

Essay: The Uncertain Future of Marriage and the Alternatives*

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The cultural and institutional predominance of marriage in our society has lately been challenged by two important social trends: growing dissatisfaction with or indifference to marriage on the part of those eligible to marry, and the emergence of nontraditional families headed by adults who may wish to marry but are presently excluded from doing so. This Essay argues that proactive law reformers have responded to these trends by taking two very different approaches. The first approach, “diversity of forms,” is exemplified by the cultivation of alternatives and substitutes to traditional marriage ranging from same and opposite-sex domestic partnerships and other forms of “marriage-lite” to commitment-intensive options like covenant marriage. The other approach, “equal inclusion,” emphasizes broader access to regular marriage itself, and is exemplified by the egalitarian, civil rights-focused, and deeply marriage-affirmative views of the Massachusetts Supreme Judicial Court in Goodridge v. Dep’t of Public Health. This Essay goes on to contend that although these two reform approaches are quite different, they share a common vision of how the law of marriage and coupling should be shaped by the social reality of citizens’ lives rather than by abstract traditional archetypes, leaving both approaches more-or-less on the same side in the larger culture war being waged over the future of marriage and family law. There is still potential for serious conflict, however, because although both approaches are skeptical of idealized tradition, they each remain nested in a diverse and disparate array of other aspirational norms that may lead them to threaten each other’s long-term institutional agendas.

INTRODUCTION.....	1
I. THE PREDOMINANT CONJUGAL REFORM APPROACHES.....	5
a. <i>Diversity of Forms</i>	5
b. <i>Equal Inclusion</i>	12
II. CONVERGENCE: SOCIAL REALITY AND PRAGMATISM.....	20
III. CONFLICTS: EQUALITY & COMMUNITY VS. LIBERTY & PLURALISM.....	25
a. <i>Same-Sex Marriage vs. Marriage Substitutes</i>	26
b. <i>Heterosexual Marriage Pluralism</i>	33
CONCLUSION.....	38

INTRODUCTION

One of the most widespread cultural debates taking place in the United States today concerns the future of marriage and coupling.¹ Its parameters are by now familiar to most

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observers, with supporters of “traditional marriage”² poised at one end of the ideological spectrum to do battle in the public arena with those advocating a variety of innovations, ranging from the inclusion of same-sex couples,³ to the creation of alternative statuses,⁴ to the complete abolition of marriage as a civil institution.⁵ Most of these innovations are themselves prompted by underlying processes of social change that are viewed with suspicion by cultural traditionalists,⁶ lending the entire debate a certain intractable quality common to many American discussions of “social issues.”⁷ The purpose of this Essay is not to weigh in on either side of the marriage controversy, which has been a major battleground within the legal academy for a generation, but to explore some of the complexities obscured by the polarization it has generated.

Two important social trends that have posed challenges to traditional marriage are the growing dissatisfaction with or indifference to it on the part of a significant number of people who could marry their partners, and the emergence of nontraditional families whose adult

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¹ This essay focuses on marriage and “coupling,” despite the author’s awareness that at some point in the future the two may actually come uncoupled. Polygamy was once a serious institutional alternative in the United States before it was stamped out by Congress, with the eventual blessing of the Supreme Court. *See* Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756, 801-806 (2006); *Reynolds v. United States*, 98 U.S. 145 (1878). While it is once more a popular topic for conversation in the debate over same-sex marriage, unlike same-sex marriage or the various marriage alternatives discussed below, polygamy has yet to secure the kind of elite and popular backing that would give it a serious chance of being enacted in any state. For now, at least, marriage and coupling remain exclusively intertwined as a matter of policy, and are thus the primary focus of this essay.

² The term “traditional marriage” is used today by many conservatives to refer to the union of “one man and one woman for life.” *See* Larry Cata Becker, *Religion as the Language of Discourse of Same-Sex Marriage*, 30 CAP. U. L. REV. 221, 236 n.79 (2002) (quoting position statement of the Southern Baptist Convention). I also use it more generally here to refer to marriage based on traditional commitment norms, regardless of the gender of the participants.

³ *See, e.g.*, *Goodridge v. Dep’t of Public Health*, 440 Mass. 309 (Mass. 2003).

⁴ The American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* § 6.01 (2002) [hereinafter ALI Principles].

⁵ *See, e.g.*, Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161 (2006); MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER: THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 228-30 (1995).

⁶ Trends that figure most prominently into this debate include growing social toleration of homosexuality and heterosexual sex outside of marriage.

⁷ *See* AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 73 (1996) (describing abortion as an example of a political debate so rooted in subjective morality that the two sides not only take different positions but cannot agree on the basic terms of discussion).

members may wish to marry but who are excluded from doing so by law. The primary law reform efforts that have emerged in response to these trends can be conceptualized as two very different legal and institutional approaches.⁸ The first might be called “diversity of forms.” It originated with state court decisions extending private law contractual principles to certain nonmarital conjugal relationships, but has since expanded to encompass an array of alternative status frameworks, such as opposite-sex domestic partnerships (a form of “marriage-lite”); civil unions, same-sex domestic partnerships, and other substitute institutions for those legally barred from marrying; and, lastly, covenant marriage for those who want more legal and spiritual commitment than “baseline”⁹ marriage can offer in the era of no-fault divorce. Although these alternative status forms have come about through diverse means and with different and often conflicting motivations, what unites them is a shared sense that the institution of marriage as it currently exists is failing to meet the real needs of significant segments of the population and must accordingly share the institutional stage with, or even be entirely replaced by, other forms.

This first approach has lately had competition, however, from a second movement, which might be labeled “equal inclusion.” Equal inclusion focuses not on creating alternatives to marriage but on making marriage itself more widely available. This point of view is exemplified by the Massachusetts Supreme Judicial Court’s decision in *Goodridge v. Dept. of Public*

⁸ Most of this Essay (except for Part IIIB) focuses on marriage reform efforts that have originated on the center-left (with the exception of covenant marriage) because thus far they have dominated the reform agenda in the United States. There has been more than occasional reform rhetoric on the right, notably about the need to modify divorce requirements, and in the 1990s it may have seemed as if a full scale legislative assault on no fault divorce was imminent. See James Herbie DiFonzo, *Customized Marriage*, 75 IND. L.J. 875, 916-920 (2000) (describing “counterrevolution” against no fault). To date that assault has not arrived. The lion’s share of conservative political efforts in recent years, while quite successful, has been devoted to the preservation of the status quo, i.e. heterosexual marriage), despite the fact that in most states that status quo actually consists of an otherwise quite liberal marriage regime. See *infra* note 12.

⁹ I use the term “baseline marriage” throughout this essay to refer to the liberalized version of marriage that exists in most states today.

*Health*¹⁰ declaring a right to same-sex marriage under the state’s constitution. *Goodridge* represents a far different type of challenge to the baseline institution of marriage than the push for diverse forms. On the one hand, the inclusion of same-sex couples in marriage may significantly change the predominant conjugal form by eliminating some of its heretofore defining characteristics, notably heterosexuality. Yet the focus on inclusion (rather than liberty, or even abstract equality) also exalts marriage, transfixing it in the public consciousness as more than a means to other ends but instead as an intrinsic public good in its own right.¹¹

We are thus faced with two significantly divergent law reform efforts. Yet the choice between the two is not as stark as that between “saving” traditional marriage and engaging in some sort of proactive law reform. Both reform approaches have emerged from a common vision of how the law of marriage and coupling ought to be shaped, a vision that deemphasizes the use of conjugal forms to express abstract traditionalist archetypes in favor of legal and social institutions that effectively respond to how citizens actually live their lives. They are thus, on one level, two facets of the same reformist impulse. Nevertheless, the rejection of idealized conjugal forms in favor of social reality does not equate to value-free institutional agnosticism. Both reform approaches remain intertwined with a diverse and often disparate set of other normative goals, ranging from the promotion of equality for marginalized groups, personal autonomy for individuals, and pluralism among varying religious and cultural traditions, to the reinvigoration of traditional mores and the reinforcement of a national sense of community through shared

¹⁰ 440 Mass. 309 (Mass. 2003).

¹¹ Recent decisions by other state supreme courts and by one federal court of appeals suggest that *Goodridge* may not have the doctrinal influence for which its supporters might once have hoped. *See Andersen v. King County*, No. 75934-1, ---P.3d--- (Wash. 2006); *Citizens for Equal Protection v. Bruning*, No. 05-2604, ---F.3d--- (8th Cir. 2006); *Hernandez v. Robles*, ---N.E.2d --- (N.Y. 2006). These decisions do not lessen the importance of *Goodridge* as an authoritative articulation of the legal and moral case for same-sex marriage. It is in fact precisely because the Massachusetts Supreme Judicial Court deployed rhetoric that so many would view as moral and political rather than doctrinal that its decision remains important for the purposes of this essay, since the debate over same-sex marriage, while it may be foreclosed by most courts, is likely to continue in the legislative arena. *See infra* note 60.

social institutions. As battles over whether to reform the law of marriage and coupling rage on, we should thus be aware that even if the forces for change win, the character of what they will implement is likely to be contested for a long time to come.

Part I of this Essay describes the two dominant approaches to law reform in the area of marriage and coupling that have emerged in response to changing social norms. Part II describes how these approaches converge through a common vision with respect to the relationship between the law's role in shaping conjugal forms and the social reality of citizens' lives. Part III raises the possibility that various aspects of these two approaches may nevertheless threaten each other's long-term institutional agendas and explores two potential loci of future conflict.

I. THE PREDOMINANT CONJUGAL REFORM APPROACHES

A. Diversity of Forms

Commentators tend to agree that the contemporary push in the United States to align the law of marriage and coupling more closely with the reality of citizens' lives is rooted in two related developments from the mid-1970s: the advent of no-fault divorce through legislative reform,¹² and the increasing enforcement of contractual alternatives to heterosexual marriage by many state courts, starting with the California Supreme Court's famous decision in *Marvin v. Marvin*.¹³ In an important article published almost fifteen years ago, Jana Singer identified both of these trends as part of a larger privatization process taking hold of family law,¹⁴ one encompassing a shift away from status-based family forms that regarded married partners as one legal entity towards a more contractarian vision in which individual spouses were able to

¹² California became the first state to adopt a no-fault framework in 1969. By 1985 no American jurisdiction retained a purely fault-based system. Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1472 (1992). Today unilateral no-fault divorce is available in all but four states. See Allen M. Parkman, *The Contractual Alternative to Marriage*, 32 N. KY. L. REV. 125, 129 n.38 (2005).

¹³ 18 Cal.3d 660 (Cal. 1976).

¹⁴ Singer, *supra* note 12, at 1445.

preserve a great deal more of their social and legal identities.¹⁵ Although society's push away from status towards contract has abated somewhat, and may even have reversed course,¹⁶ these two developments remain key family law watersheds.

Despite the importance of each of these developments, the legal forms resulting from them experienced somewhat different institutional trajectories. No-fault marriage has become the default rule in almost all states, a broad, one-size-fits-all model whose ubiquity appears matched only by its frequent inability to please anyone on any side of the debate.¹⁷ Contractual alternatives to baseline marriage have also become commonplace in several key areas, such as the provision of health, pension, and other domestic partnership benefits to unmarried couples by private companies and some government employers.¹⁸ Yet in other respects contractual alternatives have continued to languish on the institutional margins, their uneven enforcement¹⁹ due in no small part to social insecurity generated by the progression of marriage itself towards a more contractarian state.²⁰

More recently, however, a new trend has emerged in the push for institutional alternatives to the baseline model of marriage, with the focus this time going beyond the cultivation of limited private law alternatives towards the creation of one or more quasi-marital alternative

¹⁵ *Id.* at 1462.

