dissolution, and re-partnering. Americans engage in a “complex selection process into and out of distinct relationship states. One should be careful not to interpret these different states as steps in a ‘progression’ in relationship formation from single to dating, cohabitation, and formal recognition akin to marriage.”<sup>59</sup> We do not yet have enough data to know whether and to what extent the proportions of lesbian and gay couples in each of these stages, or the duration and sequencing of the stages, will differ from population-wide averages.

When same-sex partners do marry, will those marriages differ in significant ways from those of different-sex partners? I argued in 1991 that legalization of same-sex marriage has the potential to “disrupt both the gendered definition of marriage and the assumption that marriage is a form of socially, if not legally, prescribed hierarchy” and to “destabilize the cultural meaning of marriage.”<sup>60</sup> Some opponents of gay marriage have echoed similar speculations, albeit with alarm,<sup>61</sup> while some supporters of LGBT equality have criticized my view as underestimating the homogenizing power of marriage.<sup>62</sup> Twenty years later, what does the evidence show?

My argument was not that heterosexual marriage would suddenly be transformed but that both in law and culture, the appearance of same-sex couples within the category of marriage would, along with the history of changes wrought by the women’s movement, present a visible challenge to the most traditional gender norms associated with marriage. As I pointed out, the gendered definitions in the law of marriage had already all disappeared except for the last one: that the two spouses had to be of different sexes.<sup>63</sup>

Since then, the actual de-gendering of family law has been more substantial than the explication of rationales for that outcome. In addition to ending the different-sex limitation on marriage, some jurisdictions have also eliminated the requirement that a child’s parents must be of different sexes, an at least equally substantial de-gendering of family law.<sup>64</sup> And some judges have ventured into the realm of gender analysis, an exercise distinct from Equal Protection formal-

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59. Carpenter & Gates, *supra* note 41, at 583; accord Judith A. Seltzer, *Cohabitation in the United States and Britain: Demography, Kinship, and the Future*, 66 J. MARRIAGE & FAM. 921, 925 (2004).

60. Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 L. & SEXUALITY 9, 16–17 (1991).

61. See, e.g., Defendant-Intervenors-Appellants’ Opening Brief at 94–98, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) (No. 10-16696).

62. See, e.g., Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage,”* 79 VA. L. REV. 1535 (1993).

63. Hunter, *supra* note 60, at 16.

64. See *infra* notes 97–99 and accompanying text.

ism.<sup>65</sup> My observation that the different-sex spousal requirement is the last vestige of legally mandated gender difference in marriage has now appeared in judicial decisions.<sup>66</sup>

To assess changes in the social, rather than the legal, meanings of marriage is an even more complex task. Like any social institution, the meaning of marriage is constructed by a meld of behaviors and understandings of what those behaviors mean. As one anthropologist has noted, “[m]arriage . . . is both something people *do* and something they *think* . . . .”<sup>67</sup> The New Jersey Supreme Court found it self evident that because “the shared societal meaning of marriage . . . has always been the union of a man and a woman[, t]o alter that meaning would render a profound change in the public consciousness of a social institution of ancient origin.”<sup>68</sup> Whatever the truth contained in that statement, it is also true that if marriage functions as a performance of social meaning, it is one in which every actor’s script is continuously changing.

We see evidence of this ongoing change when we examine the types of life behaviors for which social-science research has found significant differences between different- and same-sex couples.<sup>69</sup> The three best-documented examples involve division of household labor, sexual exclusivity, and child rearing. All three were once associated with the legal definition of marriage, but today none of them have legal relevance.<sup>70</sup> Yet to some extent, they continue to resonate with social meanings of marriage. Underlying all three are echoes of the impact of gender—the gender differentiation in different-sex marriage and its uncertain role in gay relationships. And in all three, there are at least some

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65. My argument had to do with the evolution of gender discourse, not with whether a sex-discrimination claim would be the ground for the decision in a case challenging marriage exclusions. For a review of how courts have handled the Equal Protection doctrine in gay-marriage cases, see Clifford J. Rosky, *Perry v. Schwarzenegger and the Future of Same-Sex Marriage Law*, 53 ARIZ. L. REV. 913, 920–42 (2011).

66. In finding Proposition 8 unconstitutional, the Northern District of California court stated that “[t]oday . . . [g]ender no longer forms an essential part of marriage; marriage under law is a union of equals.” *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 993 (N.D. Cal. 2010), *aff’d sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012). Similarly, in dissenting from a ruling upholding the exclusion of gay couples from marriage, Chief Justice Judith Kaye noted that “all of New York’s sex-specific rules for marriage have been invalidated save for the one at issue here.” *Hernandez v. Robles*, 855 N.E.2d 1, 22 (N.Y. 2006) (Kaye, C.J., dissenting) (quoting amicus brief) (internal quotation marks omitted).

67. Ellen Lewin, *Does Marriage Have a Future?*, 66 J. MARRIAGE & FAM. 1000, 1006 (2004) (emphasis in original).

68. *Lewis v. Harris*, 908 A.2d 196, 222 (N.J. 2006).

69. For example, Charlotte Patterson notes that studies of same-sex couples in Vermont found that sexual orientation was related to many more aspects of experience than the individual’s status as registered or not as part of a civil union. Examples for when sexual orientation, regardless of civil-union status, differentiated gay from sibling heterosexual couples included duration of relationship, number of children, and characterization of religious beliefs. Charlotte J. Patterson, *What Difference Does a Civil Union Make? Changing Public Policies and the Experiences of Same-Sex Couples: Comment on Solomon, Rothblum, and Balsam* (2004), 18 J. FAM. PSYCHOL. 287 (2004).

