September 2010

Dear Labor & Employment Law colleagues:

The paper that I will be discussing at the colloquium, *Reconfiguring Sex, Gender, and the Law of Marriage*, explores how marriage rights for same-sex couples can offer a new perspective on work/family balance issues for different-sex couples. It argues that current and future empirical studies of same-sex married couples can offer valuable insights into the relative importance of sex, gender, and the range of benefits and rights that flow from marriage in the persistence of a gender-based division of responsibilities for straight couples.

Like many considerations of work/family issues, the analysis implicates both family law and employment law—but the focus of this paper is definitely on the family law side. Nonetheless, I wanted to present it at this conference because I hope, as I revise, to further develop the potential that it holds for evaluating possible employment-law based reforms. Of course, I would welcome comments or suggestions on any or all of the paper. That said, I know that all of our time is limited, and that much of the paper is not directly relevant to employment law (and even less relevant to labor law). In my presentation, I will be focusing on Part IV, and that would be the part that would be most helpful to have read in advance of the conference.

I look forward to our conversation.

Best,

Deborah

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ABSTRACT

An extensive body of scholarship argues that sex discrimination doctrine can help obtain marriage rights for same-sex couples. This article turns that question around, exploring instead whether the new reality of same-sex marriage can offer a fresh perspective on efforts to achieve equality within marriage for different-sex couples. This article develops a framework that traces how sex-based classifications, gender norms, and the substantive laws of marriage interrelate. Traditionally, they were collectively coherent, albeit in a way that subordinated women to men. The groundbreaking sex discrimination cases of the 1970s ended legal distinctions between the duties of husbands and wives but left largely in place gender norms and numerous aspects of marriage and related tax and benefits law that encourages specialization into breadwinning and caregiving roles. The reforms of that era are thus an unfinished project; the vast majority of different-sex families still divide responsibilities along gendered lines. Both then and now, debates over the recognition of marriage rights for same-sex couples were understood to implicate gender norms for different-sex couples. In the 1970s, the possibility of gay marriage helped derail efforts to enact the Equal Rights Amendment. Today, by contrast, the relationship offers the promise of positive change for different-sex marriages. The article reviews a body of emerging social science research that substantiates that same-sex couples divide responsibilities relating to work and domestic care more equally than different-sex couples. But it also demonstrates that these studies improperly overlook a key factor: the data sets they employ predate legal marriage for same-sex couples. Accordingly, future empirical studies and policy proposals need to be informed by this article’s analysis to gauge more accurately the relative significance of sex, gender, and the law of marriage.
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INTRODUCTION

“It never ceases to amaze me how many people will say to us, ‘So, who’s the woman, and who’s the man, in your marriage?’”
-- Jason Shumaker, husband to Paul McLoughlin II

Traditionally, substantive marriage law aligned sex-based classifications with gender norms. They were collectively coherent, albeit in a way that subordinated women to men. A husband was responsible for supporting his wife and a wife owed services to her husband. The groundbreaking sex discrimination cases of the 1970s stripped away all of the sex-based classifications within marriage law other than the basic requirement that a man must marry a woman. But at that time, the specter of same-sex marriage helped derail efforts to enact the Equal Rights Amendment, which had been expected to spur a more general realignment of gender norms. Numerous aspects of marriage, tax, and benefits law that encourage specialization into breadwinner and caregiver roles were also left in place. The result is that, despite more than thirty years of formal equality, the vast majority of different-sex marriages still divide responsibilities along gendered lines. Contemporary litigation over marriage rights for same-sex couples—that is, challenges to the

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1 Benoit Denizet-Lewis, Young Gay Rites, N.Y. TIMES MAGAZINE, Apr. 27, 2008, at 28.
4 See infra Part IV.A.
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last significant sex-based classification within marriage law—once again reconfigures the equation. The new reality of same-sex married couples not only advances equality for gays and lesbians; it also offers a fresh perspective on efforts to achieve equality within marriage for different-sex couples.

In recent cases brought by same-sex couples seeking to marry, courts almost uniformly reject sex discrimination claims even as they reify the salience of sex-based distinctions by differentiating, in due process analysis, between “marriage” and an institution they call “same-sex marriage.” Courts typically consider sex discrimination claims as wholly distinct from due process claims; this is a mistake. Identifying the interrelationship between the two claims offers insight into a primary question that lurks beneath debates over marriage rights for same-sex couples: Since marriage law no longer proscribes specific roles on the basis of sex, how can granting same-sex couples access to marriage “harm” the “institution” of marriage?

The answer begins by recognizing that sex-based classifications within marriage law, gender norms, and the substantive laws of marriage interrelate. This article develops a framework for understanding such connections. It demonstrates that changes to sex-based classifications within marriage cannot be viewed in a vacuum. Challenges to the validity of one aspect of the equation—that is, sex, gender, or marriage—necessarily call into question the others and debates over the appropriateness of recognizing homosexual relationships can “cross over” to questions regarding gender roles in different-sex couples.

During the 1970s, the possibility of same-sex marriage was used as a toxic example of the disestablishment not only of sex-based classifications within marriage but also of gender norms for (different-sex) families. Phyllis Schlafly and other opponents of the Equal Rights Amendment successfully used the putative possibility of gay marriage, along with abortion, to torpedo enactment of the amendment. In today’s debate over marriage rights for same-sex couples, gender norms are once again implicated. Significant opposition to permitting same-sex couples to marry rests not simply on a definitional understand of marriage as a union of man and woman but on a “thicker” gendered conception of marriage as ideally between a provider husband and a homemaker wife. Some critics explicitly call for a return to state-sanctioned gender roles within marriage; others, who do not go that far, worry that state recognition of same-sex marriages further undermines society’s gendered expectations of spouses, particularly men’s responsibility to their wives and children. But, surprisingly, it is opponents of the expansion of marriage rights who most frequently articulate the possibility that same-sex marriage can

7 See infra Part III.A.
change—and in their words, harm—different-sex marriage. Plaintiffs in these cases generally contend that expansion of marriage rights will make no difference to different-sex marriage.8

Against this backdrop, the advent of same-sex marriage offers the possibility of turning the sex discrimination arguments upside down: The question becomes not whether sex equality claims developed in the context of different-sex marriage can help achieve marriage equality for same-sex couples, but rather whether marriage equality for same-sex couples can help achieve sex equality for different-sex couples. This is not a new idea. Although contemporary proponents of expanded marriage rights shy away from making such claims, earlier advocates celebrated this possibility.9 (Likewise, commentators and advocates have long been concerned with the potential “co-optive” effect of traditional marriage roles on same-sex relationships.)10 The current moment, however, transforms these previously theoretical debates into a reality being lived by families across the country. Same-sex couples may marry in a rapidly growing number of states and localities. As of August 2010, Connecticut, the District of Columbia, Iowa, Massachusetts, New Hampshire, and Vermont have legalized same-sex marriage, and California, Nevada, New Jersey, Oregon, and Washington have state laws providing the equivalent of spousal rights to same-sex couples within the state.11 Maryland and New York recognize same-sex marriages performed in other states.12 The questions thus are newly salient.13

8 See infra Part III.B.
10 See, e.g., Nancy D. Polikoff, We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not ‘Dismantle the Legal Structure of Gender in Every Marriage,’” 79 VA. L. REV. 1535 (1993); Paula L. Ettelbrick, Since When Is Marriage the Path to Liberation?, OUTLOOK NATIONAL GAY AND LESBIAN QUARTERLY, Fall 1989, at 14, reprinted with some modifications in LESBIAN AND GAY MARRIAGE, supra note 9, at 20.
12 See id.
13 A few other legal commentators have explored aspects of the interplay between marriage rights for same-sex couples and gender roles within different-sex marriages that I discuss. See Katherine Baker, The Stories of Marriage, 12 J.L. & FAM. STUDS. 1 (2010) (articulating multiple meanings for “marriage” and the extent to which it remains deeply gendered); Mary Anne Case, What Feminists Have to Lose in the Same-Sex Marriage Cases, 57 U.C.L.A. L. REV. 1199 (2010) (exploring historical connection between efforts to achieve equality within different-sex marriages and movement to
Indeed, a burgeoning body of social science suggests that same-sex couples divide responsibilities for housework and for child care more equally and more equitably than different-sex couples.\textsuperscript{14} Some social scientists and popular writers have accordingly claimed that the growing acceptance of same-sex marriage can serve as a model for different-sex couples struggling to achieve a balance.\textsuperscript{15} But such claims consistently overlook a key factor: the studies that exist today use data sets that predate legal marriage for same-sex couples. I show that this is a significant oversight. Marriage itself continues to encourage specialization into breadwinner and caretaker roles. Access to a spouse’s employer-sponsored healthcare often makes it possible for one spouse to exit the paid work force, and a wide range of policies—including tax, social security, and welfare benefits—reward married couples with widely disparate incomes. Divorce law, while far from a comprehensive safety net, provides some protection for a dependent spouse.\textsuperscript{16} Gay marriage thus can serve as a natural experiment to help tease out the relative significance not only of sex and gender within a relationship—but also of the law of “marriage” itself.

My hope is that the analysis in this article will inform the design of future empirical work to probe these complexities. In fact, it is a particularly opportune moment. The federal Defense of Marriage Act (DOMA) currently decrees that gay couples lawfully married under state law do not receive any of the federal benefits of marriage.\textsuperscript{17} Likewise, right now, state laws concerning marriage rights for same-sex couples vary considerably. This could soon change. In July 2010, a district court in Massachusetts held portions of DOMA unconstitutional.\textsuperscript{18} In August 2010, a district court in California held that state’s

\textsuperscript{14}See infra Part IV.A & B.
\textsuperscript{15}See, e.g., Sondra E. Solomon et al., Money, Housework, Sex and Conflict: Same-Sex Couples in Civil Unions, Those Not in Civil Unions, and Heterosexual Married Siblings, 52 SEX ROLES 561, 572 (2005) (“same-sex couples are a model for ways of equalizing the division of housework”); Tara Parker Pope, Gay Unions Shed Light on Gender in Marriage, N.Y. TIMES, June 10, 2008 (“same-sex couples have a great deal to teach everyone else about marriage and relationships”).
\textsuperscript{16}See infra Part IV.C.
ban on marriage rights for same-sex couples violated the federal constitution. Both are subject to likely appeals. Wins in either case would obviously be a significant step forward in realizing equality for same-sex couples—but the current variability offers a unique opportunity to assess the relative significance of state versus federal benefits of marriage and of the various legal frameworks employed by states. Although it is impossible to predict precisely what the result of such studies would be, the existence of married same-sex couples offers the opportunity to rethink aspects of modern family and employment law policies from a fresh perspective.

The argument proceeds as follows. Part I argues that in current litigation over marriage rights for same-sex couples, courts improperly distinguish between “marriage” and “same-sex marriage.” It then develops a framework to better understand the interrelationship between sex, gender, and marriage law. Parts II and III show how this framework offers new insights on the success and failures of the reforms of the 1970s and on the current debate. Part IV demonstrates that existing social science overlooks the role that may be played by marriage law in encouraging specialization by spouses. It then articulates the crossroads at which we stand and the way in which expanding marriage equality for same-sex couples can inform efforts to achieve equality within marriage for different-sex couples.

I. The Last Sex-Based Marriage Classification

Litigation over marriage rights for same-sex couples challenges the last sex-based classification within marriage law: the basic requirement that a man must marry a woman. This Part shows that courts err when they consider due process analysis as wholly distinct from sex discrimination analysis. By distinguishing between “marriage” and an institution they call “same-sex marriage,” courts tap into unsettled questions of gender and marriage that underlay prior reform of marriage law to vindicate modern understandings of sex discrimination. This doctrinal analysis illustrates how sex, gender, and marriage law are interconnected. The second section of this Part introduces a framework that systematically traces these relationships and shows how proposals to reform one aspect of the equation necessarily implicate the others. Both during the 1970s, when the other sex-based classifications within marriage law were dismantled, and now, these connections have been claimed and disclaimed strategically by proponents and opponents of reform.

A. Marriage and “Same-Sex Marriage”
Challenges to different-sex marriage laws typically include both claims that the statutes violate lesbian and gay couples’ substantive due process rights and that they constitute discrimination on the basis of sex. Courts have consistently treated the two claims as wholly distinct. This is not surprising; on their face, they are completely separate doctrinal tests. Substantive due process protects individuals from undue government interference with “fundamental” liberties, which are often identified as those that are “deeply rooted” in the country’s “history and traditions.” Sex discrimination analysis, by contrast, holds that laws may not classify on the basis of sex unless they serve “important government objectives” and are “substantially related to the achievement of those objectives.”

And, notably, neither claim has been very successful. Same-sex couples have won marriage rights primarily on the separate grounds that marriage laws unjustifiably discriminate on the basis of sexual orientation. My objective here is not to discuss in detail either the due process claim or the

20 See, e.g., Complaint, Perry v. Schwarzenegger, NO. 09-2292 (N.D. Cal. May 22, 2009). They also typically include claims that the statutes unconstitutionally discriminate on the basis of sexual orientation and that they violate the fundamental interests branch of equal protection law or state analogues. See id.
21 See, e.g., In re Marriage Cases, 183 P.3d 384 (Cal. 2008); Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006) (each discussing due process claims entirely separately from sex discrimination claims). The one notable exception is the district court decision in Perry v. Schwarzenegger, discussed below. See infra notes 50-52 and accompanying text.
22 Washington v. Glucksburg, 521 U.S. 702, 721 (1997); see also, e.g., Palko v. Connecticut, 302 U.S. 319, 325-26 (1937) (fundamental rights are those that are “so rooted in the traditions and conscience of our people” that they are “implicit in the concept of ordered liberty”).
23 Craig v. Boren, 429 U.S. 190, 197 (1976). In more recent cases, the Court has sometimes framed that standard as requiring a showing of an “exceedingly persuasive justification.” United States v. Virginia, 518 U.S. 515, 531(1996).
24 Hawaii is only state court of last resort to recognize the potential validity of a sex discrimination claim. See Baehr v. Lewin, 852 P.2d 44, 64-67 (Haw. 1993). The matter was mooted by a subsequent constitutional amendment specifying that marriage was between a man and a woman. See HAW. CONST. art. I, § 23. California is the only state court of last resort to hold that its state law violated its constitutional due process guarantees. See In re Marriage Cases, 183 P.3d at 420. Ultimately, however, the California Supreme Court held that a subsequent constitutional amendment that mandated marriage be between a man and a woman did not violate due process principles, at least so long as the state maintained domestic partnerships that offered the legal rights and benefits of marriage to same-sex couples. See Strauss v. Horton, 207 P.3d 48 (Cal. 2009). In the recent decision in Perry v. Schwarzenegger, discussed below, the district court held that the constitutional amendment violated federal due process. See infra text accompanying notes 50-52.
sex discrimination claim. That is something that I and others have done elsewhere.26 Rather, I seek to show that it is a mistake to view the two claims in isolation. In this particular context, substantive due process analysis and sex discrimination analysis are necessarily intertwined. Understanding the connection strengthens each claim and helps uncover what is at stake in the legal cases and the larger societal debate over marriage rights for same-sex couples.

