

## SKEPTICAL MARRIAGE EQUALITY

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*Two major approaches generally characterize the political left's debate concerning same-sex marriage—marriage equality, viewing the right of access to marriage as an important civil right,<sup>1</sup> and what I will call “marriage skepticism,” viewing the effort to obtain marriage rights as troublingly limited and assimilationist.<sup>2</sup> But a third outlook exists: the underexamined position that simultaneously supports same-sex marriage and critiques marriage. Existing scholarly efforts have not articulated this third position in a way that synthesizes the ideas of marriage equality and marriage skepticism.*

*In this Article, I set forth an approach for what I call “skeptical marriage equality,” exploring how we can be skeptical of marriage as a legal category and of its privileged place in law and*

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<sup>1</sup> See, e.g., EVAN WOLFSON, *WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE'S RIGHT TO MARRY* 161–82 (2004); Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, *OUT/LOOK: NAT'L GAY & LESBIAN Q.*, Fall 1989, at 9, 9–13.

<sup>2</sup> See generally, e.g., Paula L. Ettelbrick, *Since When is Marriage a Path to Liberation?*, *OUT/LOOK: NAT'L GAY & LESBIAN Q.*, Fall 1989, at 9, 14–17 (arguing that marriage is inconsistent with the goals of the gay and lesbian rights movement); 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) [hereinafter Polikoff, *We Will Get What We Ask For*] (arguing that the pursuit of same-sex marriage will undermine critique of the institution of marriage); Nancy D. Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 *AM. U. J. GENDER SOC. POL'Y & L.* 167 (1999) [hereinafter Polikoff, *Martha Fineman*] (approving Fineman's proposal to abolish marriage as a legal category).

society, but also favor marriage equality for same-sex couples. Exploring the feasibility and possibilities of this hybrid position is critical to a nuanced approach to same-sex marriage. Without this position, the law affecting family will continue to perpetuate a marriage-based system of legal and public support to the exclusion of other family models.

How can we harmonize the powerful and compelling critique of marriage advanced by feminist and gay rights scholars with support of same-sex marriage? This Article argues that rather than being entirely exclusive of one another, as is often assumed to be the case, marriage equality and marriage skepticism share more than is commonly recognized. We might actually view marriage skepticism's interest in pluralism and family function as paving the way for the movement for marriage equality. Conversely, marriage equality may help achieve some of the goals of marriage skepticism. Same-sex marriage may not only make marriage internally less hierarchical, as feminists have argued, but may also, and even more importantly, assist in unsettling the hierarchical relationship between marriage and other intimacy forms to support a more pluralistic vision for state recognition of family connection. The pursuit of same-sex marriage facilitates the pluralistic goals of the marriage critique by drawing attention to the gender-hierarchical and sexuality norm-enforcing construction of traditional marriage. Marriage equality may also promise to lead to greater pluralism as advocated by marriage skepticism by constituting marriage in a way that redefines it away from sex-difference and toward core values that are at stake in marriage, such as commitment and caregiving. A fundamental shift in the socially-privileged status of marriage may pave the way toward more functional understandings of family and intimacy overall.

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## INTRODUCTION

The debate on the political left over same-sex marriage generally divides into two modes of thought: “marriage equality”<sup>3</sup> and “marriage skepticism.”<sup>4</sup> Marriage equality is based on the notion that the right of access to marriage is a civil right, important for full political participation and social recognition, predicated on the legal and social significance of marriage.<sup>5</sup>

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<sup>3</sup> See, e.g., WOLFSON, *supra* note 1, at 17–18; David S. Buckel, *Government Affixes a Label of Inferiority on Same-Sex Couples When It Imposes Civil Unions & Denies Access to Marriage*, 16 STAN. L. & POL’Y REV. 73, 74–75 (2005) [hereinafter Buckel, *Label of Inferiority*]; David S. Buckel, *Lewis v. Harris: Essay on a Settled Question and an Open Question*, 59 RUTGERS L. REV. 221, 226–32 (2007) [hereinafter Buckel, *Settled Question*]; see also Brief of Amici Curiae American Civil Liberties Union, Lambda Legal Def. and Educ. Fund, Inc., and Nat’l Ctr. for Lesbian Rights, *Zarrillo v. Schwarzenegger*, No. 09-CV-2292 VRW, 2010 WL 145088 (N.D. Cal. Jan. 8, 2010), 2010 WL 391010 (arguing that Proposition 8’s ban on same-sex marriage does nothing other than single out a certain class of citizens for disfavored legal status); Brief of Amicus Curiae Cal. NAACP in Support of Parties Challenging the Marriage Exclusion at 2, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999), 2007 WL 4668726 (arguing that the arguments against same-sex marriage are the same “irrational arguments that were once used to justify slavery, the ‘separate but equal’ laws, and prohibitions against interracial marriage”); Brief in Support of Respondents Challenging the Marriage Exclusion by Amicus Curiae the Nat’l Gay and Lesbian Task Force Found., *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999), 2007 WL 3307692 (arguing that by providing different-sex couples access to marriage and withholding it from same-sex couples, the state of California directly contravened the equal protection guarantee found in the state constitution).

<sup>4</sup> See, e.g., Polikoff, *We Will Get What We Ask For*, *supra* note 2, at 1546; Polikoff, *Martha Fineman*, *supra* note 2, at 176 (arguing to “[a]bolish marriage as a legal category for everyone” rather than pursuing equal access to marriage for same-sex couples); see also Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1414–16, 1424 (2004) [hereinafter Franke, *Domesticated Liberty*] (criticizing the pursuit of marriage as limiting freedom of gays and lesbians).

<sup>5</sup> See Buckel, *Label of Inferiority*, *supra* note 3, at 74–75 (arguing that civil unions create a “separate, inherently inferior legal status” that “stigmatiz[es] members of the disfavored group as . . . less worthy participants in the political community” and “send[s] a message to the rest of society that in turn serves as an invitation to further bias and discrimination” (quoting *Heckler v. Matthews*, 465 U.S. 728, 739 (1984)) (internal quotation marks omitted)); Stoddard, *supra* note 1, at 754 (noting the practical advantages to receiving full legal recognition of marriage, including tax benefits, laws of intestacy, immunity from testifying against one’s spouse, residency rights conferred upon foreign spouses, and health insurance benefits). Evan Wolfson explains,

Marriage skepticism is based on the idea that marriage is an institution so troubled that the fight for marriage is not worth pursuing.<sup>6</sup>

This Article takes up the challenge of harmonizing the powerful and compelling critique of marriage advanced by feminist and gay rights scholars and support of same-sex marriage as a civil rights issue. To date, the political left's supporters of marriage equality who also critique marriage's privileged place in society have failed to bridge fully the gap between marriage skepticism and marriage equality. Theorizing this connection is important not only for understanding the full array of justifications for marriage equality, but also for continuing in the valuable pluralistic project started by family law, feminist, and gay rights scholars who aim toward greater protection of family connection, beyond that offered to those in heterosexual, conjugal unions. A principled reconciliation of marriage equality and marriage skepticism can also assist in charting a course toward a form of marriage equality that furthers, rather than undermines, the goals of marriage skepticism.

Thus far, leading efforts to link the concerns of marriage skepticism with those of marriage equality have tended to focus on the ways in which same-sex marriage holds the promise of transforming marriage internally into a more egalitarian institution.<sup>7</sup> This feminist argument for same-sex marriage, however, incompletely reconciles the marriage critique with the argument for marriage equality. And while the marriage critique focuses on the over-privileging in law and society of marriage over other forms of family and intimacy,<sup>8</sup> the feminist argument for same-sex marriage does little to

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[M]arriages between two men or two women can fulfill the same mix of interests as marriages between a man and a woman—a public affirmation of emotional and financial commitment and interdependence, access to legal and economic benefits and protections, a structure in which to raise children together, support for a relationship important to the individuals involved as well as to society, and a celebration of individuals' religious beliefs.

Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 580–81 (1995).

<sup>6</sup> See Ettelbrick, *supra* note 2, at 165 (“Marriage runs contrary to two of the primary goals of the lesbian and gay movement: the affirmation of gay identity and culture and the validation of many forms of relationships.”); Polikoff, *We Will Get What We Ask For*, *supra* note 2, at 1549 (arguing that legalizing gay and lesbian marriage will “require a rhetorical strategy that emphasizes similarities between our relationships and heterosexual marriages, values long-term monogamous coupling above all other relationships, and denies the potential of lesbian and gay marriage to transform the gendered nature of marriage for all people”); Polikoff, *Martha Fineman*, *supra* note 2, at 176 (advocating for the abolishment of marriage as a legal category for both heterosexuals and homosexuals).

<sup>7</sup> See, e.g., Nan Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 17 (1991).

<sup>8</sup> See, e.g., MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 230 (1995) [hereinafter FINEMAN, THE NEUTERED MOTHER]; Polikoff, *Martha Fineman*, *supra* note 2, at 167 (“[T]he equality model that seeks a right to marry on equal terms with heterosexuals . . . fail[s] to envision a truly transformative model of family for all people.”). As Martha Fineman suggests,

address the effect of same-sex marriage and the marriage equality movement on marriage's status in society.

This Article explores the possibilities presented by what I set forth as a "skeptical marriage equality" position in the debate over same-sex marriage. This perspective argues for same-sex marriage, while remaining critical of marriage as a legal category and of its privileged status in law and society.

The theory of skeptical marriage equality I set forth herein maintains that, rather than being adverse to or misaligned with one another, marriage equality and marriage skepticism may be viewed as interdependent and mutually reinforcing. Marriage equality may be viewed as carrying on some of the work of marriage skepticism. Moreover, same-sex marriage, and the quest for marriage equality, may potentially (and counterintuitively) contribute to unsettling the hierarchical relationship between marriage and other forms of intimacy under the law to make way for a more pluralistic landscape of legally recognized family forms.

This Article proceeds in three parts. Part I briefly reviews the marriage skepticism and marriage equality positions. Part II examines existing efforts to reconcile marriage skepticism and marriage equality. Part III asserts a theory of skeptical marriage equality whereby marriage skepticism and marriage equality are interdependent and mutually reinforcing. First, I argue that marriage equality may actually find an antecedent in marriage skepticism. Marriage equality's reconsideration of the sex-based definition of marriage resonates with marriage skepticism's critique of marriage as traditionally constructed. Moreover, by arguing for same-sex marriage based on the qualities and characteristics of the couples seeking marriage, marriage equality reflects marriage skepticism's concern with functional, less formalistic definitions of family. Second, I argue that marriage equality may further reinforce marriage skepticism's concerns with pluralism and family function in two interrelated ways. The pursuit of same-sex marriage *facilitates* the pluralistic goals of the marriage critique by drawing attention to the gender-hierarchical and sexuality norm-enforcing construction of traditional marriage. Marriage equality may also promise to lead to greater pluralism as advocated by marriage skepticism by *constituting* marriage in a way that redefines marriage away from sex-difference and toward core values that are at stake in marriage, such as commitment and caregiving. A fundamental shift in the socially-privileged status of marriage may pave the way toward more functional understandings of family and intimacy overall.

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[Marriage] will continue to occupy a privileged status and be posited as the ideal, defining other intimate entities as deviant. Instead of seeking to eliminate the stigma by analogizing more and more relationships to marriage, why not just abolish the category as a legal status and, in that way, render all sexual relationships equal with each other and all relationships equal with each other and . . . the sexual?

FINEMAN, THE NEUTERED MOTHER, *supra*, at 230.

## I. MARRIAGE SKEPTICISM AND MARRIAGE EQUALITY

The debate on the left over the wisdom of pursuing access to same-sex marriage arises amidst a variety of arguments against the category and practice of marriage, as well as arguments in favor of viewing marriage as an important civil right. These arguments have generally been viewed as opposing one another. This section briefly sets forth the arguments, as articulated within these traditional perspectives, against and in favor of pursuing marriage.

A. *The Argument for Marriage Skepticism*

Feminists and gay rights scholars have critiqued marriage both in its historical and contemporary permutations. This critique has largely hinged on marriage as a vehicle for subordinating women and children in a gender-hierarchical structure. Feminist critical efforts have focused on revealing and decreasing the extent to which women's economic, legal, and social power hinges on marriage and on the gender hierarchy within marriage. Gay rights scholars have also focused on the heteronormative discipline that marriage imposes on sexual minorities.

Katharine Bartlett has identified feminism's impact on family law as revealing and addressing the "subordination of some family members to others."<sup>9</sup> Marriage has fostered this subordination by providing legal cover in the guise of marital privacy for abuses of power within its putative sphere.<sup>10</sup> As described by Martha Fineman, marriage has historically served as the "primary means of protecting and providing for the legal and structurally devised dependency of wives."<sup>11</sup> This dependency occurred through the legally-enforced civil disappearance of wives through coverture.<sup>12</sup> Accord-

<sup>9</sup> Katharine T. Bartlett, *Feminism and Family Law*, 33 FAM. L.Q. 475, 475 (1999).

<sup>10</sup> See Angela P. Harris, *Loving Before and After the Law*, 76 FORDHAM L. REV. 2821, 2843 (2008) [hereinafter Harris, *Loving Before and After the Law*] ("[M]arriage has traditionally served as a site that reconciled old-style patriarchal power with newfangled liberal state power by throwing a blanket of privacy over 'the family,' in so doing giving state sanction to physical and sexual violence and abuse within the household."); see also McGuire v. McGuire, 59 N.W.2d 336, 237-38 (Neb. 1953) (declining to intervene into the marriage relationship in a wife's action in equity against her husband for maintenance); Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1486-91 (2000) (arguing that the spousal exemption from rape liability persists because marital privacy has justified non-intervention by the state).

<sup>11</sup> Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL'Y & L. 239, 245 (2001) [hereinafter Fineman, *Why Marriage?*]; see also MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 117-19 (2004) [hereinafter FINEMAN, *THE AUTONOMY MYTH*] (describing the historically patriarchal and hierarchical nature of legal marriage in England and the United States).

<sup>12</sup> Pursuant to the doctrine of coverture, a husband and wife were merged into a single legal presence, resulting in the "civil death" of the wife. BARBARA ALLEN BABCOCK ET AL., *SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE, AND THEORY* 21 (2d ed. 1996) ("A wife could not enter into contracts, write wills, or sue or be sued in her own right. She could not legally manage or retain the fruits of her real property or ac-

ing to Fineman, “[m]arriage has had particular relevance in the construction of gender” insofar as “[i]t has shaped the aspirations and experiences of women and men in ways that have historically disadvantaged women.”<sup>13</sup>

Foreshadowing this contemporary critique of marriage, equality in marriage was an important plank of the emerging feminist agenda in the nineteenth and early twentieth centuries. As I have discussed elsewhere, while it later gave way to suffrage, “American feminists took the question of marriage reform seriously.”<sup>14</sup> Participants at early women’s rights conventions “spoke more often of ‘resentment at wives’ subordination within marriage than even of suffrage.”<sup>15</sup>

From the passage of the Nineteenth Amendment in 1920 to the fundamental reforms of the 1960s onward, marriage has come to be more egalitarian, at least formally. As Twila Perry recounts, the “essentials of marriage,” such as the duty of support and duty of services, were formerly distributed along gender lines; legal change rendered these essentials mutual and gender neutral.<sup>16</sup> In addition, the right to determine a family’s domicile

quire or keep personal property . . . .”); *see also* WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS 422 (1894) (“[T]he husband and wife are one person in law: that is, the very being of legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband . . . .”).