70. See Hendrik Hartog, *Marital Exits and Marital Expectations in Nineteenth Century America*, 80 GEO. L.J. 95, 96–98 (1991).

indicators that the degree of difference between gay and straight, although still significant, is decreasing.

A number of studies have found, on average, that division of household labor is most egalitarian between same-sex partners,<sup>71</sup> and more egalitarian in different-sex cohabiting couples than in different-sex married couples.<sup>72</sup> A host of other factors may be implicated, however, and may affect how a couple divides domestic labor, such as the presence of children, the power dynamics related to being the sole biological parent in a couple, income differences between partners, the length of the relationship, women's experience of and commitment to employment outside the home, and the strength of individual desire to conform to gender expectations.<sup>73</sup> For different-sex couples, division of labor tends to be accomplished in less traditional ways in couples who cohabited prior to marriage, than in those who did not, suggesting either a selection effect—individuals for whom household-work equality is more important may be more likely to cohabit prior to marriage—or that the experience of cohabitation itself has an impact.<sup>74</sup>

Another dimension of the household-labor issue is the distinction between specialization and gender normativity. The division-of-household-labor gap is decreasing between different- and same-sex couples, but versions of that pattern exist in both groups.<sup>75</sup> In an ethnographic study of fifty-two gay and lesbian couples in the San Francisco Bay area, sociologist Christopher Carrington found that one person “specialize[d] in domesticity” in seventy-five percent of the couples, and that the tendency to specialize increased with the length of the relationship.<sup>76</sup> Carrington, who did not compare his sample with different-sex couples, concluded that gay families were reacting to the broader economic

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71. See Janeen Baxter, *To Marry or Not To Marry*, 26 J. FAM. ISSUES 300 (2005); Dan A. Black et al., *The Economics of Lesbian and Gay Families*, J. ECON. PERSP., Spring 2007, at 53, 62; Gabrielle Gotta et al., *Heterosexual, Lesbian, and Gay Male Relationships: A Comparison of Couples in 1975 and 2000*, 50 FAM. PROCESS 353, 370–71 (2011); Sondra E. Solomon et al., *Money, Housework, Sex, and Conflict: Same-Sex Couples in Civil Unions, Those Not in Civil Unions, and Heterosexual Married Siblings*, 52 SEX ROLES 561, 572 (2005).

72. See CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 145–46 (2010); Baxter, *supra* note 71, at 318 (2005); Mick Cunningham, *Gender in Cohabitation and Marriage: The Influence of Gender Ideology on Housework Allocation over the Life Course*, 26 J. FAM. ISSUES 1037, 1055–56 (2005).

73. See ABBIE E. GOLDBERG, LESBIAN AND GAY PARENTS AND THEIR CHILDREN: RESEARCH ON THE FAMILY LIFE CYCLE 99–101 (2009); Lawrence A. Kurdek, *Are Gay and Lesbian Cohabiting Couples Really Different from Heterosexual Married Couples?*, 66 J. MARRIAGE & FAM. 880, 890 (2004) (possible impact of presence of children); Mignon R. Moore, *Gendered Power Relations Among Women: A Study of Household Decision Making in Black, Lesbian Stepfamilies*, 73 AMER. SOC. REV. 335, 352–53 (2008) (effects of parenting and relationship patterns in African-American community); Letitia Anne Peplau & Adam W. Fingerhut, *The Close Relationships of Lesbians and Gay Men*, 58 ANN. REV. PSYCHOL. 405, 409, 415 (2007) (income differences between two same-sex partners and impact of children).

74. See Baxter, *supra* note 71, at 319.

75. See Gotta et al., *supra* note 71, at 367–70.

76. CHRISTOPHER CARRINGTON, NO PLACE LIKE HOME: RELATIONSHIPS AND FAMILY LIFE AMONG LESBIANS AND GAY MEN 187 (1999). Carrington's observations conflicted with the self-reports of the couples, who overwhelmingly described the division of labor as equal. *Id.* at 176–77.

pressure to maximize household income by having the partner with lower earning potential assume more of the domestic chores.<sup>77</sup> Obviously, in same-sex couples, that individual's identity does not align with a sex category different from the other partner. Conversely, different-sex couples have responded to the economic pressure to have two income earners in the household (as well as to individual pressure from the female partner) by mitigating the amount of domestic labor once assumed almost entirely by the (often stay-at-home) wife. Husbands, who typically earn the higher income, now do a greater share of household work than before, although seldom an equal share.<sup>78</sup>

In the second area of difference, a large volume of research indicates that there is a significant divergence from the norm by gay male partners in practices related to sexual exclusivity. Gay male relationships have tended to be distinctive in two respects. First, male partners report that monogamy has less importance in their relationships and that openness to other sexual partners is often negotiated within the couple.<sup>79</sup> Second, gay male relationships tend to last longer than those of lesbian partners.<sup>80</sup> There is some indication in recent data that monogamy between male partners has increased relative to different-sex or lesbian couples.<sup>81</sup> It is unclear whether the newer data reflect a reaction to the risk of HIV infection, a permanent shift in behavior, or characteristics of the study sample.<sup>82</sup> Even with this change, there is still a significant, although perhaps declining, difference between the frequency of enduring open relationships in gay male couples compared to other couples.<sup>83</sup>

Lastly, another major marker of difference between gay and straight relationships pertains to children. A large majority of heterosexual couples have children, but only about one in six same-sex couples raise children.<sup>84</sup> The decision to marry is often associated with the decision to become parents.<sup>85</sup> At least at

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77. *See id.* at 206.