To see this, begin by considering the sex discrimination claim. Litigants typically argue that marriage laws, by proscribing that marriage must be between a man and a woman, improperly classify on the basis of sex. In other words, a given individual is barred from marrying the person of her choice simply because they happen to be the same sex. They also argue that the statutes unconstitutionally enforce sex stereotypes.27 Both federal and state courts, however, have concluded that despite the use of sex-based classifications, heightened scrutiny is not merited because men and women are disadvantaged equally: Neither (gay) men nor (lesbian) women can marry the spouse of their choice.28 Sex stereotyping claims have been rejected as referencing a relic of the past separate spheres ideology that is no longer enforced in law.29 Prior reform of marriage law is held to have absolutely no relevance to the current debate.

But at the same time as they dismiss these sex discrimination claims, courts reaffirm the significance of sex-based classifications in their due process

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27 For detailed discussion of plaintiffs’ briefing strategy, see Widiss et al., supra note 26, at 468-72.

28 See, e.g., Hernandez v. Robles, 855 N.E.2d 1, 10 (N.Y. 2006) (marriage law does not trigger heightened scrutiny because “it does not put men and women in different classes, and give one class a benefit not given to the other”); Anderson v. King County, 138 P.3d 963, 988 (Wash. 2006) (because “men and women are treated identically under DOMA” it does not discriminate on the basis of sex). As Mary Anne Case argues persuasively, this matter-of-fact acceptance of such “equal” classifications is out of line with sex discrimination decisions in other contexts. See Case, What Feminists Have to Lose, supra note 13, at 1219-21.

29 See, e.g., Anderson, 138 P.3d at 989.
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analysis. In that context, courts consistently hold that “marriage” is “fundamental” because it is “deeply rooted in the country’s history and traditions” but that a separate status they call “same-sex marriage” is not. In other words, they reify the one remaining sex-based classification within marriage as inherent to the meaning of marriage.

Criticism of the line that courts draw between marriage and “same-sex marriage” has typically been framed as an issue of specificity and generality. Determining the right level of generality with which to describe a right is a common challenge in substantive due process analysis. For example, in Bowers v. Hardwick, a case challenging a ban on sodomy, the Court defined the right at issue narrowly—as a putative right for “homosexuals to engage in sodomy” (which was not deeply rooted)—but subsequently in Lawrence v. Texas, announced that this right was more properly understood as a right to consenting adults to engage in “sexual intimacy,” which did merit due process protection.

In Washington v. Glucksburg, a case concerning the legality of Washington’s ban on assisted suicide, the Court divided over whether the right at issue was narrowly understood as a right to suicide (which was not deeply rooted) or part of a more general right of personal autonomy (which probably was). And in Michael H. v. Gerald D., a case concerning parentage rights of a biological father who had conceived a child with a married woman, the Court divided over whether the right at issue was to be understood at a very specific level, the right of “adulterous natural fathers” to establish a legal relation with their children (which was not deeply rooted), or at a more general level, the right of “parents” to establish a legal relation with their children (which was).

30 See, e.g., Lewis, 908 A.2d at 209 (“The 1947 New Jersey Constitution, much less the drafters of our marriage statutes, could not have imagined that the liberty right protected by Article I, Paragraph 1 embraced the right of a person to marry someone of his or her own sex.”); Hernandez, 855 N.E.2d at 9 (“The right to marry someone of the same sex, however, is not ‘deeply rooted’; it has not even been asserted until relatively recent times.”); Andersen, 138 P.3d at 978 (“Nor is there a tradition or history of same-sex marriage in this state. Instead, prior to and after statehood, state laws reflected the common law of marriage between a man and woman.”). For a more detailed discussion of this analysis, see Tebbe & Widiss, supra note 26, at 1391-93 & accompanying notes.
33 539 U.S. 558, 566-67 (2003). The Court did not explicitly hold that the right at issue was fundamental. However, in striking down the sodomy law it seemed to apply something more rigorous than traditional rational basis review.
35 491 U.S. 110 (1989). Justice Scalia authored the plurality opinion but his footnote arguing that rights should be defined at the “most specific level … [which] can be identified” garnered the vote of just one other justice. Id. at 127 n.6. Justices O’Connor and Kennedy specifically declined to join the footnote. See id. at 132 (O’Connor, J., concurring); see also id. at 141 (Brennan, J., dissenting) (Scalia’s approach
Arguments over the level of generality with which the right is defined in the marriage cases, however, differ from those other contexts. Individuals might feel strongly that homosexual intimacy or physician assisted suicide is immoral, but inclusion of the former in a concept of sexual intimacy or the latter in a concept of personal autonomy is not perceived as a threat to the viability of those general liberties. Similarly, individuals might disagree strongly with a holding that a man who begets a child through an adulterous relationship could be recognized as a parent, but there is little concern that such a resolution would threaten the general concept of “parenthood.” Whatever the resolution of these cases, sexual intimacy is still sexual intimacy; personal autonomy is still personal autonomy; and parenthood is still parenthood.36

The marriage context is subtly different. The debate is whether “marriage” necessarily and only means the union of a man and a woman. Opponents of expansion of marriage rights claim that a more general definition, such as a union of consenting adults, is simply not accurate; they contend that the male/female aspect of the union is inherent to its meaning and that changing this definition would “threaten” the “institution” of marriage.37 Viewing the due process analysis through the prism of sex discrimination doctrine helps show that the distinction courts draw between “marriage” and “same-sex marriage” is not primarily a matter of generality and specificity. Rather, it is a question of the salience of the last significant sex-based classification within marriage law. As such, the due process analysis—at least to the extent that courts make a distinction between “marriage” and “same-sex marriage”—necessarily implicates issues of sex discrimination.

This is true even though some courts justify the distinction on the grounds that different-sex married couples may “naturally” procreate.38 Notably, ability or intention to procreate has never been a requirement for different-sex couples seeking to marry.39 And, obviously, numerous same-sex couples raise children together; often, the children bear a biological link to one or the other parent. But more generally, even the significance that courts ascribe to procreation in marriage is often intertwined with issues of gender norms. Consideration of the rationales that courts rely on in denying same-sex couples’ inappropriately would “require[,] specific approval from history before protecting anything in the name of liberty.”).

36 Of course, at some level, a more general principle is described by what is deemed to fall within or outside its parameters, and thus any decision helps articulate the contours of the interest in ways that will be meaningful in future cases. But in most substantive due process situations, the inclusion or exclusion of a given particular application is not conveyed as a “threat” to the more general principle.
38 See, e.g., Anderson v. King County, 138 P.3d 963, 978 (Wash. 2006).
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claims makes this more apparent. As I have described in greater detail elsewhere, in assessing the constitutionality of bans on same-sex marriage, courts routinely accept justifications that rely on sex-based stereotypes as adequate justification for different-sex marriage requirements under rationale basis review. These include that men and women, simply by virtue of their sex, provide different role models for children; that they play “opposite” and “complementary” roles within marriage; and that marriage is necessary to protect “vulnerable” women from “irresponsible” men who otherwise would abandon them.40 These rationales resonate in the language of the separate spheres ideology. The fact that courts embrace these justifications as adequate at the same time as they reject sex stereotyping claims is striking and helps highlight just how natural such gendered assumptions still seem.

Moreover, most of the cases that contemporary courts rely on to support their ready conclusion that (different-sex) marriage is “fundamental” are quite old. These include the Supreme Court’s declaration, in 1888, that marriage is “the most important relation in life”41; in 1925, that due process protects the liberty “to marry, establish a home and bring up children”;42 in 1942, that “marriage and procreation are fundamental to the very existence and survival of the race,”43 in 1965, that “marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred,”44 and in 1967, that “marriage is one of the basic civil rights of man.”45

It is not simply happenstance that these cases predate the groundbreaking sex discrimination cases of the 1970s. In part, that is because most of them connect marriage to the important separate liberty interest in procreation. That connection made sense in earlier times when marriage was a necessary precursor for lawful sexual intimacy and childrearing, but it has been undermined by a variety of constitutional and statutory changes, as well as by shifting cultural norms, that also date to the 1970s.46 More generally, these cases rely upon an unquestioned celebration of marriage and its significance within the social fabric that is arguably also a relic of the past. For the change that happened in that era was not simply that a series of sex-based classifications within marriage were successfully challenged. It was also that, as

41 Maynard v. Hill, 125 U.S. 190, 205 (1888).
46 For a detailed discussion of this evolution, see Tebbe & Widiss, supra note 26, at Part I.D.1.
discussed in the next Part, the country engaged in a much broader conversation and debate over gender roles, the family, and the centrality of marriage.\(^{47}\)

My point here is not that marriage is not still important in today’s society. I believe that it is, and in fact that it is so important that gay and lesbian couples should be offered equal access to it (although I believe that this duty is properly understood as derived from the Equal Protection Clause rather than as a matter of substantive due process).\(^{48}\) But if the law’s commitment to sex-based equality is also significant, then there must be justifications for retaining a commitment to marriage as “fundamental” that rely on something other than its historic role in perpetuating gender and the sex-based classification that is the last expression of this. As Katherine Baker put it recently (paraphrasing Gertrude Stein), the challenge and promise of the litigation over marriage rights for same-sex couples is to demonstrate that “there is a ‘there there’ after one take the gender out of marriage.”\(^{49}\)

The district court decision in Perry v. Schwarzenegger, the federal court challenge to California’s Proposition 8, is an important exception to the approach described above. The court reviewed copious historical evidence and concluded that the core of the right to “marriage” has been and remains the right to “choose a spouse and, with mutual consent, join together and form a household” and that changes in the racial and sex-based requirements associated with marriage had not changed this core meaning.\(^{50}\) The court therefore held that the exclusion of same-sex couples from marriage was “an artifact of a time when the genders were seen as having distinct roles in society and in marriage.”\(^{51}\) Accordingly, the court rejected proponents’ claim that the plaintiffs in the case sought a “new right” to “same-sex marriage,” explaining rather that they sought the same thing “opposite-sex couples across the state enjoy—namely, marriage.”\(^{52}\) This is a promising development that I believe appropriately recognizes the interrelationship of due process analysis with sex-

\(^{47}\) The decisions prior to 1970 treat marriage and its centrality within society as a given. The decisions issued after 1970, by contrast, carefully catalogue justifications for holding that marriage is fundamental. See Zablocki, 434 U.S. at 386 (listing other due process rights, such as abortion, and concluding that marriage should “receive equivalent protection”); and Turner, 482 U.S. at 95 (listing the material and spiritual benefits provided by marriage).

\(^{48}\) See generally Tebbe & Widiss, supra note 26, Part III.

\(^{49}\) Baker, The Stories of Marriage, supra note 13, at 5. Professor Baker accurately observes that there are numerous plausible justifications for “marriage” which point to very different outcomes in the litigation brought by same-sex couples. She ultimately suggests that the fundamental purpose of marriage should be understood as promoting interdependent and ongoing relationships between adults. See id. This definition is very similar to that adopted by the Perry district court.


\(^{51}\) See id. at *187.

\(^{52}\) See id. at *188.
discrimination analysis. But the *Perry* court stands virtually alone in its analysis, and, of course, its holding is subject to appeal.

**B. Interrelationship of Sex, Gender, and Marriage**

Recognizing the interrelationship between the due process claims and sex discrimination claims is significant not only because it should change the analysis in contemporary litigation over marriage rights for same-sex couples. It also points to deeper connections between sex-based classifications within marriage law and marriage law itself, connections that are as salient for different-sex couples as for same-sex couples. The fight over the last sex-based classification and its connection to gender norms continues arguments that began in the 1970s when the other substantive distinctions between men and women in marriage were stripped away. Now and then, proponents and opponents of reform have strategically used these interconnections to make, or break, the case for change. This section introduces a framework that illustrates the structure of these arguments and how they have shifted over time to demonstrate the promise and the threat that the current debate holds not only for same-sex couples but also for different-sex couples. The following Parts illustrate these points of transition in detail.

Before discussing this evolving terrain, however, it is important to clarify the terms. In legal cases and commentary, sex and gender are often used interchangeably. (This is in part because former-ACLU-attorney-now-Justice Ginsburg consciously chooses to articulate her constitutional arguments in terms of “gender” discrimination rather than “sex” discrimination, because as an advocate she believed that her audience would be more comfortable with the term “gender.”) In this article, however, I use the terms “sex” and “gender” to mean distinctly different things. Sex refers to men and women; gender refers to the characteristics stereotypically associated with the different sexes, in other words, to masculine and feminine. As used in the context of this article, “sex” most often refers to actual sex-based classifications within laws: that is, laws that explicitly distinguish between men and women or husbands and wives. Gender, by contrast, typically refers the different roles that men and women are expected to play within marriage: that is, men as breadwinners and women as homemakers. And marriage is used to refer to the legal rights and responsibilities that historically husbands and wives—and now, spouses—owe to each other and to the benefits that married couples enjoy relative to unmarried couples or to single individuals.

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54 The distinction between “sex” and “gender” is common in other disciplines. For a more comprehensive discussion of the difference, see id. at 10-13.
1. Aligned

Substantive marriage law, sex-based classifications, and gender norms interrelate. Historically, they were collectively coherent, albeit in a way that subordinated women to men. Under the doctrine of couverture, which was in place until the mid-nineteenth century, a woman lost her legal identity upon marriage. Husbands bore legal responsibility for supporting their wives; wives legally owed their husbands services. Wives could not own property or make contracts individually. In many cases, wives were not even responsible for their own criminal actions and husbands were granted a corresponding authority to regulate their wives’ conduct so as not to incur liability themselves. Most married women did not work outside the home; if they did, their husbands owned their salaries. 55

Although the Married Women’s Property Acts and other nineteenth-century reforms dismantled the fiction that women lost all individual identity upon marriage, numerous other sex-based distinctions remained in the law. Wives were required to take their husbands’ names and to follow their husbands if they moved. 56 Upon death or retirement of a spouse, dependent wives, but not husbands, could receive social security benefits. 57 Upon divorce, dependent wives, but not husbands, could receive alimony. 58 Under the tender-years doctrine, mothers were presumptively awarded custody of young children. 59 Many of the distinctions in family law were putatively for women’s benefit, but they were accompanied by other (often sex-neutral) provisions that dramatically limited wives’ options and authority, such as the title-based system of marital property that generally assigned ownership exclusively to the male breadwinning spouse. 60

These legal rights reinforced the separate spheres ideology in which men were expected to be breadwinners and women were expected to be homemakers. This division of responsibility effectively privatized responsibility for the care and growth of children, by seeking to ensure that they would receive both financial support and appropriate care. Of course, this

57 See Urban Institute, Social Security: Out of Step With the Modern Family 9 (2000).
60 See generally, e.g., Cott, supra note 55, at 168-79.
system was far from ideal. It often left women and children vulnerable to inadequate support, particularly in the event of divorce, and it limited women’s and men’s freedom to choose how to structure their family relationships. Second wave feminists sought to change all aspects of the equation. They sought to remove sex-based classifications within marriage that mandated different roles for husbands and wives; to challenge the gender norms that underlay them; and to rethink aspects of substantive marriage law that encouraged such specialization, as well as to involve the public sector more directly in support of child rearing. They succeeded only in part.