¹⁶ See Raymond O'Brien, *The Reawakening of Marriage*, 102 W. VA. L. REV. 339 (1999).

¹⁷ Baseline marriage, even in its liberalized form, continues to be critiqued from the left as either hopelessly coercive and paternalistic or incapable of reckoning with the reality of familial dependency. See *infra* text accompanying notes 26-27, 140-44. At the same time, those on the center and the right have decried the recent evisceration of traditional commitment norms. See, e.g., Lynn D. Wardle, *No Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U. L. REV. 79 (1991).

¹⁸ See Grace Ganz Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV. 1265, 1282-83 (2001).

¹⁹ Many states have simply refused to follow *Marvin*, while some have limited recovery to various types of express agreements. See Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitation Obligation*, 52 UCLA L. REV. 815, 817-18, 818 n.4 (2005)

²⁰ See Singer, *supra* note 12, at 1456-65, 1475-76.

statuses. The concept of status is commonplace in family law.²¹ The term is used here to denote state reinforcement of conjugal relationships going beyond the enforcement of private agreements to the creation of more comprehensive, and not entirely voluntary, legal relationships.²² Status in family law is intimately connected to the idea that individuals in families should play certain “roles,” which can be defined as “behaviors that are characteristic of persons in a context.”²³ Commentators such as Milton Regan have argued for a revival of status because it usefully fosters what Regan characterizes as a “relational” sense of obligation, i.e. a sense of obligation that transcends the acontextual self to promote community and mutual dependence.²⁴ Even in the era of no-fault the archetypal conjugal status remains marriage. Yet any type of alternative status available to couples is likely to carry the same attributes to some extent and so might be able to compete much more directly with marriage than the enforcement of private, largely economic agreements between unmarried couples.²⁵

The emergence of different conjugal status frameworks as alternatives to or substitutes for baseline marriage can be attributed to at least three broad developments. First, despite society’s ambivalence towards contractual alternatives to marriage, the incidence of nonmarital

²¹ See Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1419, 1526-48 (1994).

²² Modern conjugal status relationships (in contrast to their antecedents and to other types of familial status relationships like parenthood) can be considered voluntary in the sense that one must consent to enter into them. Once entered into, however, they continue to carry involuntary consequences, because many of the rights and obligations attached to them cannot be “unbundled” from each other even if the participants wish to do so. See Margaret M. Mahoney, *Forces Shaping the Law of Cohabitation for Opposite Sex Couples*, 7 J. L. & FAM. STUD. 135, 159 (2005). Of course, some aspects of conjugal status relationships can be unbundled, as marriage and other forms undergo a “utilitarian metamorphosis” that has made increased room for private ordering. See James Herbie DiFonzo, *Unbundling Marriage*, 32 HOFSTRA L. REV. 31, 41 (2003). This process has had limits, however. For instance, much of marriage, including the basic terms of a couple’s relationship and the grounds for dissolution, has remained largely off limits for contractual modification. See Eric Rasmussen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453, 460-64 (1998).

²³ BRUCE J. BIDDLE, *ROLE THEORY: EXPECTATIONS, IDENTITIES AND BEHAVIORS* 56 (1979) (quoted in MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 9 (1993)).

²⁴ See REGAN, *supra* note 23, at 92-94.

²⁵ Other scholars have in fact advanced visions of diverse state-supported intimate partnerships fostering equally strong relational identities. See, e.g. Chai R. Feldblum, 17 YALE J. L. & FEMINISM 139, 179-81 (2005).

cohabitation among heterosexual couples has continued to rise,²⁶ and with it the desire of many law reformers to provide protection to such couples while their relationships last, to the weaker parties on dissolution, and to other affected groups (notably minor children).²⁷ This has produced two broad sets of alternative status forms available to those who might otherwise marry. The set that predominates in the United States takes what is usefully thought of as a “conscriptive”²⁸ rather than a voluntary approach. It consists of de facto regimes established by various state courts that automatically impose certain aspects of the marital relationship on long-term cohabiting couples. The Supreme Court of Washington State, for instance, has held that property acquired during heterosexual cohabitation is subject to equitable distribution if it “would have been characterized as community property had the couples been married.”²⁹ Other state courts have reached similar results in more limited contexts.³⁰ On a far broader scale, four years ago the American Law Institute proposed that virtually all of the private benefits and obligations currently reserved for marital relationships be automatically applied to certain unmarried cohabitants.³¹

A second set of forms for unmarried heterosexual couples that is still uncommon in the United States but growing in popularity abroad consists of voluntary domestic partnership frameworks providing a kind of “marriage-lite” that couples may opt into through formal

²⁶ The number of unmarried, opposite sex couples rose eight-fold from 1970 to 1998, from roughly half a million to over 4.2 million. Blumberg, *supra* note 18, at 1268 n.11 (reprinting table from Census Bureau report).

²⁷ See ALI Principles, *supra* note 4, at § 6.02 cmt. B; Martha L. Minow, *Redefining Families: Who’s In and Who’s Out?*, 62 U. COLO. L. REV. 269, 282-83 (1991).

²⁸ Garrison, *supra* note 19, at 818.

²⁹ *Connell v. Francisco*, 127 Wash.2d 339, 351 (Wash. 1995).

³⁰ See, e.g. *Sullivan v. Rooney*, 404 Mass. 160, 162-63 (Mass. 1989) (unmarried partner entitled under constructive trust doctrine to one half interest in home where partners resided during cohabitation); *Pickens v. Pickens*, 490 So.2d 872, 875-76 (Miss. 1986) (homemaker had equitable claim to property accumulated during long-term, stable cohabiting relationship).

³¹ ALI Principles, *supra* note 4, at §§ 6.03-6.06.

registration.³² Although in the United States this form has more often been enacted as a marriage substitute for those who may not legally wed,³³ it has also been conceived of as an alternative for those who might otherwise marry but desire fewer of the bundled rights and obligations that marriage entails.³⁴ Today, a few American domestic partnership statutes do include some heterosexual couples, although such inclusion is generally limited to those perceived to have special requirements making marriage-lite particularly appropriate.³⁵

In addition to heterosexual cohabitation, a second important development driving the push for additional conjugal forms has been the increasing emphasis that advocates for gay and lesbian rights have placed on securing legitimacy and support for same-sex couples.³⁶ For a variety of reasons, including both distaste in some parts of the GLBT community for marriage as an institution and political opposition from other segments of society, these efforts have most often culminated not in same-sex marriage but in the creation of parallel statuses reserved for certain classes who are legally barred from marrying.³⁷ These arrangements function as marriage substitutes; they are available to those who may not legally marry their partners (usually same-sex couples, although sometimes others in non-conjugal dependency relationships are also included). Vermont's civil union law and Hawaii's reciprocal beneficiary law are well known examples of the extremes of this type of regime in the United States. Both were compromise solutions enacted as a response to litigation on behalf of same-sex couples seeking the right to

³² Garrison, *supra* note 19, at 866.

³³ See *infra* text accompanying notes 36-47.

³⁴ See Mahoney, *supra* note 22, at 163 (describing foreign domestic partnership laws that include opposite sex couples).

³⁵ Retirees, for instance, are more likely to be widowed and therefore precluded from remarrying if they want to keep various federal benefits, and so they have sometimes been included. See, e.g., CAL. FAM. CODE § 297 (West Supp. 2005) (domestic partnership status available to heterosexual couples over the age of 62).

³⁶ See GEORGE CHAUNCEY, WHY MARRIAGE: THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY (2004).

³⁷ Blumberg, *supra* note 18, at 1281 (describing domestic partnership and civil union legislation as "counter-proposal" to same-sex marriage initiatives); see also Anemia Hartocollis, *For Some Gays, A Right They Can Foresake*, N.Y. TIMES, July 30, 2006, at D9 (describing unfavorable view of same-sex marriage relative to civil unions for some in gay and lesbian community).

marry,³⁸ but whereas Vermont’s civil unions law is limited to same-sex couples and purports to bestow on them virtually all of the benefits and burdens of marriage,³⁹ Hawaii’s reciprocal beneficiaries framework is far narrower in substantive scope but open to many other pairings who are equally ineligible to marry.⁴⁰ Currently six states, the District of Columbia, and numerous municipalities have some variation on one of these statutory regimes,⁴¹ and despite the significant backlash against same-sex marriage⁴² it is likely that more state and local governments will follow suit.⁴³ One point of contention, however, relates to the permanence of these statutory frameworks. Some gay and lesbian advocates, along with many of their conservative critics, see them as fundamentally temporary compromises, a “down-payment”⁴⁴ or, depending on one’s viewpoint, a “slippery slope”⁴⁵ towards same-sex marriage. Others may view such alternatives as viable permanent solutions that address most of the needs of nontraditional families while also preserving heterosexual marriage,⁴⁶ and perhaps the independence and distinctiveness of sexual minority cultures.⁴⁷

³⁸ *Baker v. State*, 744 A.2d 864 (Vt. 1999); *Baehr v. Lewin*, 74 Haw. 530 (Haw. 1993).

³⁹ VT. STAT. ANN. tit. 15 §§ 1201-07 (2005).

⁴⁰ HAW. REV. STAT. §§ 572C-4, 572C-6 (Michie 2005).

⁴¹ The other states to have enacted an alternative status primarily (although not always exclusively) for same-sex couples are California, Connecticut, Maine, and New Jersey. *See* CAL. FAM. CODE ANN. § 297.5 (West 2005); Conn. Pub. Acts 05-10 (Apr. 20, 2005) (effective Oct. 1, 2005); ME. REV. STAT. ANN. tit. 24-A § 4249 (2006); N.J. STAT. ANN. § 26-8A.2 (West 2005); *see also* D.C. STAT. § 32-701, et. seq. (2001); Mahoney, *supra* note 22, at 161 (as of 2005 thirty-five American municipalities had enacted domestic partner ordinances).

⁴² *See infra* note 65 and accompanying text.

⁴³ Two additional states that appear likely to enact some form of alternative status for same-sex couples relatively soon are Colorado and Maryland. *See* Myun Oak Kim, *Values Divide Camps, '06 Ballot: Separate Measures on Gay Rights, Unions Could Pass*, ROCKY MTN. NEWS, Feb. 2, 2006, at 5A (describing efforts to pass civil unions bill in Colorado); Sumathi Reddy, *Gay, Lesbian Lobbyists Claim Victory*, BALTIMORE SUN, Apr. 15, 2005, at 1B (describing passage of civil union bill in Maryland later vetoed by governor).

⁴⁴ Press Release, National Organization for Women, Connecticut Legalizes Civil Unions for Same-Sex Couples, available at <http://www.now.org/press/04-05/04-21.html> (quoting NOW Action Vice President Olga Vives) [hereinafter NOW Press Release].

⁴⁵ Lynn Waldsmith, *Gay Marriage Draws Backlash, but Backers Note Growing Tolerance Among the Young*, DETROIT NEWS, Sept. 7, 2003, at 15A (quoting archdiocese spokesman).

⁴⁶ *See, e.g.*, Douglas W. Allen, *An Economic Assessment of Same-Sex Marriage Laws*, 29 HARV. J.L. & PUB. POL’Y 949, 980 (2006).

⁴⁷ *See, e.g.*, Paula L. Ettelbrick, *Since When is Marriage the Path to Liberation?*, OUT/LOOK, Autumn 1989, at 20.