<sup>13</sup> Fineman, *Why Marriage*, *supra* note 11, at 247. Fineman explains,

[A]ssignment of burdens within the family operates in an inherently unequal manner; the uncompensated tasks of caretaking are placed with women while men pursue careers that provide economically for the family but also enhance their individual career or work prospects. This division of family labor, perpetuating historic gendered family roles, has been understood as just and “natural,” rather than manufactured or contrived.

Martha Albertson Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2188 (1995) [hereinafter Fineman, *Masking Dependency*].

<sup>14</sup> Suzanne A. Kim, *Marital Naming/Naming Marriage: Language and Status in Family Law*, 85 IND. L.J. 893, 944–45 (2010) (citing JOELLE MILLION, *WOMAN’S VOICE, WOMAN’S PLACE* 2 (2003)) (discussing how many women saw reformation of marriage as a major priority for the early women’s movement); *see also* NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 64 (2000) [hereinafter COTT, *PUBLIC VOWS*].

<sup>15</sup> Kim, *supra* note 14, at 945 (quoting COTT, *PUBLIC VOWS*, *supra* note 14, at 64). According to Marlene LeGates, one commentator in 1870 wrote in a newspaper run by Elizabeth Cady Stanton and Susan B. Anthony:

The ballot is not even half the loaf; it is only a crust—a crumb. The ballot touches only those interests, either of women or men, which take their root in political questions. But woman’s chief discontent is not with her political, but with her social, and particularly her marital bondage. The solemn and profound question of marriage . . . is of more vital consequence . . . than any such superficial and fragmentary question as woman’s suffrage.

MARLENE LEGATES, *IN THEIR TIME: A HISTORY OF FEMINISM IN WESTERN SOCIETY* 208 (2001) (citing WILLIAM L. O’NEILL, *FEMINISM IN AMERICA: A HISTORY* 19–20 (2d ed. 1989)).

<sup>16</sup> Twila L. Perry, *The “Essentials of Marriage”: Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1, 12 (2003) (citing HOMER CLARK, *DOMESTIC RELATIONS* 251 (2d ed. 1988)).

is held today by each marital partner, rather than solely by the husband.<sup>17</sup> Moreover, reforms in custody presumptions and the advent of no-fault divorce have been lauded for helping to create more formal gender equality in marriage.<sup>18</sup>

Although women's legal status within marriage has improved significantly, marriage still reflects and reinforces gender hierarchy to a significant degree. As I have written previously, current social practices of marriage continue to constitute marriage as a status rooted in gender hierarchy.<sup>19</sup> For example, the practice of women taking their husband's last name upon marriage continues almost universally in this country, despite the elimination of any formal compulsion to do so.<sup>20</sup> Others have written persuasively about the continued gendered division of carework within marriage.<sup>21</sup> Moreover,

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<sup>17</sup> See CLARK, *supra* note 16, at 30 (“A joint domicile of husband and wife is no longer required, since under the influence of state Equal Rights Amendments and of recent decisions under the Equal Protection Clause married women are presumably able as a matter of constitutional right to choose a domicile separate from their husbands.”); see also Crosby v. Crosby, 434 So. 2d 162, 163–64 (La. Ct. App. 1983) (holding unconstitutional the requirement that a woman defer to her husband's choice of domicile); Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 164 (1998) (“[S]tates have removed the vast majority of stereotype-ridden, sex-based duties and obligations under which, for example, . . . the wife was obligated to follow the husband's choice of domicile.”).

<sup>18</sup> See NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 31–32 (2008) [hereinafter POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE*]; Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 4 (1987) (noting that while equality was not the primary motivation for no-fault reform, it “may yet serve to stimulate a more substantive approach to that goal”). Elizabeth S. Scott explains,

The trend toward formal gender equality can be seen in changes in child-custody law since the 1970s. Before that time the tender-years presumption favoring mothers was the dominant rule. This rule was replaced by the formally gender-neutral best interest standard in the 1970s and 1980s, partly in response to Equal Protection challenges.

Elizabeth S. Scott, *A World Without Marriage*, 41 FAM. L.Q. 537, 555 n.72 (2007).

<sup>19</sup> See Kim, *supra* note 14, at 912.

<sup>20</sup> *Id.* at 910–11. Traditional marital naming practices construct the status of marriage as internally gendered by reflecting and reinforcing gender hierarchy in a number of ways. *Id.* at 895.

<sup>21</sup> See Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 460–67 (2001) (arguing that the Pregnancy Discrimination Act (“PDA”) and the Family Medical Leave Act fail to provide for the common employment needs of caregivers and perpetuate an attachment gap between men and women in the labor force); Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 215 (2007) (arguing against family law's overprivileging of marriage and marriage-like relationships, noting pressure on women to “prioritize domesticity and conjugality over other relationships” and observing that “once in domestic relationships, women continue to perform most of the carework for the family”); Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES MAG., Oct. 26, 2003, available at <http://www.nytimes.com/2003/10/26/magazine/the-opt-out-revolution.html> (noting that a significant number of women now receive elite educations and increased opportunities, but still leave the workforce to raise families); see also Tracy E. Higgins, *Job Segregation, Gender Blindness, and Employee*

the phenomenon of women “opting out” of the workforce to care for children highlights the economic vulnerability of women within marriage.<sup>22</sup>

The critique of marriage extends to the privileged status of marriage in family law and policy. Martha Fineman has urged the abolition of marriage as a legal category.<sup>23</sup> She points to the “distort[ing]” effects of marriage, insofar as the “concept of marriage, and the assumptions it carries with it . . . preclude[ ] consideration of other solutions to social problems.”<sup>24</sup> Fineman’s proposal to reorganize family law around caretaking units aims to provide societal and state support for the inevitable and universal state of dependency more effectively than marriage does.<sup>25</sup>

In critiquing the primacy of marriage as the central organizing principle of family law, Laura Rosenbury has argued that the focus on the marital relationship marginalizes those who are not married and perpetuates “gendered patterns of care.”<sup>26</sup> To the extent that the caregiving work that many women perform throughout their lives is only recognized in the context of marriage, women receive inadequate support for the carework that occupies much of their lives.<sup>27</sup> Moreover, Rosenbury points to the stigmatization that women who live outside of marriage, either by choice or circumstance, experience due to the primacy of marriage.<sup>28</sup>

Many in the lesbian and gay communities criticize the effort to secure access to marriage for same-sex couples.<sup>29</sup> While some of these critics raise “pragmatic” concerns,<sup>30</sup> others critique the same-sex marriage movement

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*Agency*, 55 ME. L. REV. 241, 247–49 (2002) (discussing problems with prevailing Title VII approaches to addressing gender-based disparate impact, in context of employment practices like overtime expectations, that can disproportionately burden women due to childcare responsibilities).

<sup>22</sup> See Belkin, *supra* note 21; see also Kim, *supra* note 14, at 914, 926 (discussing women’s seeming choice to opt out of the workforce as actually constrained by a “normative baseline” that positions women as primary caregivers).

<sup>23</sup> FINEMAN, *THE NEUTERED MOTHER*, *supra* note 8, at 228–30.

<sup>24</sup> Fineman, *Why Marriage*, *supra* note 11, at 244.

<sup>25</sup> See FINEMAN, *THE NEUTERED MOTHER*, *supra* note 8, at 230–31.

<sup>26</sup> See Rosenbury, *supra* note 21, at 191. “Family law thereby continues to signal that domestic relationships are the only relationships worthy of state recognition and support, ignoring friendships outside of the home and, in doing so, likely perpetuating gendered patterns of domestic care.” *Id.* at 224.

<sup>27</sup> See *id.* at 212–14 (arguing that in focusing on caregiving in the home, the state perpetuates gender inequality by reinforcing that a woman’s worth is tied to her care of a man or a household, and that once married, a woman must provide domestic support, with income only being provided by the husband).

<sup>28</sup> See *id.* at 217 (“Family law’s privileging of marriage and domesticity over friendship has consequences beyond the encouragement of domestic coupling. It can also lead to feelings of stigmatization and even loneliness and fear, particularly among some who exist outside of marriage by circumstance rather than choice.”).

<sup>29</sup> See Carlos A. Ball, *This is Not Your Father’s Autonomy: Lesbian and Gay Rights From a Feminist and Relational Perspective*, 28 HARV. J.L. & GENDER 345, 349 (2005) [hereinafter Ball, *Father’s Autonomy*] (describing three views in the lesbian and gay communities critical of the pursuit of same-sex marriage).

<sup>30</sup> *Id.* (citing WILLIAM N. ESKRIDGE, JR., *EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS* 127–58 (2002)). Some, for example, critique the effort to obtain same-sex marriage for fueling a backlash that will ultimately make it more difficult to

for its “insertion of mainstream heteronormative values into the gay and lesbian community that will fundamentally transform the community and rob it of its alternative views and values.”<sup>31</sup>

Some queer theorists critique marriage as a vehicle of the state in regulating intimacy.<sup>32</sup> For example, for Michael Warner, marriage demonstrates the state’s sexual discipline and control.<sup>33</sup> Moreover, whether populated and performed by same-sex or opposite-sex couples, marriage is inherently heteronormative; the pursuit of marriage is troublingly normalized and normalizing.<sup>34</sup>

The queer theory critique of marriage also focuses on the over-privileging of marriage above other types of affective connection. Warner discusses the “ennobling and . . . demeaning” functions of marriage as part of the problem with marriage, gay or straight:

To a couple that gets married, marriage just looks ennobling . . . . Stand outside it for a second and you see the implication: if you don’t have it, you and your relations are less worthy. Without this corollary effect, marriage would not be able to endow anybody’s life with significance. The ennobling and the demeaning go together. Marriage does one only by virtue of the other.<sup>35</sup>

Katherine Franke’s critique of marriage focuses similarly on protecting “affective sexual liberty outside of marriage.”<sup>36</sup> Franke raises concerns that the same-sex marriage movement threatens this extra-marital space.<sup>37</sup> She has argued that the decision in *Lawrence v. Texas*<sup>38</sup> created a “relative absence of regulation of homosexualities,” which should be viewed “as an

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obtain the right to marry. See John D’Emilio, *Will the Courts Set Us Free? Reflections on the Campaign for Same-Sex Marriage*, in *THE POLITICS OF SAME-SEX MARRIAGE* 39, 59 (Craig A. Rimmerman & Clyde Wilcox eds., 2007) (“[T]he most significant outcome of litigation has been the negative legislative and voter response that the Hawaii case and its successors have elicited.”).

<sup>31</sup> Ball, *Father’s Autonomy*, *supra* note 29, at 349 (citing, as examples of this position, MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 81–147 (1999); Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 *TEMP. L. REV.* 709, 819–20 (2002)).

<sup>32</sup> Ball, *Father’s Autonomy*, *supra* note 29, at 349.

<sup>33</sup> WARNER, *supra* note 31, at 96 (describing marriage as the way that the state “regulates and permeates people’s most intimate lives; it is the zone of privacy outside of which sex is unprotected”).

<sup>34</sup> *Id.* at 143–46.

<sup>35</sup> *Id.* at 82.

<sup>36</sup> See Katherine M. Franke, *Longing for Loving*, 76 *FORDHAM L. REV.* 2685, 2688 (2008) [hereinafter Franke, *Longing for Loving*] (citing, generally, NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE*, *supra* note 18).

<sup>37</sup> *Id.* at 2689.

<sup>38</sup> In *Lawrence v. Texas*, the Supreme Court overturned *Bowers v. Hardwick*, holding that Texas’s sodomy law was unconstitutional and that same-sex intimate sexual interactions, so long as they were consensual, were protected under the liberty right found in the Due Process Clause of the Fourteenth Amendment. *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558, 577–79 (2003).

opportunity rather than as an injury.”<sup>39</sup> This regulatory gap prompts the question: “[A]re there ways of conceptualizing the gap such that it might both permit and germinate new and broader forms of sexual liberty than those that lie in a regime that puts all its eggs in the marriage basket?”<sup>40</sup>

At issue for both Warner and Franke is recognition of a greater range of human connections, beyond the marital relationship. While Franke acknowledges the benefits of marriage, these benefits come at a cost. She acknowledges the big “payoff” of marriage that requires its participants to submit to a wide range of “regulatory demands”: marriage may involve “only two adults, not married to anyone else, who pledge to be monogamous, are financially interdependent in a particular way, and will be bound by a set of non-negotiable default rules when one or both parties seek to terminate the marriage.”<sup>41</sup> Franke argues, accordingly, that “the institution of marriage demands the surrender of a great deal of the liberty rights acknowledged in *Lawrence*, rights that unmarried people enjoy more robustly.”<sup>42</sup>

The critique of the same-sex marriage movement on the left draws from the feminist and gay rights critiques of marriage and its privileged status in law and society. Feminist and gay rights scholars have argued that to advance the cause of same-sex marriage is to promote the primacy of marriage as a central organizing force in family law and to perpetuate a gendered, patriarchal, and oppressive institution.<sup>43</sup>

Drawing on Martha Fineman’s rejection of marriage as a legal category, Nancy Polikoff has argued that the quest for same-sex marriage is misguided because it diverts attention away from finding more innovative, effective solutions to supporting families and caretaking outside of marriage.<sup>44</sup> Polikoff argues that we should be focusing our collective efforts on valuing all families under the law, not just marital families.<sup>45</sup>

<sup>39</sup> Franke, *Longing for Loving*, *supra* note 36, at 2688.

<sup>40</sup> *Id.* at 2688.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See Ettelbrick, *supra* note 2, at 9, 14–17. According to Polikoff, Ettelbrick “cautioned that advocacy for same-sex marriage was a retrenchment from support for diverse family forms, an attempt to standardize gay and lesbian relationships, and an abandonment of a larger social justice agenda.” Nancy D. Polikoff, *Equality and Justice for Lesbian and Gay Families and Relationships*, 61 RUTGERS L. REV. 529, 536 (2009) [hereinafter Polikoff, *Equality and Justice*]. Ettelbrick’s critique continues to influence the gay rights critique of the marriage movement. See, e.g., WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY 99–100 (1995) (discussing the hazards of pursuing seemingly liberating political rights within regulated institutions); URVASHI VAID, VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION 178–209 (1995) (arguing that same-sex couples should aspire to individual freedom and cultural liberation rather than assimilation through the civil rights model).

<sup>44</sup> See POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE, *supra* note 18, at 131–35.

<sup>45</sup> See generally *id.* (arguing for legal reform that comports with realities of family life). Polikoff argues, “[a] legal system in a pluralistic society that values all families should meld as closely as possible the purposes of a law with the relationships that that law covers. *Marriage* is not the right dividing line.” *Id.* at 126.