2. *In Flux*

Because sex-based classifications, gender norms, and the substantive laws of marriage are interconnected, challenges to the validity of one aspect of the equation call into questions the others. Reforms in one area may be premised on expected changes in the others or may be implemented in the hope that they will spur additional changes; if these do not materialize, however, an underlying balance is upset. The difficulty is that some aspects of the question are far more amenable to legal reform than others.

The interrelation between sex, gender, and the law of marriage works along two vectors. The first is internal to different-sex marriages (or, arguably, now that they exist, to same-sex marriages). That is, changing any aspect of the equation calls into question the others, and changing one unilaterally may upset the balance. As discussed more fully in the next Part, alimony reforms provide a good example of this. Alimony was originally available only to women as part of men’s obligation of support. Changing sex-based alimony eligibility to a sex-neutral, time-limited eligibility for “maintenance” without changing the gender norm that women play the primary caretaking role upset the previous balance and has arguably left women worse off.61 Because these arguments operate within the construct of (traditional different-sex) marriage, I call these kinds of connections “internal.”

The second vector on which the interrelation works is between same-sex and different-sex relationships. Same-sex relationships necessarily call into question gender roles. That is, if two women come together to form a family, at least one will need to take on the breadwinning role, thus deviating from gendered expectations; if the women share breadwinning and caretaking responsibilities, they each partially deviate from the expected gender role. Both proponents and opponents have argued that this is relevant not only with respect to same-sex couples, but that it also challenges the validity of gender roles as applied to different-sex couples. Accordingly, I call these kinds of connections “crossover arguments.”

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61 *See infra* text accompanying notes 116-22.
The next three Parts show in more detail why it is a mistake to view sex-based classifications—either the historical distinctions between husbands and wives or the current remaining vestige of those distinctions, that is, that marriage be between a man and a woman—in a vacuum. Reform of one aspect of the equation can push forward the others. The reverse is true as well. Backlash against one aspect of reform, or proposed reform, can undermine the efficacy of others. This is true both for internal arguments and for crossover arguments. Thus, reconsideration of the historical debate over the dismantling of these other sex-based classifications can offer a significant perspective on the debate playing out today. And the new reality of marriage rights for same-sex couples offers an opportunity to rethink the unfinished aspects of the last great reform for different-sex couples as well.

II. 1970s: The Demise of the Other Sex-Based Classifications

In the 1970s, activists hoped that enactment of the Equal Rights Amendment, along with substantive reform of some aspects of marriage law, would spur a realignment of the gender norms that expected husbands to be breadwinners and wives to be homemakers. In other words, they hoped that internal connections between sex, marriage, and gender would stimulate progressive reform. But in fact, opponents of the ERA successfully used the threat of such changes to torpedo efforts to enact the amendment. Then, as now, the possibility of marriage between two individuals of the same sex served as the ultimate illustration of the threat—or promise—posed by disaggregating marriage, sex, and gender. The result is that the reforms of the 1970s are unfinished project. Although litigation under the Equal Protection Clause stripped most sex-based classifications within marriage law, the substantive laws of marriage, and related tax and benefit policies, continue to encourage spouses to specialize in breadwinning and caretaking roles. Since the underlying gender norms were also left largely in place, it continues to be far more common for men to play the former role and women to play the latter.

A. Internal Arguments

In the 1960s and 1970s, a growing women’s movement challenged the separate spheres ideology that was embodied and perpetuated by sex-based classifications within the law. These included not only substantive differences between responsibilities for husbands and wives within marriage law but a host of distinctions in other contexts, including notably aspects of employment and labor law and military service. Reform efforts centered on enactment of the Equal Rights Amendment, which would have amended the constitution to provide that “equality of rights under the law shall not be denied or abridged by
the United States or any state on account of sex. Although, as is the case with any constitutional provision, the actual impact of an enacted ERA was hard to predict with absolute confidence, the general consensus was its primary legal effect would have been simply to require modification of most sex-specific classifications within the law. In other words, it only explicitly addressed the “sex” piece of the equation.

Yale law school professor Thomas Emerson and several students wrote a highly influential analysis of the proposed amendment, which was published in the Yale Law Journal and then largely read into the Congressional record. It advocated for enactment of the amendment and analyzed its likely effects in various areas of the law. With respect to family law, it suggested that then-existing sex-specific provisions of marriage law would have to be either removed or replaced by sex-neutral descriptions. Thus, for example, the sex-specific duty of support imposed upon husbands would need to be modified, but, as the authors also noted, the practical effect of this was expected to be rather limited since judges almost never enforced it within marriages anyway. Similarly, alimony, rather than being available only to dependent wives, would become available to dependent spouses or eliminated entirely. The authors of the Yale Law Journal article suggested that women (or men) could nonetheless remain homemakers, proposing that alimony laws could be written to provide “special protection” to a spouse had been or continued to be out of workforce in order to provide care for a child. The authors did not speculate on whether enactment of the amendment would require permitting two individuals of the same sex to marry, although, as discussed below, other academic commentators believed that it might.

Removing the sex-based classifications within the law would not necessarily dismantle the gendered ideology of the family, but it would permit individual women and men to choose to live differently. Nor would it necessarily require changing substantive aspects of marriage law, such as alimony or support provisions, that facilitated specialization within marriage.

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62 Barbara A. Brown et al., The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 Yale L.J. 871, 872 (1971)
63 See id. The expectation was that, if enacted, laws that classified on the basis of sex would be subject to heightened scrutiny but that the state would likely to have been able to provide adequate justification for some laws that were responsive to “real” differences between the sexes. The scope of this category was somewhat up for debate, but advocates for the ERA suggested that laws regarding certain sex crimes, military service, and relating to reproduction would have fallen in this category. See id.
64 Id.
66 Brown et al., supra note 62, at 945.
But for both proponents and opponents of the ERA, the ERA was significant because it was expected to have a symbolic import beyond its actual legal effect. Thus, although Ervin and his co-authors observed that “[i]n the realm of marriage and the family, social customs, economic realities, and individual preferences have a far greater influence on behavior than the law,” they believed it would “play[] an important role in shaping and channeling these other forces.”68 In other words, supporters believed that ending sex-classifications would significantly advance efforts to dismantle the gendered assumptions that underlay them. They hoped because of that the internal connections between sex, gender, and marriage, changing sex alone would spur future reform.

The National Organization for Women, then one of the more conservative feminists groups, idealized a paradigm of marriage as a partnership in which men and women both worked outside the home and shared the responsibilities for childcare and housework.69 Rather than rejecting marriage, NOW rejected the “traditional assumption that a woman has to choose between marriage and motherhood, on the one hand, and serious participation in industry or the professions on the other.”70 NOW advocated an “equitable” division of responsibilities between parents rather than a rigidly “equal” divide, but also emphasized the need for government-supported childcare so that both parents could work outside the home.71 Some radical feminist groups went further, denouncing marriage in general as a fundamentally flawed institution that necessarily enforced historical patriarchal dominance.72

68 Brown et al., supra note 62, at 937.
69 See, e.g., NOW Task Force on the Family (1967), reprinted in FEMINIST CHRONICLES, supra note 67, at 201 (“The basic ideological goal of NOW is a society in which men and women have an equitable balance in the time and interest with which they participate in work, family and community. NOW should seek and advocate personal and institutional measures which would reduce the disproportionate involvement of men in work at the expense of meaningful participation in family and community, and the disproportionate involvement of women in family at the expense of participation in work and community.”)
70 NOW Statement of Purpose (1966), reprinted in FEMINIST CHRONICLES, supra note 67, at 162.
71 See JANE J. MANSBRIDGE, WHY WE LOST THE ERA 99 (1986).
72 In a notable demonstration outside the New York marriage license bureau in 1969, a group called The Feminists (which had splintered from NOW) distributed a pamphlet that referenced sex-specific rules, such as the fact that a husband had unilateral right to choose a domicile and to the services of his wife, in deliberatively provocative language: “Do you know that you are your husband’s prisoner? Do you know that, according to the United Nations, marriage is a ‘slavery-like practice’? So why aren’t you getting paid?” ALICE ECHOLS, DARING TO BE BAD: RADICAL FEMINISM IN AMERICA 1967-1975, 170 (1989).
That said, most liberal feminists were careful to characterize their objectives as simply permitting choice rather than prohibiting families from maintaining traditional gender-based role divisions. NOW also advocated ascribing value to the contributions of dependent homemakers to better protect their rights in the event of divorce. It characterized such reforms as “consistent with the principle of equality of rights under the [Equal Rights] Amendment.”

But opponents of the ERA and these larger reform efforts picked up on and exaggerated the extent to which the ERA would require or promote a realignment of gender roles and the substantive provisions of marriage, not merely removal of the sex-based classifications themselves. In other words, they used the internal arguments in reverse. Discomfort over potential reform of gender norms or substantive support for dependent spouses was used as a roadblock to the more narrow objectives of simply making the law sex-neutral.

The debate became not only a discussion over the ERA itself but also about whether feminists’ broader efforts to challenge the gendered ideology of the family were desirable. In Congress, Senator Sam Ervin took the lead in opposing the amendment, “plead[ing] for a traditional view of women in which gender (culture) and sex (anatomy) are fused” and arguing that many existing sex-based classifications within the law appropriately served to protect and advance the interests of women within their traditional roles. He accordingly proposed amendments to the ERA that would have carved out any law that is “reasonably designed to … enable [women] to perform their duties as homemakers or mothers.” Although Ervin’s efforts to amend the ERA were unsuccessful and the ERA easily passed both houses of Congress, his speeches were subsequently reprinted and circulated widely in the efforts to stop ratification by the states.

Phyllis Schlafly, who led the grassroots opposition movement, characterized the ERA as an assault on homemakers, something that would deprive them of legal protection and, equally significant, undermine their status within society. In her first published attack on the ERA, she contended that:

Women’s lib is a total assault on the role of the American woman as wife and mother, and on the family as the basic unit of society. Women’s libbers are trying to make wives and mothers unhappy with their career, to make them feel that they are ‘second-class citizens’ and ‘abject slaves.’ Women’s libbers are promoting free sex instead of the ‘slavery’ of marriage. They are

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74 See, e.g., MANSBRIDGE, supra note 71, at 108 (“It was the ERA’s symbolic meaning that frightened the opposition.”)
75 MATHews & De HART, supra note 3, at 45.
promoting Federal ‘day-care centers’ for babies instead of homes. They are promoting abortions instead of families.

In subsequent newsletters, and in her 1977 book *The Positive Woman*, Schlafly developed these themes. Her chapter arguing against the ERA, titled “Rejecting Gender-Free Equality,” contends that the “Positive Woman wants to be treated like a woman, not like a man, and certainly not like a sex-neutral ‘person.’”

Ignoring the fact that the right to support was all but impossible to enforce, Schlafly argued that the ERA would abolish the “most basic and precious legal right that wives now enjoy: the right to be a full-time homemaker.”

Picking up on an Ohio report that suggested that the ERA might require the state to provide childcare services to ensure that mothers, like fathers, had “freedom” to engage in activities outside the home, Schlafly contended that the ERA would “compel the government to care for children in order to take that ‘discriminatory burden’ of the backs of mothers” and that “elimination of the role of ‘mother’ is a major objective of the women’s liberation movement.” Schlafly argued that these and other legal developments advocated by ERA supporters, such as requiring social security taxes be paid on the contributions made by homemakers or that upon divorce both parents owed an equal duty of support to their children, would collectively force women out of the home and were part of an effort to “deliberately degrade[] the homemaker and hack[] away at her sense of self-worth and pride and pleasure in being female.”

The underlying legal analysis in many of these points is open to question, but Schlafly’s arguments not surprisingly were extremely successful in mobilizing many homemakers to oppose the ERA. The key thing for purposes of this discussion is to note how Schlafly’s claims merge removal of sex-based classifications within law—that is, the distinctions between husbands’ rights and responsibilities and wives’—with substantive reform of marriage law and gender norms. As discussed in the *Yale Law Journal* article, the ERA would probably not have required substantive changes to alimony or support provisions. Thus, enactment of the ERA would not necessarily have meant the end of the “right to be a full-time homemaker.” It simply would have permitted either men or women to play that role. NOW and other feminists actually advocated other reforms that were intended to *increase* the security that homemakers would have upon divorce. But Schlafly effectively elided distinctions between “sex,” “marriage,” and “gender” (“the pleasure in being female”) to make her larger point. The potential significance of reforms of marriage law and gender norms helped derail efforts to enact the ERA which

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77 Schlafly, supra note 6, at 68.
78 Id. at 79.
79 Id. at 71.
80 Id. at 69.
would have required merely reform of the “sex” based classifications themselves.

B. Crossover Arguments

The possibility of gay marriage became an even more toxic example of the ERA’s potential to change relationships between sex, gender, and marriage law. In 1970, Jack Baker and Michael McConnell were the first gay couple in the United States to appeal a denial of a marriage license. Well aware of the controversy this would generate, they held a press conference before appearing at the clerk’s office in Minneapolis with a crowd of reporters. The story was news across the country, and the couple explicitly situated it as part of the larger debate over marriage. They characterized their objective as seeking recognition for their love—but also as a hope that “within five years we can turn the whole institution of marriage upside down.”81 Similarly, Paul Barwick and John Singer, a couple who applied for a marriage license in Seattle the following year, responded to lesbian and feminist friends who questioned whether marriage was a valid goal by stating that they sought, among other things, to “challenge mainstream definitions of marriage and the family.”82 Both couples remember being asked repeated “which one was the wife” and being pleased to emphasize that they were simply two men who sought to wed.83 (As Mary Anne Case has pointed out, at that time, the question had significant legal consequences, since the rights of wives were distinctly different from those of husbands.84) The press likewise saw the issue as part of the larger debate over gender roles within marriage. In 1971, when Look magazine, a widely-read general circulation magazine, devoted an issue to the changing American family, it included Baker and McConnell as “The Homosexual Couple,” along with profiles of “The Young Unmarrieds” and “The Executive Mother.”85

Courts in Minnesota and Washington quickly disposed of the gay couples’ claims (as did a court in Kentucky faced with a claim brought by a

82 Id.; see also DONN TEAL, THE GAY MILITANTS 291-93 (1971) (discussing varying views on the appropriateness of seeking to expand marriage rights for gays and lesbians because of the historically patriarchal structure of marriage).
83 Chambers, supra note 81, at 286. Likewise, when Tracy Knight attempted to wed Marjorie Ruth Jones in Kentucky, the county attorney “became confused during his questioning about which of the two was to be the ‘wife’ and who was the ‘husband.’” TEAL, supra note 82, at 290 (quoting Stan MacDonald, Two Women Tell the Court Why They Would Marry, LOUISVILLE COURIER-JOURNAL, Nov. 12, 1970).
84 Case, What Feminists Have to Lose, supra note 13.
85 Chambers, supra note 81, at 284.
lesbian couple), relying primarily on conclusory statements that marriage was the union of a man and a woman.\textsuperscript{86} And thus, the first wave of same-sex marriage litigation ended. But the possibility—or, in many minds, the threat—of gay marriage cast a much longer shadow as it became intertwined with larger questions of gender roles within marriage as part of the increasingly virulent debates over the ERA.