78. *See* Gotta et al., *supra* note 71, at 369–70.

79. *See* Colleen C. Hoff & Sean C. Beougher, *Sexual Agreements Among Gay Male Couples*, 39 ARCHIVES SEXUAL BEHAV. 774, 778 (2010); Michael C. LaSala, *Monogamous or Not: Understanding and Counseling Gay Male Couples*, 82 FAMILIES SOC'Y 605, 609–10 (2001); Peplua & Fingerhut, *supra* note 73, at 410–11; Michael Shernoff, *Negotiated Nonmonogamy and Male Couples*, 45 FAM. PROCESS 407 (2006).

80. *See* Carpenter & Gates, *supra* note 41, at 584 n.19; Kurdek, *supra* note 73, at 893–94, 896.

81. *See* Gotta et al., *supra* note 71, at 371; Peplau & Fingerhut, *supra* note 73, at 411.

82. The results of the Gotta study, for example, may have been influenced by the fact that the mean age of the 2000 sample population was almost thirteen years older than the mean age of the 1975 sample. *See* Gotta et al., *supra* note 71, at 357 tbl.1, 371.

83. *See id.* at 366 tbl.5.

84. *See* Gary J. Gates, *Family Formation and Raising Children Among Same-Sex Couples*, NCFR REPORT, Winter 2011, at F1, F2, available at <http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/family-formation-and-raising-children-among-same-sex-couples/>; *see also* Black et al., *supra* note 71, at 58; Solomon, *supra* note 71, at 565, 568.

85. *See* PEW RESEARCH CTR., *supra* note 21, at 22; Seltzer, *supra* note 30, at 1255. Same-sex couples also report considering issues related to children in their decision making about marriage. *See* CHRISTOPHER RAMOS, NAOMI G. GOLDBERG & M.V. LEE BADGETT, THE WILLIAMS INSTITUTE, THE EFFECTS OF MARRIAGE EQUALITY IN MASSACHUSETTS: A SURVEY OF THE EXPERIENCES AND IMPACT OF MARRIAGE ON

the moment, the percentage of same-sex couples who are raising children is dropping, probably because the pattern of raising children from the prior heterosexual marriage of one or both partners is fading, as younger lesbians and gay men are less inclined to pass through a heterosexual marriage stage before coming out.<sup>86</sup> (This pattern is somewhat mitigated by same-sex couples who choose to adopt children.) If the overall trend away from child raising continues, it may signal a de-heteronormalization effect, in which individuals who felt social pressure to become parents while in a heterosexual marriage can more easily discount that pressure once they adopt a lesbian or gay social identity.

The downward shift in child-raising among lesbians and gay men also harmonizes with a trend of fewer heterosexuals becoming parents<sup>87</sup> and a trend of diminishing stigma associated with childlessness.<sup>88</sup> Again, there may be something of a convergence occurring. In the lesbian-and-gay group in which parenthood is much less common than the norm, more couples are likely to marry. In the (far larger) heterosexual group, more married couples may opt not to have children. Overall, the traditional conflation of marriage and children may weaken.

In making the decision whether to have children, race appears to be a more salient factor than sexual orientation. In the population as a whole, households in which one or both adults are a racial or ethnic minority are more likely to include children.<sup>89</sup> Similarly, same-sex couples in which at least one individual is a person of color are substantially more likely than white same-sex couples to be raising a child: African-Americans are 2.4 times more likely and Latinas and Latinas are 1.7 times more likely to be in parenting households.<sup>90</sup> Future trends in childbearing among persons of color, rather than among gay and lesbian couples, may better predict the percentage of same-sex couples who decide to raise children.<sup>91</sup>

In sum, these are the clusters of marriage-related behaviors—domestic work, sex, and procreation—where one will find whatever significant differences, if any, exist between gay and straight couples. In each, the stringent rules, norms and expectations that have traditionally governed marriage between a man and a woman are weakening, creating the opening for, among other things, the influence of other forms. In Cherlin's terms, we are in a period of the deinstitution-

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SAME-SEX COUPLES (2009), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Ramos-Goldberg-Badgett-MA-Effects-Marriage-Equality-May-2009.pdf>.

86. See Gates, *supra* note 84, at F2.

87. BARBARA DAFOE WHITEHEAD & DAVID POPENOE, LIFE WITHOUT CHILDREN: THE SOCIAL RETREAT FROM CHILDREN AND HOW IT IS CHANGING AMERICA 13–20 (2008).

88. In 2002, fifty-nine percent of Americans disagreed with the statement that “people who have never had children lead empty lives,” up from thirty-nine percent who disagreed in 1988. PEW RESEARCH CTR., *supra* note 21, at 70.

89. U.S. CENSUS BUREAU, THE 2012 STATISTICAL ABSTRACT: BIRTHS, DEATHS, MARRIAGES, & DIVORCES tbl.80, available at [http://www.census.gov/compendia/statab/cats/births\\_deaths\\_marriages\\_divorces.html](http://www.census.gov/compendia/statab/cats/births_deaths_marriages_divorces.html).