A final social development is the increasing dissatisfaction of social conservatives with what marriage has become in the era of no-fault divorce, which has led them to push for a stricter alternative to the baseline status, usually referred to as covenant marriage.⁴⁸ Covenant marriage, a heightened version of baseline marriage with increased barriers to both entry and exit, was first enacted in Louisiana in 1997.⁴⁹ The Louisiana law requires premarital counseling and other special licensing procedures prior to a couple's entry into marriage. Once married, the waiting period for divorce absent traditional forms of fault is two years (as opposed to 180 days under Louisiana's baseline marriage law).⁵⁰ Covenant marriage has made some progress since it was first enacted,⁵¹ despite the initial suspicion it generated in many would-be supporters who worried that it would weaken, devalue, and essentially compete with "normal" marriage.⁵² Although such fears appear to have abated,⁵³ one of the most striking aspects of the covenant marriage movement is its focus on institutional pluralism in lieu of simply reforming marriage for everyone. Supporters have argued that part of the value of covenant marriage is the fact that it gives a real institutional choice to those who want to infuse their relationships with a greater level of binding spiritual and emotional commitment.⁵⁴ Choice is actually one of the movement's driving themes; the very word "covenant" presupposes an entirely voluntary commitment, made in this instance with the hope of securing meaning and lasting intimacy for one's life.⁵⁵ In a very real sense then, although covenant marriage has been promoted in part as a means to make adults

⁴⁸ See Joel A. Nichols, *Louisiana's Covenant Marriage Law: A First Step Toward a More Robust Pluralism in Marriage and Divorce Law?*, 47 EMORY L.J. 929 (1998).

⁴⁹ *Id.* at 947-52.

⁵⁰ *Id.*

⁵¹ Covenant marriage is now available in three states. See ARK. CODE ANN. § 9-11-801 (Michie 2004); ARIZ. REV. STAT. § 25-901; LA. REV. STAT. ANN. §§ 9: 234, 9:272-75, 9: 307-09 (West 2004).

⁵² Nichols, *supra* note 48, at 956 (recounting objections to Louisiana's law voiced by many clergy).

⁵³ At least to the extent that two other states passed similar laws.

⁵⁴ See, e.g. Nichols, *supra* note 48, at 991-92.

⁵⁵ See Marie Failinger, *A Peace Proposal for the Same-Sex Wars: Restoring the Household to its Proper Place*, 10 WM. & MARY J. WOMEN & L. 195, 239 (2004).

more moral and responsible,⁵⁶ it has also been sold as a way to address the emotional and spiritual needs of yet another segment of our society that feels alienated from marriage as it currently exists.⁵⁷ This focus on serving, rather than shaping, citizens' existing needs as they themselves perceive them has led at least one scholar to suggest that the covenant marriage movement has more in common with liberal family law reform efforts than the supporters of either might initially expect.⁵⁸

The alternative status frameworks that have emerged to compete with baseline marriage have originated from diverse sources, including those who feel the predominant conjugal form inadequately copes with the full reality of heterosexual familial dependency, those who object to its exclusion of gay and lesbian families, and those who are drawn to a more traditionalist moral and spiritual vision. They are nevertheless united by a shared focus on institutional pluralism driven by citizens' real needs and desires. Lately, however, they have had competition from another law reform movement.

B. Equal Inclusion

In a different vein, another, lately more high-profile push to reform the law of marriage and coupling has focused not on institutional pluralism but on making the predominant form more inclusive. The push for same-sex marriage is certainly not the only effort to reform baseline marriage by changing its legal superstructure.⁵⁹ Yet despite all of the controversy it has

⁵⁶ See, e.g., Katherine Shaw Spaht, *For the Sake of the Children: Recapturing the Meaning of Marriage*, 73 NOTRE DAME L. REV. 1547 (1998).

⁵⁷ E.g., Nichols, *supra* note 48, at 988 (describing covenant marriage as first step in a move towards "a more robust pluralism" in the law of marriage and coupling)

⁵⁸ Failinger, *supra* note 55, at 216.

⁵⁹ There have been, for example, some efforts to do away with no fault divorce, or at least make it less available to some couples. *Supra* note 8. As noted above, however, to the extent that cultural conservatives have focused on positive law reform in this area, they have been more successful at creating institutional alternatives to baseline marriage. There have also been less structural efforts, such as initiatives to promote a stronger "marriage culture." O'Brien, *supra* note 16, at 339.

engendered it is currently the most successful, both in the United States and in other parts of the developed world.⁶⁰

Marriage rights have been a component of the agenda promoted by many legal advocates for the gay and lesbian community since the 1970s,⁶¹ not only because marriage still carries with it significant benefits and obligations that are not otherwise available to couples, but also because many perceive it as the key to achieving real dignity and respect for gay and lesbian relationships and family choices.⁶² Yet the pro-same-sex marriage movement in the United States may be at a crossroads. For the first time in its history it has achieved the complete realization of its vision in one state, with the Massachusetts Supreme Judicial Court's holdings in *Goodridge v. Dep't of Public Health*⁶³ and *In re Opinion of the Justices*⁶⁴ mandating same-sex marriage under the state's constitution. Even as it achieves such success, however, it is also under threat from a considerable political and now judicial backlash.⁶⁵ Perhaps as a result, the movement's own

⁶⁰Only one state, Massachusetts, permits same sex couples to marry, *see infra* text accompanying notes 59-60. The California legislature also passed a bill that would have provided for it, but it was subsequently vetoed by Governor Arnold Schwarzenegger. Nancy Vogel & Jordan Rau, *Gov Vetoes Same-Sex Marriage Bill*, L.A. TIMES, Sept. 30, 2005, at 3. Yet given the significant regional support same sex marriage enjoys in the Northeast and on the West Coast and the diminished chances of an outright federal ban, there is a strong possibility that same-sex marriage will soon be the minority rule in multiple states. *See* Benjamin Wittes, *Marital Differences*, ATLANTIC MONTHLY, May 2006, at 46 (noting "quiet countercurrent" of support for same sex marriage and predicting that it will be enacted in several states in the next ten years). Same-sex marriage is also becoming increasingly prevalent in other parts of the developed world. *See* Anjuli Willis McReynolds, *What International Experience Can Tell U.S. Courts About Same-Sex Marriage*, 53 UCLA L. REV. 1073 (2006) (describing enactment of same-sex marriage in South Africa, Canada, The Netherlands and Belgium); Renwick McLean, *Spain Legalizes Gay Marriage*, N.Y. TIMES, July 1, 2005, at A9.

⁶¹*See, e.g.*, *Baker v. Nelson*, 291 Minn. 310 (Minn. 1971); *Singer v. Hara*, 11 Wash.App. 247 (Wash. Ct. App. 1974).

⁶²*See* Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, in., LESBIAN AND GAY MARRIAGE 13, 14-16 (Suzanne Sherman, ed. 1992); *see also* Mary L. Bonauto, *Goodridge in Context*, 40 HARV. C.R.-C.L. L. REV. 1, 2-8 (2005). David L. Chambers, *What If? The Legal Consequence of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447 (1996).

⁶³440 Mass. 309 (Mass. 2003).

⁶⁴440 Mass. 1201 (Mass. 2004).

⁶⁵In 2004 thirteen states amended their constitutions to ban same-sex marriage in the wake of *Goodridge*. As of early 2006, such constitutional bans had been enacted in eighteen states. *See* Human Rights Campaign, Chart: State Prohibition on Marriage for Same-sex Couples, available at <http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=28225&TEMPLATE=/ContentManagement/ContentDisplay.cfm>. More recently, several other state and federal courts rebuffed litigation strategies similar to that successfully employed in Massachusetts.

rhetoric has shifted away from its traditional pose of substantive moral neutrality with respect to lifestyle choices⁶⁶ towards deeper affirmation of traditional marriage as an institution.⁶⁷ This shift has been reinforced by judicial rhetoric which appears even more disposed than that of many advocates to frame marriage as an inherently positive social good.⁶⁸ Thus, while the theme of gay and lesbian legal equality remains in pro-same-sex marriage legal and political discourse,⁶⁹ the insistence that marriage, and *only* marriage, can vindicate the rights of same-sex couples may have important implications for state-endorsed coupling generally.

Despite contrary disclaimers from some supporters,⁷⁰ the inclusion of same-sex couples in marriage necessarily carries with it the potential for significant transformation of the institution. Indeed, before the issue achieved the national prominence it enjoys today, supporters frequently argued to skeptics on the left that same-sex marriage was a worthy goal precisely because it would be likely to divest traditional marriage of its roots in gender hierarchy.⁷¹

Although such transformational arguments from the left have been significantly muted, in the

See Andersen v. King County, No. 75934-1, ---P.3d--- (Wash. 2006); *Citizens for Equal Protection v. Bruning*, No. 05-2604, ---F.3d--- (8th Cir. 2006); *Hernandez v. Robles*, ---N.E.2d --- (N.Y. 2006).

⁶⁶ In a view typical of most same-sex marriage advocates until fairly recently, Tom Stoddard wrote: “First and most basically, the issue is not the desirability of marriage, but rather the desirability of the right to marry.” Stoddard, *supra* note 62, at 17.

⁶⁷ Several commentators have written about the need to move beyond morally neutral liberal argumentation in the push for gay equality. *See, e.g.*, Carlos Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871, 1930-31 (1997); Chai R. Feldblum, *Sexual Orientation, Morality and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237, 303 (1996). Such arguments obviously gained renewed force in the wake of the 2004 campaign’s supposed emphasis on “moral values.” *See, e.g.*, *The Triumph of the Religious Right*, ECONOMIST, Nov. 13, 2004, at 29. What is newer, however, is the focus of some same-sex marriage advocates not on the worth of gay and lesbian relationships but on the inherent value of marriage. *See, e.g.* JONATHAN RAUCH, GAY MARRIAGE: WHY IT’S GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA 2 (2004).

⁶⁸ *See infra* text accompanying notes 78-84, 88-91.

⁶⁹ This is clearly in evidence in the *Goodridge* concurring opinion. *See* 400 Mass. at 346-47 (Greaney, J., concurring). *See also Andersen*, ---P.3d at --- (Fairhurst, J., dissenting) (concluding that state Defense of Marriage Act motivated solely by “animus towards homosexuals”); *Robles*, ---N.E.2d at --- (Kaye, C.J., dissenting).

⁷⁰ Bonauto, *supra* note 62, at 33 (marriage is about “love and commitment” rather than heterosexuality); REGAN, *supra* note 23, at 120 (marriage is about relational identity).

⁷¹ *See Stoddard, supra* note 62, at 18-19 (arguing that same sex marriage could free marriage from its sexist roots); Robin West, *Universalism, Liberal Theory, and the Problem of Gay Marriage*, 25 FL. ST. U. L. REV. 705, 727 (1998) (“Should same-sex marriage ever become a reality in this culture, it would ‘normalize’ the ideal of a for-life union between sexual equals ... (and) allow us an opportunity to glimpse the possibility of marital life freed of the ...institution’s deeply patriarchal past.”)

current debate similar arguments have been featured in rhetoric from the right, much of which focuses on the possibility that same-sex marriage will further disaggregate the underlying institution from procreation.⁷² Whether or not either assertion is true,⁷³ it is far less debatable that the inclusion of gay and lesbian couples in marriage at least moves marriage's core definitional relationship away from a heterosexual union between "one man and one woman" to an omniseual (or perhaps asexual) one between two "spouses."⁷⁴ Such formal gender neutrality, even the *Goodridge* plurality and sympathetic dissenters in other state supreme court decisions concede, stands in marked contrast to "long-standing" legal and cultural practices.⁷⁵ Whether such a change makes marriage "weaker" is a different question entirely, however. One might imagine, on the one hand, that such a shift would reduce the specialness of marriage, thereby cramping its ability to send a particularly positive message about monogamous heterosexual unions and leading to its abandonment by many heterosexual couples.⁷⁶ On the other hand, the

⁷² See, e.g., Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage*, 2 U. ST. THOMAS L. REV. 33, 46-51 (2004); Jean Bethke Elshtain, *Against Gay Marriage*, in SAME-SEX MARRIAGE: PRO AND CON 60 (Andrew Sullivan, ed. 1996).