### B. *The Argument for Marriage Equality*

The argument for marriage as an important civil right generally flows from the premise that the right to marry is important for equality or autonomy. Arguments for marriage equality based on the tangible and intangible benefits associated with marriage fit into these broader categories of equality or autonomy-based arguments.<sup>46</sup>

In contrast with the critique of marriage outlined above, as Reva Siegel has noted, “[a] movement of sexual dissent has increasingly come to embrace the institution of marriage as it seeks acknowledgment that its members are equal in status to others in the polity.”<sup>47</sup>

Thomas Stoddard articulated a view, contrary to Paula Ettelbrick’s in their seminal dispute over same-sex marriage,<sup>48</sup> that the right to marriage is critical to obtaining equality and full recognition for lesbians and gay men.<sup>49</sup> Noting that marriage “is the centerpiece of our entire social structure,” Stoddard argued that “marriage is . . . the issue most likely to lead ultimately to a world free from discrimination against lesbians and gay men.”<sup>50</sup> By recog-

<sup>46</sup> This summary does not include the full range of arguments in favor of same-sex marriage or the right to same-sex marriage, which also includes arguments based on the best interests of children. (compare Nancy Polikoff, *For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark*, 8 N.Y. CITY L. REV. 573, 585 (2005) [hereinafter Polikoff, *For the Sake of All Children*] (describing the argument made by same-sex marriage proponents that “marriage is good for children—better than having unmarried parents—and therefore children of lesbian and gay parents will be better off if their parents can marry”), with Lynn D. Wardle, *A Response to the “Conservative Case” for Same-Sex Marriage* and “*The Tragedy of the Commons*,” 22 BYU J. PUB. L. 441, 459–60 (2008) [hereinafter Wardle, *A Response*] (stating there is no evidence that legalizing same-sex relationships will benefit children), and the “civilizing” function of marriage for gays and lesbians. See JONATHAN RAUCH, *GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA* 7 (2004) (“For all its failings in particular cases, and for all the stress it has borne lately, marriage is *the* great civilizing institution. No other institution has the power to turn narcissism into partnership, lust into devotion, strangers into kin. What other force can bond across clans and countries and continents and even cultures? In *Romeo and Juliet*, it was not the youths’ love which their warring and insular clans feared; it was their marriage.”); see also Andrew Sullivan, *Here Comes the Groom: A Conservative Case for Gay Marriage*, THE NEW REPUBLIC, August 28, 1989, at 20 [hereinafter Sullivan, *Here Comes the Groom*] (“Marriage provides an anchor, if an arbitrary and weak one, in the chaos of sex and relationships to which we are all prone. It provides a mechanism for emotional stability, economic security, and the healthy rearing of the next generation. We rig the law in its favor not because we disparage all forms of relationship other than the nuclear family, but because we recognize that not to promote marriage would be to ask too much of human virtue.”). I am primarily focused on the civil rights-based arguments for same-sex marriage, which conflict most directly with what I describe as marriage skepticism.

<sup>47</sup> Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323, 1417 (2006).

<sup>48</sup> See Polikoff, *Equality and Justice*, *supra* note 43, at 529 (noting that the Stoddard and Ettelbrick essays have reached “iconic” status); Stoddard, *supra* note 1, at 9–13; Ettelbrick, *supra* note 2, at 9, 14–17.

<sup>49</sup> Stoddard, *supra* note 1, at 12–13.

<sup>50</sup> *Id.* at 12.

nizing same-sex marriages, the government and society will recognize the people *in* those marriages. Stoddard advocates for same-sex marriage because of “the importance of marking the equal significance of same-sex relationships,” and the many rights that marriage confers upon those in this relationship.<sup>51</sup>

The embedded debate over the desirability of civil unions as opposed to marriage also focuses on the right to marriage as an important civil right and on the significance of conferring the title “marriage” to guarantee equality. For example, David Buckel, in arguing against the label “civil unions” as an alternative to “marriage” for same-sex couples has asserted,

The lesson of our nation’s history is that “separate but equal” is inherently unequal and destructive. To discuss merely the sufficiency of civil unions misses the larger point that the government is fencing off same-sex couples with a separate status that is a mark of inferiority and invites further bias and discrimination.<sup>52</sup>

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<sup>51</sup> Polikoff, *Equality and Justice*, *supra* note 43, at 536 (citing Stoddard, *supra* note 1).

<sup>52</sup> Buckel, *Label of Inferiority*, *supra* note 3, at 74; *see also In re Opinion of Justices to the Senate*, 802 N.E.2d 565, 569–70 (Mass. 2004) (“If, as the separate opinion posits, the proponents of the bill believe that no message is being conveyed by eschewing the word ‘marriage’ and replacing it with ‘civil union’ for same-sex ‘spouses,’ we doubt that the attempt to circumvent the court’s decision in *Goodridge* would be so purposeful.”); Stephen Clark, *Same-Sex But Equal: Reformulating the Miscegenation Analogy*, 34 RUTGERS L.J. 107, 160 (2002) (“It is true, as Professor Paul Freund presciently observed thirty years ago, ‘if the law must be as undiscriminating concerning sex as it is toward race, it would follow that laws outlawing wedlock between members of the same sex would be as invalid as laws forbidding miscegenation.’” (quoting *Hearings on S.J. Res. 61 and S.J. Res. 231 Before the S. Comm. on the Judiciary*, 91st Cong., 2d Sess. 74–75 (1970), *reprinted in* 118 Cong. Rec. 9317 (Mar. 21, 1972) (statement of Sen. Sam Ervin (quoting Paul Freund, Professor, Harvard Law School)) (original citation corrected)); Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont’s Civil Unions Law, Same-Sex Marriage, and Separate But (Un)Equal*, 25 VT. L. REV. 113, 136 (2000) (arguing that “[s]eparate [m]eans [u]nequal” and that there is “inherent inequality based on segregation of same-sex couples from marriage and into civil unions”); Christine Jax, *Same-Sex Marriage—Why Not?*, 4 WIDENER J. PUB. L. 461, 490 (1995) (noting that offering civil unions in the place of same-sex marriage “is a public policy creation that discriminates in the same manner as the concept of ‘separate but equal,’” and that “[it] ‘is, for better or worse, second-class citizenship”’ (citing Eloise Salholz et al., *For Better or For Worse*, NEWSWEEK, May 24, 1993, at 69 (quoting Thomas B. Stoddard))). As I have written elsewhere,

Underlying the marriage equality position is the claim that equality and public recognition are contained in the term “marriage.” For example, according to the majority in *Lewis*, “the word marriage itself—independent of the rights and benefits of marriage—has an evocative and important meaning to both parties.” For those in favor of same-sex marriage, that meaning includes a sense of privilege, recognition, and inclusion. For example, in its brief submitted as amicus curiae in the case before the Connecticut Supreme Court considering the constitutionality of that state’s civil union scheme, *Kerrigan v. Commissioner of Public Health*, Lambda Legal Defense Fund argued that while civil union status provides the legal rights of marriage, it “preserves a privileged status for the majority and forces the minority into a distinct, lesser status” and “does not temper the harm

Critical to this equality-based argument for same-sex marriage is a descriptive-normative view of the significance of marriage in society. In some instances, the marriage equality argument proceeds from a description of the significance of marriage in law and society.<sup>53</sup> In other instances, however, assertions of the significance of marriage seem to flow from a normative commitment to this state of affairs.<sup>54</sup>

This view has grounded legal advocacy in favor of marriage rights for gays and lesbians.<sup>55</sup> This advocacy stance derives strength from the civil rights context, in which separate legal treatments under the law have been viewed as inherently unequal.<sup>56</sup> From a civil rights perspective, *Loving v. Virginia*'s protection of interracial marriage<sup>57</sup> is instructive and paradigmatic, insofar as it suggests the constitutional limits of restrictions on marriage.<sup>58</sup>

The argument for same-sex marriage is also predicated on autonomy. In this sense, the option of legally-sanctioned marriage can support the autonomy of same-sex couples. While autonomy is typically "associate[d] . . . with leaving individuals alone to pursue their life goals as they deem

suffered by a couple who wish to convey most accurately what their relationship means, using the one term that is universally understood: marriage."

Kim, *supra* note 14, at 906–07 (quoting *Lewis v. Harris*, 908 A.2d 196, 221 (N.J. 2006)).

<sup>53</sup> See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003) ("Marriage also bestows enormous private and social advantages on those who choose to marry.").

We can no more now create an alternate mode of commitment carrying a parallel intensity of meaning than we can now create a substitute for poetry or for love.

The status of marriage is therefore a social resource of irreplaceable value to those to whom it is offered: it enables two people together to create value in their lives that they could not create if that institution had never existed.

*Lewis*, 908 A.2d at 231 (Poritz, C.J., concurring and dissenting); see also *Baehr v. Lewin*, 852 P.2d 44, 60 (Haw. 1993) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free [people].") (quoting *Loving v. Virginia*, 388 U.S. 1, 12 (1967)) (internal quotation marks omitted).

<sup>54</sup> See *Lewis*, 908 A.2d at 225–26 (Poritz, C.J., concurring and dissenting) ("When we say that the Legislature cannot deny the tangible benefits of marriage to same-sex couples, but then suggest that 'a separate statutory scheme, which uses a title other than marriage,' is presumptively constitutional, we demean plaintiff's claim. What we 'name' things matters, language matters." (internal citation omitted)); see also *Goodridge*, 798 N.E.2d at 955 ("Because [marriage] fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition.").

<sup>55</sup> See, e.g., WOLFSON, *supra* note 1, at 17–18.

<sup>56</sup> See, e.g., *Loving*, 388 U.S. at 8–11 (1964); Buckel, *Label of Inferiority*, *supra* note 3, at 74–75.

<sup>57</sup> *Loving*, 388 U.S. at 3, 11–12 (holding that the State cannot interfere with the freedom to marry a person of a different race, which is protected by the Fourteenth Amendment, and reversing petitioner's convictions for violating Virginia's anti-miscegenation laws).

<sup>58</sup> See *id.* at 12; see also R.A. Lenhardt et al., *Forty Years of Loving: Confronting Issues of Race, Sexuality, and the Family in the Twenty-First Century*, 76 *FORDHAM L. REV.* 2669, 2674 n.31 (2008) ("*Loving* has been cited and is often discussed at length in major case filings submitted by advocates for the right of same-sex couples to marry.").

best,”<sup>59</sup> according to Carlos Ball, the autonomy-based argument, in the context of same-sex marriage, “places on the state an *affirmative* obligation to recognize committed same-sex relationships.”<sup>60</sup> Working from this relational conception of autonomy, wherein “relationships of support and care” are important,<sup>61</sup> “the state promotes autonomy not only through restraint and noninterference, but also through providing meaningful choices to individuals,” including choices pertaining to relationships.<sup>62</sup> Autonomy depends less on leaving individuals alone and more on the “particular social context or conditions that make it possible for individuals to choose and act in ways that are consistent with their wants, values, concerns, and commitments.”<sup>63</sup> The relationships we share with those around us allow us to fully realize our autonomy.<sup>64</sup> The ability to order one’s relationships leads to a fully autonomous self.<sup>65</sup>

## II. GROUNDWORK FOR SKEPTICAL MARRIAGE EQUALITY

Preliminary efforts to reconcile marriage skepticism and marriage equality have failed to consider fully the range of connections between the two movements. In particular, these attempts neglect marriage skepticism’s concern with “dislodg[ing] marriage from its normatively superior status as compared with other forms of human attachment . . . .”<sup>66</sup> The following section identifies existing efforts to bridge marriage skepticism and marriage equality. These attempts at uniting marriage skepticism and marriage equality are helpful but incomplete. I break these efforts into three categories: (1) intent-based, (2) result-based, and (3) process-based. There is admittedly

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<sup>59</sup> Ball, *Father’s Autonomy*, *supra* note 29, at 345.

<sup>60</sup> *Id.* (emphasis in original).

<sup>61</sup> *Id.* at 377.

<sup>62</sup> *Id.* at 376–77.

<sup>63</sup> *Id.* at 356 (citing MARILYN FRIEDMAN, *AUTONOMY, GENDER, POLITICS* 103–04 (2003)).

<sup>64</sup> See Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 *YALE J.L. & FEMINISM* 7, 12 (1989) (“If we ask ourselves what actually enables people to be autonomous, the answer is not isolation, but relationships—with parents, teachers, friends, loved ones—that provide the support and guidance necessary for the development and experience of autonomy.”).

<sup>65</sup> See Ball, *Father’s Autonomy*, *supra* note 29, at 376–77 (noting that while some in the gay and lesbian community disagree about whether the state should provide the choice of same-sex marriage, agreement exists that the state should be required to provide “meaningful choices” to assist individuals in their pursuit of autonomy).

<sup>66</sup> Franke, *Longing for Loving*, *supra* note 36, at 2686. Katherine Franke argues:

The challenge we face is in crafting arguments that support the extension of marriage rights to same-sex couples who want them, while not doing so at the price of denigrating or shrinking affective sexual liberty outside of marriage . . . . I happen to think we can argue that same-sex couples be allowed to marry, while also offering strong critiques not only of the institution of marriage, but of those who wish to marry.

*Id.* at 2688.

overlap between these three categories, but I set them forth to clarify the range of marriage equality's skeptical supporters. I discuss the terms and limits of these particular approaches before moving on to my skeptical marriage equality formulation in Part III.

The categories of arguments explored in this section do not include those on the left or the right who wholly support or fully oppose the pursuit of same-sex marriage—i.e., individuals who support marriage equality without skepticism,<sup>67</sup> those who are so skeptical of marriage that they do not support the pursuit of the institution itself,<sup>68</sup> or those who oppose same-sex marriage on conservative grounds.<sup>69</sup> The objective of this Article is to chart the space and interconnections between those who are skeptical of marriage and those who seek legal recognition of same-sex couples.

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<sup>67</sup> See, e.g., RAUCH, *supra* note 46, at 7 (“I come to this as a true believer in the special importance and unique qualities of the institution of marriage. For all its failings in particular cases, and for all the stress it has borne lately, marriage is *the* great civilizing institution . . . . Unlike some people, therefore, I wouldn’t support same-sex marriage as a matter of equal rights if I thought it would wreck opposite-sex marriage.”); Wolfson, *supra* note 5, 569–71 (responding to Nancy Polikoff’s criticism of the institution of marriage and of the gay and lesbian community’s desire for the freedom to marry by examining the intra-community debate, and urging that all participants overcome their tactical differences, enabling same-sex couples to “win and keep [their] equal marriage rights”); *Marriage*, LAMBDA LEGAL, <http://www.lambdalegal.org/issues/marriage> (last visited Nov. 13, 2010) (“[I]ndividuals in same-sex relationships frequently are treated like strangers under the law—and none are afforded full equality in this country. This unequal treatment causes concrete and devastating harm . . . . Lambda Legal will continue to seek an end to discrimination in access to civil marriage so that same-sex couples in this country have the same choices other couples have, including whether or not to marry.”); see also Sullivan, *Here Comes the Groom*, *supra* note 46, at 21 (“Legalizing gay marriage would offer homosexuals the same deal society now offers heterosexuals: general social approval and specific legal advantages in exchange for a deeper and harder-to-extract-yourself-from commitment to another human being. Like straight marriage, it would foster social cohesion, emotional security, and economic prudence . . . . A law institutionalizing gay marriage would merely reinforce a healthy social trend.”).