Since it was understood that the ERA would generally invalidate sex-based classifications in the law, it obviously invited consideration whether it would require elimination of the basic requirement that marriage include a man and a woman. In the Senate debate, Senator Ervin quoted committee testimony by law school professor Paul Freund, who opposed the ERA. Noting that the Supreme Court had recently, in \textit{Loving v. Virginia},\textsuperscript{87} held that anti-miscegenation laws were unconstitutional, Freund speculated that if the law “must be as undiscriminating concerning sex as it is to race, it would follow that laws outlawing wedlock between members of the same sex would be as invalid as laws forbidding miscegenation.”\textsuperscript{88} He added, presciently, “[w]hether proponents of the Amendment shrink from these implications is not clear.”\textsuperscript{89} A student Note published in the \textit{Yale Law Journal} in 1973 likewise used the \textit{Loving} decision to argue that the logic of the ERA would compel recognition of same-sex marriage.\textsuperscript{90}

Supporters of the ERA found the concept of gay marriage sufficiently alarming, or at least recognized that many others would do so, that they went out of their way to disclaim this possible implication. In other words, they claimed that the legal rights they sought and the larger reforms they symbolized simply would not have a crossover effect. Senator Birch Bayh, one of the primary advocates for the ERA, anticipated the “equal application” argument that has proven successful in the modern cases by claiming that the ERA would not require same-sex marriage so long as law banned both male-male and female-female marriages.\textsuperscript{91} In fact, Paul Barwick and John Singer, the couple


\textsuperscript{87} 388 U.S. 1, 10-12 (1967).

\textsuperscript{88} 118 Cong. Rec. § 4373 (Mar. 21, 1972) (Sen. Ervin, quoting testimony of Paul Freund).

\textsuperscript{89} Id.

\textsuperscript{90} Note, \textit{The Legality of Homosexual Marriage}, 82 YALE L.J. 573, 583-88 (1973). The author of the Note suggests that this would be a positive, rather than a negative, byproduct of enactment of the amendment.

\textsuperscript{91} 118 Cong. Rec. § 4389 (Sen. Bayh). The author of the \textit{Yale Law Journal} Note claimed that Professor Emerson, who had written the “definitive” analysis of the ERA published the prior year, likewise agreed that the Amendment would not require same-sex marriage. \textit{The Legality of Homosexual Marriage}, supra note 90, at 584 n.50.
that sought to marry in Washington in 1971, claimed that the state’s marriage law violated an equal rights amendment that had just been enacted as part of the state constitution. Voter information materials prepared by supporters of the state ERA, however, had stated explicitly that its enactment would not require same-sex marriage; based largely on these materials, the state intermediate appellate court rejected their claim.92 (This same history was deemed dispositive in Anderson, the same-sex marriage case decided by the Washington Supreme Court in 2006.93) By 1977, when the National Conference on Women was held, supporters of the ERA adopted a platform proclaiming “ERA will NOT change or weaken family structure… ERA will NOT require States to permit homosexual marriage;” they cited Washington state case denying marriage to Barwick and Singer as assurance on this point.94

Phyllis Schlafly nevertheless seized on the academic musings that suggested the ERA might lead to legalization of gay marriage to bolster her case against the ERA. She reprinted relevant pages from the student Note in her newsletter.95 In The Positive Woman, she returned to the theme, quoting Congressional testimony from professors Freund and White and Senator Ervin, and a long section of the Note.96 She characterized the possibility of same-sex marriage, along with employment rights for gays and lesbians, as “an assault on our right to have a country in which the family is recognized, protected, and encouraged as the basic unit of society.”97 She explicitly linked recognition of gay rights to the traditional gendered based assumption that husbands support their families, claiming that enactment of the ERA would offer benefits only to “the offbeat and the deadbeat male—that is, to the homosexual who wants the same rights as husbands [and] to the husband who wants to escape supporting his wife and children.”98 Schlafly integrated crossover and internal arguments to claim that the ERA would destabilize the protections that the existing equation offered to “normal” women and men.

These tactics proved effective. As Reva Siegel characterizes it, Schlafly’s association of the ERA with homosexuality and with abortion “mobilized a grassroots, ‘profamily constituency’ to oppose this unholy trinity.”99 Ratification, which had seemed all but assured, sputtered to a stop.

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93 Anderson v. King County, 138 P.3d 963, 988 (Wash. 2006).
95 Siegel, Constitutional Culture, supra note 3, at 1400.
96 SCHLAFLY, supra note 6, at 90.
97 Id.
98 Id. at 95.
99 Siegel, Constitutional Culture, supra note 3, at 1390. See also MATHEWS & DE HART, supra note 3, at 154 (describing how anti-ERA women were jarred by the “apocalyptic future that Schlafly sketched out” out for homemakers, combined with the
Same-sex marriage became a symbol of the ultimate disestablishment of sex-classifications and gender-norms for the different-sex families. Although it was probably extremely unlikely that the Supreme Court of the 1970s would have interpreted the ERA to require granting same-sex couples access to marriage, the crossover arguments played a key role in defeating the proposed amendment.

C. Addressing Only Sex

As the ERA was being debated and eventually as efforts to enact it ground to a halt, liberal feminists, led by Ruth Bader Ginsburg as director of the ACLU’s Women’s Rights Project, successfully used the existing equal protection clause to strip sex-based classifications from the law. In Reed v. Reed, a challenge to an Idaho law that established a presumption in favor of men over women in the appointment of administrators of estates, the Court first held that such distinctions could violate the Equal Protection Clause. The Court went on to strike down a host of sex-based classifications that enforced the separate spheres ideology of the family: a presumption that unwed fathers, but not mothers, were inadequate caregivers for their children; a presumption that wives, but not husbands, of service members were dependent on their spouses; a categorical ban on widowers, but not widows, receiving social security survivors’ benefits; a law that extended child support for boys until age 21 but for girls only until age 18; a law that provided alimony upon divorce for women but not for men; and a law that provided benefits to children of unemployed fathers, but not unemployed mothers; (as well as a law that permitted girls to buy low-alcohol beer at a younger age than boys).

Under modern sex discrimination law, sex-based classifications are almost always invalid unless they respond to so-called “real” physical differences

“abomination” that the “revolution in gender symbolized by an implicit sanction of homosexual marriage” and the “danger” it would lead to a constitutional mandate for abortion rights) (emphasis original); Franklin, supra note 40, at 140-41 (describing Schlafly’s use of the gay marriage issue).

100 404 U.S. 71 (1971).
101 Stanley v. Illinois, 405 U.S. 605 (1972). In that case, the Court held that the father’s due process rights were violated by the failure to provide him with an opportunity to contest the state’s determination of neglect, but also identified an “equal protection” violation in the distinction between unmarried fathers and unmarried mothers in protection of these procedural interests.
between the sexes. 108 These decisions collectively dismantled almost all sex-based distinctions within marriage law by making the responsibilities of husbands and wives identical and reciprocal.

Leading constitutional scholars characterize this body of case law as a “de facto ERA” that has accomplished “virtually everything the ERA would have accomplished.” 109 This may be correct, but it is a relatively thin understanding of the potential promise of the ERA. While they shied away from its implications for expanding marriage rights to same-sex couples, supporters believed—and hoped—that the ERA would not merely strip sex-based classifications from the law. They hoped that it would also spur a more general realignment of gender norms within the family and within society as a whole that would lead to a more equal sharing of responsibilities at home as well as at work. Whether or not this is would have occurred is impossible to assess definitively. 110

What is clear, however, is that the body of Supreme Court sex discrimination decisions did not. That is, the Court made clear that government could not rely upon generalizations regarding appropriate roles for men and women, or the empirical reality that far more women than men were dependent on their spouses for economic support. The Court disclaimed the separate spheres ideology that that “the female [is] destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas” as expressing impermissible sex stereotypes. 111 But it did not require the government to take steps to affirmatively dismantle the gendered division of responsibility or to implement policies that would encourage such realignment or that as relying on impermissible sex stereotypes. In fact, Reva Siegel and Cary Franklin argue that the debates over the ERA—and the popular backlash against proposed changes of the gender norms and substantive laws of

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108 These include laws regulating statutory rape, see Michael M. v. Superior Court, 450 U.S. 464 (1981); birth, see Nguyen v. INS, 533 U.S. 53 (2001); and military service, see Rostker v. Goldbert, 453 U.S. 57 (1981).
109 William Eskridge, Channeling: Identity-Based Social Movements and Public Law, 150 U. Pa. L. Rev. 419 (2001); see also, e.g., Michael C. Dorf, Equal Protection Incorporation, 88 Va. L. Rev. 951, 985 (2002) (“The social changes that did not quite produce the Equal Rights Amendment produced a de facto ERA in the Court’s equal protection jurisprudence.”); David Strauss, The Irrelevance of Constitutional Amendments, 114 Harv. L. Rev. 1457, 1476 (2001) (“Today, it is difficult to identify any respect in which constitutional law is different from what it would have been if the ERA had been adopted.”).
110 Cf. MANSBRIDGE, supra note 71, at 2 (“[The ERA’s] direct effects would have been slight, but its indirect effects on both judges and legislators would probably have led in the long run to interpretations of existing laws and enactment of new laws that would have benefited women.”)
111 Stanton, 421 U.S. at 14-15; see also, e.g., Califano, 443 U.S. at 89 (rejecting contention that ‘the father has the ‘primary responsibility to provide a home and its essentials,’ while the mother is the ‘center of home and family life’.”).
marriage, as well as the putative possibility of same-sex marriage and effects on abortion rights—caused the attorneys in these cases to cabin the scope of the changes they sought and the way in which they structured their claims. As is described in Part IV, numerous aspects of tax and benefits law continue to encourage a provider/homemaker divide within existing marriages and gender norms regarding which spouse plays which role remain firmly in place for many families.

Accordingly, commentators have looked back at this series of victories as a rather hollow victory. Although men and women are treated “equally” by the law, the masculine norms that defined the status quo were not changed. The end result has been that although the law is now sex-neutral, the relative position of husbands and wives has not changed very much. Some scholars go further, arguing that formal equality has actually harmed women, because it has imposed a symbolic notion of “equality” that comes at the cost of structural reform that could have actually improved the condition of women.

Alimony provides a good example of the way in which changing some aspects of the sex, gender, and marriage law equation without changing others can destabilize a pre-existing logic. Historically, alimony was sex-specific. It was available upon divorce to wives, not husbands, and generally limited to “innocent” wives whose divorces were granted on the basis of a finding that their husbands were at fault. It continued the basic requirement that husbands provide support to their wives within marriage until either party’s death or until the wife’s marriage to a new husband who then assumed the support responsibility. The theory of alimony thus was consistent with the larger premise of the separate spheres and a husband’s support duties to his wife. Importantly, in practice, alimony was far from sufficient to protect divorced women’s interests. It was actually awarded relatively rarely; offered no recourse to a woman who provided “cause” for the divorce; and often offered

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112 See Siegel, Constitutional Culture, supra note 3, at 1395-99 (describing shift in litigation away from articulating issues related to abortion on equality grounds in response to advocacy against the ERA); Franklin, supra note 40, 140-41 (similar).
114 See generally, e.g., JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2000).
116 On the history of alimony, see, e.g., Kisthardt, supra note 58.
inadequate support even when awarded.\textsuperscript{117} So my point is not that the prior system should not have been reformed.

But the specific reforms that occurred in the 1970s demonstrate some of the dangers implicit in partial reform of sex, gender, and marriage law equation. Alimony changed in two respects in response to new demands of sex equality (as well as the shift to no-fault divorce). First, after \textit{Orr v. Orr}, alimony could no longer be limited to dependent wives; sex equality mandated that it be made available to dependent spouses of either sex.\textsuperscript{118} But alimony was also substantively changed as part of the larger commitment to rethinking the separate spheres ideology. Rather than rely on protection from men, the expectation was that woman would themselves participate in the paid workforce during marriage or re-enter it promptly upon divorce. Accordingly, under most state codes, the concept of alimony was not only made sex-neutral but it was also replaced by “maintenance” which provides time-limited support to dependent spouses who are deemed unable to support themselves for a short period while they prepare to re-enter the paid workplace.\textsuperscript{119} This approach fit comfortably with the commitment to remaking marriage as a union of “equals”, and to a larger commitment to challenging so-called benevolent protections which were ‘rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage.”\textsuperscript{120}

If gender roles had been restructured and women participated on an equal basis with their husbands in paid work during marriage, these reforms of alimony might have been a success. In fact, however, several studies have found that women’s standard of living after divorce still falls dramatically while men’s rises.\textsuperscript{121} In large part, these can be traced to the fact that, as discussed in Part IV.A, women continue to provide the bulk of caregiving

\textsuperscript{117} See, \textit{e.g.}, Jana Singer, \textit{Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony}, 82 GEO. L.J. 2423, 2424 n.5 (1994) (between 1887 and 1922 fewer than 16% of wives received alimony).

\textsuperscript{118} See 440 U.S. 268 (1979).

\textsuperscript{119} Moreover, studies find that alimony is awarded in no more than 20% of marriages. \textit{See, \textit{e.g.}}, Karen Turnage Boyd, \textit{The Tale of Two Systems: How Integrated Divorce Laws Can Remedy the Unintended Effects of Pure No-Fault Divorce}, 12 CARDOZO J. L. & GENDER 609, 622 (2006) (citing a study that found that maintenance is awarded in about 20% of divorces); \textit{Williams, supra} note 114, at 122 (citing study that found alimony is awarded in about 8% of divorces).

\textsuperscript{120} Frontiero v. Richardson, 411 U.S. 677, 684 (1973).