⁷³ Some feminists have suggested that same sex marriage is less likely to weaken traditional gender norms than it is to simply impose them on a new group of couples. 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 (October, 1993). As for the disaggregation of marriage from procreation, one might counter that such a transformation has already taken place. See *Griswold v. Connecticut*, 389 U.S. 471, 485 (1965) (Goldberg, J., concurring) (right to marital privacy includes right to use birth control).

⁷⁴ *Goodridge*, 440 Mass. at 309, 320-2; see also Janet Halley, *Recognition, Rights, Regulation, Normalization: Rhetorics of Justification in the Same-Sex Marriage Debate*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN, AND INTERNATIONAL LAW 99 (Robert Wintemute, et al., eds., 2001) (noting that same-sex marriage "erase(s) the same-sex/cross-sex distinction" that currently demarcates the institution's boundaries). Such definitional implications may ultimately have been decisive in convincing narrow majorities on the Washington Supreme Court and the New York Court of Appeals to reject proposed state constitutional rights to same-sex marriage. See *Andersen v. King County*, ---P.3d---, ---- (Wash. 2006) ("although marriage has evolved, it has not included a history and tradition of same-sex marriage"); *Hernandez v. Robles*, ---N.E.2d---, --- (N.Y. 2006) ("The idea that same-sex marriage is even possible is a relatively new one.").

⁷⁵ *Goodridge*, 440 Mass. at 320; *Andersen*, ---P.3d at --- (Fairhurst, J., dissenting) (conceding that same-sex marriage is a recent phenomenon but noting that "history and tradition are the starting point but not in all cases the ending point") (internal quotations omitted); *Robles*, ---N.E.2d at --- (Kaye, CJ., dissenting) (same).

⁷⁶ Halley, *supra* note 74, at 101. This is a favorite argument of critics on the right, who often point to high heterosexual cohabitation rates in countries that have adopted same sex marriage or a near equivalent. See, e.g., Stanley Kurtz, *The End of Marriage in Scandinavia*, WEEKLY STANDARD, Feb. 2, 2004, at 9.

more couples who can marry, the more marriage itself becomes a universal mean and therefore a powerful vehicle for social ordering.⁷⁷

The pro-marriage rhetoric deployed in *Goodridge* and other sympathetic decisions arguably works to further the latter scenario.⁷⁸ One of the ironies of the Massachusetts case, as noted by a dissenting justice, is that for all the supposed doctrinal associations between same-sex marriage and libertarian substantive due process in the vein of *Griswold v. Connecticut*,⁷⁹ *Roe v. Wade*,⁸⁰ and *Lawrence v. Texas*,⁸¹ in the end marriage is about bringing the government into people's lives, not keeping it out.⁸² Inclusion and access, rather than autonomy, are dominant themes in both the plurality and concurring opinions in *Goodridge*; the core of the injury suffered by the plaintiffs is that they have been "arbitrarily deprived of membership in one of our community's most rewarding and cherished institutions" by a statute one of whose essential functions is that of "gatekeeping."⁸³ The result is the perpetuation of an unacceptable hierarchy, a "caste-like system" that cannot be justified by the "mantra of tradition" or "deeply held moral or religious beliefs" standing alone.⁸⁴ The decision and its most ardent defenders thus appear to be channeling not the social libertarian jurisprudence of the Burger and Rehnquist Courts but the equality-minded push for inclusion and access associated most clearly with the civil rights movement and first-wave feminism. For example, Mary Bonauto, the attorney who argued the case for the plaintiffs, summed up a recent law review essay defending the decision by quoting

⁷⁷ Halley, *supra* note 74, at 100. This may explain why "marriage equality" is not a cherished goal for many radical libertarians. See, e.g., Polikoff, *supra* note 73, at 1540-41; Michael Warner, *Beyond Gay Marriage*, in LEFT LEGALISM, LEFT CRITIQUE 260 (Wendy Brown & Janet Halley, eds. 2002).

⁷⁸ Indeed, the Massachusetts decision has already come under sharp attack from parts of the left for its unquestioning validation of traditional marriage. See, e.g., Marc Spindelman, *Homosexuality's Horizons*, 54 EMORY L.J. 1361, 1364-66 (2005) (critiquing the *Goodridge* decision's "resounding and resoundingly simplistic affirmation of marriage's presumptive goodness" as harmful to gay and lesbian victims of same-sex domestic violence).

⁷⁹ 389 U.S. 471 (1965).

⁸⁰ 410 U.S. 113 (1973).

⁸¹ 539 U.S. 558 (2003).

⁸² 440 Mass. at 357 (Spina, J., dissenting).

⁸³ *Id.* at 314, 317.

⁸⁴ *Id.* at 348, 349 (Greaney, J., concurring).

not *Lawrence* but *United States v. Virginia*.⁸⁵ Like the integration of women at the Virginia Military Institute, Bonauto argues, the push for same-sex marriage is part of “another chapter in the story of our constitutional history,” which has been defined by “the extension of . . . rights and protections to people once formerly ignored or excluded.”⁸⁶ Even more telling, Massachusetts governor Mitt Romney, the *Goodridge* decision’s most high-profile antagonist, was dubbed by some the “George Wallace of the New Millennium.”⁸⁷

This morally-charged, civil rights-focused approach to advocating for “marriage equality” goes hand-in-hand with normative validation of marriage itself.⁸⁸ Justice John M. Greaney’s concurrence in *Goodridge*, for instance, calls marriage “an association for as noble a purpose as any involved in our prior decisions.”⁸⁹ Likewise, dissenting from the Washington Supreme Court’s decision to deny same-sex couples the right to marry, Justice Bobbe Bridge maintained that “civil marriage anchors an ordered society.”⁹⁰ This type of judicial marriage affirmation is echoed by most supportive commentators, some of whom have written openly of the salutary effect they hope same-sex marriage will have on those LGBT people (particularly

⁸⁵ 518 U.S. 515 (1996).

⁸⁶ Bonauto, *supra* note 62, at 69 (quoting *VMI*, 518 U.S. at 557).

⁸⁷ Jennifer Buckendorff, *Bracing for the Backlash*, SALON, Mar. 3, 2004, available at <http://www.salon.com/news/features/2004/03/03/massachusetts/index.html>. There are some pro same-sex marriage opponents of the civil rights-centered approach. See, e.g., ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY 164-65 (1995).

⁸⁸ Some commentators argue that “rights” rhetoric in the marriage context, far from building marriage up, necessarily tends to diminish its normative significance as an institution and detract from morality-based approaches. See Feldblum, *supra* note 25, at 142; West, *supra* note 71, at 724-25. I am not convinced that this characterization is descriptively accurate with respect to the current public discussion. Both the *Goodridge* decision and many of its strongest advocates do in fact deploy egalitarian, anti-caste rights rhetoric in combination with more traditional moral discourse about the inherent goodness of marriage, apparently with no sense of internal conflict. That does not remove the tensions between these two argument strains. More than in the past, however, they are being melded into one, more cohesive framework.

⁸⁹ *Goodridge*, 440 Mass. at 350 (Greaney, J., concurring). In this respect, at least, he was in full agreement with the dissents. See *Id.* at 383 (Cordy, J., dissenting) (“This court . . . has consistently acknowledged both the institutional importance of marriage as an organizing principle of society, and the State’s interest in regulating it.”)

⁹⁰ *Andersen v. King County*, ---P.3d---, --- (Wash. 2006) (Bridge, J., dissenting).

gay men) whose marginality has left them alienated from traditional values.⁹¹ Marriage, these commentators have asserted, is the “foundation of civilization,” which means that the exclusion of any eligible group like homosexual couples does nothing but alienate a segment of the population from the “key values and commitments” upon which the community as a whole depends.⁹²

Andrew Koppelman has described this push for equal inclusion in the communal vision marriage represents as the “normative” aspect of the push for marriage equality,⁹³ which he contrasts with its “administrative” aspect (roughly the quest for equal access to the particular benefits that marriage bestows).⁹⁴ Although they are two sides of the same movement, these two aspects are rooted in distinct institutional visions, a fact evidenced by the reactions of same-sex marriage proponents to any mention of a civil unions compromise. If marriage were only an aggregation of benefits and burdens to which same sex couples were morally entitled on equality grounds, one might expect few objections to bestowing its substance under a different name. The rhetoric of “segregation” and “separate but equal” deployed in response to this suggestion indicates otherwise.⁹⁵ The essence of this perspective, as political commentator Jonathan Rauch intones, is that “for gay people, civil unions and the like are a seat at the back of the bus.”⁹⁶

⁹¹ WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 70 (1996); see also Craig W. Christensen, *If Not Marriage?: On Securing Gay and Lesbian Family Values by a ‘Similacrum of Marriage’*, 66 *FORDHAM L. REV.* 1699, 1782 (1998) (arguing for same sex marriage as a means to achieve the “domestication of sexual outlaws”); Jonathan Rauch, *For Better or Worse?: The Case for Gay (and Straight) Marriage*, *NEW REPUBLIC*, May 6, 1996, at 18.

⁹² RAUCH, *supra* note 67, at 2, 6. This emphasis on marriage as an institutional expression of communal values is also useful for distinguishing between same-sex marriage and polygamy. The former, advocates argue, is consistent with the core aims of western liberalism, whereas the latter has tended to correlate with societies that are illiberal and undemocratic. See, e.g., Dale Carpenter, *Bad Arguments Against Gay Marriage*, 7 *FLA. COASTAL L. REV.* 181, 216 (2005).

⁹³ Andrew Koppelman, *The Decline and Fall of the Case Against Same-Sex Marriage*, 2 *U. ST. THOMAS L.J.* 5, 14 (2004).

⁹⁴ *Id.*

⁹⁵ See *In Re Opinions of the Justices to the Senate*, 440 *Mass.* 1201, 1205 (Mass. 2004); Bonauto, *supra* note 62, at 6-7; Koppelman, *supra* note 93, at 14.

⁹⁶ RAUCH, *supra* note 67, at 46.

In sum, because marriage is a “social institution of the highest importance,”⁹⁷ one that binds citizens together through common ideals and experiences, the right to participate becomes integral to sharing in society’s common vision of the family.⁹⁸ The rhetoric of inclusion and integration, unlike that of equal benefits, presupposes the existence of a valuable shared institution. Writing about marriage generally, Milton Regan has argued for the reinforcement of marriage as status and the rejection of contract because the former offers “a model of identity defined in terms of communal norms, which can root the self in context.”⁹⁹ In a later chapter of his book Regan makes a point of including same-sex couples in this vision, but he urges advocates to focus on the substantive value that marriage has in people’s lives rather than on the abstract right to self determination.¹⁰⁰ The approach Regan urges has in large part been adopted by the judges and advocates who are driving the current push for equal inclusion of same-sex couples in marriage. Somewhat ironically, the overarching institutional vision these actors espouse has much in common with the traditional marriage revival for which many of their most ardent conservative opponents long.¹⁰¹ From both of these perspectives, marriage is not so much a path to achieving other social goods but a profound social good in its own right, the one conjugal form supported by the weight of tradition and common social practice. It thus, quite appropriately, occupies a central position in our society. This addition of liberal reformist voices to the call to reaffirm our commitment to marriage, traditional or otherwise, may be the most truly significant consequence of the equal inclusion approach, not only for gay and lesbian couples, but also for the heterosexual majority.