<sup>68</sup> See, e.g., FINEMAN, *THE AUTONOMY MYTH*, *supra* note 11, at 123 (“I argue that for all relevant and appropriate societal purposes, we do not need marriage and we should abolish it as a legal category.”); Kara S. Suffredini & Madeleine V. Findley, *Speak Now: Progressive Considerations on the Advent of Civil Marriage for Same-Sex Couples*, 45 B.C. L. REV. 595, 607 (2004) (“[S]ame-sex marriage may import some of the inequalities” of marriage and “may carry potentially deleterious consequences for some LGBT individuals, both because it introduces new forms of state regulation into LGBT lives and because it may endorse the presumed supremacy of married, two-parent families over other formations.”).

<sup>69</sup> For conservative opposition to same-sex marriage, see generally, e.g., William C. Duncan, *DOMA and Marriage*, 17 REGENT U.L. REV. 203 (2004–2005) (discussing public support for traditional definition of marriage); Maggie Gallagher, *The Case for the Future of Marriage*, 17 REGENT U.L. REV. 185 (2004–2005) (discussing argument against same-sex marriage that same-sex marriage will harm children who do not grow up in households with a father and mother); Lynn D. Wardle, *The Attack on Marriage as the Union of a Man and a Woman*, 83 N.D. L. REV. 1365 (2007) (arguing that legalizing same-sex marriage will infringe on the civil rights of those who oppose same-sex marriage).

### A. *Intent-Based Efforts*

Some on the left who articulate a deeply skeptical marriage equality approach tend to focus on the animus or intent that drives the opposition to same-sex marriage, rather than on any significance inherent in marriage. For example, Franke's work exhibits this kind of deep skepticism about same-sex marriage while supporting marriage equality. Franke argues that the heterosexism and homophobia inherent in barring same-sex marriage helps justify the pursuit of same-sex marriage:

I condemn the legitimacy and legality of laws that prohibit same-sex couples from marrying on the same terms as different-sex couples. Why? Not because I believe strongly in the right to marry, but rather because the refusal to distribute this public benefit and status to same-sex couples is motivated by and perpetuates both heterosexism and homophobia.<sup>70</sup>

Others have articulated a similar intent-based argument for marriage equality.<sup>71</sup> This group includes Nancy Polikoff, who has been deeply skeptical of marriage and of efforts to obtain same-sex marriage, but whose more recent writings reflect her support of the right to marry from a civil rights standpoint, to the extent marriage exists as a legal category.<sup>72</sup>

Franke has recently described the relationship of many on the left to same-sex marriage as supportive, although not always wholeheartedly so. "To borrow a term Janet Halley has recently put to much use, all of us are conscripted into the cause of 'carrying a brief for' marriage whether or not we so wish."<sup>73</sup> This deeply skeptical marriage equality position argues against marriage and its privileged status but tells those who want to marry: "[K]nock yourselves out if that's what you want . . . . Just do not make all

<sup>70</sup> Franke, *Longing for Loving*, *supra* note 36, at 2687.

<sup>71</sup> See, e.g., Darren Lenard Hutchinson, *Sexual Politics and Social Change*, 41 CONN. L. REV. 1523, 1537 (2009) (acknowledging the same-sex marriage movement as a "valid . . . dimension of GLBT social movements" in part because the "prohibition of same-sex marriage rests on pernicious stereotypes of GLBT individuals and upon the privileging of heterosexuality").

<sup>72</sup> Compare Polikoff, *We Will Get What We Ask For*, *supra* note 2, at 1536 ("[T]he desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism."), with Nancy D. Polikoff, *Law that Values All Families: Beyond (Straight and Gay) Marriage*, 22. J. AM. ACAD. MATRIMONIAL L. 85, 87 (2009) ("I support the right to marry for same-sex couples as a matter of civil rights law. But I oppose discrimination against couples who do not marry, and I advocate solutions to the needs all families have for economic well-being, legal recognition, emotional peace of mind, and community respect."), and Polikoff, *For the Sake of All Children*, *supra* note 46, at 593 ("As long as marriage exists as a legal institution, lesbian and gay couples must have access to it. The inability to marry is a badge of inferiority and validates discrimination against and disapproval of lesbians and gay men as well as bisexual and transgender individuals.").

<sup>73</sup> Franke, *Longing for Loving*, *supra* note 36, at 2698 (citing JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 17 (2006)).

the rest of us sign up for that project.”<sup>74</sup> Hence, these deep skeptics will come to the proverbial same-sex marriage party but they will not promise to bring anything to it. While I look to Franke as the primary example of this position, I suspect that many who write on the left in family law, sexuality, and feminism and who are critical of marriage silently share this view.

### B. *Result-Based Efforts*

A second category of skeptics who support same-sex marriage includes those who are sympathetic to critiques of marriage while simultaneously paying heed to the negative consequences of refusing to admit same-sex couples into the institution of marriage or the positive consequences of allowing same-sex marriage.

In her essay “*Loving Before and After the Law*,” Angela Harris pursues a result-based approach to marriage equality based on the negative outcomes that result from barring same-sex marriage. She is skeptical of marriage insofar as she acknowledges that marriage has “foster[ed] the subordination of women and children.”<sup>75</sup> While she is critical of marriage, in a manner similar to Franke, Harris does not explicitly eschew the significance of marriage in the same way that Franke does. Harris’s marriage equality is based, at least in part, on how marriage is understood socially and politically.

Harris understands marriage “as a practice of national citizenship.”<sup>76</sup> Without addressing whether, as a normative matter, marriage should play such an important social and political role, Harris points out that “legal exclusion from the right to marry the partner(s) of one’s choice is understood both by those excluded and the excluders as a denial of full citizenship.”<sup>77</sup> This understanding of marriage’s centrality to citizenship is evident in the current debate over same-sex marriage and in “earlier debates over interracial marriage, polygamy, and slave marriage . . . .”<sup>78</sup> Harris continues,

From the perspective of citizenship as rights, . . . the marriage equality movement among gays and lesbians is [the] right to demand access to legal marriage. Throughout American history, withholding the legal right to marry the partner(s) of one’s choice has sent the cultural message that certain groups are not suited for full citizenship. The converse, of course, is also true: the belief that certain kinds of marital unions send the “wrong” message

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<sup>74</sup> *Id.* at 2687 (internal quotation marks omitted).

<sup>75</sup> Harris, *Loving Before and After the Law*, *supra* note 10, at 2843.

<sup>76</sup> *Id.* at 2821.

<sup>77</sup> *Id.* at 2822.

<sup>78</sup> *Id.*

about American citizenship has supported decisions to withhold the right to marry.<sup>79</sup>

The denial of the right of same-sex couples to marry poses a problem, argues Harris, “not because marriage holds any special position in human life,” but because of its result.<sup>80</sup> Properly understood within its “historical context,” withholding the right to marry “signals that state power is being used to enact a system of caste.”<sup>81</sup> That “historical context” is “marriage’s link to the state construction of proper citizens.”<sup>82</sup>

Others have advanced result-based arguments for same-sex marriage from a skeptical standpoint by focusing on the *benefits* to marriage that would ensue from same-sex marriage. Nan Hunter and others have argued that the admission of same-sex couples into the institution of marriage could have salutary effects on marriage itself, namely the dismantling of gender hierarchy.<sup>83</sup> By disturbing the “gendered definition of marriage,” same-sex marriage promises to define marriage away from the gender hierarchy that has characterized it for so long.<sup>84</sup> William Eskridge has similarly argued that same-sex marriage “would contribute to the erosion of gender-based hierarchy within the family, because in a same-sex marriage there can be no division of labor according to gender.”<sup>85</sup>

### C. Process-Based Efforts

Some scholars on the left have also advanced process-based skeptical approaches to marriage equality. These efforts have identified how the process of pursuing same-sex marriage as a legal and political goal has been helpful to achieving protection for a greater diversity of family forms.

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<sup>79</sup> *Id.* at 2823.

<sup>80</sup> *Id.* at 2846.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Hunter, *supra* note 7, at 16 (“Its potential is to disrupt both the gendered definition of marriage and the assumption that marriage is a form of socially, if not legally, prescribed hierarchy.”); see also Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 UCLA L. REV. 519, 528 (2001) (“I argued at length that sexism was an important wellspring of antigay animus, and that the homosexuality taboo functions to strengthen gender hierarchy.”); Deborah A. Widiss et al., *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461, 464 (2007) (reviewing the use of sex discrimination claims in support of same-sex marriage and stating that “[b]y highlighting the extent to which the statutory objectives identified as underlying different-sex marriage restrictions actually depend on sex-based stereotypes regarding gender roles, [her] Article strengthens the case for striking down such restrictions as unlawful sex discrimination”); Jennifer Wriggins, *Marriage Law and Family Law: Autonomy, Interdependence, and Couples of the Same Gender*, 41 B.C. L. REV. 265, 312–14 (2000) (discussing how same-sex marriage will make marriage “less sexist”).

<sup>84</sup> Hunter, *supra* note 7, at 16.

<sup>85</sup> William N. Eskridge, Jr., *A Social Constructionist Critique of Posner’s Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333, 356 (1992).

In evaluating competing perspectives represented in the late 1980s debate between activists Thomas Stoddard and Paula Ettelbrick about the wisdom of pursuing same-sex marriage as a gay rights objective,<sup>86</sup> Edward Stein has argued, “The aggressive push for marriage equality has made a surprising amount of progress: not only has it produced substantial legal reform in a few states, but it has also contributed to a significant change in attitudes toward LGBT people and their families.”<sup>87</sup> Stein not only points to actual progress in extending marriage rights and changes in the views of LGBT people and their families, but also to increased protections for diverse family forms that have resulted from the same-sex marriage movement’s shortcomings. He notes that “[w]hen . . . attempts to achieve marriage equality have failed, alternative forms of relationship recognition have been created instead of same-sex marriage.”<sup>88</sup>

These alternative forms, Stein argues, further the “relationship pluralism” advanced by marriage skeptics.<sup>89</sup> Stein acknowledges that many of these protections serve as a kind of “consolation prize” for the failure to obtain marriage, but “under the influence of Ettelbrick’s approach, [they] may blossom into relationship pluralism, especially if the new form of relationship recognition develops in a sedimentary fashion.”<sup>90</sup> Stein draws upon William Eskridge’s idea of “sedimentation,” by which new relationship forms exist alongside old ones, thereby creating diversity in family forms.<sup>91</sup> Stein notes, however, that “sedimentation” has not yet occurred robustly.<sup>92</sup>

#### D. *Challenges of Skeptical Marriage Equality*

Arguing against marriage generally while arguing for same-sex marriage is challenging because arguments for same-sex marriage often sound like implicit (or even explicit) endorsements of the status quo. This is evident through arguments advanced in recent state court same-sex marriage cases.

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<sup>86</sup> Compare Stoddard, *supra* note 1, with Ettelbrick, *supra* note 2 (debating the wisdom of pursuing same-sex marriage as gay rights goal).

<sup>87</sup> Edward Stein, *Marriage or Liberation?: Reflections on Two Strategies in the Struggle for Lesbian and Gay Rights and Relationship Recognition*, 61 RUTGERS L. REV. 567, 591 (2009) [hereinafter Stein, *Marriage or Liberation?*].

<sup>88</sup> *Id.* Carlos Ball has made a similar argument. According to Ball, the struggle for same-sex marriage has resulted in the extension of legal rights and benefits to a broader range of family connections, beyond marriage. Carlos Ball, Remarks at the Lavender Law Conference 5 (Sept. 11, 2009) (remarks on file with author). Ball argues, moreover, that the pursuit of same-sex marriage “has made many aware of the limitations of a benefits regime grounded so extensively on heterosexual marriage.” *Id.*

<sup>89</sup> Stein, *Marriage or Liberation?*, *supra* note 87, at 591.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 586–87 (citing WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 121 (2002)).

<sup>92</sup> *Id.*

Plaintiffs in these cases, particularly those addressing whether same-sex couples are entitled to the term “marriage,” repeatedly emphasize the value of marriage. For example, descriptions of marriage’s importance can verge on the normative: “The State excludes plaintiffs from perhaps the most cherished rite of passage in American family life, and the accepted means to demonstrate to others the depth and permanency of one’s commitment to another person.”<sup>93</sup> In *Lewis v. Harris*, the plaintiffs stated their commitment to the special status conferred upon marriage: “Plaintiffs along with most Americans understand marriage as the institution expressing best the commitment and the core values of integrity, community, honor, respect, and love that the plaintiff couples share.”<sup>94</sup>

One complication in developing the skeptical marriage equality approach is the nature of advocacy. By nature, advocacy involves making clear, positive arguments, rather than phrasing legal and political arguments tentatively, contingently, or in a social constructionist way.<sup>95</sup> It is difficult to argue for marriage rights without claiming the significance of marriage.

Another related challenge in arguing for marriage equality without reinforcing marriage is the vexed relationship between description and norm. Family law, for instance, is rife with the difficulty of conforming law to the

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<sup>93</sup> Reply Brief of Plaintiffs-Appellants at 20, *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006) (No. A-2244-03T5); see also *Baehr v. Lewin*, 852 P.2d 44, 60 (Haw. 1993) (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free people.”) (alteration in original) (quoting *Loving v. Virginia*, 388 U.S. 1, 12 (1967)); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003) (describing civil marriage as an expression of society’s ideals, including “mutuality, companionship, intimacy, fidelity, and family”); *Lewis*, 908 A.2d at 230 (Poritz, C.J., concurring and dissenting) (describing marriage as “one of society’s most cherished institutions”).

<sup>94</sup> Brief of Appellants at 11, *Lewis*, 908 A.2d 196 (No. A-2244-03T5); see also *id.* at 27 (“The core purpose of marriage—to provide shelter and stability for two committed people and the family they form—has remained constant over time, and is as vital to plaintiffs as to other citizens.”); Brief of Plaintiffs in Support of Their Motion for Summary Judgment at 25, *Lewis*, 908 A.2d 196 (No. MER-L-15-03) (“There are many basic reasons that different-sex couples who wish to spend their lives together most often make the choice to marry over other choices. One reason is that marriage is widely understood in our culture as the most compelling and definitive expression of love and commitment that can occur between two people. It is an expression of profound ‘emotional support’ and ‘personal dedication.’”) (quoting *Turner v. Safley*, 482 U.S. 78, 96 (1987)); Brief of Amicus Curiae Lambda Legal Def. and Educ. Fund, Inc. at 5, *iv*, *Kerrigan v. Connecticut*, 957 A.2d 407 (Conn. 2006) (S.C. 17716) (explaining that same-sex couples seek “[t]he sense of being ‘married’—what this conveys to a couple and their community, and the security of having others clearly understand the fact of their marriage and all it signifies” and also noting that same-sex marriage advocates are “acutely aware of the benefits that only marriage can provide to committed couples and their children”).

<sup>95</sup> Suzanne B. Goldberg, *Social Justice Movements and LatCrit Community: On Making Anti-Essentialist and Social Constructionist Arguments in Court*, 81 OR. L. REV. 629, 660 n.115 (2002) (“[L]awyers making anti-essentialist and social construction arguments may find themselves accused of seeking to stretch the law beyond its intended reach.”).

practices of life without reinforcing the status quo.<sup>96</sup> In the context of same-sex marriage, what do we mean when we say that marriage is important legally and socially? Is this merely a description, or is it somehow a normative claim?