\textsuperscript{121} In 1985, Lenore Weitzmann received widespread attention for studies that showed that women experience a 73% decrease in their standard of living after divorce and men experienced a 42% gain. \textit{See} \textit{LENORE WEITZMANN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA} 323 (1985). Other scholars questioned the magnitude of her findings but have generally confirmed that men experience an increase in their standard of living and women experience a decrease. \textit{See, \textit{e.g.}}, Jennifer L. McCoy, \textit{Spousal Support Disorder: An Overview of Problems in Current Alimony Law}, 33 FLA. ST. U. L. REV. 501 (2005).
within (different-sex) marriages. During marriage, they are far more likely than men to drop out of paid work or to minimize such work in order to respond to domestic needs. Even if they return to paid work upon divorce, their wage earning capacity is dramatically lessened by this time out of the workplace. Additionally, upon divorce, women are far more likely than men to have custody of children and to therefore continue to compromise their ability to maximize wage-earning potential in order to meet family responsibilities. Changing one aspect of the equation (that is, sex-based open-ended alimony eligibility) without changing others (that is, the gender norms that expect women to be primary caretakers) upset the previous balance and arguably left divorced women worse off than they would have been under the prior regime.

Notably, more recent proposals to reform maintenance move away from the expectation that men and women will participate equally in the paid workplace during marriage. Rather, they focus the fact that one spouse—and in most marriages, the wife—will often minimize or drop out of participation in the workplace during marriage and propose providing “compensation” for the “residual loss in earning capacity.” Such approaches respond to the evident truth that equality between men and women is not yet realized. The remaining Parts show how the possibility of gay marriage, which served as a lightening rod that helped derail the ERA, may in turn inform the contemporary debates over achieving—or equally important, potentially rethinking—the vision of equality that it offered.

III. The Present Debate

The questions that were at the heart of the debates over the ERA in the 1970s remain salient today in the debate over expansion of marriage rights to same-sex couples. Just as in the past, the possibility of marriage by two persons of the same sex calls into question gender roles for different-sex couples. But, strikingly, currently, it is opponents of marriage rights that most frequently make this connection. In the past, proponents of expansion of marriage rights for same-sex couples celebrated the transformative impact that was offered by same-sex marriage. In litigation and the public debate today, by contrast, supporters typically claim that recognition of marriage rights for same-sex couples will in no way change “marriage” as lived by different-sex couples. In other words, opponents make largely the same crossover argument that was made forty years ago and proponents disclaim the crossover effect entirely. This may be a smart position to take in public advocacy—but it forfeits the possibility that the realization of same-sex marriage could in fact positively impact efforts to reconsider gender norms in different-sex marriages.

A. Opponents: Negative Crossover Arguments

Many leaders of the opposition to same-sex marriage link their position to efforts to protect or reinvigorate gender roles for men and women in different-sex marriage. Some explicitly seek to roll back modern sex discrimination law to return to sex-based classifications within marriage law that prescribe different roles for husbands than from wives. Others, who do not go that far, worry that permitting same-sex couples would dangerously erode remaining gender norms that protect dependent women and children.

Several influential conservative leaders, including Gary Bauer (former leader of the Family Research Council and currently president of American Values), the late Jerry Falwell (former leader of the Moral Majority), Phyllis Schlafly (founder of the Eagle Forum and, as discussed above, leader of the opposition to the ERA), Nebraska Congressman Lee Terry, Rick Warren (evangelical minister and bestselling author), and Paul Weyrich (founder of the Heritage Foundation and currently leader of the Free Congress Foundation), have signed onto a Manifesto in support of the “natural family.” The Manifesto grounds opposition to marriage rights for same-sex couples in a broader denunciation of what it calls the “aggressive state promotion of androgyny.” It decries a range of legal reforms and social changes in the latter half of the twentieth century, including “attacks on the meaning of ‘wife’ and ‘husband’”; the “imposition of full ‘gender equality’ [that] destroyed the family wage system”; and the “turn[ing] over of children to state-funded day care.”

The Manifesto purports to recognize and “wholeheartedly embrace” women’s rights, but it defines these rights as “above all” rights that recognize “women’s unique gifts of pregnancy, birthing, and breastfeeding.” Although it affirms that “nothing in [the] platform” would “prevent” women from attaining education and employment, it also proclaims definitively that “women and men are equal in dignity … but different in function,” and that the “calling of each boy is to become husband and father and the calling of each

124 Manifesto, at 6. Rather shockingly, it asserts that the goal of “androgyny,” which it characterizes as efforts to eliminate “real differences” between men and women, “does every bit as much violence to human nature and human rights as … efforts by the communists to create ‘Soviet Man’ and by the Nazis to create ‘Aryan Man.”’ Id. at 7.
125 Id. at 3.
126 Id. at 7.
127 Id. at 7.
girl is to become wife and mother.” It embraces the separate spheres ideology: young women are to grow into “wives, homemakers, and mothers” and young men are to grow into “husbands, homebuilders, and fathers.” To make such specialization possible, the Manifesto seeks to reinstate the so-called “family wage,” under which heads of households (that is, mostly men) may be paid premium wages, a system which violates current sex discrimination laws mandating equal pay for equal work. Marriage rights for same-sex couples, it avers, violate these basic principles of the “natural family”; any family form, other than the marriage of a man and a woman, is denigrated as “incomplete or [a fabrication] of the state.” Thus, opposition to gay marriage is explicitly framed as part of a larger agenda to roll back modern sex discrimination principles and reinstate laws reinforcing sex-stereotyped gender roles.

Michael Medved, one of the most popular talk radio hosts in the country, sounds similar themes. Indeed, he posits that defending gender-based roles can be instrumental in building opposition to same-sex marriage. Claiming that social conservatives often “lose the debates before we even begin” by framing gay marriage as a decision regarding the validity or morality of homosexual attraction, Medved suggests instead that the problem with same-sex marriage is that it “undermine[s] the crucial importance of gender specific roles in all relationships,” which he characterizes as a subject on which “nearly all Americans can agree.” Medved makes clear that he believes that gender roles—that is, the division of responsibility for breadwinning from caretaking—are properly determined by sex difference:

A gay couple might claim that fill distinctive roles in their relationship—with one woman working hard to support the family, for instance, while the other cooks and decorates and nourishes the kids. But choosing complementary roles for the sake of convenience or preference isn’t the same thing as recognizing that these contrasting approaches arise from your very essence as a man or a woman. There’s something arbitrary, synthetic and, indeed, temporary about a same sex couple

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128 Id. at 5.
129 Id. at 4 (emphasis added).
130 Id. at 5.
131 Id. at 4.
attempting to imitate a heterosexual marriage by fulfilling distinct responsibilities in the relationship.\(^{134}\)

Phyllis Schlafly, who, as described in Part II, led opposition to the ERA in the 1970s, still links the movement for marriage rights for same-sex couples to opposition to the ERA and disestablishment of the government-enforced gender roles. For example, in 2008, she campaigned against a state ERA proposed in Illinois on the ground that it would “allow the courts to legalize same-sex marriages,” in addition to “depriv[ing] wives and widows of their ‘dependent wife’ benefits in Social Security,” requiring “taxpayer funding of abortions,” and requiring women to register for a draft.\(^{135}\) In another recent column, she derided feminists as “engaged in a long-running campaign to make husbands and fathers unnecessary and irrelevant,” as she suggested was proved by lesbians “request[ing] same-sex marriage licenses in Massachusetts so that, with two affirmative-action jobs plus in vitro fertilization, they can create a ‘family’ without husbands or fathers.”\(^{136}\)

Such arguments emerge in legal academic writing opposing the expansion of marriage rights as well. Monte Stewart, a director of the Marriage Law Foundation, has authored several articles, as well as numerous briefs in same-sex marriage litigation, opposing what he calls the move to “genderless marriage.”\(^{137}\) He argues that “man/woman marriage is the only institution that can confer the status of husband and wife, that can transform a male into a husband or a female into a wife (a social identity quite different from

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\(^{134}\) Id. Medved elsewhere characterizes the promotion of marriage rights for same-sex couples as “recycling” the “bad ideas” of “‘equity feminists’ of the 60s and 70s” who had argued against gender roles. See Michael Medved, *Gay Marriage Recycles Bad Idea* (2008), available at http://townhall.com/columnists/MichaelMedved/2008/05/21/gay_marriage_recycles_bad_idea.


\(^{137}\) See, e.g., Stewart, *Genderless Marriage, supra* note 37, at 19; Monte N. Stewart, *Marriage Facts*, 31 HARV. J. OF L. & PUB. POL’Y 313; Brief of Amici Curiae United Families International, *Hernandez v. Robles* at 18-24, 855 N.E.2d 1 (N.Y. 2006) (hereinafter *Hernandez* Amici Brief), available at http://marriagelawfoundation.org/publications/NY%20COA%20Brief.pdf. Stewart explains that he chooses this term, rather than the more common terms such as same-sex marriage or gay marriage, to emphasize that expansion of marriage rights results in a single state—marriage—available to both same-sex and different-sex couples, rather than a new, different institution of “same-sex marriage.” I agree with him, although I see this as a positive rather than a negative aspect of the expansion of marriage rights. As discussed in Part I, the distinction courts make between “marriage” and “same sex marriage” has improperly been used to deny plaintiffs’ substantive due process claims
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‘partner’).”  

Or, as he puts it elsewhere, a purpose of traditional marriage is to “confer the status of husband and wife and to transform identity and conduct in a way consistent with that status.”

Lynn Wardle, another academic who has written extensively opposing expansion of marriage rights, likewise claims that “legalizing same-sex marriage will instantly transform the meaning of marriage, spouse, husband,[and] wife.”

F.C. DeCoste similarly contends that “marriage as an institutional practice is deeply, irretrievably, and oppositely-sexed, just because it is the practice of men and women uniting as husbands and wives.” Additionally, opposition to permitting same-sex couples to marry on the grounds that different-sex couples provide an “optimal” environment for child rearing also typically rely heavily on gender norms regarding claimed sex-specific contributions made by mothers and fathers.

At one level, claims that permitting same-sex couples to marry will change the meaning of “husband” or “wife” make little sense. The law of marriage is already sex neutral. Although these terms still have salience in so far as marriage must be between a man and a woman, as a matter of law they otherwise have no significance. But at another level, as discussed in Part IV, they point to a gendered reality that persists.

B. Proponents: Disclaiming Crossover Arguments

Earlier proponents of the expansion of marriage rights for same-sex couples have highlighted the potential that such reforms have for rethinking gender roles within different-sex marriage. As discussed above, Jack Baker and Michael McConnell and Paul Barwick and John Singer, the first couples in the United States to file law suits challenging their inability to marry, couched their efforts as part of a larger agenda of transforming gender roles within marriage for both same-sex and different-sex couples. The same themes emerged in

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138 Stewart, Genderless Marriage, supra note 37, at 19 (emphasis original). Stewart uses virtually identical language in his briefs. See, e.g., Hernandez Amici Brief at 17-18. He does admit, summarizing an argument put forward by Nicholas Bala, that the legal significance of these terms has changed dramatically since the 1970s and further that “socially there is a growing ambiguity over the roles of husband and wife.” Stewart, Genderless Marriage, supra note 37, at 61-63. But Stewart argues that they still retain a core substantive meaning beyond simply denoting a male spouse or a female spouse and also that further evolution, as suggested by expansion of marriage rights to same-sex couples, would be harmful to the social order. See id. at 64, 69.


142 See Widiss et al., supra note 26, at 489-92.

143 See supra text accompanying notes 81-82.
1989, when Thomas Stoddard, who was then the executive director of Lambda Legal Defense and Education Fund, and Pamela Ettelbrick, who was then the organization’s legal director, publically debated the virtues of seeking marriage rights for gay and lesbian couples.

Stoddard announced that he was “no fan of the ‘institution’ of marriage,” in large part because “even for [young] couples … who had the chance to learn the lessons of feminism, [a]lmost inevitably, the partners seem to fall into a ‘husband’ role and a ‘wife role.’” Nonetheless, Stoddard argued that fighting for an expansion of marriage rights should “rise to the top of the agenda for every gay organization.” He contended that marriage was important because of the practical benefits it offered families and because denying gay and lesbians access to marriage, the “centerpiece of our entire social structure,” necessarily branded them as different and lesser. But it is his third point that is most pertinent to this discussion: That “enlarging the concept” of marriage would “necessarily transform it into something new. If two women can marry, or two men, marriage—even for heterosexuals—need not be a union of a ‘husband’ and a ‘wife.’”

Ettelbrick disagreed. She argued primarily that by seeking marriage rights, gays and lesbians would be accepting the status quo privilege accorded married couples relative to any other family form and thereby harming the movement’s larger objective of legitimizing diversity. She linked this to an argument against Stoddard’s claim regarding gender roles. She agreed that “gay liberation is inexorably linked to women’s liberation,” but thought that seeking marriage rights—and thus necessarily contending that gay couples were “just like” heterosexual couples—would “begin the dangerous process of silencing our different voices.”

A few years later, a conversation between Nan Hunter and Nancy Polikoff revisited these same questions. Hunter, like Stoddard, contended that legalizing marriage for same-sex couples “would have enormous potential to destabilize the gendered definition of marriage for everyone.” “Same-sex marriage,” she contended, “could create the model in law for an egalitarian kind of interpersonal relation” by raising the question of “what, without gendered content, could the social categories of ‘husband’ and ‘wife’ mean.”