90. See Gates, *supra* note 84, at F3.

91. *Id.* (noting that “unique dynamics of race, ethnicity, socioeconomic status, geography, gender, and sexual orientation . . . intersect and interact to affect how LGB people come to be parents”).

tionalization of marriage, a process to which (primarily different-sex) cohabitation and same-sex marriage are contributing.<sup>92</sup> Meanwhile, these two historically new family forms are themselves becoming more institutionalized.<sup>93</sup>

In this process, the explicit and implicit cultural markers that have shaped heterosexual relationships are shifting, often in ways related to gender expectations and norms, as illustrated by household-labor patterns. For both gay and straight couples, the decision to marry has become more complex and is sometimes made when other options are possible. Whether to marry has become the kind of question that gay and straight friends discuss as a shared concern. Those same friends will continue to discuss how to navigate the decisions that couples make, such as whether to have children. From individual conversations to representations in the media, cultures—even large ones—are influenced by other cultures—even small ones. Norms for family-life structures, like all other norms, evolve.

In addition, as long as same-sex marriage remains a political hot-button issue, gay couples will be the subjects of much greater social visibility than their numbers would suggest. That cultural overexposure, ironically, will enhance the extent to which norms with a stronger association to same-sex than to different-sex partners will become more widespread.

In sum, the growing number of same-sex married couples will create the opportunity to study from a fresh perspective many of the questions that have been most important to scholars of family life, including:

- Issues related to the variety of family forms in American life: Who will decide to marry (or register or cohabit or remarry) and why? Who will decide to have children and why? Will marriage patterns for lesbians and gay men of color more closely track those of other persons of color<sup>94</sup> than those of other lesbians and gay men? Who will decide to divorce and why? Will the presence of different levels of regulation in different states align with greater or lesser rates of dissolution for certain legal statuses?
- Issues related to the effects of economic change on family formation: Will changes in the economy produce the same movements up or down in marriage, cohabitation, and divorce rates among same- and different-sex couples?<sup>95</sup> If not, why? Will marriage occur with greater frequency for same-sex couples with higher education and income levels, as is now the case for different-sex couples?<sup>96</sup> If not, why?

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92. See Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848, 848–49 (2004).

93. See *id.* at 850 (cohabitation). Cherlin describes same-sex marriage as almost completely lacking in the indicia of institutionalization, but his essay was published very soon after same-sex marriage first became legal in the United States. *Id.* at 851.

94. See CHERLIN, *supra* note 1, at 169–71; Furstenberg, *supra* note 21, at 30.

95. See Mark Mather & Diana Lavery, *In U.S., Proportion Married at Lowest Recorded Levels*, POPULATION REFERENCE BUREAU (Sept. 2010), <http://www.prb.org/Articles/2010/usmarriage Decline.aspx>.

96. See BOWMAN, *supra* note 72, at 106–08; CHERLIN, *supra* note 1, at 140–42, 166–68, 178–79; Mather & Lavery, *supra* note 95.



- Issues related to the social meanings of marriage: Will gender differentiation become less pronounced in different-sex relationships? Will different-sex and same-sex couples develop shared patterns of household-labor division? Will marriage be perceived as one of two types: not gay or straight, but with or without children?

For all of these questions, intellectually honest scholars must be willing to follow wherever the research leads, regardless of whether the findings appear to cast same-sex marriage in a warm glow of tradition or to suggest the persistence of less popular differentiations or to take the analysis in new and unforeseen directions. If, as I suspect, gay couples over time will both assimilate to *and* change the social meanings of marriage, the knowledge that we will gain from better understanding the linkages between relationship patterns, gender, sexuality, and race will prove far more important than today's anxieties about exactly how these new dynamics can be portrayed by one side or another in short-term media strategies.

### III. LEGAL QUESTIONS FOR THE FUTURE

In considering the prospect of legal change, the beginning point is to acknowledge that regardless of the ultimate fate of same-sex marriage as a nationally recognized status, lesbian and gay Americans have already changed family law in multiple ways. Two developments stand out as the most significant for legal doctrine.

First, adult partners seeking legal recognition have fueled the creation of new legal statuses. States have created both *marriage equivalents*, in which the new status carries all or virtually all the material incidents of marriage, lacking only the name,<sup>97</sup> and *marriage alternatives*, which include significantly fewer marriage-like rights and responsibilities.<sup>98</sup> The extent to which these categories continue after same-sex couples gain access to marriage will depend on whether a sufficient demand for them exists from both gay and straight couples who do not want to marry.

Second, parenting law has expanded to recognize that both of a child's two legal parents can be of the same sex. The former universal rule was that only one partner in a same-sex couple could adopt children because there could be only one mother or one father.<sup>99</sup> Today, that rule has been replaced in many

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97. California, Delaware, the District of Columbia (in addition to marriage), Hawaii, Illinois, Nevada, New Jersey, Oregon, Rhode Island, and Washington have all created marriage equivalents. Badgett & Herman, *supra* note 42, at 3. In addition, litigation is pending in the Montana Supreme Court that seeks access to the tangible benefits of marriage for same-sex couples. Notice of Appeal, *Donaldson v. Montana*, No. DA 11-0451 (Mont. July 22, 2010).

98. Colorado, Hawaii (in addition to a marriage equivalent), Maine, Maryland, Vermont (in addition to marriage), and Wisconsin have all created marriage alternatives. Badgett & Herman, *supra* note 42, at 3.

99. Polikoff, *supra* note 47, at 468–69.

states by a policy of allowing two persons of the same sex to adopt.<sup>100</sup> Similarly, when a child is born to one partner in a same sex marriage or other registered relationship, marriage-equivalent laws often provide that both same-sex partners will be listed as the two parents on the birth certificate.<sup>101</sup>

In thirteen states plus the District of Columbia, the law has taken both of these steps away from traditional family law. In these states, the law both recognizes either marriage or a marriage equivalent for same-sex couples *and* allows a gay or lesbian couple to adopt a child together as the two parents.<sup>102</sup> One-third of the U.S. population lives in these fourteen jurisdictions,<sup>103</sup> which collectively comprise a culturally and legally distinct family-law regime for same-sex couples.