A similar problem has been widely discussed in the contexts of gender. According to Janet Halley's typology of feminism, all feminisms share the characteristic of drawing a distinction between that associated with men ("m") and that associated with women ("w").<sup>97</sup> But in addition to drawing a distinction between "m" and "w," some aspects of feminism also criticize the very categories of "m" and "w." For instance, Judith Butler's inquiry into the performance of gender unsettles the very category on which any consideration of gender is based.<sup>98</sup> Criticisms of the categories of gender are largely based on gender being socially constructed.<sup>99</sup> To use gender, and specifically the categories of "man" and "woman," threatens to reinforce a fictional and oppressive system.

The socially constructed nature of gender, however, does not necessarily preclude the use of these categories for addressing subordination. As has been well-articulated by critical race scholars, there is value in a certain level of "strategic essentialism," whereby we pragmatically deploy social categories to overcome subordination predicated on those very social categories.<sup>100</sup>

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<sup>96</sup> The tender years presumption is one such example. See, e.g., Scott, *supra* note 18, at 555 n.72 and accompanying text. While the assumption that children of a young age were better suited to live in their mother's custody might have comported with the distribution of childcare work within families, the doctrine has been struck down as discriminatory against men and violative of the equal protection clause. Mary Kate Kearney, *The New Paradigm in Custody Law: Looking at Parents with a Loving Eye*, 28 ARIZ. ST. L.J. 543, 549 (1996) (citing *Ex parte Devine*, 398 So. 2d 686, 695 (Ala. 1981)).

<sup>97</sup> HALLEY, *supra* note 73, at 17–18.

<sup>98</sup> See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 4 (1999).

<sup>99</sup> See, e.g., Judith Lorber, "Night to His Day": *The Social Construction of Gender*, in READINGS FOR DIVERSITY AND SOCIAL JUSTICE: AN ANTHOLOGY ON RACISM, ANTISEMITISM, SEXISM, HETEROSEXISM, ABLEISM, AND CLASSISM 203, 205 (Maurianne Adams et al. eds., 2000) ("[G]ender cannot be equated with biological and physiological differences between human females and males. The building blocks of gender are *socially constructed statuses*." (emphasis in original)).

<sup>100</sup> See, e.g., Gayatri Chakravorty Spivak, *Subaltern Studies: Deconstructing Historiography*, in SELECTED SUBALTERN STUDIES 3, 13–15 (Ranjit Guha & Gayatri Chakravorty Spivak eds., 1988) (encouraging "a *strategic* use of positivist essentialism in a scrupulously visible political interest."); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 612 (1990) (describing the need to be strategic in discussing the category "woman"); Angela P. Harris, *The Unbearable Lightness of Identity*, 2 AFR.-AM. L. & POL'Y REP. 207, 211 (1995) ("Understanding race as a 'strategic essentialism' helps us understand its value to anti-racists."); Stephanie M. Wildman, *Reflections on Whiteness and Latina/o Critical Theory*, 2 HARV. LATINO L. REV. 307, 311 (1997) ("Naming Latinas/os, being strategically essentialist, instead of relying on the umbrella categories 'race' or 'people of color', [sic] can help us reveal the hierarchies that exist within the category race.").

“Strategic essentialism” is instructive for same-sex marriage insofar as it provides a paradigm for considering the political value of a category about which we are ultimately skeptical. Applied to the marriage context, the concept of strategic essentialism presents the possibility of mobilizing the category of “marriage” without necessarily acceding to the ideology behind it. In other words, strategic essentialism provides one way to use marriage to think about addressing problems of power, equity, and autonomy, while also understanding the problems of power, equity, and autonomy that plague the category of marriage. Strategic essentialism does not provide a specific roadmap for how to use a category about which we are ultimately critical, but it does important work in suggesting the possibility of doing so.

### *E. Critiques of Existing Efforts Toward Skeptical Marriage Equality*

Those who attempt to address both marriage skepticism and marriage equality generally acknowledge the marriage critique in the course of the marriage equality argument without explaining how same-sex marriage relates at a theoretical level to the marriage critique. Conversely, those focused on the marriage critique do not fully explore how same-sex marriage can ultimately help achieve the greater pluralism at which marriage skepticism is aimed.

The intent-based approach espoused by Franke, and to some extent by Polikoff, highlights the animus inherent in opposition to same-sex marriage by those on the right. This position, however, merely backs into support of marriage equality, leaving marriage skepticism unaddressed. While the intent-based approach to bridging marriage skepticism and marriage equality is certainly a viable one, it is ultimately unsatisfying because it assumes that each camp is entirely separate from the other and fails to counsel us on how to proceed with marriage equality arguments from a skeptical point of view.

In her effort “to secure marriage equality for same-sex couples . . . in a way that is compatible with efforts to dislodge marriage from its normatively superior status as compared with other forms of human attachment, commitment, and desire,” Franke suggests looking at friendship as an alternative model for conceptualizing human connection.<sup>101</sup> This approach, in her view, would leave intact the affective sexual liberty of lesbians and gays that marriage and pro-marriage arguments threaten.<sup>102</sup>

While I support Franke’s and others’ arguments in favor of alternative models for conceptualizing intimacy and connection beyond marriage (indeed, this sympathy motivates this Article), Franke’s turn to friendship does little to join the marriage critique with the marriage equality case. Instead, it pursues only the marriage critique by proposing a relational paradigm that stands separate and apart from marriage. Despite her suggestion that mar-

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<sup>101</sup> Franke, *Longing for Loving*, *supra* note 36, at 2686.

<sup>102</sup> *Id.* at 2702–05.

riage equality arguments can be made without bolstering marriage's significance, the move to friendship does nothing to further the marriage equality cause.

Result-based efforts at bridging marriage equality and marriage skepticism also fall short of relating the two critical camps in a principled way. Harris's concern with the denial of citizenship and the caste system that a failure to extend marriage to same-sex couples would produce<sup>103</sup> backs into the argument for same-sex marriage in a manner similar to intent-based efforts. We are left without any guidance on how to think about the marriage critique in the context of marriage equality. In other words, Harris's approach presents a robust case for marriage equality, but a tentative one for marriage skepticism.

Feminist arguments for same-sex marriage based on the potential disruption of marriage's gender hierarchy are more effective at synthesizing marriage equality and marriage skepticism because they address the concerns about gender hierarchy within marriage that ground feminist skepticism about marriage.<sup>104</sup> The feminist argument for same-sex marriage based on its transformative potential is compelling.<sup>105</sup> From a marriage skepticism point of view, however, the feminist argument does not go far enough. It leaves intact the hierarchical relationship between marriage and other family forms.<sup>106</sup> In other words, the feminist approach makes the case for marriage equality without fulfilling more completely the marriage critique's promise, to the extent the marriage critique is based on achieving greater pluralism in legal and social protection for families.

Existing process-based approaches like Edward Stein's are more helpful in relating marriage equality with the goals of marriage skepticism. By identifying how the pursuit of same-sex marriage has ushered in greater protec-

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<sup>103</sup> See *supra* Part II.B.

<sup>104</sup> See Eskridge, *supra* note 85, at 356 (arguing that same-sex marriages would erode the gender hierarchy in heterosexual marriage); Hunter, *supra* note 7, at 16 (arguing that legalization of gay marriage would "disrupt both the gendered definition of marriage and the assumption that marriage is a form of socially, if not legally, prescribed hierarchy").

<sup>105</sup> But see J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2362 (1997) (arguing that the feminist sex discrimination argument implies "that discrimination against homosexuals is merely a 'side effect' of discrimination against women, and therefore somehow less important"); John Gardner, *On the Ground of Her Sex(uality)*, 18 OXFORD J. LEGAL STUD. 167, 183 (1998) ("[T]hose committed to the moral wrongfulness of sexuality discrimination should not be at all happy to find this wrongfulness appended to the moral margins of somebody else's grievance, namely the grievance of those who are victims of sex discrimination."); Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471, 485-505 (2001) [hereinafter Stein, *Evaluating the Sex Discrimination Argument*] (acknowledging certain strategic advantages of the sex discrimination approach, but arguing that a focus on sexism misstates the primary harm of laws limiting gay and lesbian rights, which are in fact primarily motivated by homophobia and predominantly harm gay men and lesbian women).

<sup>106</sup> It is also not clear whether same-sex marriage would indeed dismantle gender hierarchy, as Hunter suggests. Hunter, *supra* note 7, at 17. This is a question that invites further consideration outside of this Article.

tions for non-marital family forms, albeit sometimes through the marriage equality movement's failures, Stein articulates with greater specificity than other commentators how marriage equality might support marriage skepticism.<sup>107</sup>

To the extent that marriage skepticism works toward "relationship pluralism,"<sup>108</sup> however, Stein relies heavily on the assumption that same-sex marriage will coexist alongside other family forms and thus create diversity through "sedimentation."<sup>109</sup> As Stein acknowledges, however, this "sedimentation" has not occurred with much robustness.<sup>110</sup> This presents a challenge for Stein's effort to bridge marriage equality and marriage skepticism.

### III. TOWARD SKEPTICAL MARRIAGE EQUALITY

I advance "skeptical marriage equality" as a way to reconcile the aims of the marriage equality movement with those of marriage skepticism. The prevailing approaches to same-sex marriage on the left have tended to assume the compatibility or incompatibility of these two positions, without offering persuasive justification. I argue, instead, that marriage equality and marriage skepticism can be viewed as interdependent and mutually reinforcing, with the objectives of one potentially supporting the goals of the other. Skeptical marriage equality may promise a more inclusive and egalitarian marital institution at the same time as a more pluralistic landscape for the recognition of diverse family forms.

In this Part, I explore, first, how marriage skepticism can be viewed as setting the stage for marriage equality. I argue, second, that the current movement for marriage equality may further the goals of marriage skepticism to achieve greater pluralism in family forms and reduce the hierarchical relationship between marriage and other types of families. Marriage equality advances the marriage critique project aimed at pluralism in two interrelated ways—the first, facilitative or process-based; the second, constitutive, or result-based.

#### A. *From Marriage Skepticism to Marriage Equality*

From the standpoint of deep marriage skepticism, the focus on marriage equality seems incongruous and misguided—incongruous because of family law's recent tendencies to rely less on marriage as a basis for legal and social protection and more on protecting those who "function" as families, not just those who follow legal "form", and misguided because of arguments that

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<sup>107</sup> See Stein discussion *supra* notes 87–92 and accompanying text.

<sup>108</sup> Stein, *Marriage or Liberation?*, *supra* note 87, at 591.

<sup>109</sup> *Id.* at 586.

<sup>110</sup> *Id.* at 587.

marriage operates hierarchically.<sup>111</sup> Given these apparent concerns, how can we reconcile current family law and policy's focus on marriage equality with marriage skepticism? Can we trace a connection, at a theoretical level, from marriage skepticism to marriage equality?<sup>112</sup>

### 1. *Reconsidering Traditional Marriage*

As discussed above, marriage skepticism ultimately concerns itself with problems of power and hierarchy both within marriage and surrounding it.<sup>113</sup> Feminist approaches to marriage skepticism question the orthodoxy of many aspects of marriage as it has been traditionally constructed, based as it has been on opposite-sex membership.<sup>114</sup>

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<sup>111</sup> Polikoff sets forth an account of how, during the last few decades, marriage has come to "matter less" in the distribution of social and legal subsidies and entitlements to families. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE*, *supra* note 18, at 47. *See id.* at 32 (noting that the Supreme Court had to react to legislatures' failures "to adapt to a society in which people organized their lives less and less around marriage"). The movement for marriage equality, from this perspective, diverges from this trend of valuing marriage less.

Out of the radical and reform movements of the 1960s and 1970s, and the changes in social norms that accompanied those movements, came a transformation in the legal significance of marriage. The constitutional principles of equality and liberty toppled ancient rules about families that were based on hierarchy and conformity.

*See id.* at 11. Polikoff examines various social and legal forces demonstrating this progress toward marriage mattering less, including the sexual and divorce revolutions of the 1960s, legal transformations of marriage and family in the 1970s, the formal demise of legal distinctions based on "illegitimacy," increased acceptance of sex outside marriage, and the advent of no-fault divorce. *Id.* at 21–32. Each of these changes, Polikoff argues, shows law becoming more tolerant of a society in which "people organized their lives less and less around marriage." *Id.* at 32. As a historical matter, Polikoff contends, "there was every reason to believe that the law would continue to develop in the direction of [a definition of family] encompassing lesbian and gay families as well as those of the heterosexuals who had toppled the rigid, dichotomized, hierarchical family structures of old." *Id.* at 33.

<sup>112</sup> Polikoff has articulated the strongest recent argument on the left against prioritizing same-sex marriage. In Polikoff's view, as discussed above, the focus on same-sex marriage diminishes efforts to create social and legal support for a broad range of family and caretaking units, beyond marital couples and their families. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE*, *supra* note 18, at 5.

<sup>113</sup> *See supra* Part I.A.

<sup>114</sup> *See* POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE*, *supra* note 18, at 12 (asserting that the feminist movement changed laws that "punished sex outside of marriage, imposed catastrophic consequences for bearing children outside of marriage, assumed and fostered 'separate spheres' for men and women, and denied the ability to exit a marriage except under penalty"); Fineman, *Why Marriage*, *supra* note 11, at 262 ("The institution [of marriage] is based on an unequal and hierarchical social arrangement in which men are considered the heads of households, owed domestic and sexual services by wives and obedience and deference by all family members."); Alicia Brokars Kelly, *Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life*, 19 WIS. WOMEN'S L.J. 141, 160–62 (2004) [hereinafter Kelly, *Rehabilitating Partnership Marriage*] (arguing that current divorce law enforces the inequality between men and women that begins during marriage); Kim, *supra* note 14, at

Marriage skepticism reflects a sustained critical effort to unpack and examine the legal and social practices and effects of marriage.<sup>115</sup> An inquiry into the legal and social practices of marriage also addresses how membership in marriage affects its practices and consequences. Marriage skepticism, more specifically, puts marriage on the table as a proper and rich subject of critical inquiry about power, subordination, and hierarchy. These questions, not surprisingly, lead us to consider whether and how the criteria for membership in the institution of marriage affect its practice and effects. The movement for marriage equality partially answers this question. By putting into play the basic qualifications for participation in marriage, the movement for marriage equality engages in an effort to reexamine the relationship between marriage's traditional workings and hierarchy.

It is important to note the distinction here between the substantive arguments that marriage equality advocates make and the procedural questions raised by the movement for marriage equality. Understandably, marriage equality advocates do not claim to redefine marriage.<sup>116</sup> Indeed, the marriage equality agenda can and has been faulted for its status-quo-reinforcing

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919 (“[D]uring feminism’s ‘first wave,’ feminists focused on the extent to which the mandated loss of women’s names upon marriage embodied the absence of autonomy and individual identity of women both within the family and in public life.”).