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144 See Stoddard, supra note 9; Ettelbrick, supra note 10. For a detailed analysis of Stoddard and Ettelbrick’s essays and of similar points made subsequently by other theorists, see Schacter, supra note 13. The Rutgers Law Review also recently hosted a symposium revisiting the debate and its implications for the contemporary marriage movement. See 61 Rutgers L. Rev. 493 et seq. (2009).
145 Stoddard, supra note 9, at 14.
146 Id. at 19.
147 Ettelbrick, supra note 10, at 22, 23.
148 Hunter, supra note 9; Polikoff, What We Ask For, supra note 10.
149 Hunter, supra note 9, at 12.
150 Id. at 16, 17.
on the other hand, contended that rather than transforming the institution of marriage, the advent of same-sex marriage would threaten to transform the relationships of gays and lesbians. She reviewed evidence gathered by Professor William Eskridge (as counsel in one of the early second-wave gay marriage cases) on same-sex marriage in other cultures that showed that despite being of the same sex, the spouses took on distinctly gendered—and distinctly hierarchal—roles.\footnote{151} She predicted that in seeking marriage rights, gays and lesbians would minimize the transformative aspect of their claim and valorize the current institution of marriage.\footnote{152}

In many respects, Polikoff’s and Ettelbrick’s concerns were realized. When same-sex marriage shifted from being perceived as a legal and political impossibility to a viable legal claim and then a reality, the gay and lesbian advocacy movement moved to presenting a unified front in support of expanding marriage rights.\footnote{153} At this point, all of the major national gay and lesbian advocacy organizations have actively supported litigation and legislative efforts to expand marriage rights. And marriage advocates, far from challenging the historical institution of marriage, have celebrated it as unique and special; this has been particularly clear in recent lawsuits that test the constitutionality of establishing alternative legal statuses such as civil unions or domestic partnerships.\footnote{154}

Proponents of expanding marriage rights no longer claim that it will transform gender roles within different-sex marriages. Rather, in response to oft-stated claims that the advent of same-sex marriage would “destroy” the “institution” of marriage, advocates have carefully minimized the impact of the change they seek. Their consistent argument, particularly in public education efforts, lobbying, and the popular press, has been that permitting same-sex marriage would in no way affect different-sex marriages.\footnote{155} Thus, as Courtney

\footnote{151} Polikoff, What We Ask For, supra note 10, at 1538.
\footnote{152} Id. at 1541.
\footnote{153} See, e.g., Schacter, supra note 13, at 394 (discussing evolution of marriage skeptics within the LGBT movement once marriage rights were framed as the definitive issue of gay and lesbian equality).
\footnote{154} Nancy Polikoff has been an outspoken critic of this approach. See, e.g., Nancy D. Polikoff, Equality and Justice for Lesbian and Gay Families and Relationships, 61 Rutgers L. Rev. 529, 546-47 (2009) (describing how in California case, gay rights advocates celebrated the unique status of “marriage” in response to a question of whether the legislature could change the name of the legal relationship for gay and straight couples).
\footnote{155} See, e.g., Freedom to Marry, Moving Marriage Forward: Building Majority Support for Marriage, available at http://www.letcaliforniaring.org/atf/cf/%7B7a706b3a-165f-4950-9144-2fc92fe4d8d1%7D/MOVING%20MARRIAGE%20FORWARD%20REPORT.PDF (“When talking about the freedom to marry, share the truth: gay couples want to join marriage, not ‘change’ it, as opponents like to threaten…—the same rules, same responsibilities, and same respect for all committed couples.”); Marriage Equality
Cahill observes, advocates for expansion of marriage rights have de-emphasized research showing that same-sex couples do tend to differ from different-sex couples, even in ways, like the egalitarian division of household responsibilities, that many might find normatively attractive.\(^\text{156}\) As marriage rights for same-sex couples have become a reality, a few other commentators have recently referred back to the earlier debate to suggest that the move to same-sex marriage invites a reconsideration of the gender-based tensions within different-sex marriage.\(^\text{157}\) But generally it has been absent from the conversation.

This may well have be a smart strategy from litigation, public relations, and fundraising perspectives—and it certainly is an understandable response to the apocalyptic claims of those opposing expansion of marriage rights. But now that same-sex marriage exists, these previously academic debates have on-the-ground significance. They are no longer abstract musing about gender roles. Rather, they are the day-to-day decisions made by (newly married) same-sex couples around the country: Will one husband drop out of the paid workforce to stay home with children while the other husband provides income? Will one wife focus on advancing her career while the other wife provides domestic support? Simply asking the questions highlights the potentially transformative impact of the reality. It merits reconsideration of the extent to which the marriage of same-sex couples presents an opportunity, rather than a threat, for better realizing equality within different-sex marriages.

IV: A Positive Crossover Argument

Sex, gender, and the law of marriage interrelate in the way in which they collectively shape decisions over the allocation of duties within a family. As shown in Parts II and III, both in the 1970s and now, advocates on both sides of the debate speak of intuitive connections between recognition of same-sex relationships and gender roles within different-sex relationships. The actual salience of such connections have been largely assumed rather than established.


\(^\text{157}\) See generally Schacter, supra note 13; cf. Suzanne A. Kim, Charting the Future of Sexual Orientation and Gender Identity Scholarship: Bridging Marriage Skepticism and Marriage Equality, 19 L. & SEXUALITY 170 (2010) (arguing that marriage equality movement can not only “make marriage internally less hierarchal, but … [also] unsettle the hierarchical relationship between marriage and other forms of intimacy under the law”).
This Part explores a body of social science that seeks to demonstrate and explain the ongoing effects of gender within different-sex and same-sex relationships. But this is only part of the story. Traditional “marriage,” in which sex-based distinctions between husbands and wives enforced the separate spheres ideology, relied not only on gender norms but also on substantive provisions that of marriage law and related benefits and tax schemes that encourage specialization. Claims that same-sex couples may provide a model for struggling different-sex couples overlook a fact that has been almost entirely ignored in existing social science research: the data considered in previous studies predates legal marriage for same-sex couples. This Part identifies key questions that should be addressed by future empirical work in this area. The Conclusion then reclaims the crossover argument and runs it in reverse, asking to what extent the new reality of marriage by same-sex couples could jump start the stalled efforts to better achieve balance within different-sex marriages.

A. Different-Sex Marriages

In the background of the debates of the 1970s over marriage and family and the discussion today is the proper division of responsibilities between spouses to meet the needs of a family with dependent children. Before the reforms of the 1970s, the idealized family consisted of a male/breadwinner/father working outside the home and a female/homemaker/mother providing the bulk of childcare and housework. To some extent, this was legally required, although, as numerous historians have pointed out, the reality was far more varied.158 The feminist reformers of the 1970s re-imagined the ideal as a family in which both parents were employed in meaningful work outside the home and shared childcare and housework equally or at least “equitably,” with government support for childcare and flexible employment policies to make this possible. As noted in Part I, they sought not only to remove sex-based classifications from the law but to revise the gendered assumptions that underlay them. This was only partially achieved.

There have been dramatic changes in women’s employment. Women now do typically share breadwinning responsibility. In 1960, only 27% of married women with children under 18 were in the paid labor force;159 by 1970, that figure had already climbed to almost 40% and by 2007, it was up to 70%.160 In 1970, working wives contributed 27% of their families’ total

158 See, e.g. STEPHANIE COONTZ, THE WAY WE NEVER WERE (1992)
incomes; by 2007, that figure had risen to 36%. More strikingly, in 2007, 26% of wives earned more than their husbands. The recession of 2008-2009 compounded this trend, as more men than women lost jobs.

Even though married women’s participation in the labor force has increased dramatically, married men’s contribution to housework has changed far less. In 1965, married women who worked outside the home spent six times as much time on housework as their husbands; now, married women who work full-time spend about twice as much time as their husbands on housework or childcare, but that still means that they are doing two-thirds of the work at home although, since men spend to work more hours in their paid employment, the total number of hours “worked” is actually rather close to equivalent.

That translates into a significant difference in hours. A recent study found that when both spouses work full-time, the wife typically does 28 hours of housework while the husband does just over 16. The kind of housework varies as well; women more typically do the cleaning, cooking, and laundry while men more typically do more sporadic jobs such as house maintenance and lawn mowing. Thus, not only do women do more work but the work that
they do has less flexibility in terms of scheduling. Women also tend to still do more child care, even if working full-time, although some recent studies suggest that this imbalance is narrowing considerably, particularly among younger men.\(^\text{167}\)

There are several leading explanations for this imbalance. The first, primarily developed by Gary Becker, focuses on the efficiencies provided by specialization. Becker argued that households, like companies, benefit from a certain level of specialization.\(^\text{168}\) Both work in the paid workforce and work inside the home require skills that can be developed through experience, and the family unit will benefit collectively if one member of the household develops expertise in the former and a separate member of the household develops expertise in the latter.\(^\text{169}\) Marriage law offers (limited) protection to the dependent spouse against abandonment by the provider spouse.\(^\text{170}\)

Becker initially suggested that women were innately better suited to taking on responsibilities for childcare and for housework due to the biological realities of pregnancy, childbirth, and breastfeeding, and that (different-sex) marriages were a societal solution to bring together the “complementary” skills of male and females into an efficient familial unit.\(^\text{171}\) In later work, he backed somewhat away from this conclusion to suggest that wage discrimination and other factors, rather than simply “innate” differences, could play a significant role in pushing women to specialize in unpaid work.\(^\text{172}\) Nonetheless, his basic premise—that it was maximally efficient for the woman to specialize in domestic work and the man to specialize in breadwinning—remained unchanged.

As women entered the paid market place in increasing numbers, however, the basic premise of specialization needed to be rethought. If both men and women were spending significant hours performing paid work, why did women still tend to do the bulk of the housework and childcare? Economists and other social scientists developed a group of theories stemming from economic exchange principles to help explain this reality. These begin with the premise that housework is unpleasant and that, even within a marriage, individuals will bargain with their spouses to do less of it if they can.\(^\text{173}\)

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\(^{167}\) See, e.g., Kimmel, supra note 165 (reporting that men on average spend 3 hours a day on work days with children under the age of 13 and women on average spend 3.8 hours).


\(^{169}\) Id.

\(^{169}\) Id. at 30.

\(^{170}\) Id. at 37.

\(^{172}\) Id. at 54-79. For a recent critique of specialization in the context of family law, see Katherine K. Baker, Supporting Children, Balancing Lives, 34 PEPPERDINE L. REV. 359 (2006).

\(^{173}\) See, e.g., Sarah Thebaud, Masculinity, Bargaining, and Breadwinning: Undertanding Men’s Housework in the Cultural Context of Paid Work, 24 GENDER &
Therefore, an individual who earns more than his spouse will bargain to do less housework, using his extra earning power as the leverage in the implicit or explicit deal-making. Unlike Becker’s specialization theories, these exchange theories are typically presented as sex-neutral. Whichever member of the couple earns more should be able to use this leverage (either implicitly or explicitly) to perform less housework.

Economic exchange theories suggest, however, that in general men are more likely to have the power in the relationship to “bargain out” of housework because on average they earn more than women. Despite guarantees of equal treatment in employment law, a significant wage gap between men and women persists. Women who work full-time earn only about 80% of what men who work full-time do. Women are also far more likely than men to work part-time; this is particularly common for married mothers. This dramatically widens the wage gap: a comparison of men’s and women’s wages in prime earning years that includes women who work part-time and/or part-year found that women earn just 38 cents for every dollar men earn. And women tend to marry men a little older than they. This means that when children are born, men tend to be further along in their careers and thus earning more than their wives; accordingly, if one member of the family is going to curtail work to take on additional household responsibilities, it generally makes “sense” for it to be the woman.

But even controlling for such realities (which themselves owe much to the historic separate spheres ideology), economic theories still do not adequately explain the housework imbalance in some families. Women who

SOCIETY 330, 332 (2010) (describing these economic exchange based theories). A similar theory focuses on time allocation, suggesting that the spouse that spends less time in the paid workforce will typically perform a greater percentage of the housework; often this will correlate with the economic exchange theory but not always. In general, results tend to be more robust for the resource exchange hypothesis than the time allocation ones. Economic exchange theories are more often used to explain housework allocation than childcare, perhaps because the premise that childcare is a burden to be bargained away from is less likely to be correct.

174 There are numerous explanations for this wage gap. See generally, e.g., Michael Selmi, Family Leave and the Gender Wage Gap, 78 North Carolina L. Rev. 707 (2000) (collecting sources). Notably, marriage tends to enhance men’s salaries while it decreases women’s. See id. at 726.

175 Databook 2009, supra note 160 (table 20) (25% of employed women usually worked part-time compared with 11% of employed men).

176 Moe & Shandy, supra note 164 at 64 (noting that because married men tend to work considerably more hours outside the home, the actual hours “worked” by married men and married women are, on average, about equal).

177 Heidi Hartmann et al., How Much Progress in Closing the Long-Term Earnings Gap? in THE DECLINING SIGNIFICANCE OF GENDER? (Francine D. Blau et al. eds., 2006)


179 See id.
earn more than their husbands also do a greater share of the housework than their husbands—and even more surprising, several studies have found that as the gap in their earnings widens, the gap in the housework split also tends to widen.\(^\text{180}\) In other words, a woman who far out-earns her husband will tend to do a considerably larger share of the housework than a woman who earns about the same amount as her husband. These findings have led to alternative theories regarding the division of housework that explicitly focus on gender. Social scientists speculate that in couples where the woman earns more than the man, they “correct” for the “gender deviance” by embracing a traditional gendered split regarding household responsibilities.\(^\text{181}\)

Gender based views can help shape the division of responsibility even among couples where women do not earn more than men. Studies have found that couples who hold strongly traditional ideas about gender roles, and particularly if the male in the couple does so, are more likely to assign the bulk of housework or child work to the wife, regardless of the split of income earning.\(^\text{182}\) Other researchers have found fathers with “feminist attitudes” perform significantly more childcare than fathers with more traditional attitudes.\(^\text{183}\) In short, traditional expectations regarding appropriate gender roles for men and women continue to push women to do a greater share of housework and childcare than pure economic theory would predict. Interestingly, some research suggests that couples internalize these societal expectations so significantly that very unequal divisions of responsibilities—and ones that are clearly not inline with the balanced exchange that economic theory suggests “should” happen—are nevertheless perceived by both members of the household as “fair.”\(^\text{184}\)

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\(^{181}\) See id.


\(^{184}\) See, e.g., Michael Braun et al., *Perceived Equity in the Gendered Division of Household Labor*, 70 J. of MARRIAGE & FAMILY 1145 (2008).
These factors collectively give rise the reality that Arlie Hochschild has famously described as the “second shift.” Women work significant hours outside the home and then return to a significant child care and housework responsibilities at home. And labor force participation and housework division are only part of the story. Working mothers are far more likely than working fathers to miss work for children’s illnesses or when childcare arrangements break down. Working mothers are also far more likely than fathers to forego or transition out of time-intensive or travel-intensive careers when children are born. They are more likely to quit when required to work extensive overtime; they are also more likely to quit when their spouses are required to work extensive overtime. It is hard to measure to what extent these trends are due to individual “choice.” Women and men both face significant societal pressures to conform to traditional gender roles. Additionally, discrimination by employers against mothers (even so-called “benign” discrimination such as an assumption that a mother of a young child would not want a promotion with significant travel responsibilities) can compound these effects; likewise, employers often penalize men who seek to play a greater caregiving role than society expects.

In other words, notwithstanding more than thirty years of sex-neutral family law and employment law, most couples continue to divide responsibilities along distinctly gendered lines. And, strikingly, many state that they prefer it. In a recent, large-scale survey, a majority (albeit not a large one) of Americans stated that they believed that it was best for society for men to work outside the home and women to remain home.