⁹⁷ *Goodridge*, 440 Mass at 322.

⁹⁸ *See*, Bonauto, *supra* note 62, at 3-5.

⁹⁹ REGAN, *supra* note 23, at 89.

¹⁰⁰ *Id.* at 118-22.

¹⁰¹ *See, e.g.* MAGGIE GALLAGHER, *THE ABOLITION OF MARRIAGE: HOW WE DESTROY LASTING LOVE* (1996) [*hereinafter* GALLAGHER, *THE ABOLITION OF MARRIAGE*]; *see also* Val D. Ricks, *Marriage and the Constitutional Right to Free Sex: The State Marriage Amendments as Response*, 7 FLA. COASTAL L. REV. 271, 322 (2006) (“many people in America, particularly religious people, see traditional marriage itself as a good”).

II. CONVERGENCE: SOCIAL REALITY AND PRAGMATISM

We are thus confronted with two very different conjugal reform approaches, defined by far different visions of the role of marriage as the predominant form. Before any further exploration of what divides these visions can take place, however, it is important to be clear about what *unites* them. What these visions share is a common impulse to address “the disjunction between a wide range of lived experience and the law,”¹⁰² by moving state endorsement of conjugal relationships away from a basis in idealized traditional archetypes towards one rooted in the social reality of citizens’ lives.

Despite all the marriage-affirmative moral rhetoric of the *Goodridge* court and its supporters, one aspect of the decision does rest heavily on the persuasive weight of morally-neutral social reality: its treatment of the plaintiffs’ sexuality. Although the tone of the decision is broadly gay-affirmative, no portion of the plurality or concurring opinions actually addresses itself to the morality of homosexual conjugal relationships or their suitability as a basis for family life.¹⁰³ Instead the decision’s reasoning is predicated on deference to “the changing realities of the American family,” a set of pre-existing conditions that set the stage and then drive the law forward but cannot themselves be contested as appropriate objects for the less benign aspects of the law’s power.¹⁰⁴ One might argue that this constitutes the decision’s true “libertarian” side and its link to the Supreme Court’s substantive due process jurisprudence. Quoting *Lawrence*, the plurality argues that it is obliged to “define the liberty of all,” an

¹⁰² Barbara Stark, *Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law*, 89 CAL. L. REV. 1479, 1482 (2001); see also Martha Minow, *All In the Family and In All Families: Membership, Loving, and Owing*, 95 W. VA. L. REV. 275, 279 (1992/1993) (decriing the “increased gap between legal or conventional definitions of family membership and actual lived practices”).

¹⁰³ The moral neutrality that many liberal same-sex marriage advocates display towards same-sex intimacy and sexuality has been critiqued by Chai Feldblum, who has identified it as an outgrowth of a wider mainstream discourse (shared by both the Left and Right) that is at once forthrightly marriage-affirmative, agnostic on the topic of gay sexuality, and anti-“gay bashing.” Feldblum, *supra* note 25, at 146, 148.

¹⁰⁴ 440 Mass. at 334.

unspoken corollary being that it must take the “all” as it finds them, rather than seeking to “mandate our own moral code.”¹⁰⁵ In this respect the rhetoric of *Goodridge* resembles that of *Marvin*, where the California Supreme Court justified its decision to enforce an implied contract between unmarried cohabitants by concluding that “the mores of...society have indeed changed so radically...that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many.”¹⁰⁶ It also parallels the approach of many advocates for heterosexual domestic partnership, whose agenda tends to be motivated less by moral approval for nonmarital cohabitation than by the sense that, for better or worse, that lifestyle takes the functional place of traditional marriage in many peoples’ lives.¹⁰⁷

The approach of the *Goodridge* and *Marvin* courts and of many other family law reformers is usefully contrasted with that taken in a recent document put out by the Catholic Church’s Congregation for the Doctrine of the Faith. The document, which is signed by Cardinal Joseph Ratzinger (now Pope Benedict XVI), articulates the Church’s opposition to the recognition of homosexual unions.¹⁰⁸ One of its key points pertains to the fact that same-sex relationships already exist. For the Church, this reality, or even the belief that gays and lesbians may deserve “respect,” can never be a justification for granting their relationships formal legitimacy, because family law exists not to simply defer to people’s choices but to impose “structuring principles” based on a higher moral and spiritual vision.¹⁰⁹ That vision emphatically

¹⁰⁵ *Id.* at 312 (quoting 539 U.S. 558, 571 (2003))

¹⁰⁶ *Marvin v. Marvin*, 18 Cal.3d 660, 684 (Cal. 1976).

¹⁰⁷ See Blumberg, *supra* note 18, at 1297 (describing normative position underlying the ALI’s Principles of Family Dissolution).

¹⁰⁸ See Congregation for the Doctrine of the Faith, “Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons,” June 3, 2003, available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html.

¹⁰⁹ *Id.* at ¶ 6. In theory, of course, the opinions in *Goodridge* also affirm that law should provide “structuring principles,” which is why the plurality is so eager to stress that it is not questioning the state’s right to set social engineering objectives, but only the irrationally discriminatory means the state is using to achieve them. 440 Mass. at 331. What is important, however, is that for a majority of the court the fundamental circumstance triggering the

does not include same-sex sexual relations, and it never will. The Church's view, particularly as it applies to same-sex marriage, has been echoed by a number of conservative legal scholars in the United States, especially those affiliated with the New Natural Law movement.¹¹⁰ The view they share of same-sex marriage runs parallel to many of the "moral relativism" charges that have also dogged domestic partnership and other alternative status arrangements, which have likewise been portrayed by critics as a betrayal of the fundamental morality underlying state support for traditional marriage.¹¹¹

What this rhetorical divide suggests is that, broadly speaking, the two dominant approaches to conjugal reform come down on the same side of the underlying debate about how law should respond to evolving social trends in family formation. Both posit the appropriate stance as partially reactive and partially proactive: the law should take evolving trends into account rather than trying to ignore or reverse them wholesale, but then impose limiting institutional mechanisms that protect other priorities like fairness, communal cohesion, familial stability and socio-economic security for the vulnerable.¹¹² Whether this stance can be broadly equated with a retreat from "morality" as a basis for law is doubtful. A number of influential

case before them- the plaintiffs' homosexuality and their desire to have normal lives and families *as* homosexuals- is out of bounds for even the soft coercive power of the state. *Id.* at 312.

¹¹⁰ See, e.g., Theresa Stanton Collett, *Law and the Politics of Marriage: Loving v. Virginia After 30 Years*, 47 CATH. U. L. REV. 1245, 1248-49 (1998); Robert P. George & Gerald V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301, 309 (1995); John M. Finnis, *Law, Morality, and 'Sexual Orientation'*, 69 NOTRE DAME L. REV. 1049 (1994). It would be unfair to accuse these commentators of having no regard for the social reality of marriage. What they do tend to believe is that certain traditional values articulate or "recognize" fundamental and transcendent truths about human existence. Thus same-sex marriage is "impossible" as a "moral reality," regardless of what the state chooses to do. Collett, at 1246; George, et al., at 309.

¹¹¹ See Lynn D. Wardle, *Deconstructing Family: A Critique of the American Law Institute's 'Domestic Partners' Proposal*, 2001 B.Y.U. L. REV. 1189, 1233 (2001) [hereinafter Wardle, *Deconstructing Family*]; see also Mahoney, *supra* note 22, at 174 ("(M)uch of family law is no more—and no less—than the symbolic expression of certain cultural ideals.") (quoting MARY ANNE GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 10 (1987)).

¹¹² See, e.g., Katherine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809, 818-19 (1998) (arguing for shift from "family-standardizing" to "family-enabling" institutional model); Minow, *supra* note 27, at 270 (arguing in favor of a "functional notion of family"); Barbara Bennett Woodhouse, *Towards a Revitalization of Family Law*, 69 TEX. L. REV. 245, 288 (1990) ("A revitalized family law should place a premium on family-like behavior.")

scholars have pointed to what they perceive as a shift away from traditional norms based on religion, duty, and abstract ideals of behavior towards a more pragmatic vision centered on individual psychological well-being, choice, and the pursuit of “happiness.”¹¹³ Yet this shift appears to be less away from morality than towards a different moral “vocabulary,”¹¹⁴ one focused less on the preservation of artificial forms and more on supporting families as they actually exist.¹¹⁵ This new family morality sometimes privileges care, commitment, and sacrifice over individual autonomy, self-actualization, and equality, although not always.¹¹⁶ What is ultimately important is that even when it champions “traditional” values, it perceives itself to be responding to real social imperatives rather than upholding abstract ideals.¹¹⁷

In other words, one might imagine the two dominant approaches to reforming the law of marriage and coupling as equally representative of a partial realignment away from *aspirational* morality towards *situational* morality in family law, away from family law as the enforcer of binding premises tailored to archetypal situations towards a less judgmental but more comprehensive regulatory framework. From a vantage point that emphasizes this shared pragmatism, the movement to further universalize marriage and the movement to create alternatives to it, far from being mutually exclusive, appear as nothing more than products of

¹¹³ See, e.g., BARBARA DAFOE WHITEHEAD, *THE DIVORCE CULTURE* 144 (1997); MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 112-15 (1995); Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1844-45 (1985).

¹¹⁴ Naomi R. Cahn, *The Moral Complexities of Family Law*, 50 STAN. L. REV. 225, 244 (1997).

¹¹⁵ *Id.* at 237-38; Bartlett, *supra* note 112, at 818-19.

¹¹⁶ See, e.g., Woodhouse, *supra* note 112, at 288 (“I do not view protection of same gender marriage and family as flowing from an abstract and private freedom to define one’s own life. In same-gender, as in heterosexual marriage, law should promote values of stability, commitment, and interdependence.”)

¹¹⁷ Cahn, *supra* note 114, at 228-29; Bartlett, *supra* note 112, at 818. For example, one liberal commentator has suggested that instead of tightening divorce laws for all couples, we should establish a stricter regime only for those with minor children. See Judith Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 57 CORNELL L. REV. 45, 90-91 (1982). Of course tradition-minded scholars are quick to point to the many real social problems that they see as consequences of society’s abandonment of traditional ideals as standards of behavior for everyone. See WHITEHEAD, *supra* note 113, at 189 (pointing to social costs of divorce inflicted on children); GALLAGHER, *THE ABOLITION OF MARRIAGE*, *supra* note 101, AT 3-4 (attributing an array of social problems to the “overthrow” of marriage culture).

different citizens' choices and the state's corresponding need to support and regulate them. The ideal world they might produce would be one in which many couples could select from a diverse array of institutional alternatives, a "menu of choices"¹¹⁸ based on their particular cultural expectations, preferred level of commitment, desire to make a particular moral or spiritual statement, etc.¹¹⁹ Such a framework would include a refortified traditional marriage, along with other status alternatives, and might even be supplemented with a background regime of implied obligations attaching in certain un-formalized cohabitation settings.¹²⁰ It could even vary in terms of which options were available to whom. What is essential is that the law of marriage and coupling would not be based on idealized vestigial taboos but on patterns in actual family life. In this way the two reform approaches might conceivably come together to create one multilayered system that actualized both of their institutional agendas.