Predicting the next set of important legal changes is hazardous. For the future, ongoing evolution almost certainly is the only reliable forecast about same-sex marriage, family law, and the relationship between them. In that spirit, I pose three sets of questions to consider as the legal structures continue to change. Each question is addressed in its own subsection below.

A. HOW WILL THE EMERGENCE OF A PLURALIST MENU OF RELATIONSHIP-STATUS CATEGORIES AFFECT REGULATION OF *DIFFERENT*-SEX PARTNERSHIPS?

The legal regulation of unmarried-couple households is quite complex. Legal issues arising from unmarried different-sex partners led to the first steps toward incorporating nonmarital households into family law. Same-sex couples then began to invoke that body of case law in an attempt to secure rights and remedies for gay and lesbian families. The next major developments may involve a migration of legal concepts in the opposite direction if different-sex couples become a significant component of those who utilize new legal statuses created primarily for gay couples.

Different-sex partner cohabitation has become a standard household form. Of all Americans between thirty and forty-nine years old, fifty-seven percent have cohabited with a partner.<sup>104</sup> Professor Eskridge argues that cohabitation has also become a coherent legal regime, citing the emergence of common law principles recognizing nonmarital relationships, especially in contract, property and tort law.<sup>105</sup> However, a complete picture of the legal landscape requires acknowl-

100. See WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 1143–44 (3d ed. 2011) (noting that eighteen states and the District of Columbia explicitly allow second-parent adoption by a same-sex partner).

101. See Nancy D. Polikoff, *A Mother Should Not Have To Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 *STAN. J. C.R. & C.L.* 201, 215–17 (2009).

102. Those states are California, Connecticut, Delaware, the District of Columbia, Illinois, Iowa, Massachusetts, Nevada, New Hampshire, New Jersey, New York, Oregon, Vermont, and Washington. ESKRIDGE & HUNTER, *supra* note 100.

103. See *List of U.S. States and Territories by Population*, WIKIPEDIA, [http://en.wikipedia.org/wiki/List\\_of\\_U.S.\\_states\\_and\\_territories\\_by\\_population](http://en.wikipedia.org/wiki/List_of_U.S._states_and_territories_by_population).

104. PEW RESEARCH CTR., *supra* note 21, at 77.

105. Eskridge, *supra* note 51, at 1924–35.

edging that the story has at least one other subplot, which is the rise and fall of common law marriage.

In a common law marriage regime, the law imposes the same rules associated with formal marriage on the two parties upon a showing that they held themselves out to be spouses during the relationship.<sup>106</sup> It is neither a marriage equivalent nor a marriage alternative; rather, it is a form of marriage. Cynthia Grant Bowman, the most prominent scholar of common law marriage, argues that the move away from its recognition since the late nineteenth century has deprived the weaker party in such unions—usually the woman—of important protections.<sup>107</sup> A series of reasons contributed to many states terminating the official status of common law marriage: a concern with fraudulent claims, worries over administrative burdens from having to adjudicate what was the “true” marriage, class and racial prejudice against African-Americans and lower income persons with whom common law marriage was associated, and worries that allowing informal ties to convey official legal standing would weaken the status and sanctity of marriage.<sup>108</sup> Bowman argues that the cluster of case law remedies is inadequate to provide comparable protection because explicit contracts are infrequent and remedies inadequate.<sup>109</sup>

Both common law marriage and the case law that began with *Marvin v. Marvin*<sup>110</sup> originated in claims presented by heterosexual partners. By contrast, the formalized status categories of domestic partner and civil union grew out of demands for recognition by same-sex couples, often in the wake of courts’ rejections of the same kinds of tort or property claims that had begun to be accepted when pressed by unmarried heterosexual partners.<sup>111</sup>

For different-sex couples, access to the menu of marriage-equivalent and marriage-alternative relationship options that have emerged from LGBT-equality claims varies from jurisdiction to jurisdiction. Ten states and the District of Columbia still permit common law marriage.<sup>112</sup> Four jurisdictions allow both different- and same-sex couples to opt for a nonmarital status.<sup>113</sup> In two others, different-sex couples can obtain the nonmarital status only if one partner is above a certain age.<sup>114</sup> In the remainder of states, different-sex couples are allowed to register their relationship only as a marriage. The pattern

106. BOWMAN, *supra* note 72, at 22.

107. *Id.* at 27–38, 169–72.

108. *Id.* at 23–26.

109. *Id.* at 51–53, 226–27.

110. 557 P.2d 106 (Cal. 1976) (en banc).

111. See NAN D. HUNTER ET AL., *THE RIGHTS OF LESBIANS AND GAY MEN* 80 (1992); Nancy J. Knauer, *Domestic Partnership and Same-Sex Relationships: A Marketplace Innovation and a Less Than Perfect Institutional Choice*, 7 TEMP. POL. & CIV. RTS. L. REV. 337, 344–45 (1998).

112. BOWMAN, *supra* note 72, at 26.

113. See D.C. CODE § 32-701(3) (2012); HAW. REV. STAT. § 572B-2 (West 2012); 750 ILL. COMP. STAT. ANN. 75/10 (West 2011); NEV. REV. STAT. § 122A.100 (West 2010).