<sup>115</sup> See BABCOCK ET AL., *supra* note 12, at 21 (arguing that the doctrine of coverture was the “civil death” of a woman’s legal identity); Fineman, *Masking Dependency*, *supra* note 13, at 2188 (noting that family burdens are distributed in an inherently unequal manner between a husband and wife); Harris, *Loving Before and After the Law*, *supra* note 10, at 2843 (arguing that the putative sphere of privacy surrounding “the family” isolated women in state-sanctioned physically and sexually abusive marriages); Kim, *supra* note 14, at 895 (discussing how practices of marriage, like last names, reflect and reinforce gender hierarchy in marriage).

<sup>116</sup> See Brief of Amici Curiae American Civil Liberties Union et al. at 6, *Perry v. Schwarzenegger*, 702 F. Supp. 2d 1132 (N.D. Cal. 2010) (No. 09-CV-2292 VRW) (arguing that same-sex couples “by no means diminish or minimize the significance that the official designation of “marriage” holds”) (quoting *Strauss v. Horton*, 207 P.3d 48, 61 (2009)); Brief of Appellants at 11, *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006) (No. A-2244-03T5) (explaining that marriage is recognized as a dedication to various essential principles). See also Evan Wolfson, *ANALYSIS: Why Should I Be for ‘Gay Marriage’?*, FREEDOM TO MARRY (Dec. 3, 2003), [http://freedomtomarry.ipower.com/evan\\_wolfson/by\\_why\\_should\\_i\\_be\\_for\\_gay\\_marriage.php](http://freedomtomarry.ipower.com/evan_wolfson/by_why_should_i_be_for_gay_marriage.php):

We are asking for marriage, not “gay marriage” . . . . The truth is we’re working for an end to discrimination in marriage itself—the same rules and responsibilities, the same protections, the same dignity, the same commitment, the same opportunity to declare your love for another person with whom you build a life. Same-sex couples want the equal choice—the freedom to marry—not two lines at the clerk’s office for separate and unequal treatment.

*Id.*

tendencies.<sup>117</sup> The arguments and strategies deployed by marriage advocates suggest that marriage equality is about access to an institution as is.<sup>118</sup>

But the very process of talking about admission into marriage by members of the same sex is an inquiry into marriage's relationship to hierarchy and power. I suggest then that marriage equality, like marriage skepticism, is not just a substantive outcome but also a process. The marriage movement poses fundamental questions, such as the necessity of sex-based criteria, that pursue marriage skepticism's critique of marriage's traditional workings.

By no means do I suggest that marriage equality is the sole and best answer to marriage skepticism's questions and concerns. Indeed, deep marriage skeptics argue for the abolition of the legal category of marriage entirely.<sup>119</sup> But the answer that the current movement for marriage equality purports to provide—that access to marriage is a necessary predicate to social, political, and legal equality and autonomy—continues in the tradition set by marriage skeptics of trying to sort out how marriage, as traditionally constructed, has reflected and reinforced hierarchy. Marriage equality advocates, however, answer the question differently than marriage skeptics. In other words, marriage equality advocates and marriage skeptics may be engaging in procedurally similar inquiries while reaching different substantive conclusions.

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<sup>117</sup> See generally Katherine Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236 (2006) (describing concerns with the same-sex marriage movement, including the seeking of rights as couples to the exclusion of individuals, the affirmation of normative importance of marriage, and the lost opportunity to explore other relationship options); see also Franke, *Domesticated Liberty*, *supra* note 4, at 1414 (“I fear that *Lawrence* and the gay rights organizing that has taken place in and around it have created a path dependency that privileges privatized and domesticated rights and legal liabilities, while rendering less viable projects that advance nonnormative notions of kinship, intimacy, and sexuality.”). Michael Warner articulates:

Is marrying something you do privately, as a personal choice or as an expression of taste, that has no consequences for those who do not marry? That would be true only if marriage were thought to lack the privileged relation to legitimacy that makes people desire it in the first place, or if the meaning of marriage could be specified without reference to the state. But as long as people marry, the state will regulate the sexual lives of those who do not. It will refuse to recognize the validity of intimate relations—including cohabiting partnerships—between unmarried people or to grant them the same rights as those enjoyed by married couples . . . . To speak of marriage as merely one choice among many is at best naïve; it might be more accurately called active mystification.

Michael Warner, *Normal and Normaller: Beyond Gay Marriage*, 5 GLQ: A JOURNAL OF LESBIAN & GAY STUD. 119, 127–28 (1999).

<sup>118</sup> See Franke, *Longing for Loving*, *supra* note 36, at 2702 (critiquing the same-sex marriage movement for “surrendering to a normative landscape that seeks to establish the conventional meaning of relationships by virtue of their similarities or dissimilarities to a marriage”).

<sup>119</sup> See, e.g., FINEMAN, *THE NEUTERED MOTHER*, *supra* note 8, at 228 (“[W]e should abolish marriage as a legal category and with it any privilege based on sexual affiliation.”); Polikoff, *Martha Fineman*, *supra* note 2, at 176 (arguing for the abolition of marriage as a legal category).

Marriage equality may be viewed not just as an extension of marriage as it has traditionally operated, but as a possible answer to those problems of hierarchy. To the extent that sex-based difference, and its socially constructed counterpart, gender, have served as the bases for hierarchy in marriage, marriage equality may provide a means of reconstructing marriage in more egalitarian terms.<sup>120</sup>

## 2. *Functionalizing Marriage*

The marriage equality movement may also be viewed as proceeding from the legacy of marriage skepticism insofar as it ultimately relies on a more functionalized definition of marriage, rather than a traditionally formal, sex-based one.

Marriage skepticism has animated much of the movement toward functionalism in family law. Functionalization of family law in the past thirty years has both reinforced and reflected, in particular, feminism's critique of traditional marriage and broader calls in family law scholarship for more pragmatic, less formalistic definitions of family.<sup>121</sup> Polikoff describes how "[t]he feminist critique of marriage . . . steered advocates for lesbian and gay families away from marriage."<sup>122</sup> Feminists and advocates for lesbian and gay families criticized marriage's "patriarchal script" and pursued the "overarching goal" of "facilitating social, legal, and economic support for diverse family forms outside the patriarchal family . . ."<sup>123</sup> Greater diversity could be achieved through using alternative measures of family, such as how people in relationships functioned, not just whether they fit into particular legal statuses traditionally awarded legal and social support.<sup>124</sup>

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<sup>120</sup> See, e.g., Hunter, *supra* note 7, at 16–17.

<sup>121</sup> See, e.g., Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 882 (1984) (criticizing "the law's adherence to the exclusive view of parenthood when the premise of the nuclear family has failed"); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 464 (1990) (arguing, in the context of parenthood, that nontraditional families are "ill-served by rigid definitions" of familial relationships); Alison Harvison Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 AM. U. J. GENDER SOC. POL'Y & L. 505, 508 (1998) (advocating for a "reconceptualization of the family which would . . . recognize the limitations of the ideology of the ex[cl]usive family and articula[t]e a model that includes non-traditional family units").

<sup>122</sup> POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE*, *supra* note 18, at 48.

<sup>123</sup> *Id.* See also *id.* at 47 ("Redefining family, including recognizing unmarried couples, was an extension of the developments of the 1970s that made marriage matter less. Redefining family, rather than achieving marriage for same-sex couples, was also the driving vision of the coalitions in which advocates for gay and lesbian families participated.").

<sup>124</sup> See *id.* at 173 ("A valuing-all-families approach . . . would garner many allies under a banner of family diversity and protect the wide range of caring LGBT families and relationships.").

Greater functionalization in family law has occurred along several lines to decrease the role of marriage as the primary distributive force in family law. First, family law has displayed a more open approach to defining family.<sup>125</sup> Second, functionalization appears through an increased willingness to award the rights and benefits of marital partners to unmarried parties.<sup>126</sup> Third, functionalization has occurred through the abandonment of most formal distinctions in the law between marital and nonmarital children.<sup>127</sup> And fourth, the law of marriage has shifted to reduce the penalties for sex outside of marriage, thus making marriage matter less as a regulator of intimacy.<sup>128</sup>

The concept of “functional equivalency” manifests this increased willingness to undertake substantive assessments of family, rather than relying merely on legal form to distribute the benefits of marriage and family. In the seminal functional equivalency case, *Braschi v. Stahl Associates*, the New York Court of Appeals considered the claim by a surviving same-sex partner to remain as a statutory “family” member in the apartment he had shared with the deceased, who had been the original rent control tenant.<sup>129</sup> In considering the surviving partner’s claim, the court applied a functional equivalency standard, stating that “protection against sudden eviction should not rest on fictitious legal distinctions or genetic history . . . .”<sup>130</sup> Instead, the court adopted an approach that considered the “reality of family life,” rather than conferring benefits “rigidly restricted to those people who have formal-

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<sup>125</sup> See *Moore v. City of East Cleveland*, 431 U.S. 494, 504–06 (1997) (holding that a housing ordinance that limits occupancy to members of a single family and defines “family” as only including a handful of relationship categories violates due process). The Court stated, “[o]urs is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.” *Id.* at 504–05.

<sup>126</sup> See *Marvin v. Marvin*, 557 P.2d 106, 116 (Cal. 1976) (holding an oral contract between an unmarried man and woman for division of property to be enforceable).

<sup>127</sup> See, e.g., *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 165 (1972) (finding unconstitutional a Louisiana statute denying equal recovery rights for workmen’s compensation to unacknowledged non-marital children); *Levy v. Louisiana*, 391 U.S. 68, 70–72 (1968) (rejecting lower court’s holding that non-marital children were not included under Louisiana statute granting children right to recover for wrongful death of parent); *De Sylva v. Ballentine*, 351 U.S. 570, 580–82 (1956) (determining that non-marital children are “children” of the author under the federal Copyright Act).

<sup>128</sup> See *Surles v. Surles*, 437 S.E.2d 661 (N.C. Ct. App. 1993); AM. JUR. 2D *Divorce* § 2 (2010) (noting that the majority of states now have no-fault divorce statutes primarily “[t]o remove from domestic relations litigation the issue of marital fault as a determining factor, to abolish the necessity of presenting sordid and ugly details of conduct by either party to obtain a dissolution of marriage, and to replace the concept of ‘fault’ by substituting marriage failure or ‘irretrievable breakdown’ as a basis for a decree dissolving a marriage.”); 49 AM. JUR. PROOF OF FACTS 3D 277 *Adultery and Child Custody* § 7 (2010) (“[A] finding of adultery does not in any way create a presumption of unfitness to have custody of one’s own child.”) (citing *Sider v. Sider*, 639 A.2d 1076 (Md. 1994)).

<sup>129</sup> *Braschi v. Stahl Assocs.*, 543 N.E.2d 49, 50–51 (N.Y. 1989). The statute said that “upon the death of a rent-control tenant, the landlord may not dispossess ‘either the surviving spouse of the deceased tenant or some other member of the deceased tenant’s family who has been living with the tenant.’” *Id.* at 50 (emphasis in original).

<sup>130</sup> *Id.* at 53.

ized their relationship by obtaining, for instance, a marriage certificate or an adoption order.”<sup>131</sup>

This substantive determination of family status relied on a host of factors aimed at determining how equivalent the couple was to one deserving legal protection. These factors included “exclusivity and longevity of the relationship”; “level of emotional and financial commitment”; “manner in which the parties have conducted their everyday lives and held themselves out to society”; and “reliance placed upon one another for daily family services.”<sup>132</sup> With none of these elements dispositive, the court stated that the “totality” of the evidence must be considered as demonstrated by the “dedication, caring and self-sacrifice of the parties.”<sup>133</sup>

Marriage equality’s argument that marriage should be open to those who demonstrate commitment and dedication resonates with functionalism’s focus on distributing legal and social protection based on the conduct of relationships.<sup>134</sup> Major same-sex marriage cases repeatedly present a view of marriage that focuses on how a couple lives and conducts itself, rather than what its sex-based characteristics are. The case for same-sex marriage relies on the argument that access to marriage should not depend on formal distinctions like sex-based identity; instead, access should be based on the existence of functional characteristics. For example, plaintiffs’ affidavits focus on functional characteristics like dedication and commitment that they argue render them worthy of participation in marriage: “Alicia and I live our life together as if it were a marriage. I am proud that Alicia and I have the courage and the values to take on the responsibility to love and cherish and provide for each other . . . My parents long to talk about their three married children, all with spouses, because they are proud and happy that we are all in committed relationships.”<sup>135</sup>

Advocates of same-sex marriage’s conduct- and characteristic-based approach to marriage resonates with the functional approach to family favored by marriage skeptics. In this regard, it may be viewed as a project in functionalizing standards for access to legal and social support of family.

I do not mean to suggest that marriage equality advocates aim to do away with marriage the way that some marriage skeptics suggest. Indeed, marriage equality applies functionalism within the confines of the estab-

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 55.

<sup>133</sup> *Id.*

<sup>134</sup> See, e.g., Kavanagh, *supra* note 121, at 85 (critiquing the “state-imposed model of a family” because it “bases decisions on an intentionally, but unnecessarily, limited vision of parenthood that distorts the narrative of too many people’s lives”).

<sup>135</sup> *Lewis v. Harris*, 908 A.2d 196, 226 (N.J. 2006) (Poritz, C.J., concurring and dissenting) (quoting plaintiffs’ affidavits); see also Transcript of Proceedings at 81, *Perry v. Schwarzenegger*, 702 F. Supp. 2d 1132 (N.D. Cal. 2010) (No. C 09-2292-VRW) (testimony of plaintiff Zarrillo) (“When someone is married, . . . it says to them these individuals are serious; these individuals are committed to one another; they have taken that step to be involved in a relationship that one hopes lasts the rest of their life.”).

lished institution of marriage. The same-sex marriage movement does not erase the boundary line between married and unmarried.

Marriage equality does something important, however, in broadening our understanding of who should be entitled to access to marriage. It should not necessarily be based automatically on sex-based status. Instead, access should flow from more searching inquiries into who acts the way we think people should act in marriage. This is a form of functionalism, and functionalism has roots in marriage skepticism.

Marriage skeptics might argue that functionalism cannot occur in the context of marriage—that the very purpose of functionalism is to work against and stand outside of marriage.<sup>136</sup> But the view of marriage equality as a project in functionalism makes sense when we place the marriage movement's focus on marriage in the context of functionalism's continued tendency to use marriage as a benchmark of family status.

While the functional equivalence approach the *Braschi* court adopted purported to be more flexible than one based on rigid adherence to the marital form, it proceeded from certain assumptions of what would make *Braschi* and *Blanchard* appear like a couple deserving legal protection. In other words, *Braschi* and *Blanchard* were evaluated for how closely they resembled a married couple.<sup>137</sup> Accordingly, the functional equivalence approach in *Braschi* has been criticized for using marital relationships as the standard against which to evaluate families.<sup>138</sup>

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<sup>136</sup> See Polikoff, *Equality and Justice*, *supra* note 43, at 553–54. Polikoff explains that *Braschi* was not a “victory [that] came under the banner of support for diverse families,” but that if *Braschi* and *Blanchard* were living today in a state that allowed their formal union, but did not exercise this option, “the ability to argue for a fit between a law’s purpose and the relationships included within that law that does not draw the line at marriage” might be lost. *Id.* at 553–54. She thus argues that the focus on opposite-sex marriage “reinforces, rather than expands, the terms of the debate about families and the law” for both same-sex and opposite-sex couples living outside of marriage. *Id.* at 554.