If the above scenario seems naïve and farfetched, it may be because the shift away from aspirational morality towards situational morality has been at best partial. For example, even supporters of covenant marriage who have championed pluralism admit that one of the ultimate purposes of enacting a covenant marriage law is to push people towards what these proponents view as morally better behavior.¹²¹ By embracing pluralism and moral and spiritual autonomy they may signal their awareness that a satisfactory one-size-fits-all approach to conjugal

¹¹⁸ See ESKRIDGE, *supra* note 91, at 78.

¹¹⁹ Paula L. Ettelbrick, for example, has proposed that society "consciously create a continuum of family recognition options" spanning from covenant marriage to default recognition of marriage-lite for cohabiting couples on a case-by-case basis. See Ettelbrick, *Avoiding a Collision Course in Lesbian and Gay Family Advocacy*, 17 N.Y.L. SCH. J. HUM. RTS. 753, 758 (2000).

¹²⁰ See, e.g., J. Thomas Oldham, *Lessons from Jerry Hall v. Mick Jagger Regarding U.S. Regulation of Heterosexual Cohabitants, or Can't Get No Satisfaction*, 76 NOTRE DAME L. REV. 1409, 1433 (2001) (proposing default marriage-lite regime for cohabiting relationships "of some duration where a partner has suffered career damage due to the relationship, either by being a primary caretaker for a common child or for some other reason.")

¹²¹ See Nichols, *supra* note 48, at 957.

relationships is not feasible,¹²² but they are also quite self-consciously articulating a universal ideal. Proponents of “marriage equality” are no different; their own retreats into formalistic neutrality are rarely able mask their substantive embrace of gay and lesbian family life and also of baseline marriage itself as a valuable shared social institutions.¹²³ The final section of this Essay explores the potential for such underlying normative goals to generate new conflicts over the law of marriage and coupling that may very well outlast today’s battles between idealized tradition and pragmatic innovation.

III. CONFLICTS: EQUALITY & COMMUNITY VS. AUTONOMY & PLURALISM

Ultimately, a shared conception of how family law should recognize and respond to social change may not be sufficient to make diversity of forms and equal inclusion compatible, for each reform effort is powered not only by a pragmatic desire to make the law of marriage and coupling more responsive to citizens’ needs, but also by normative advocacy for an array of disparate values and institutions. The result is a brand of normative conflict that is subtler, but potentially no less enduring, than the pitched battles over social change that attract most attention today. Already we can see these more muted conflicts appearing at crucial moments, particularly when secular egalitarian and communitarian values driving the push to universalize one form of marriage clash with the more diverse normative impulses of those on both the left and the right who advocate for more than one conjugal form. The remainder of this Essay is devoted to exploring two likely sites for such conflict: the debate over whether gay and lesbian couples should be included in marriage or given a substitute status and that over whether heterosexuals

¹²² Zelinsky, *supra* note 4, at 1178. Covenant marriage has in fact been attacked by some traditionalists for promoting capitulation in the larger effort to abolish no-fault divorce. See Chauncey E. Brummer, *The Shackles of Covenant Marriage*, 25 U. ARK. LITTLE ROCK L. REV. 261, 297 (2003).

¹²³ See *supra* part IB.

should be allowed to create multiple forms of legal marriage to accommodate religious, cultural, and ideological differences.

A. Same-Sex Marriage vs. Marriage Substitutes

The debate over whether same-sex couples should be included in marriage or given a separate status like civil unions or domestic partnerships is often portrayed as being mainly about pragmatic compromise: should those in favor of same-sex marriage insist on nothing but the full realization of their agenda, or can they live with imperfect but more immediately feasible solutions like civil unions or domestic partnerships?¹²⁴ Should those opposed to homosexuality block all formal recognition of homosexual relationships, or permit civil unions in the hopes of preserving at least marriage as exclusively heterosexual?¹²⁵ Yet there are also normative arguments that support the creation of a substitute status for same-sex couples as preferable to either denying them all formal recognition or including them in baseline marriage. To the extent that such arguments gain increasing force, the potential for fundamental conflict over *how*, rather than *whether*, the law should recognize nontraditional conjugal pairings is likely to grow.

As we have seen, one byproduct of the marriage-as-a-civil-right approach favored by much of the gay and lesbian legal establishment and embraced in *Goodridge* is the corresponding denigration of any other conjugal alternative,¹²⁶ often employing the familiar phrase “separate but equal” as shorthand for the argument that civil unions or another marriage substitute will

¹²⁴ Much pro-gay impatience with the same-sex marriage movement focuses on the immediate needs of same-sex couples that could be met by civil unions or another sort of compromise. *See, e.g. See Nancy J. Knauer, A Marriage Skeptic Responds to the Pro-Marriage Proposals to Abolish Civil Marriage*, 27 CARDOZO L. REV. 1261, 1276 (2006); *see also* NOW Press Release, *supra* note 44.

¹²⁵ President Bush, for example, has backed a federal constitutional amendment to ban same-sex marriage but signaled his willingness to allow states to enact civil unions or other substitute forms should they choose to do so. *See Mike Allen & Allen Cooperman, Bush Endorses Same-sex Marriage Constitutional Ban*, WASH. POST, Feb. 24, 2004, at 1.

¹²⁶ *See supra* notes 95-96 and accompanying text.

relegate same-sex couples to second-class citizenship.¹²⁷ The expositors of this position could be accused of a certain formalistic lack of nuance. The evil that lay behind the legal doctrine of separate but equal as it was originally employed was rooted in its fundamental hypocrisy as much as anything else, since the primary function of the regime that it spawned was the perpetuation of a racial caste system.¹²⁸ Similarities between this caste system and the creation of parallel conjugal forms through which the state facilitates similar, but perhaps not identical, modes of family formation may therefore appear tenuous.¹²⁹

The suspicion directed by same-sex marriage advocates towards civil unions and other substitute forms becomes more comprehensible with consideration of how easily such forms can be used to moderate but also preserve the primacy of heterosexual unions. Although most social conservatives continue to oppose any state recognition of nontraditional coupling,¹³⁰ a growing minority have embraced alternative forms as a means for society, in the words of Jean Bethke Elshtain, to recognize “plural possibilities” without adopting the normative view that “each

¹²⁷ In re Opinions of the Justices to the Senate, 440 Mass. 1201, 1204 (Mass. 2004); Bonauto, *supra* note 62, at 67.

¹²⁸ See, e.g., Derrick Bell, *Brief for Respondents*, 52 AM. U. L. REV. 1401, 1404 (2003); see also Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1221 n.150 (1989) (making similar argument about “separate spheres” ideology in gender context).

¹²⁹ See *Opinion of the Justices*, 440 Mass. at 1213-14 (Sosman, J., separate opinion). Courts that have passed on the subject more recently have gone a step farther, holding that no caste system analogous to segregation arises even when same-sex couples are entirely excluded from formal recognition. See *Hernandez v. Robles*, ---N.E.2d ---, --- (N.Y. 2006). Skepticism here is not solely the preserve of those who oppose judicially-mandated same-sex marriage. Both Janet Halley and Darren Lenard Hutchinson, for instance, have written more generally about the problematic nature of “like race” arguments as applied to sexual orientation, in terms of their capacity to both misrepresent the nature of sexual identity and divert civil rights debates away from those who remain more systematically marginalized. Halley, *Gay Rights and Identity Imitation*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 124, 131 (David Kairys, ed. 3d ed. 1998); Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 631 (1997).

¹³⁰ Lynn Wardle has expressed what likely remains the majority viewpoint on the right in opposing the ALI’s domestic partnership recommendations for same sex couples as “fully equivalent to marriage.” Wardle, *Deconstructing Family*, *supra* note 111, at 1223. Other conservatives have frequently referred to civil unions and domestic partnerships as “marriage by another name” or “counterfeit marriage.” See Knauer, *supra* note 122, at 1269 (2006) (quoting Press Release, Thomas More Law Center, Law Center Sues to Stop Taxpayer Funding of Same-sex Benefits in Michigan (Sept. 22, 2003)); see also Elizabeth Bumiller, *Bush Backs Ban in Constitution on Gay Marriage*, N.Y. TIMES, Feb. 25, 2004, at A1 (quoting spokesman for the Concerned Women for America’s Culture and Family Institute).

alternative is equal to every other with reference to specific social goods.”¹³¹ Elshtain concedes that same-sex conjugal relationships may be advantageous for some individuals, but she insists that they are cut off from marriage’s capacity for social regeneration because they are inherently non-procreative. Consequently, they do not deserve equal recognition.¹³² More hard-edged commentators like Teresa Stanton Collett have gone even farther. Collett argues that society has “no stake” in any sexual pairing that is by definition incapable of producing biological offspring.¹³³ Where such pairings lead to “mutually supportive” relationships they may nevertheless merit some formal affirmation, but in her view there is no defensible reason to distinguish based on the presence or absence of sexual activity.¹³⁴ The reciprocal beneficiary regime she advocates (which is roughly equivalent to that enacted in Hawaii¹³⁵) not only relegates stable, monogamous same-sex relationships to a subordinate status, but also denies them any sort of “conjugal” quality entirely by lumping them together with a variety of platonic intimate associations.

To support their positions both Collett and especially Elshtain rely heavily on empirical observations about differences between same and opposite-sex relationships, particularly the fact that same-sex couples cannot conceive biological children together.¹³⁶ Each might therefore claim she is advocating for nothing more than reasonable institutional variance based on the needs of fundamentally different kinds of relationships. Yet such empirical distinctions are extremely difficult to disentangle from the normative agendas of either side. The procreation argument, for example, has been forcefully rejected by most advocates for gay and lesbian

¹³¹ Elshtain, *supra* note 72, at 59-60.

¹³² *Id.* at 60.

¹³³ Collett, *supra* note 110, at 1268.

¹³⁴ *Id.* at 1265.

¹³⁵ *See supra*, text accompanying notes 35-37.

¹³⁶ Collett, *supra* note 110, at 1247-49; Elshtain, *supra* note 72, at 59-60.

equality given the inability or unwillingness of many heterosexual couples to procreate and the fact that children, biological or not, are present in many families headed by same-sex couples.¹³⁷ Such advocates are equally suspicious of other traditionalist empirical arguments against same-sex marriage, partly because many of these arguments do not seek to portray same-sex relationships as simply different, but instead strive normatively to link them to family decline by alleging that they possess a variety of negative characteristics, such as instability, potential for domestic violence, or even inherent “selfishness.”¹³⁸ Even if any of these characterizations were true, equality advocates argue, they are at best the products of discrimination rather than valid justifications for it.¹³⁹ For such advocates, any acceptance of diverse forms based on supposed differences between same and opposite-sex relationships is thus fraught with peril, for while marriage substitutes may provide practical benefits for gays and lesbians, they also reify the faulty empirical assumptions that fuel their subordination.

Yet the institutional alternative fielded by most of these advocates, inclusion of same-sex couples in marriage, may be equally problematic from at least two other reformist perspectives. First, there are the non-conformists. Many critics of marriage have argued that it perpetuates an even more forceful type of stigma than does a hierarchy of conjugal forms, one that not only devalues outsider relationships but actively seeks to restructure them along different, more socially preferred lines. This is the primary reason that it has been under continuous attack from radical queer and feminist theorists, who have consistently dismissed the notion that marrying is

¹³⁷ See Mark Strasser, *Marriage, Parental Rights and Public Policy: On the FMA, Its Purported Justification, and Its Likely Effects on Families*, 2 U. ST. THOMAS L.J. 118, 126 (2004); Bonauto, *supra* note 62, at 35-36; Jennifer Wriggins, *Marriage Law and Family Law: Anatomy, Interdependence, and Couples of the Same Gender*, 41 B.C. L. REV. 265, 308-09; Chambers, *supra* note 62, at 463; ESKRIDGE, *supra* note 91, at 13.