114. See CAL. FAM. CODE § 297(b)(4)(B) (West 2012); WASH. REV. CODE ANN. § 26.60.030(6) (WEST 2012).

of state laws contrasts with that of municipal domestic-partner laws, which began to be enacted in the 1980s and created registration systems open to different-sex partners.<sup>115</sup>

Professor Eskridge argues that the regulation of cohabitation has become sufficiently extensive that it should be understood as, in my terms, another marriage-alternative status.<sup>116</sup> Like codified marriage alternatives, cohabitation law attaches only discreet portions of marriage-like rights or obligations to the partnership, as contrasted with the mirroring of those rights and obligations present in marriage-equivalent statuses. The most significant differences between cohabitation and marriage-alternative statutes concern termination of the status. If a cohabiting couple satisfies the indicia for the imposition of a constructive contract, neither of the parties can simply opt out of his or her duties. In addition, cohabitation regimes do not include formal dissolution, a process which exists in codified alternatives.

One irony of the coexistence of the body of case law applying to cohabitation with the enactment of new formal statuses is that the former constructively enforces many of the rules and norms of the latter. In California, for example, a different-sex cohabitant may be entitled to pursue certain claims under *Marvin* and its progeny even if she does not qualify for or has intentionally elected not to take part in the registered domestic-partnership scheme. Although only a small number of different-sex partners choose to enter into formalized nonmarital statuses that are open to them, millions engage in cohabitation, a fact that triggers a body of applicable law of which they may not even be aware.

The fastest growing segments of cohabiting different-sex couples are those middle-aged or older. There are more unmarried partners between the ages of 30 and 44 than between 18 and 29, and almost as many 45 and older as there are in the 18-to-29 age group.<sup>117</sup> In the majority of cohabiting couples, one or both partners have previously been married.<sup>118</sup> Almost one in five American women between the ages of 40 and 44 are in cohabiting couples *after* having been married.<sup>119</sup> These numbers help explain the demand for a nonmarital status open to different-sex couples older than the typical premarriage-age cohorts.<sup>120</sup>

Very little data exists as to the demand by different-sex couples for participation in formal registration systems. In Washington, where different-sex couples may register as domestic partners only if at least one partner is 62 or older, forty-five percent of the couples in that age category who registered from 2007

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115. See Nancy J. Knauer, *supra* note 111, at 346–47.

116. Eskridge, *supra* note 51, at 1934–35.

117. U.S. CENSUS BUREAU, *supra* note 33, at 2 tbl.2.

118. BOWMAN, *supra* note 72, at 117.

119. See U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, MARRIAGE AND COHABITATION IN THE UNITED STATES: A STATISTICAL PORTRAIT BASED ON CYCLE 6 (2002) OF THE NATIONAL SURVEY OF FAMILY GROWTH, at 29 tbl.13 (2010).

120. See BOWMAN, *supra* note 72, at 116–20.

to 2011 were heterosexual.<sup>121</sup> In Nevada, where a marriage-equivalent status is open to all couples, eleven percent of registrants in the first year were different-sex couples.<sup>122</sup> After New Jersey enacted a marriage-alternative status in 2004 open to different-sex couples 62 and older, about four percent of those who registered in the first year were straight couples.<sup>123</sup> However, because there are so many more different-sex than same-sex couples, the straight-couple registrants constituted a very small proportion of all such couples in these states.

Another way to read the data is to ask how many persons chose a nonmarital status when they could have chosen marriage. Between May and November 2008 in California, when same-sex couples were allowed to marry, between 292 and 386 persons a month opted to enter the registered-domestic-partner system.<sup>124</sup> The data do not indicate the numerical breakdown between heterosexual couples and same-sex couples. However, even if the take-up rate continued to be approximately 170 couples per month, or roughly 2,000 couples per year, that is a small number relative to the population of California.

If one is analyzing the preferences of different-sex couples, the data so far indicate a very strong preference for marriage over alternative-status categories. If one is analyzing the composition of the group of people who elect a nonmarital status, it appears that, at least in some locations, a significant portion consists of different-sex couples.

Will we start to see more formal “postmarriage unions” tailored to the concerns of persons who have children or property from prior marriages? Would adoption of such laws create a new relationship status defined not only by age but also effectively by socio-economic status? What set of legal rights and responsibilities would such laws entail? Will AARP become a major player when state legislatures consider nonmarital status laws?<sup>125</sup> Will the cultural trend to specialization and narrow casting dominate family law? Will different states with different demographic profiles enact other niche relationship laws?

An increase in the number of jurisdictions offering more formal legal recognition of nonmarital *different-sex* relationships would be consistent with the broader trend toward greater variety in the patterns and norms of American family life. It would also have a major impact on family law.<sup>126</sup>

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121. Badgett & Herman, *supra* note 42, at 30.

122. *Id.* at 28 (forty-five percent in Nevada); *id.* at 30 (eleven percent in Washington, increasing to sixteen percent when additional legal incidents were added to the status).

123. *Id.* at 29.

124. BOWMAN, *supra* note 72, at 66.

125. In 2004, the Ohio chapter of AARP opposed Issue One, which won enactment by voters and amended the state's constitution to bar recognition of same-sex marriage and marriage-equivalent relationship statuses for both gay and straight couples. See Sam Howe Verhovek, *Gay Marriage Ban Faces Some Unlikely Foes*, L.A. TIMES (Oct. 31, 2004), <http://articles.latimes.com/2004/oct/31/nation/na-gay31>.

126. Such an expansion could also include individuals with a significant mutual commitment who are not coupled.

B. WHAT WILL BE THE IMPACT ON FAMILY LAW AND ON LGBT FAMILIES WHEN FEDERAL AGENCIES BEGIN TO RECOGNIZE SAME-SEX MARRIAGE?