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186 See, e.g., Moe & Shandy, supra note 164, at 63 (citing a study finding that 2/3 of “highly educated employed” women report taking time off to take a child to a doctor while only 7% of their husbands had).
187 See id. at 52-57.
188 Youngjoo Cha, Reinforcing Separate Spheres: The Effect of Spousal Overwork on Men’s and Women’s Employment in Dual-Earner Households, 75 AM. SOC. REV. 303 (2010); see also, generally, Moe & Shandy, supra note 164(describing phenomenon they dub the “100-hour couple” where extensive overtime demands on both members of a couple lead to the wife dropping out of the labor force).
190 John Halpin & Roy Teixeira, Battle of the Sexes Gives Way to Negotiations, in A Woman’s Nation, available at http://www.awomansnation.com/americanPeople.php. See also, e.g., Arland Thornton & Linda Young-De Marco, Four Decades of Trends in Attitudes Towards Family Issues in the United States: The 1960s through the 1990s, 63 J. OF MARRIAGE & FAMILY 1009, 1014, 1032 (2001) (“The data … suggest that there may have been not only a leveling off of the egalitarian trend in the late 1990s but a small reversal of a long-term pattern. … A substantial number of Americans—more
commentators have recently described policy efforts to help (different-sex) families better balance work and family as “stagnant”\textsuperscript{191} and at an “impasse.”\textsuperscript{192}

B. Same-Sex Relationships

In different-sex families, it is often difficult to determine the relative significance of specialization gains, economic exchange dynamics, and gender pressures, since they all tend to mutually reinforce a traditional gendered divide within a family. Same-sex relationships therefore offer the opportunity to help disentangle the distinct roles that are played by sex, gender, societal expectations in the division of responsibilities within families. In 1983, Philip Blumstein and Pepper Schwartz published a book with the results of the first large-scale study of married (heterosexual) couples, unmarried heterosexual couples, and same-sex couples.\textsuperscript{193} They found that most heterosexual married couples still divided responsibilities along distinctly gendered lines; same-sex couples, by contrast divided housework and decision-making more equally. The authors noted, however, that same-sex couples accordingly lost some of the “efficiencies” associated with traditional gender roles.\textsuperscript{194}

More recent studies have consistently found that lesbian and gay couples divide housework more equally than different-sex couples.\textsuperscript{195} As one researcher put it, “Although members of gay and lesbian couples do not divide household labor in a perfectly equal manner, they are more likely than members of heterosexual couples to negotiate a balance between achieving a fair distribution of household labor and accommodating the different interests, skills, and work schedules of particular partners.”\textsuperscript{196} One of the most detailed examinations is a study that compared same-sex couples who registered for civil unions during the first year that they were legalized in Vermont with

\begin{itemize}
\item men than women—continue to believe in men having primary responsibility outside the home, with women being in charge of the home.”
\item Julie C. Suk, \textit{Are Gender Stereotypes Bad for Women?: Rethinking Antidiscrimination Law and the Work-Family Conflict}, 110 COLUM. L. REV. 1, 13 (2010).
\item PHILIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES (1983).
\item Id. at 324-25.
\item Lawrence A. Kurdek, \textit{What Do We Know About Gay and Lesbian Couples?} 14 CURR. DIR. PSYCHOL. SCIENCE 251, 252 (2005).
\end{itemize}
married their heterosexual siblings.\textsuperscript{197} The researchers determined that, as they expected, the lesbian and gay couples divided responsibility for housework considerably more equally than heterosexual couples; in fact, referring to the various economic and gender-related theories put forth to explain different-sex couples’ division of responsibilities, the researchers observed that sexual orientation was a stronger predictor of equality of division than income. That is, same-sex couples with significantly different incomes were more likely to divide their responsibilities for housework relatively equally than different-sex couples with the same incomes.\textsuperscript{198}

Many studies of lesbian parents also find a more equal sharing of parenting responsibilities than in different-sex couples.\textsuperscript{199} One study that looked specifically at couples transitioning into parenthood recorded consistent efforts by the couples to develop special “mothering” opportunities for the non-biological mom, such as taking on bath-time routines.\textsuperscript{200} In sharp contrast to different-sex couples, where the birth of a child often signals not only a decrease in the mother’s paid work hours but an increase in the father’s, several of the couples reported that both the biological and the non-biological mother decreased paid work hours to better accommodate childcare responsibilities.\textsuperscript{201} Another study, which compared lesbian couples raising children to heterosexual couples, likewise found that lesbian mothers in a couple each tended to spend about the same number of hours each week in paid employment and to split childcare responsibilities relatively equally, while in heterosexual families, fathers spent twice as much time in paid employment as their wives and considerably less time providing direct childcare.\textsuperscript{202} On the other hand, some

\textsuperscript{197} See Solomon et al., supra note 15.
\textsuperscript{198} See id. Notably, since the heterosexual couples included a sibling of the gay or lesbian couple, the background and upbringing was similar for at least half of each couple, raising “questions about how women and men are socialized to assume gendered roles within adult relationships.” Id. at 573.
\textsuperscript{199} See, e.g., Charlotte J. Patterson, Family Relationships of Lesbians and Gay Men, 62 J. OF MARRIAGE & THE FAMILY 1052, 1054 (2000) (collecting studies); Peplau & Fingerhut, supra note 195, at 415 (collecting studies). There are many more studies of lesbian parents than there are of gay male parents. See Peplau & Fingerhut, supra note 195, at 415.
\textsuperscript{201} Id.
\textsuperscript{202} Charlotte J. Patterson et al., Division of Responsibility Among Lesbian and Heterosexual Parenting Couples: Correlates of Specialized Versus Shared Patterns, 11 J. OF ADULT DEVELOPMENT 179, 187 (2004). The researchers also found that despite similar educational background, heterosexual mothers had less prestigious paid work than heterosexual fathers or than lesbian mothers. Id.
(mostly rather dated) studies found that, like different-sex couples, specialization was common in same-sex families raising children together.\textsuperscript{203}

Of course, these findings do not mean gender does not matter in same-sex couples; rather, they simply suggest that when both members of the couple are the same sex and thus share the same gendered assumptions, they may more readily share responsibilities both within and outside the home more equally. Indeed, some of the most interesting evidence of this comes from studies that explore what families consider an “ideal” split of responsibility. Same-sex couples (like the second wave feminists) typically articulate an equal split of home and work responsibilities as “ideal.”\textsuperscript{204} If the couple’s actual division departs too radically from this, one or the other member typically perceives it as unfair. That said, some same-sex couples do specialize with one partner playing the primary breadwinning role and one playing the dependent caregiver role. And interestingly, at least one researcher has argued that the phenomenon of correcting for “gender deviance,” documented in different-sex couples,\textsuperscript{205} may play in reverse for such couples.\textsuperscript{206} Specialization within a same-sex couple necessarily means that one member of the couple is departing entirely from gender-based assumptions. The researcher found that such couples “correct” for the gender deviance by claiming that the split is more equal than it actually is.\textsuperscript{207}

Despite these variations, the vast majority of these studies find that same-sex couples share responsibilities for childrearing and for housework more equally than different-sex couples, and that they also tend to work more equal amounts of hours outside the home. Thus, naturally, researchers have suggested that gay and lesbian couples may be a model for different sex couples. The Vermont researchers, for example, suggest that “same-sex couples are a model for ways of equalizing the division of housework.”\textsuperscript{208} These echo

\textsuperscript{203}Peplau & Fingerhut, \textit{supra} note 195, at 415 (collecting studies).
\textsuperscript{204}See, e.g., Patterson et al., \textit{Division of Responsibility, supra} note 202, at 183.
\textsuperscript{205}See \textit{supra} notes 180-81.
\textsuperscript{206}See \textsc{Christopher Carrington}, \textsc{No Place Like Home: Relationships and Family Life Among Lesbians and Gay Men} 52-53 (1999). Christopher Carrington conducted an in-depth study of 26 gay and 26 lesbian couples who had been together at least two years and who were living together. In addition to interviewing the members of the couples about their division of responsibility, he also observed the families each for one week. In contrast to many other studies that find relatively equal sharing of household responsibilities, Carrington found most of the couples specialized, with one member of the household performing considerably more of the domestic tasks than the other. He speculates that this may be due to the fact that the couples had been together for a longer time period than those in many other studies and that the study design allowed him to uncover the extent to which such specialization occurred notwithstanding the couples’ statements that they shared responsibilities equally. See \textsc{Carrington} \textit{id.} at 216-18.
\textsuperscript{207}\textit{Id.} at 52-53.
\textsuperscript{208}Solomon et al., \textit{supra} note 15, at 572.
the claims made a generation ago by Thomas Stoddard and Nan Hunter that recognition of marriage rights for same-sex couples could help upend the separate spheres mentality for different-sex couples. Although, as noted above, current advocates for marriage rights tend to eschew such arguments, a few commentators in the popular press have picked up on this theme. There is promise—but it is only a potential promise. These claims overlook a key factor that is often unnoticed: the data sets used in these studies uniformly predate legal marriage.

C. Same-Sex Marriages

The empirical studies described in the previous section typically compare heterosexual married couples to same-sex couples in long-term relationships. These differ in two significant ways. The first, and the one that has been the focus of the studies, is obviously whether the members of the couple are of the same or different sexes. The second distinction is whether the couple is married or not. Although the latter distinction is rarely considered significant in the study design, and in fact is often completely ignored, it may be an important factor. None of the data sets used in the studies described in the previous part concern married same-sex couples. That is likely soon to change. A rapidly growing number of states permit same-sex couples to marry or have created a status, such as civil unions or domestic partnerships, that provides all of the state-level benefits of marriage. As of August 2010, Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont, as well as the District of Columbia, have legalized same-sex marriage, and California, Nevada, New Jersey, Oregon, and Washington have state law providing the equivalent of spousal rights to same-sex couples within the state.

209 See, e.g., Pope, supra note 15.
210 A few studies mention the absence of legal marriage as a potential factor that merits future study. See, e.g., Patterson et al., Division of Labor, supra note 183, at 188. Lee Badgett offers a fuller discussion of the possible implication of the absence of the legal benefits of marriage on the specialization—or lack thereof—of lesbian couples. See M. V. Lee Badgett, Money, Myths, and Change: The Economic Lives of Lesbians and Gay Men 160-63 (2001).
211 The Solomon et al. study of members of civil unions in Vermont is a partial exception, since civil unions provide the rights and benefits of marriage, albeit without the actual moniker of “marriage.” However, Vermont does not have a residency requirement for eligibility for civil unions and, since Vermont was the first state to recognize a legal status comparable to marriage, many out-of-state couples registered for civil unions. Accordingly, only one-fifth of the couples in the study were from Vermont. Solomon et al., supra note 15, at 564. At the point where the study was conducted, no other state was recognizing civil unions as granting the benefits of marriage under state law. Thus, the vast majority of study participants had minimal or no legal benefits from their civil union status.
212 See Human Rights Campaign, supra note 11.
Additionally, New York and Maryland recognize same-sex marriage legally entered into in another jurisdiction, and Colorado, Hawaii, Maine, and Wisconsin provide at least some of the benefits of marriage to same-sex couples that register as domestic partners. The questions thus are newly salient.

Same-sex couples seeking marriage rights seek not only the public validation and personal satisfaction that comes with marriage; they seek the tangible legal protections and economic benefits of marriage. A decision to marry is a statement from each member of the couple that they intend to remain in the relationship, ideally for life. Marriage naturally encourages a shift from an individualized focus to a family-based focus for decision making. Members of a family develop interdependencies. They can take advantage of individual skills and aptitudes and reap gains from specialization. They can subordinate immediate interests of one or both members of the couple for expected collective long-term gain. In other words, marriage itself encourages specialization. Of course, unmarried couples may likewise plan from a family perspective, but they do so with much less security and protection if the relationship unravels.

Marriage law obviously makes it harder to exit a relationship. A court must adjudicate a divorce and in most states it has the power to award a share of the couple’s property, regardless of title, as well as at least some maintenance, to a dependent spouse. Courts are generally instructed to “equitably divide” such property and a typical statute requires consideration of factors such as the extent to which one spouse has provided care for children or other services that facilitate, as well as the relative ability of the spouses to support themselves. Although far from a comprehensive safety net, the law offers a dependent spouse a claim to (at least some of the) income and property accumulated during the marriage and the possibility that one spouse will be required to pay maintenance to the other. Empirical studies have attempted to track the significance of such laws on decision-making by different-sex couples. Although researchers disagree as to the significance of certain factors, they generally find that changes in the law of divorce do affect bargaining between spouses and the willingness to invest in marriage-specific capital. In

213 See id.
214 Benefits facilitating specialization are only some of the legal benefits of marriage. Others important legal benefits of marriage include the right to make medical decisions for a spouse, parental rights for the children of a spouse, and inheritance rights. See, e.g., 23 PA. CONS. STAT. § 3501 (allowing for the division of marital property upon divorce).
215 See, e.g., 23 PA. CONS. STAT. § 3502 (factors considered in equitable distribution include the contribution by one party to the increased earning power of the other, including contributions as a homemaker, and the opportunity for future income). Other factors, however, may push in favor of significant property awards to a breadwinning spouse. See id.
other word, laws protecting dependent spouses will make specialization more likely.\footnote{See, e.g., Betsey Stevenson, The Impact of Divorce Laws on Marriage-Specific Capital, 25 J. OF LABOR ECON. 75 (2007).}

In addition to laws that generally encourage each member of a couple to invest in the relationship, some laws affirmatively encourage breadwinner/dependent specialization. Federal tax law, for example, imposes a “marriage penalty” on married couples who earn relatively comparable amounts—they pay more than they would pay together if they were able to file individual returns—and a “marriage bonus” for couples where one member of the couple earns significantly more than the other.\footnote{See, e.g., Lily Khang, One Is the Loneliest Number: The Single Tax-Payer in a Joint Return World, 61 HASTINGS L. J. 651, 657-59 (charting bonuses and penalties in 2000 tax law).} If one member of the couple stays home and provides childcare or housework services, the couple pays no tax on the imputed value of such services, further increasing the marriage “bonus” for couples with such specialization.\footnote{Id. at 662.} Additionally, employers often make healthcare available to an employee and his or her spouse and dependents; since individual health care plans are often prohibitively expensive, the access to such derivative benefits through marriage can be a key factor in permitting one adult in a family to stay home.\footnote{The new health care law may change this to some extent. However, it is expected that most individuals will continue to receive health care through their employers or their spouses’ employers.} Even if employers offer such benefits to the partners of gay and lesbian employees, they must pay tax on the value of the policy because they are not married.\footnote{See M.V. Lee Badgett, Unequal Taxes on Equal Benefits (2007), available at http://www.law.ucla.edu/williamsinstitute/publications/UnequalTaxesOnEqualBenefits.pdf.}

Social security likewise provides far greater collective benefits to couples where one partner earns much more than the other than to a household with an equivalent aggregate income where each spouse earns roughly equal amounts.\footnote{Eugene Steurle et al., Does Social Security Treat Spouses Fairly? (1999), available at http://www.urban.org/publications/309257.html.} These differences can be quite significant. A family with a single breadwinner who earns twice the national average wage will, over a typical lifetime, collectively receive $100,000 more in social security benefits than a family with two breadwinners each of whom earns the national average.\footnote{Id.} This disparity is due to the “spousal benefit,” which was designed to protect dependent wives when social security was created in the 1930s, by permitting a dependent spouse (now male or female) to collect 50% of the benefits earned by a breadwinning spouse, in addition to the benefits collected by the

\footnotesize{\begin{itemize}
  \item \footnote{See, e.g., Betsey Stevenson, The Impact of Divorce Laws on Marriage-Specific Capital, 25 J. OF LABOR ECON. 75 (2007).}
  \item \footnote{See, e.g., Lily Khang, One Is the Loneliest Number: The Single Tax-Payer in a Joint Return World, 61 HASTINGS L. J. 651, 657-59 (charting bonuses and penalties in 2000 tax law).}
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  \item \footnote{Eugene Steurle et al., Does Social Security Treat Spouses Fairly? (1999), available at http://www.urban.org/publications/309257.html.}
  \item \footnote{Id.}
breadwinning spouse him or herself.\textsuperscript{224} (Originally, these benefits were limited to dependent wives, and Phyllis Schlafly has used the possibility that they would be eliminated as one of her arguments against the ERA;\textsuperscript{225} rather than eliminating the spousal benefits, they were simply made sex-neutral.)