¹³⁸ See Koppelman, *supra* note 93, at 25-31.

¹³⁹ See ESKRIDGE, *supra* note 91, at 8-9 (much self-destructive behavior by LGBT people can be attributed to sexual outlaw status); SULLIVAN, *supra* note 87, at 130.

nothing more than a “personal choice” adopted by wholly autonomous individuals.¹⁴⁰

Interestingly, although supporters of marriage equality have sometimes tried to refute such arguments,¹⁴¹ an increasing number of them have actually embraced a modified coercive ideal. They, like many traditionalists, approve of what Robin West terms the “communitarian and communal nature of marriage,”¹⁴² i.e. its capacity to “channel” people away from selfish towards self-giving behavior of which the community at large approves.¹⁴³ Their aspiration is to disaggregate this type of positive social coercion from the negative consequences resulting from antiquated gender and sexual orientation hierarchies.¹⁴⁴

Marriage, in other words, is at least tacitly accepted by even its liberal supporters to be a force for social control through its valorization of particular types of relationships (committed, monogamous, non-consanguineous dyads at its most inclusive) and stigmatization or even pathologization of many others. The promotion of a one-size-fits-all marriage regime will therefore be threatening to those who feel their relationships and families do not conform to the social values that marriage emphasizes. This may be true even where baseline marriage is not the only conjugal form available, since the availability of one alternative that has the backing of tradition and common social practice is likely to devalue other options.¹⁴⁵ To the extent that the universalization of marriage undermines individuals’ liberty to chose alternate forms tailored to

¹⁴⁰ Warner, *supra* note 77, at 275; Polikoff, *supra* note 73, at 1543; *see also* Judith Butler, *Isn’t Kinship Always Already Heterosexual?*, 13 DIFFERENCES 14, 25 (2002).

¹⁴¹ *See generally* Stoddard, *supra* note 62.

¹⁴² West, *supra* note 71, at 727-28.

¹⁴³ *See* Carl Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV 495 (1992). Jennifer Wriggins, for example, quotes Schneider approvingly and argues that claims that allowing same-sex couples to wed will not diminish marriage’s ability to channel people towards more healthy, socially beneficial relationships, but simply make that function more effective. Wriggins, *supra* note 137, at 308-09.

¹⁴⁴ *See, e.g.* Elizabeth Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 254-55 (2004).

¹⁴⁵ *See* Feldblum, *supra* note 25, at 153-54 (“Liberal morality advocates never need to explicitly argue that being married is better than not being married--because society has already made that background normative judgment for them.”)

alternate lifestyles, it may threaten the goals and values of many nonconforming communities as much as diverse forms threaten the aims of same-sex marriage advocates.

In addition to the non-conformists, the other reformist group who might oppose same-sex marriage is made up of those who could be called “moderate traditionalists.” These individuals are not necessarily opposed to gay and lesbian equality, but they also embrace the traditional heterosexual family. They may note that there remain (at least for the moment) observed differences between many same and opposite-sex couples (to say nothing of differences between male and female same-sex couples). Some of these differences, such as higher separation rates for same-sex couples, are deeply contested, and even if real might be attributed to the psychological damage wrought by social stigma or to the fact that most same-sex couples currently lack access to any stabilizing conjugal form.¹⁴⁶ Yet there are also other less emotionally charged variations, such as the increased likelihood that both members of a same-sex couple will work¹⁴⁷ and the decreased likelihood that the couple will have children,¹⁴⁸ and these differences could easily be viewed in a more benign light.¹⁴⁹ Benign or not, however, all such differences could be relevant to whether baseline marriage should be expanded to encompass same-sex relationships. As Douglas Allen has recently argued, many people may believe that the

¹⁴⁶ The common cultural perception that same-sex couples are far more likely to separate than their opposite-sex counterparts is deeply contested, yet also frequently cited by courts as a justification for denying these couples formal recognition. *See, e.g.* Andersen v. King County, ---P.3d---, --- (Wash. 2006) (J.M. Johnson, J., concurring).

¹⁴⁷ *See* Virginia Postrel, *The (Gay) Marriage Penalty*, BOSTON GLOBE, May 23, 2004, at L5 (quoting data extrapolated from 2000 census figures purporting to show that in 66% of cohabiting same-sex couples in the state of Massachusetts both work, as compared with 55% of heterosexual married couples).

¹⁴⁸ While the number of same-sex couples raising children is growing, it is still lower than for opposite-sex couples. One gay-friendly commentator, extrapolating from U.S. Census data, has estimated that approximately 22.2% of male and 34.3% of female same-sex couple headed households are raising children, as compared to 45.6% of married opposite-sex couple headed households. Jay Weiser, *Forward: The Next Normal- Developments Since Marriage Rights for Same-Sex Couples in New York*, 13 COLUM. J. GENDER & L. 48, 49 (2004). Some commentators hostile to gay rights insist that the figures for same-sex couples raising children are lower by as much as two thirds. *See, e.g.*, Lynn D. Wardle, *Adult Sexuality, the Best Interests of Children, and Place Liability of Adoption and Foster Care Agencies*, 6 J. L & FAM. STUD. 59, 65 (2004).

¹⁴⁹ The former can be attributed to the likely absence of traditional gender roles in many homosexual relationships, while the latter remains, at least for now, the result of the biological reality that same-sex couples cannot procreate “naturally.”

traditional model of marriage was designed and is largely optimal for heterosexual families.¹⁵⁰ Assuming there are some differences between same and opposite-sex couples, Allen contends that we should be wary of including both in the same institution, because doing so could either force same-sex couples to fit into a model of marriage ill-suited to some of their needs, or empower them to force changes through either litigation or legislative reform that would make marriage worse for many heterosexuals.¹⁵¹

Of course, it could be that all differences between same and opposite-sex couples that appear salient now will in fact turn out to be irrelevant or illusory.¹⁵² Moderate traditionalists like Allen nevertheless argue that the unexpected consequences resulting from past family law changes, such as the creation of no-fault divorce, mediate in favor of caution.¹⁵³ Moreover, rather than rejecting same-sex marriage outright, he offers an innovative solution: create a parallel institution for same-sex couples (which he dubs “homosexual marriage”) that is initially identical to traditional marriage but allowed to develop separately through the process of common law rulemaking.¹⁵⁴ This alternative would invest same-sex marriage with all of the rights, obligations, and qualities of baseline marriage, but it would also control for any potential adverse

¹⁵⁰ See Allen, *supra* note 46, at 957.

¹⁵¹ *Id.* at 977; see also Amy Wax, *The Conservative’s Dilemma: Traditional Institutions, Social Change, and Same-sex Marriage*, 42 SAN DIEGO L. REV. 1059, 1080 (2005) (“Homosexual practices regarding sexuality and familial relations may differ on average from heterosexual practices”).

¹⁵² The childrearing gap between same and opposite sex couples, for example, may be narrowing rapidly. See Weiser, *supra* note 148, at 49.

¹⁵³ Allen, *supra* note 46, at 976.

¹⁵⁴ *Id.* at 980. Allen presumes that this separate institution for same-sex couples would be less restrictive of personal freedom than opposite sex marriage because same-sex partners have fewer dependency issues and are less likely to have children. See *id.* at 962. Yet a society that places paramount emphasis on familial stability might actually want to make separation more difficult for same-sex marriages, on the assumption that at least for the foreseeable future there will be fewer social forces holding same-sex couples together in place of the law. Comparatively higher barriers to exit might also help address the problem of opportunistic marriage by heterosexual same-sex couples seeking temporary access to various marital benefits, which would be likely to increase as the general stigma attached to homosexual relationships declined.

consequences that could result from drawing absolutely no distinctions between same and opposite-sex relationships.¹⁵⁵

Allen's proposal is likely to be deeply offensive to many advocates for same-sex marriage, not only because of the potential for lingering informal social hierarchy,¹⁵⁶ but also because a separate form of "homosexual marriage" offends the basic communitarian impulse to create a broader, more inclusive vision of marriage to reinforce that form's role as a unifying social force.¹⁵⁷ Yet so long as "homosexual marriage" is approached honestly as an attempt to deal with the needs of particular communities without compromising the needs of the rest of the population, it is exactly the type of pluralistic solution likely to be embraced by those who have few principled objections to gay and lesbian equality but who are also wary of changes to baseline marriage in its present form. These individuals, like the non-conformists who want nothing to do with marriage, may be the most enduring opponents of the same-sex marriage movement.

B. Heterosexual Marriage Pluralism

A second locus for potential conflict between the two dominant reform approaches has been furnished by the rise of heterosexual marriage pluralism. Pluralism with respect to entry into heterosexual marriage is not a new phenomenon in this country, as evidenced by the widespread acceptance of common law marriage during the nineteenth and first half of the twentieth centuries.¹⁵⁸ Nor is diversity in the substance of marital obligations, which has been achieved on a limited basis through private contracting.¹⁵⁹ What is relatively new, however, is the idea that states should create or actively enable the private creation of one or more formalized

¹⁵⁵ *Id.* at 980.

¹⁵⁶ *Id.* at 979.

¹⁵⁷ See *supra* notes 97-101 and accompanying text.

¹⁵⁸ See Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 969 (2000).

¹⁵⁹ See Difonzo, *supra* note 8, at 937-40.

alternative marriage statuses to compete directly with baseline marriage as it now exists,¹⁶⁰ or even to replace it entirely. Such proposals are likely to create tension among reformers where the broadly egalitarian aims of pro-marriage liberals run up against the desire to revive religious or other traditional values underlying many proposed alternative forms of marriage. More generally, tension is also likely to result from the clash between desires for individual and communal autonomy on the one hand, and broader communitarian goals on the other.

Advocacy for heterosexual marriage pluralism is not the unique province of either the left or the right. On the left, for example, Barbara Stark has proposed the creation of “postmodern marriage,” marriage whose substance is tailored to the particular ideological, cultural, and personal values of couples, with the explicit goal of avoiding cultural “metanarratives” in order to accommodate the needs of a diverse society.¹⁶¹ At the same time, baseline heterosexual marriage itself has become significantly more open to many left values like secularism and gender equality.¹⁶² It is therefore unsurprising that strong traditionalists are the ones who appear most alienated from the predominant conjugal form; their feelings may only be amplified if it continues to embrace ever more socially progressive definitions of family.¹⁶³ This disaffection

¹⁶⁰ See *supra* Part IA. By “marriage pluralism” I mean to denote proposals for conjugal forms that would literally take the place of baseline marriage. Excluded are forms, like domestic partnerships, which may be viewed as temporary marriage alternatives.

¹⁶¹ Stark, *supra* note 102, at 1487, 1512. Postmodern marriage would allow couples to choose between various marriage models emphasizing different values. One choice, for example, would be between the “gender equity” model, in which each partner agrees to assume an equal share of the household tasks and responsibility for breadwinning, and the “relational” model, which emphasizes complementarity over strict equality. *Id.* at 1529-38. The relational model would include permanent commitment; the gender equity model might not; couples could choose to make it renewable every five years. *Id.* at 1548.

¹⁶² Even progressive commentators who have been highly critical of the privatization of baseline marriage have recognized that the process has promoted many of their values. Jana Singer, for instance, calls emphasis on private ordering in marriage a useful “transition strategy,” a means to escape “an unjust and outdated system of public ordering.” Singer, *supra* note 12, at 1565. Having successfully purged baseline marriage of old hierarchies and injustices, communitarians like Singer and Regan now seek to maintain its institutional predominance.