The Defense of Marriage Act (DOMA) prohibits the federal government from “giving effect to” marriages between same-sex partners.<sup>127</sup> The statute is under significant attack in court,<sup>128</sup> and the Department of Justice has stated its opinion that DOMA is unconstitutional.<sup>129</sup> Although it is impossible to know whether or when DOMA will be invalidated or repealed, I will assume for purposes of this article that the end of DOMA will occur before same-sex couples acquire the right to marry under state law throughout the United States.

The marriage-equality movement has created what amounts to a natural experiment testing the extent to which a stigmatized group that has been barred from marriage will seek to participate in marriage when that status becomes open to them. The point at which same-sex couples can acquire all of the federal law incidents of marriage will be one moment when a significant change could occur in the patterns and rates of same-sex couples who marry. One possibility is that, because of the extent and importance of federal benefits,<sup>130</sup> a large number of couples who have so far decided not to marry will change their minds when DOMA ends.

Social science research indicates that different- and same-sex couples identify virtually the same mix of reasons behind the desire to marry.<sup>131</sup> For both groups, however, the only data come from self reports, which could be influenced by respondents’ desire to provide what they believe to be the most socially acceptable answers. If there is a surge in the number of same-sex couples who marry once federal recognition is available, it would signal that access to material benefits is more critical to the decision than indicated by survey responses. Alternatively, the absence of a surge in the numbers would provide stronger evidence that material incentives are less important than other

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127. 1 U.S.C. § 7 (1996).

128. The First Circuit found parts of DOMA unconstitutional in *Massachusetts v. United States Department of Health & Human Services*, 682 F.3d 1 (1st Cir. 2012).

129. Letter from Eric H. Holder, Jr., U.S. Attorney Gen., to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

130. See generally M.V. Lee Badgett, *The Economic Value of Marriage for Same-Sex Couples*, 58 *DRAKE L. REV.* 1081 (2010).

131. Compare PEW RESEARCH CTR., *supra* note 21, at 22 (noting that different-sex couples state primary reasons as love, commitment, companionship, the desire to have children, and financial stability), with RAMOS, GOLDBERG & BADGETT, *supra* note 85 (finding that couples cite love and commitment, legal recognition of relationship, societal visibility of lesbian and gay relationships, and issues related to children, factors related to will or inheritance, issues related to property, and health benefits as reasons to marry), and M.V. Lee Badgett, *Social Inclusion and the Value of Marriage Equality in Massachusetts and the Netherlands*, 67 *J. SOCIAL ISSUES* 316, 327, 331–32 (2010) (finding the most common responses of same-sex couples to the question, “how has marriage changed you,” to be increased commitment, worrying less about legal problems, and feeling more accepted by society). See also DIANE M. PURVIN ET AL., *TYING THE KNOT: THE CONTEXT OF SOCIAL CHANGE IN MASSACHUSETTS* (2005); ELLEN SCHECTER ET AL., “DOING MARRIAGE”: SAME-SEX RELATIONSHIP DYNAMICS IN THE POST-LEGALIZATION PERIOD (2005).

factors to the decision of whether to marry.<sup>132</sup>

It is also possible that recognition under federal law would alter some of the psychological dynamics underlying the decision whether to marry. Perhaps recognition at the national level, even if not controlling the policy of any state, would be perceived as a more powerful signal of legitimacy and acceptance than equality under state marriage law.<sup>133</sup> There is also evidence that the ceremonial aspects of a wedding can affect the psychological dimension of the couple's relationship as well as the social recognition and support provided to them, even if it has no legal consequence and even if—perhaps especially if—the couple has appropriated traditional forms in gay-identified ways.<sup>134</sup> The end of DOMA could provide a unique opportunity to investigate what relationship, if any, exists between change in marriage law and the emotional health of the couples who decide to marry versus those who decide not to marry.

Although the end of DOMA will produce one nationwide policy—federal agencies will apply the same standard to same-sex as to different-sex marriages—it remains unclear precisely what that standard will be. Federal agencies defer to the states for determining the validity of a marriage. But it is an open question whether federal recognition will attach only to the marriages of gay and lesbian couples whose state of residence recognizes their marriage, or whether federal agencies will also recognize marriages that were legal where performed.<sup>135</sup> This question will have enormous practical impact, since sixty percent of the same-sex couples who have married have been nonresidents of the jurisdiction where the marriage occurred.<sup>136</sup>

Whatever policy option the federal government chooses, the post-DOMA family law landscape for gay and lesbian families is likely to become even more incoherent than it is now. A local couple who married in Massachusetts, for example, would be considered married under both federal and state law, but that recognition could easily change if they moved to any of more than forty states. Once relocated, some gay married couples have found that the courts of their new state of residence will not recognize their marriage, even in order to grant a

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132. Compare this theory with studies on the effects that different state laws governing material issues such as property division and child welfare programs have on divorce decisions. Kate Sweezy & Jill M. Tiefenthaler, *Do State-Level Variables Affect Divorce Rates?*, 54 REV. SOC. ECON. 47 (1996).

133. Some research indicates that gay and lesbian couples who have married or formalized their relationship report greater feelings of well-being and security. GOLDBERG, *supra* note 73, at 39–40; Ellen D.B. Riggle et al., *Psychological Distress, Well-Being, and Legal Recognition in Same-Sex Couple Relationships*, 24 J. FAM. PSYCHOLOGY 82 (2010); cf. Mark L. Hatzenbuehler et al., *State-Level Policies and Psychiatric Morbidity In Lesbian, Gay, and Bisexual Populations*, 99 AMER. J. PUB. HEALTH 2275 (2009).