<sup>137</sup> For example, the court noted that (1) the couple had “lived together as permanent life partners for more than 10 years”; (2) the partners “regarded one another, and were regarded by friends and family, as spouses”; (3) their “families were aware of the nature of the relationship”; and (4) they had joint finances, they were each other’s insurance beneficiaries, and *Braschi* was the “primary legatee and coexecutor of *Blanchard*’s estate.” *Braschi v. Stahl Assocs.*, 543 N.E.2d 49, 55 (N.Y. 1989).

<sup>138</sup> See Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1664–65 (1993) (“Although *Braschi* did give legal status to a ‘stable, loving’ gay couple, it did so precisely because the behavior of the couple, rather than radically calling into question the ‘nuclear’/‘normal’/‘genuine’ family, closely resembled it, without squarely challenging its preeminence . . . [I]t should cast a shadow over the unbounded enthusiasm with which gay and lesbian advocates greeted the decision. In *Braschi*, the court held, in effect, that if you behave like Ozzie and Harriet, or alternatively like Baron and Feme, then you are a couple and can receive the succession rights of family members under the New York rent control laws.”); Darren Rosenblum, *Queer Intersectionality and the Failure of Recent Lesbian and Gay “Victories,”* 4 LAW & SEXUALITY 83, 108–09 (1994) (The *Braschi* Court attempts “to determine the presence of emotional ties by using indicia presupposing a heterosexually structured relationship. In so doing, they exclude queers who choose alternative structures.”).

The persistence of marriage as a measure of family, even within purportedly functionalist approaches, suggests that there is a place for considering marriage itself along functional lines. Family law's functionalization cases like *Braschi* widen the path of access to social and legal subsidies for some nonmarital families. But these cases highlight the extent to which legal form still takes precedence over family function insofar as functional equivalency is measured against marriage.

*Braschi* underscores the pragmatic observation that grounds the marriage equality movement—that marriage, for better or for worse, is in social practice and in law the measure against which we tend to measure family and intimacy.<sup>139</sup> A skeptical marriage equality approach contemplates the possibility that marriage equality may contribute to addressing the persistence of marriage as the benchmark of family recognition. I address this possibility in the next section.

### B. *From Marriage Equality to Marriage Skepticism*

Not only may marriage skepticism support marriage equality, but marriage equality may indeed support marriage skepticism. Rather than undermining the goals of marriage skepticism, marriage equality might actually be helpful for achieving the goals of pluralism and diversity that animate marriage skepticism.

I move beyond the standard feminist argument for same-sex marriage, one based on same-sex marriage's potential for transforming marriage into an internally more egalitarian institution. I focus, alternatively, on the transformative potential of same-sex marriage on a legal and social landscape dominated by marriage as the central organizing principle for family life. Marriage equality advances the marriage critique project aimed at pluralism in facilitative and constitutive ways.

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<sup>139</sup> See *Braschi*, 543 N.E.2d at 55 (describing the couple's relationship as "more than mere roommates" by noting their long-term living arrangements; that they, their friends, and family considered the couple to be spouses; and that their lives were both socially and financially interwoven); see also *Michael H. v. Gerald D.*, 491 U.S. 110, 119–21 (1989) (holding that in a custody case, the state's interest in preserving harmonious marriages and the marital family outweighed the biological and relational ties between father and child); *In re Marriage Cases*, 183 P.3d 384, 423 (Cal. 2008) ("[T]he right to marry represents the right of an individual to establish a legally recognized family with the person of one's choice, and, as such, is of fundamental significance both to society and to the individual."); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 954–55 (Mass. 2003) ("Marriage . . . bestows enormous private and social advantages on those who choose to marry. Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family."); *Lewis v. Harris*, 908 A.2d 196, 226 (N.J. 2006) (Poritz, C.J., concurring and dissenting) ("[P]laintiffs express a deep yearning for inclusion, for participation, for the right to marry in the deepest sense of that word.").

### 1. *Facilitating Pluralism*

The pursuit of same-sex marriage *facilitates* the pluralistic goals of the marriage critique, and the destabilization of marital primacy, by drawing attention to the gender-hierarchical and sexuality-norm enforcing construction of traditional marriage. This particular effort at reconciling marriage skepticism with marriage equality is process-based, along the lines discussed above.<sup>140</sup> The debate over same-sex marriage reveals the historically discriminatory construction and operation of marriage in law and society. The pursuit of same-sex marriage and the resistance to it on the right shed light on the extent to which marriage has tended to bear its privileged status because of its exclusionary, heterosexual, and heteronormative construction, rather than just in spite of it. The debate over same-sex marriage facilitates reconsideration of the privileged status of marriage and gender- and sexuality-related hierarchy and exclusion. By questioning the foundations of marriage's heteronormative, gender-based exclusivity, marriage by same-sex couples bears the potential to unsettle traditional marriage's primacy in family law.

#### *a. Reconsidering the Gender of Marriage*

Contemporary arguments on the political right against same-sex marriage demonstrate just how much marriage has been constructed as a gender-enforcement mechanism in law and society. This is particularly evident in the definitional argument against same-sex marriage—that marriage is “between a man and a woman.”<sup>141</sup> Under skeptical marriage equality, we might consider the extent to which this gender-enforcement function is integral to traditional marriage's appeal.

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<sup>140</sup> See *supra* Part II.C.

<sup>141</sup> See, e.g., 1 U.S.C. § 7 (2006) (containing Defense of Marriage Act definitions); CAL. CONST. art. I, § 7.5 (“Only marriage between a man and a woman is valid or recognized in California.”); MICH. CONST. art. I, § 25 (“To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.”); Charles J. Reid, Jr., *The Augustinian Goods of Marriage: The Disappearing Cornerstone of the American Law of Marriage*, 18 BYU J. PUB. L. 449, 469 (2004) (“What, then, constitutes the thing called a marriage? What is it in the eye of the *jus gentium*? It is the union of one man and one woman, ‘so long as they both shall live,’ to the exclusion of all others . . . which can be dissolved only by the authority of the State. Nothing short of this is a marriage.” (quoting *Roche v. Washington*, 19 Ind. 53, 57 WL 2046 (Ind. 1862))); Alfonso Cardinal López Trujillo, *The Nature of Marriage and Its Various Aspects*, 4 AVE MARIA L. REV. 297, 328 (2006) (“We have reached, in Europe and the Americas, not only the enormous fiction, without any foundation, that certain ‘unions’ of persons of the same sex can be an explicit alternative to marriage, but even the greater fiction that these unions can act as ‘marriage.’ This goes against reason and sound legal sense . . . This contradicts the sciences, which view the complementarity of the sexes as something natural and see Judeo-Christian anthropology not as something exclusively for believers, but as an experience and a wisdom of dignified universal value.”).

The definitional argument against same-sex marriage is frequently dismissed as “circular”<sup>142</sup> and overly narrow, failing to take into account the many ways in which the law of marriage has transformed without those changes being perceived as threatening to reduce marriage to a meaningless institution.<sup>143</sup> Less frequently discussed, however, are the ways in which the definitional argument is actually an apt description of marriage’s traditional gender function in society.

For same-sex marriage opponents, this definitional description of marriage, as it has traditionally operated, does double duty as a normative argument against same-sex marriage. Ironically, the definitional argument—to the extent it is based on historical description—actually resonates surprisingly with the feminist critique of marriage. This is true insofar as the feminist critique of marriage is based on the observation that marriage is, in fundamental ways, about gender.<sup>144</sup> To use Susan Appleton’s phrase, the definitional argument reveals quite tellingly how much marriage is about “gender talk.”<sup>145</sup>

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<sup>142</sup> David Cole writes,

The . . . argument [against same-sex marriage], based on preserving tradition, is circular: it seeks to justify the limitation of marriage to unions between a man and a woman on the ground that marriage always has been limited to unions between a man and a woman. As Judge Judith Kaye of the New York Court of Appeals has written, “The Justification of ‘tradition’ does not explain the classification; it merely repeats it.” . . . Tradition itself is not a justification for discrimination.

David Cole, *The Same-Sex Future*, N.Y. REV. OF BOOKS, July 2, 2009, available at <http://www.nybooks.com/articles/22791>.

<sup>143</sup> Cole articulates:

A variant of the tradition argument maintains that the state has a legitimate interest in preserving the institution of marriage. But how exactly would extending the right to marry to same-sex couples undermine marriage? It would certainly change the institution, in the sense of including couples that were traditionally excluded. But the institution of marriage has already changed dramatically over the years.

Cole, *supra* note 142; see also Susan Frelich Appleton, *Missing In Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL’Y REV. 97, 133–34 (2005) (dismissing the definitional argument by noting the “myriad ways in which once closely held understandings of marriage have evolved—to incorporate new features such as interracial unions and easy divorce, for example,” and rhetorically asking, “By way of comparison, did no-fault divorce (now, in a significant departure from history, widely available at either spouse’s request even over the other’s objection) change the ‘definition’ of marriage or simply signal an adjustment that leaves the previous ‘definition’ intact?”).

<sup>144</sup> See, e.g., POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE, *supra* note 18, at 11 (noting that “ancient rules about families . . . were based on hierarchy”); Fineman, *Why Marriage*, *supra* note 11, at 245 (noting that, historically speaking, marriage “was the primary means of protecting and providing for the legal and structurally devised dependency of wives”); see also FINEMAN, THE AUTONOMY MYTH, *supra* note 11, at 148 (“Marriage, gendered in its very foundation by its historic definition as a union between one man and one woman, has had particular relevance to the construction of the family as a legal and political category.”).

<sup>145</sup> See Appleton, *supra* note 143, at 100. For an explanation of the sex discrimination argument in support of same-sex marriage, see Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197

According to the feminist critique, marriage both reflects and reinforces gender difference and hierarchy through, for example, its rules of operation<sup>146</sup> and exit.<sup>147</sup> As Nancy Cott has observed, “[M]arriage uniquely and powerfully influences the way differences between the sexes are conveyed and symbolized. So far as it is a public institution, it is the vehicle through which the apparatus of the state can shape the gender order.”<sup>148</sup>

The gender function of marriage may be understood not only as an important side-effect of marriage but an intrinsic part of its mainstream societal appeal. The argument against same-sex marriage has focused to a signifi-

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*passim* (1994) (advancing the sex discrimination argument which states that discrimination against lesbians and gay men functions as part of a larger social control based on gender); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 *passim* (1988) (arguing that contemporary legal and cultural contempt for lesbian women and gay men serves primarily to preserve and reinforce the inherently misogynistic social meaning attached to gender); Samuel A. Marcossou, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1 *passim* (1992) (outlining the sex discrimination argument in the context of employment); Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 1 (1995) (defining as a “powerful argument” the idea that “discrimination on the basis of sexual orientation is a form of discrimination on the basis of sex”). For a critique of the sex discrimination argument, see Carlos A. Ball, *The Blurring of the Lines: Children and Bans on Interracial Unions and Same-Sex Marriages*, 76 FORDHAM L. REV. 2733, 2763 (2008) (“[The] limiting of marriage to opposite-sex couples . . . does not put men and women in different classes, and give one class a benefit not given to the other. Women and men are treated alike—they are permitted to marry people of the opposite sex, but not people of their own sex.”); Carlos A. Ball, *Lesbian and Gay Families: Gender Non-conformity and the Implications of Difference*, 31 CAP. U. L. REV. 691, 731 (2003) (noting as a challenge to the sex discrimination argument that there is “no burden imposed on women that is not imposed on men and vice-versa.”); Stein, *Evaluating the Sex Discrimination Argument*, *supra* note 105, at 518 (“[T]he sex discrimination argument mischaracterizes both the nature of the harm of sexual orientation discrimination and the underlying belief system that supports it . . .”).

<sup>146</sup> See Perry, *supra* note 16, at 10–15 (exploring the gendered nature of marital duties).

<sup>147</sup> See Kelly, *Rehabilitating Partnership Marriage*, *supra* note 114, at 170 (“[Modern divorce law’s] conclusion that a career asset is a solitary rather than joint accomplishment . . . starkly rejects core partnership principles that each spouse provides a set of different, but equally meaningful contributions to the marital estate . . . . This approach systematically devalues the contributions made by wives.”). There is a long line of cases in which the Court has invoked anti-stereotyping analysis to strike down many traditional family laws under the Equal Protection Clause. For example, using this approach, the Court has invalidated laws that specified on the basis of gender who might need alimony (former wives only), who needs education and training to perform the provider role (young men only), who can manage community property (husbands only), and who will be caring for a child after the other parent dies (mothers only). See Appleton, *supra* note 143, at 113.

<sup>148</sup> COTT, PUBLIC VOWS, *supra* note 14, at 3. As Appleton explains,

Once, family law consisted largely of rules specifying different rights and responsibilities for men and women, husbands and wives, and fathers and mothers. Traceable to Blackstone’s famous commentary about the legal nonexistence of married women, these gender-based rules regarded a wife as her husband’s property; subjected her money to his control; denied her access to certain employment; and recognized his prerogative to inflict domestic violence, including rape.

Appleton, *supra* note 143, at 110–11.

cant degree on the role that marriage, as traditionally constituted, has played in promoting conventional gender roles. As Deborah A. Widiss, Elizabeth L. Rosenblatt, and Douglas NeJaime's study of the arguments against same-sex marriage in major same-sex marriage cases persuasively demonstrates, opponents of same-sex marriage are significantly motivated by the desire to promote and protect traditional gender roles.<sup>149</sup>

The gender function of traditional marriage is best summed up by the following "fact" about same-sex marriage, or what the Family Research Council calls "counterfeit marriage": "Homosexual marriage is an empty pretense that lacks the fundamental sexual complementariness of male and female."<sup>150</sup> To those who oppose same-sex marriage, marriage as conventionally constituted brings together "man" and "woman," "husband" and "wife." Marriage performs its gender function by defining who fits into these categories and how.

*b. Reconsidering the Exclusion of Marriage*

For many, the value of marriage also lies significantly in its exclusionary nature, limited to those who fit within its gendered and heteronormative paradigm. According to Susan Appleton, "Those who seek federal and state constitutional amendments to restrict marriage to 'one man and one woman' often describe their goal as 'preserving' or 'protecting' marriage. For example, in calling for a constitutional amendment, President Bush cited the need 'to protect marriage in America.'"<sup>151</sup> The language of protectionism and preservation that pervades the opposition to same-sex marriage presupposes a limited pool of marital privilege.

For example, former U.S. Senator Rick Santorum has argued that it is important to consider the impact on the "entire moral ecology of our country" from allowing same-sex marriage.<sup>152</sup> Santorum likens support of same-sex marriage to "people argu[ing] that we can build the equivalent of a strip mall without even thinking about what those consequences are."<sup>153</sup>

Those "consequences" are the putative devaluation of marriage. In the eyes of same-sex marriage opponents, opening up marriage to same-sex couples means "taking away" marriage from heterosexuals. In Santorum's view, the heterosexual, gendered, and exclusive nature of marriage com-

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<sup>149</sup> See Widiss et al., *supra* note 83, at 499 ("[C]onservative advocates often make explicit connections between opposition to marriage by individuals of the same sex and preservation of "traditional" gender-differentiated family roles.").