¹⁶³ See Zelinsky, *supra* note 5, at 1175; Maimon Schwarzschild, *Marriage, Pluralism, and Change: A Response to Professor Wax*, 42 San Diego L. Rev. 1115, 1121 (2005) (traditionalists view gay marriage at the latest step towards “rationalizing marriage, towards adapting it to the range of choices that modern or postmodern people are accustomed to”).

has already produced the covenant marriage movement described above,¹⁶⁴ and other proposals may follow. For example, several commentators have called for changes in the law to allow enforcement of comprehensive prenuptial agreements rooted in explicitly sectarian religious frameworks.¹⁶⁵ Such agreements would in essence effectuate the contractual assumption of status relationships by their parties, delegating jurisdiction over these relationships to specific religious institutions, which would then perform many of the mediative and regulatory roles currently performed by the state on the basis of their own laws and strictures.¹⁶⁶

From the pragmatic reformist perspective described in Part II of this Essay, the most compelling argument for such proposed alternatives for heterosexual couples focuses on the need for institutional flexibility in light of substantial diversity among even “traditional” families with respect to lifestyles, aspirations, and norms.¹⁶⁷ In a nation as diverse as ours, many left libertarians *and* traditionalists argue, some provision has to be made for those whose values differ from the moderate liberalism embraced by baseline marriage. Such individuals have an

¹⁶⁴ See *supra* notes 48-57 and accompanying text.

¹⁶⁵ See Daniel Crane, *A ‘Judeo-Christian’ Argument for Privatizing Marriage*, 27 CARDOZO L. REV. 1221, 1252 (2006); Nichols, *supra* note 48, at 988.

¹⁶⁶ Crane, *supra* note 165, at 1252. While such proposals would be novel in this country, acceptance of multiple forms of marriage to accommodate religious pluralism is relatively common elsewhere, including several large secular democracies. For example, religious pluralism is a central component of Indian family law under Art. 25 and 26 of the Indian Constitution, although the disparate religious legal traditions which are recognized are applied by the secular judiciary. See Seval Yildirim, *Expanding Secularism’s Scope: An Indian Case Study*, 52 AM. J. COMP. L. 901, 918 (2004). Similarly, in South Africa, African customary law is applied by secular courts and traditional authorities to govern marriage and family life for many citizens. See Brenda Oppermann, *The Impact of Legal Pluralism on Women’s Status: An Examination of Legal Pluralism in Egypt, South Africa, and the United States*, 17 HASTINGS WOMEN’S L.J. 65, 74-83 (2006). In this country, prevailing interpretations of the Establishment clause would probably bar states from directly administering sectarian religious family law regimes. This fact, along with a more general sense that marriage cannot be a truly spiritual commitment so long as it is administered by secular liberal government, had led American proponents of this type of reform to focus on contract law as the primary vehicle for its implementation. Crane, *supra* note 165, at 1252 (“privatization would thus restore religion to marriage, and marriage to religion”).

¹⁶⁷ Stark, *supra* note 102, at 1489-91.

autonomy interest in being able to structure binding conjugal relationships as they see fit,¹⁶⁸ and society as a whole has a regulatory interest in helping them to do so.¹⁶⁹

It seems unlikely, however, that traditionalist advocates for marriage pluralism will be able to disaggregate their goal of autonomy for their own constituencies from their broader normative advocacy for traditional values that conflict with the egalitarian beliefs of many liberal marriage advocates.¹⁷⁰ Most of covenant marriage's most ardent sponsors, for example, openly admit that their goal is not just to secure more options for the traditionally-minded, but to sway all people to live their lives according to the values that covenant marriage represents.¹⁷¹ Although these values could be described in terms of generic commitment and protection of the vulnerable (i.e. children), opponents will argue that they are at least tacitly linked to traditional gender roles, because focusing on commitment discourages the type of spousal autonomy that first gave rise to women's liberation, and women continue to be subject to a variety of social norms that encourage them to invest more of their personal resources in marriage and family life than do men.¹⁷² Moreover, the practice of covenant marriage thus far has frequently been associated with traditional Judeo-Christian religious values that also encourage sexual inequality.¹⁷³ Entrance into a covenant marriage may thus signal at least partial backtracking from the liberal, sexually egalitarian values of baseline marriage.

For covenant marriage opponents, the question then becomes whether such entrance is truly voluntary. Some have charged that enacting a covenant marriage alternative could

¹⁶⁸ See, e.g. Stark, *supra* note 102, at 1491; Rasmussen & Stake, *supra* note 22, at 460-64 (arguing that those who dislike no fault divorce should be able to contract out of it)

¹⁶⁹ See Barbara Bennett Woodhouse, "It All Depends on What You Mean by Home": Toward a Communitarian Theory of the 'Nontraditional Family,' 1996 UTAH L. REV. 569, 587 (1996) (arguing that legal structures should "capitalize on the forces ... generated by deeper structures of embedded cultural, religious, and social imperative").

¹⁷⁰ See, e.g., Wriggins, *supra* note 137, at 284-85; Scott, *supra* note 144, at 254-55; West, *supra* note 71, at 727.

¹⁷¹ Spaht, *supra* note 56, at 1579; Nichols, *supra* note 48, at 957.

¹⁷² Cf. Kathryn Abrams, *Choice, Difference, and the Reinvigoration of the Traditional Family*, 73 IND. L.J. 517, 523-26 (1998) (making this argument with respect to private contracting out of no-fault divorce).

¹⁷³ Brummer, *supra* note 122, at 292.

essentially institute a “two-tiered marriage structure”¹⁷⁴ that devalues egalitarian marriage as “less committed” than the covenant alternative. Such devaluation could result not only in social stigma but even a kind of “marital sub-status” discrimination¹⁷⁵ on the part of both government and the private sector in everything from insurance rates, to tax consequences, to wrongful death awards, to adoption and child custody. Similar types of discrimination are currently practiced with respect to married and unmarried individuals based on the supposed benefits of marriage,¹⁷⁶ so there is no reason to think they could not also develop between “more” and “less” committed marriages. Opponents of covenant marriage, or any other type of tradition-oriented alternative form, might accordingly feel justified in questioning whether the creation of such an alternative would truly be a shift towards pluralism rather than simply a more gradual means to compel all family life to return to more traditional hierarchies.¹⁷⁷

Ironically, however, even where proposals for marriage pluralism are clearly not motivated by expansionist aspirations for traditional values, pro-marriage liberals may still greet them with increasing hostility, because these advocates have their own normative plans for family life in which marriage is playing a more and more central role. Many socially liberal law reformers have come to view marriage as a “foundation of civilization,”¹⁷⁸ and a repository for

¹⁷⁴ Nichols, *supra* note 48, at 956-57 (quoting columnist Katha Pollitt).

¹⁷⁵ Bartlett, *supra* note 112, at 833-34.

¹⁷⁶ These benefits have been extensively expounded by pro-marriage commentators. They include better mental and physical health and more assets. *See generally* WILLIAM J. DOHERTY, ET AL., WHY MARRIAGE MATTERS: TWENTY ONE CONCLUSIONS FROM THE SOCIAL SCIENCES (2002); LINDA R. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY (2000). Critics contend that these factors could be due as much to the social stigma attached to not marrying as to the inherent benefits of marriage. *See, e.g.*, Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305, 370 (2006).

¹⁷⁷ Bartlett, *supra* note 112, at 834 (worrying that covenant marriage could “easily be subverted into a general tightening of divorce grounds”). Bartlett claims that preserving covenant marriage as an “authentic choice” actually requires that the covenant marriage movement fail, since that movement’s broader goal is to eventually make it the norm. *Id.* at 832-33.

¹⁷⁸ RAUCH, *supra* note 67, at 2.

what they consider to be positive social values like commitment and gender equality.¹⁷⁹ It is therefore reasonable to expect these advocates to become increasingly unfriendly to the autonomy claims of groups who feel alienated from the predominant form.

Ultimately, like same-sex marriage, heterosexual marriage pluralism raises the fundamental question of “what is marriage for?”¹⁸⁰ Their present emphasis on procreation notwithstanding, cultural conservatives have always responded that one of the things marriage was for was the inculcation of communal values and civic virtue.¹⁸¹ Many pro-marriage liberals now appear to agree. Even as they strive for social institutions that more fully reflect the reality of American family life, they may therefore become more skeptical of some people’s realities than they are of those of others.

CONCLUSION

The future of marriage and the alternatives is uncertain. The emergence of a significant segment of the American population who are, for a variety of reasons, disconnected from marriage as it currently exists has triggered a serious discussion about the meaning and future of the predominant conjugal form. Although lately the most high profile aspect of this discussion has been the controversy over whether baseline marriage should be expanded to include same-sex couples, we should not lose sight of the more longstanding debate over marriage’s basic institutional primacy. Both challenges to the paramount status of marriage and the push to make it more inclusive are part of a larger shift in family law away from traditionalist aspirational morality towards a more flexible normative vision that responds to the realities of citizens’

¹⁷⁹ See West, *supra* note 71, at 727-28 (embracing communal nature of marriage); Elizabeth Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1949 (2000) (“Lawmakers have systematically withdrawn support for gender hierarchy in marriage, and modern law offers an ideal of marriage as an equal partnership of autonomous individuals.”)

¹⁸⁰ See E.J. GRAFF, *WHAT IS MARRIAGE FOR? THE STRANGE SOCIAL HISTORY OF OUR MOST INTIMATE INSTITUTION* (1999).

¹⁸¹ Wax, *supra* note 151, at 1090.

intimate lives. This vision does not equate to value-free pluralism, however; on the contrary, both reform approaches discussed in this Essay remain driven by a diverse set of other normative goals, many of which are certain to generate conflict with the long-term institutional agendas of those sympathetic to the other approach.

Intractable polarization has lately become a kind of metanarrative in American politics, and no set of issues seems to provoke stronger and more seemingly fundamental disagreements than those surrounding the future of marriage and the family. One purpose of this Essay has been to suggest that many of these disagreements are more contingent than they appear. The law of marriage and coupling is in a state of flux: even as many liberal reformers have moved gradually away from pluralism, some conservatives appear to have discovered it. At the same time, many on the right remain committed to baseline marriage, and to the project of reinforcing it as the paramount or even exclusive means for conjugal family formation.¹⁸² At least some of these pro-marriage conservatives may become more open to innovations like same-sex marriage if such innovations prove to reinforce rather than undermine marriage as an institution.¹⁸³ Moreover, although pro-marriage conservatives have yet to gain political traction for their more sweeping proposals, such as the general abolition of no-fault divorce, if and when they succeed in doing so they, like pro-marriage liberals, may encounter unexpected opposition from normally sympathetic constituencies.¹⁸⁴ If such developments come to pass, we might see a fundamental shift away from legal and political battles that pit tradition against innovation, towards conflicts focused more on uniformity versus pluralism. Alternatively, there might be some sort of accommodation, with a newly strengthened marriage coexisting with one or more alternative

¹⁸² See, e.g., GALLAGHER, *THE ABOLITION OF MARRIAGE*, *supra* note 101, at 148-52.

¹⁸³ Jonathan Rauch, for instance, argues that social conservatives should support same-sex marriage because it is the *only* way to keep acceptance of homosexual relationships from undermining marriage generally by depriving it of its universality. RAUCH, *supra* note 67, at 6.

¹⁸⁴ See Zelinsky, *supra* note 5, at 1177 (noting potential opposition from religious communities).

forms geared toward particular subcultures. Or, in the end, the staying power of tradition may be such that the battles of today are also those being fought twenty years from now. Regardless, the future may look nothing like what today's reformers expect.