Although opting out of the paid labor market is often conceived as “luxury” for the middle- or upper-class, two of the most significant government assistance programs for low-income families also encourage, or at least permit, a breadwinner-caretaker divide for married couples. In 1996, welfare was dramatically reformed to move recipients from “welfare to work.” Supporters of the legislation justified work requirements by pointing to the statistics, discussed above, showing dramatic increases in the number of mothers in the paid work force and arguing that poor women receiving government support should likewise be required to work outside the home.\textsuperscript{226} But as Noah Zatz has demonstrated, the federal legislation actually imposes work requirements on families collectively. In single-parent families, the parent (mostly mothers) must work to receive benefits, but two-parent families can receive benefits so long as either parent, or the two parents together, meets slightly higher work requirements.\textsuperscript{227} Similarly, the Earned Income Tax Credit determines eligibility for benefits on the basis of household earnings, with identical or almost identical standards applying for single-parent households and dual-parent households.\textsuperscript{228} Under both programs, since the value of childcare provided by a parent is not imputed as income, it will often make sense for one parent to provide childcare and the other to perform the paid work.\textsuperscript{229} Indeed, although

\textsuperscript{224} See id.
\textsuperscript{226} See, e.g., Boushey, supra note 161, at 11.
\textsuperscript{227} See Zatz, supra note 160, at 322. TANF requires a single parent to work (or participate in other qualifying activities, which include some education and training programs) at least 30 hours per week, although some exceptions apply to parents with children under 6. \textit{Id.} at 317. Two-parent families must work collectively at least 35 hours per week (far less than the 60 hours per week that would be the equivalent of simply twice the single-parent requirement). \textit{Id.} at 322. The majority of states permit the two-parent work requirement to be satisfied by either parent or by the parents collectively; a few encourage or require that they be satisfied by a single breadwinner. \textit{Id.} at 326-27. By contrast, a significant minority of states require both parents to do at least some work and some further require an equal division. \textit{Id.}
\textsuperscript{228} See Gregory Acs & Elaine Maag, \textit{Irreconcilable Differences? The Conflict between Marriage Promotion Initiatives for Cohabiting Couples with Children and Marriage Penalties in Tax and Transfer Programs}, \textsc{Urban Institute} (2005); Zatz, supra note 160, at 328.
\textsuperscript{229} \textit{Id.} at 341.
the EITC has been shown to increase single mothers’ employment, it seems to
decrease married mothers’ employment.230

Thus, as same-sex couples are able to marry, they gain access to
significant legal rights and benefits that both unify the family as an
economically interdependent unit and encourage a provider/dependent split of
responsibilities. At the margins, at least, the combination of substantive
marriage laws and tax and benefits policies will push a couple towards
specialization because this provides the greatest aggregate benefits.

The studies discussed in the previous part, showing that same-sex
couples are more likely to participate equally in the workforce and to divide
household responsibilities more equally than different-sex couples, may simply
reflect that necessity that as an unmarried couple, each individual will do more
to “look out” for his or her own interests or that the absence of a legal union
makes it prohibitively expensive or impossible to achieve certain benefits that
can flow from specialization in different-sex married couples.231 If this is the
case, the more rights of marriage that same-sex couples can access, the more
likely one would see divisions of responsibilities—including one member of a
family dropping out of, or minimizing participation in, the paid workforce—
that mirror those of heterosexual married couples.

Future studies which use data from same-sex couples who are married
thus can greatly increase our understanding of the relative importance of such
legal rights. Importantly, it still is not possible to fully compare same-sex
married couples to different-sex married couples because the federal Defense of
Marriage Act (DOMA) denies same-sex couples any of the many federal
benefits of marriage.232 (For any given couple, however, the inapplicability of
federal law may not be an unmitigated disadvantage. As noted, under federal
law, married couples in which each member of the couple earns roughly
equivalent amounts face a “marriage penalty” relative to the amount that they
would pay as single persons; thus, for same-sex married couples with relatively

230 Nada Eissa & Hilary Williamson Hoynes, Taxes and the Labor Market Participation
231 The specific tax, pension, social security, and welfare benefits discussed above are
simply unavailable to same-sex couples who cannot marry. Some of the other benefits
of marriage, particularly upon divorce or death, may be achieved through private
contract. This is of course expensive and time-consuming. It also depends on a couple’s
recognition that such contracts would be advantageous. Further, to the extent that a
couple disagrees (for example, that a breadwinning spouse would be unwilling to pre-
commit to income sharing upon the divorce), the shift from a default, under legal
marriage, of sharing, to a default, in a non-marital union of not-sharing, can be quite
significant. That said, some states will apply common law implied contract principles to
co-habitants that can in certain circumstances protect a dependent partner; other states
categorically refuse to do so. Compare Marvin v. Marvin, 557 P.2d 106 (Ca. 1976) with
equal incomes, the inability to file joint federal taxes may actually reduce the 
aggregate amount of taxes they owe.) DOMA also permits states to refuse to 
recognize out-of-state marriages between persons of the same sex, meaning that 
if same-sex couples move from a jurisdiction that permits marriage to one that 
does not, they will no longer have the benefits of marriage.

Notably, however, a federal district court recently held portions of 
DOMA to be unconstitutional.233 The demise of DOMA would obviously be a 
significant benefit for same-sex married couples. But the current moment, when 
the federal benefits of marriage are not available, offers the opportunity (which 
may be fleeting) to compare the relative significance of aspects of federal law 
that push couples towards specialization and aspects of state law that do. If the 
decision striking down the provisions of DOMA that limit access to federal 
benefits is upheld, or if DOMA were repealed, there would be greater 
opportunity for a true comparison between different-sex and same-sex married 
couples, but we would lose the possibility to probe the relative significance of 
the state versus federal factors.

More generally, the current variation in marriage rights across the 
country serves as a true “laboratory of the states.”234 This permits research that 
probes the significance of different kinds of property protections and divorce 
provisions. Comparisons of couples’ behavior in states that permit marriage 
with those that have established civil unions or other “equivalent” statuses can 
likewise help tease out the actual significance of the moniker marriage relative 
to the legal rights and benefits that flow from it. Again, this may be a time-
limited opportunity. As noted above, a significant federal challenge to 
California’s Proposition 8, which banned marriage by same-sex couples, is 
currently pending.235 It is expected to reach the Supreme Court. Of course, it is 
impossible to predict how the Court will resolve the matter. But if it were to 
find not only that California’s law was unconstitutional but do so on grounds 
that invalidated other states’ bans, the variation among states would quickly 
end. Again, this obviously would be a significant step forward in achieving 
equality for gay and lesbian couples, but it would mark the end of the 
possibility of empirical studies that take advantage of the current variability.

234 Cf. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1931) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”)
The extent of legal recognition of marriage and derivative benefits is not the only factor that could play a role in how same-sex versus different-sex married couples divide responsibilities. One important difference may be the rate of childrearing. Although some studies have found that the proportion of lesbian households with children is comparable to the proportion in heterosexual women’s households, others report lower rates. And gay male households are far less likely to have children. Since specialization among different-sex couples increases dramatically as children enter the equation, this could be a very significant factor. But, notably, it would interact dynamically with the advent of marriage rights, especially since many same-sex couples seek to marry precisely to obtain protections for children.

Additionally, as noted above, same-sex marriages are not immune from societal pressures related to gender roles. Engrained gender-based assumptions may put pressure on same-sex couples just as they do on different-sex couples. It could be that gay male couples would react to these possibilities differently from female lesbian couples. This offers an additional opportunity for teasing out, in a different way, the relative significance of gender compared to marriage in both same-sex and different-sex relationships.

There are other less directly related factors that could play a significant role. Third parties may treat same-sex marriages differently from different-sex marriages and this variation could have more to do with the sexual orientation of the couple than with their sex or gender. For example, an employer might discriminate against members of a same-sex married couple based on their sexual orientation rather than, for example, a decision to seek flexibility from work to facilitate work. Notably, however, preliminary evidence from Massachusetts, where same-sex marriage has been legal for the longest period of time, suggests that this is not much of a factor. In fact, the recognition of marriage rights for same-sex couples may itself decrease the extent of animus or discrimination based on sexual orientation. Whatever the significance of such other factors, clearly the fact that same-sex marriages now exist in a growing number of jurisdictions offers a significant, and potentially time-limited, opportunity to probe the relationship between sex, gender, and the law in marriage.

236 See, e.g., BAGDERTT, supra note 210, at 153-55 (collecting studies).
237 See id.
238 See also Schacter, supra note 13, at 400-01 (making similar point).
239 Cf. N.J. CIVIL UNION REVIEW COMM’N, THE LEGAL, MEDICAL, ECONOMIC & SOCIAL CONSEQUENCES OF NEW JERSEY’S CIVIL UNION LAW (2008) 20-24, available at http://www.state.nj.us/lps/dcr/downloads/CURC-Final-Report-.pdf (referencing research from Massachusetts finding third parties such as employers typically treated same-sex marriages the same as different-sex marriages in terms of benefits, even when not required to do so by federal law).
Conclusion: Equality Reconsidered

The traditional structure of sex-segregated marriage laws subordinated the interests of a caretaking wife to those of her breadwinning husband. The feminist reformers of the 1970s re-envisioned the ideal marriage as a union in which each spouse would take on substantial and meaningful paid work and share in domestic responsibilities. Despite the demise of sex-based classifications within marriage law, that ideal has proven extremely elusive. Rather, as described above, in the typical different-sex family today, the wife participates in the paid marketplace and still takes on primary responsibility for house and childcare. Since men typically work more hours in the paid labor force than women, in many families this results in what might be considered an equitable divide. But it has had limited utility in disestablishing the separate spheres ideology that underlay the erstwhile legal distinctions that mandated this division. This is all the more true in families where a high-earning woman compensates for gender deviance by also shouldering the majority of domestic work.

Current proposals to address the imbalance in different-sex families fall generally into two camps. The first argues that gender roles are so deeply entrenched in society that we need policies specifically designed (and potentially employing sex-specific requirements) to counter these norms and thus enforce a more equal sharing of responsibility between men and women. The second approach, by contrast, suggests that gender roles are so deeply entrenched, or that they respond to actual biological or physiological differences between men and women, that rather than striving for an “equal” split of household and workplace responsibilities between men and women, we instead need to revalue the feminine contribution and make it easier for women to spend time out of the paid workforce, at least when their children are young.

The new reality of marriage rights for same-sex couples offers the opportunity to revisit these questions from a fresh perspective. As noted in the previous section, same-sex marriages offer the opportunity for empirical research to tease out the relative importance of sex, gender, and the laws and benefits of marriage. The fact that such studies do not yet exist may actually offer an unexpected benefit: Because the results are not yet in, it may be easier to consider potential results with an open mind. Broadly speaking, there are two findings that are possible. One is that, notwithstanding marriage, same-sex couples continue to share responsibilities on the home and work front relatively equally. This would suggest that gender is the key factor in different-sex

240 See supra note 164 and accompanying text.
241 See supra note 181 and accompanying text.
242 See, e.g., Selmi, The Work-Family Conflict, supra note 191, at 573-74 (summarizing these two approaches); WILLIAMS, UNBENDING GENDER, supra note 114, at 226-30 (similar).
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couples’ specialization. Such findings would lend support to current policy proposals that seek to achieve work/family balance by adopting policies that are designed to counter existing gender norms.\textsuperscript{243}

The opposite potential result is that upon being permitted to marry—and particularly if the federal benefits of marriage become available—same-sex couples will move away from sharing responsibilities for children and housework relatively equally and instead move towards specialization. This would suggest that the law and social significance of marriage is comparatively more important than sex or gender in encouraging specialization in couples. If the normative ideal remains a marriage in which spouses equally share responsibilities for breadwinning and caretaking, this finding would suggest that reforms should focus on modifying, or, more provocatively, dismantling the law and benefits that flow from marriage itself.\textsuperscript{244}

But it also invites reconsideration of the normative vision of equality within marriage. Perhaps rather than idealizing a marriage in which both spouses equally share breadwinning and caregiving responsibilities, it is appropriate to accept and expect a certain level of specialization in many marriages.\textsuperscript{245} Such an approach would call for more robust protections for a spouse who does such caregiving and more flexible workplace policies to accommodate it. In the past, it would be almost impossible to disaggregate such a statement from gender-based assumptions regarding which parent would play the caretaking role. And some policymakers and theorists would likely reject such a vision of equality out-of-hand because they assume that it would perpetuate the inferiority and subordination of women. This is a quite valid concern. Domestic roles are still little valued in our society and are still largely filled by women. But policies crafted today or in the future to accommodate caregiving within families are necessarily different from the sex-specific responsibilities for wives that they replace. The simple reality of same-sex married couples, as well as the relatively small number of different-sex couples in which it is the husband, rather than the wife, who drops out of or minimizes participation in the paid workplace, changes the story.

\textsuperscript{243}See, e.g., Selmi, Family Leave, supra note 174, at 595 (suggesting mandatory paternity leave or rewards for employers that adopt policies that successfully increase paternity leaves); Baker, Supporting Children, supra note 172 (suggesting that to claim custody a parent would need to show a pre-existing “significant (defined in terms of time) relationship with his or her child”) (internal parentheses original).


\textsuperscript{245} See, e.g., Suk, supra note 192, at 42 (arguing that if most mothers desire to take a maternity leave, than a “paternalistic” policy that mandates such a leave protects the interests of the majority against “superwomen” who would return to work immediately).