134. See ELLEN LEWIN, *RECOGNIZING OURSELVES: CEREMONIES OF LESBIAN AND GAY COMMITMENT* 163–64, 246–51 (1998).

135. William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 STAN. L. REV. (forthcoming 2012), available at <http://ssrn.com/abstract=1954965>.

136. Badgett & Herman, *supra* note 42, at 9.

divorce.<sup>137</sup> Although marriage is a state law status, the variation among states as to the rules for recognizing marriages from other jurisdictions sharply diminished in the last century. Same-sex marriage re-introduces substantial disarray in that aspect of family law. The complexity surrounding this issue will heighten after federal recognition begins, and the result will increasingly bedevil local judges and practitioners, among others. Inevitably, national uniformity will have to be restored with state and federal jurisdictions following the same definitional rules, a process that could drag on for years.

C. WILL PARENTHOOD BECOME THE DIVIDING LINE BETWEEN REGULATORY REGIMES OF MORE VERSUS LESS STRINGENCY?

The hedonic norm values that Professor Eskridge asserts as the foundation for contemporary family law are least persuasive when they conflict with the imperative to protect vulnerable or dependent persons in the family. A series of appellate courts have ruled, consistent with this intuition but nonetheless irrationally, that the risk of “accidental procreation” by different-sex partners justifies the exclusion of same-sex couples from marriage (including those with children) on the theory that “an important function of marriage is to create more stability and permanence in the relationships that cause children to be born [by] . . . offer[ing] an inducement . . . to opposite-sex couples.”<sup>138</sup> However inapt this risk is as the rationale for an exclusion, the goal of maximizing family stability once children are born is legitimate.

Given the strength of the assumption that marriage is the best path to stability, it is notable that legislators have not enacted laws with expandable marriage duties for couples who become parents. Such laws could automatically enhance the obligations of the adult partners after children are born or adopted, for example, whereas marriages without children (whether of same- or different-sex partners) would be subject to looser rules as to property division and other matters. For any marriage during which a child was born or adopted, the law could expand the duties of former spouses to each other, linked somewhat to the division of custody and visitation but primarily calculated to produce equivalent levels of resources for the children, regardless of with which spouse they were living.

If the repeated references to the potential harms of accidental procreation that appear in same-sex-marriage case law are taken seriously, the development of new status categories targeted to providing greater protection for children by the creation of stronger legal bonds between their parents would seem to merit

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137. See, e.g., *Chambers v. Ormiston*, 935 A.2d 956 (R.I. 2007) (finding no jurisdiction to adjudicate divorce of couple whose marriage was legal in state where performed); *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654 (Tex. App. 2010) (same). *Contra* *Port v. Cowan*, No. 69, 2012 WL 1758629 (Md. May 18, 2012); *Christiansen v. Christiansen*, 253 P.3d 153 (Wyo. 2011).

138. *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006); *accord* *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006); *Morrison v. Sadler*, 821 N.E.2d 15, 24–26 (Ind. Ct. App. 2005); *Andersen v. King County*, 138 P.3d 963, 982–83 (Wash. 2006).



serious consideration. So far as I am aware, however, no such proposal is before any lawmaking body.

The American Law Institute published a set of principles ten years ago under which unmarried couples would be made subject to mandatory, marriage-like rules for property distribution and family support if they had lived together for a specific number of years established by state law or if they had had a child.<sup>139</sup> The ALI proposal, however, covers only cohabiting couples and it can be triggered by a durational test as much as by the addition of a child to the family unit. No jurisdiction has enacted it.<sup>140</sup>

The closest thing to such a status actually in existence today is covenant marriage, which makes divorce more difficult but is unrelated to the presence of children.<sup>141</sup> Additional family-support obligations tied to a parenting marriage category would be more stringently regulatory than covenant marriage in two respects. First, although the prospect of enhanced support obligations might dissuade two parents from divorcing in the same way that covenant marriage is intended to do, the tougher regulatory mechanism would not terminate if a divorce did occur, unlike with covenant marriage. Its goal would not be to prevent divorce but to enhance the well-being of children in postmarital households. Second, the distinctive legal aspects of a parenting marriage would attach automatically upon the birth or adoption of a child rather than only when the spouses opt in, as occurs in covenant marriage.

My purpose here is not to endorse or advocate for such an approach. One enormous shortcoming is that it would heighten the privatization of child-welfare costs and thereby provide little value to children in families with less available income. My preferred policy choice would be to rely primarily on an allocation of resources to children independent of their parents' marital status. I offer it for policymakers who prioritize maintaining the marriage-child-rearing link. If the concern with child welfare that forms a recurring theme in marriage-equality debates is genuine, a tighter marriage bond for parents, if not by a new formal status then by incremental case law modifications to current support law, should be under consideration. The absence of support for this kind of approach is telling.

#### CONCLUSION

Same-sex marriage is a new family form that seems destined to gain increasing legal and social acceptance. Same-sex marriage and marriage alternatives will both produce more change in family law and continue to reflect underlying shifts in gender norms and social practices across the population. These house-

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139. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 6.04-6.06, 4.09-4.10, 5.04 (2002).

140. ESKRIDGE & HUNTER, *supra* note 100, at 702.

141. Katherine Shaw Spaht, *Covenant Marriage Seven Years Later: Its As Yet Unfulfilled Promise*, 65 LA. L. REV. 605, 612-13, 622 (2005).

hold forms remain very much a set of works in progress, “incomplete institutions” in both law and culture. That very incompleteness, however, also heightens the possibility that the regulation of same-sex relationships will influence the law governing all family structures in ways that we cannot yet foresee.