<sup>150</sup> *InFocus: Ten Facts About Counterfeit Marriage*, FAMILY RESEARCH COUNCIL, <http://www.frc.org/content/ten-facts-about-same-sex-marriage> (last visited Mar. 6, 2010).

<sup>151</sup> Appleton, *supra* note 143, at 126–27.

<sup>152</sup> Interview by David Masci with Rick Santorum, former U.S. Senator from Pennsylvania, Current Senior Fellow at the Ethics and Public Policy Center, in *Two Perspectives on Gay Marriage: Arguments Against Same-Sex Marriage: An Interview With Rick Santorum*, PEW RESEARCH CTR. PUBL'NS (May 5, 2008), <http://pewresearch.org/pubs/820/two-perspectives-on-gay-marriage>.

<sup>153</sup> *Id.*

prises its value. To allow same-sex marriage is to “deconstruct[ ] marriage” and “devalue what you want to value.”<sup>154</sup>

In other words, marriage has been traditionally meaningful to same-sex marriage opponents because it has been constructed as an “elite private club,”<sup>155</sup> insofar as “[t]he value of membership depreciates if just anyone—particularly outsiders like gays and lesbians—can join.”<sup>156</sup> Marriage’s coveted status for many of its truest believers lies in the distinguishing function it performs in dividing those worthy of its privileges and benefits from those who are not. This division has powerful and painful effects. It bears serious consequences for those, gay and straight, who live outside of marriage.<sup>157</sup>

For these opponents, the best way to save marriage is not to encourage it widely, but to continue to conserve it for the benefit of those who fit its traditional gender and sexuality paradigm. On this view, overuse threatens the institution of marriage.<sup>158</sup>

### c. *Unmasking Marital Privilege*

As has been argued elsewhere, same-sex marriage holds the potential for radically altering marriage internally toward more egalitarian norms into a less gender-hierarchical institution.<sup>159</sup> As discussed above, Nan Hunter has argued that same-sex marriage can disrupt the traditionally gendered dynamics of marriage.<sup>160</sup> William Eskridge has also argued that “[r]ecognizing same-sex marriage would contribute to the erosion of gender-based hierarchy within the family, because in a same-sex marriage there can be no division of labor according to gender.”<sup>161</sup> These scholars have focused on the promise that same-sex marriage holds for transforming gender relations

<sup>154</sup> *Id.*

<sup>155</sup> Appleton, *supra* note 143, at 127.

<sup>156</sup> *Id.*

<sup>157</sup> See, e.g., FINEMAN, *THE AUTONOMY MYTH*, *supra* note 11, at 113 (“[T]he marital family . . . has historically been viewed as the foundation of society, as the ‘healthy’ form of family essential for the well-being of the nation, as well as individuals. Many in our society would not even count some of the units described in the census report under that category as families. Others might concede the designation, but modify ‘family’ with terms such as ‘broken’ or ‘nonmarital,’ even ‘illegitimate,’ signifying that those units deviate from the ideal marital norm.”); POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE*, *supra* note 18, at 7 (arguing that the use of marriage as the dividing line for benefits is detrimental and that “people in any relationship other than marriage suffer, sometimes to a level of economic or emotional devastation”); Rachel F. Moran, *How Second-Wave Feminism Forgot the Single Woman*, 33 *HOFSTRA L. REV.* 223, 284–85 (2004) (noting the negative stereotypes of single women as “threat[s] to family values” and of single mothers as dependent on welfare); Rosenbury, *supra* note 21, at 217 (arguing that the division between marriage and friendship stigmatizes women who are not in marriages).

<sup>158</sup> Lynn Wardle has analogized the prospect of same-sex marriage to the “tragedy of the commons.” Wardle, *A Response*, *supra* note 46, at 470–72.

<sup>159</sup> See *supra* Part II.B.

<sup>160</sup> Hunter, *supra* note 7, at 16–17.

<sup>161</sup> Eskridge, *supra* note 85, at 356; see also Wriggins, *supra* note 83, at 314 (“[A]llowing people of the same gender to marry will be more likely to further gender equality than the current restriction[s] . . .”).

within marriage.<sup>162</sup> But from the standpoint of skeptical marriage equality, a more pressing question is how the pursuit of same-sex marriage may transform the status of marriage within law and society across the board.

The pursuit of same-sex marriage promises to facilitate a reconsideration of the primacy of traditional marriage in the social and legal landscape concerning family. The counterarguments to same-sex marriage, as based on gender and exclusion, highlight the extent to which the predominance of traditional marriage may not just be incidental to the gender-enforcement and exclusionary aspects of marriage, as traditionally constituted, may not just be incidental to the predominance of marriage, but might actually be the *sine qua non* of marriage in its traditional form. Accordingly, the debate over same-sex marriage draws out the extent to which marriage's primacy has significantly derived from its discriminatory workings.

Same-sex marriage holds the potential not only to transform marriage internally but also to alter marriage's "place in law and society."<sup>163</sup> Marriage skepticism has substantially focused on the ways in which marriage has functioned socially and legally to create and enforce hierarchy—inside the institution and across a variety of relationships. As Martha Fineman has discussed, marriage is privileged as the primary way of addressing dependency.<sup>164</sup> The intense focus on marriage as a means of privatizing care leaves out vast segments of the population and marginalizes those who are not married.

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<sup>162</sup> There is some evidence to suggest that Hunter's and Eskridge's theorizing from the early 1990s is coming to pass. Indeed, social scientists have found that same-sex couples do not base their division of labor in the household on gender but actually on other factors, such as preferences about particular chores. See Lisa Belkin, *When Mom and Dad Share It All*, N.Y. TIMES MAG., June 15, 2008, § MM, at 44 (citing Kimberly F. Balsam, et. al., *Three Year Follow-Up of Same-Sex Couples Who Had Civil Unions in Vermont, Same-Sex Couples Not in Civil Unions, and Heterosexual Married Couples*, 44 DEV'L PSYCHOL. 102 (2008)). Moreover, when comparing relationship satisfaction, "same-sex couples fared better than heterosexual married couples." Balsam et al., *supra*, at 113. Heterosexual women in the Balsam study were also more likely to do more of the household work and childcare in their relationships than their lesbian counterparts. *Id.* at 114. Indeed, Esther D. Rothblum, one of the authors of the Balsam study has said, "Heterosexual married women live with a lot of anger about having to do the tasks not only in the house but in the relationship. That's very different than what same-sex couples and heterosexual men live with." Tara Parker-Pope, *Well: Gay Unions Shed Light on Gender in Marriage*, N.Y. TIMES, June 10, 2008, at F1.

Admittedly, the gender-egalitarianism of same-sex marriage is not necessarily an unmitigated success. Gender is a powerful construct and affects not just straight people, but also lesbian and gay people. Social practices often associated with marriage demonstrate the persistence of gender dynamics. For example, Vermont civil union records show that lesbian couples are more likely to share last names than gay male couples. See Elizabeth Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 789 (2007). While this information is based on civil unions and not marriages, this result suggests that gender-based marital practices might still persist despite formal recognition of same-sex relationships.

<sup>163</sup> Appleton, *supra* note 143, at 124.

<sup>164</sup> See FINEMAN, *THE AUTONOMY MYTH*, *supra* note 11, at 38 ("[I]nvincible dependency has been assigned to the quintessentially private institution—the traditional, marital family.").

Rooted in this marriage skepticism is a concern about legally supporting a diverse array of caretaking and intimate relationships, beyond the conjugal relationships that have traditionally been between women and men. Marriage skepticism, accordingly, may be viewed as a project in pluralism.

The pursuit of same-sex marriage facilitates pluralism by shining a light on the nature and origins of marriage's privileged status. By doing so, it opens the path toward reconsidering its primacy and considering, instead, additional means of supporting family, intimacy, and caretaking beyond marriage.

## 2. *Constituting Pluralism*

Marriage equality also promises to lead to greater pluralism as advocated by the marriage critique by *constituting* marriage away from sex-difference and toward more core and laudable values. I categorize this part of my skeptical marriage equality approach as "result-based," in accordance with the scheme I set forth above.<sup>165</sup> The state's recognition of same-sex couples' right to marry reconstitutes marriage as a legal category predicated not on gender hierarchy, sex difference, or sexuality, but on core values like commitment<sup>166</sup> and caregiving.<sup>167</sup> This state message is particularly important, in light of the social and legal stature that marriage has historically enjoyed, for better or for worse.<sup>168</sup>

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<sup>165</sup> See *supra* Part II.B.

<sup>166</sup> The value of commitment is a common thread describing the relationships of those seeking marriage. For example, in *Perry v. Schwarzenegger*, Professor Nancy Cott testified for the plaintiffs describing marriage as

a unique institution, as an evaluation of a couple's choice to live with each other, to remain committed to one another, and to form a household based on their own feelings about one another, and their agreement to join in an economic partnership and support one another in terms of the material needs of life.

So marriage places a unique valuation on such couples' choices.

Transcript of Proceedings, *supra* note 135, at 201 (testimony of Professor Nancy Cott).

<sup>167</sup> I do not suggest that these are the only important qualities that do and should inform our determinations about access to marriage. They are, however, basic characteristics of what Martha Fineman calls our "inevitable dependency." See FINEMAN, *THE AUTONOMY MYTH*, *supra* note 11, at 38.

<sup>168</sup> See *supra* notes 23–28, 35–43 and accompanying text; see also Transcript of Proceedings, *supra* note 135, at 207–08 (testimony of Professor Nancy Cott). As Professor Cott testified in *Perry v. Schwarzenegger*,

I would say that the religious connotations that many different groups, different sects and different religions have attached to marriage have been part of its high cultural valuation.

More than that, in our entertainment, in our folktales, in our songs, in our movies, at least since the rise of the novel in the 18th century, marriage has been the happy ending to the romance, to the conflict that may have transpired over the course of a story. It is the principal happy ending in all of our romantic tales.

And that kind of cultural polish on marriage has, in the past century, been greatly forwarded by advertising and other forms of visual imagery that surround us all the time and that present the rice, the white dress, the happy couple parad-

For conventional marriage equality advocates, this new state message is sufficient from a rights perspective. For skeptical marriage equality advocates, however, the bigger payoff lies in the potential for marriage equality to promise protection for others outside of marriage.

The result of a fundamental shift in such a socially privileged status as marriage may open the path toward considering the functional value in a broader range of intimate and family ties. Detaching marriage from the very hierarchical and formal terms that have given it its staying power, and understanding marriage itself in more functional terms, may pave the way toward more pervasively functional understandings of family and intimacy overall. Restructuring the legal category of marriage may be viewed as critical for completing the important project of functionalizing family law, promoted by feminist and queer legal scholars who have pursued the marriage critique.

The work of transforming the privileged status of marriage arises not only from the destabilization of traditional marriage to expose its discriminatory underpinnings but also from the repopulation of this institution to provide an additional option in the range of possibilities for ordering intimate relationships. The elimination of the legal barrier to entry into marriage for same-sex couples provides a powerful opportunity to project the value of pluralism. The legal change signified by same-sex marriage promises not only to make marriage accessible to a broader range of intimate partners, but also to infuse societal thinking about family with a greater functionalism that focuses on the values of commitment and caretaking, supported by state recognition of family.

The ability to achieve this sort of pluralism and diversity depends, however, on the continuation of legally recognized alternatives to the marital family. As Stein has noted, “sedimentation” of relation forms has not occurred to help achieve “relationship pluralism.”<sup>169</sup> Indeed, preexisting alternatives to marriage have been repealed when marriage has become available to same-sex couples.<sup>170</sup>

This result is not necessarily inevitable. Marriage does not have to eclipse civil unions or other legally recognized alternatives to marriage. Stein argues that pluralism may occur through the influence of “reform-minded, pluralist” approaches like Paula Ettelbrick’s.<sup>171</sup> Through skeptical

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ing down the aisle, as a destination to be gained by any couple who love one another.

So these cultural attributes are probably too various to mention, but I’m sure you get my point.

*Id.*

<sup>169</sup> See Stein, *Marriage or Liberation?*, *supra* note 87, at 591.

<sup>170</sup> See S.B. 899, 2009 Gen. Assem., Jan. Sess. (Conn. 2009) (repealing any further issuance of civil unions in Connecticut); H.B. 436, 2009 Gen. Ct., 161st Sess. (N.H. 2009) (repealing the issuance of civil unions in New Hampshire, effective January 1, 2010); S. 115, 2009 Gen. Assem., 70th Sess. (Vt. 2009) (repealing the issuance of civil union licenses and certifications in Vermont).

<sup>171</sup> Stein, *Marriage or Liberation?*, *supra* note 87 at 591; see Ettelbrick, *supra* note 2.

marriage equality, we see how the process of working toward same-sex marriage can facilitate greater awareness about the historical role and construction of marriage. These arguments may influence society's willingness to embrace alternatives to an institution that has marginalized many for so long, even though same-sex marriage may result in significant improvements in marriage.

The pluralism at which skeptical marriage equality aims admittedly has its limitations. It does not address the whole of the marriage critique as advanced by queer theory scholars who eschew legal regulation of intimacy entirely.<sup>172</sup> This effort to reconcile marriage equality and marriage skepticism operates within the rubric of legal regulation and recognition of family forms and intimacy.

If the ultimate goal of a skeptical marriage equality position is the additional recognition of family forms beyond marriage, then why same-sex marriage at all? While postmodernists and legal realists tell us that law is not pre-social, that we make the law,<sup>173</sup> we also know that we are shaped by the law.<sup>174</sup> Developments in family law in the past few decades support this observation. Family law scholars have tended to applaud the move in family law toward increasingly "functional" approaches to defining family, in lieu of traditional "formal" approaches, which are predicated most commonly on the existence of marriage.<sup>175</sup>

While it is through functionalization that we are able to consider a greater range of families, this functionalization has done little to disturb the primacy of marriage in family law. Functionalization has tended to result in assessments of how closely couples or groups correlate with traditional legal family forms. Marriage has remained the standard against which we evaluate all families. The persistence of form in the face of family law's functionalization demonstrates the sense in which law has powerfully shaped our understanding of what makes a family. Even our efforts to move away from marriage are marriage-oriented.

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<sup>172</sup> See WARNER, *supra* note 31, at 81–147 (arguing that marriage demonstrates the state's sexual discipline and control); see also Franke, *Longing for Loving*, *supra* note 36, at 2688 (lauding regulatory gap left by *Lawrence* that could support paradigm of sexual liberty outside of marriage); *supra* text accompanying notes 36–40 (discussing queer theory's concern with protecting affective liberty of sexual minorities beyond marriage context).

<sup>173</sup> K. N. LEWELLYN, *THE BRAMBLE BUSH* 12 (1960) ("[T]he people who have the doing in charge, whether they be judges or sheriffs or clerks or jailers or lawyers, are officials of the law. What these officials do about disputes is, to my mind, the law itself.") (emphasis omitted).

<sup>174</sup> See Austin Sarat & Thomas R. Kearns, *Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life*, in *LAW IN EVERYDAY LIFE* 21, 29 (Austin Sarat & Thomas R. Kearns eds., 1993) ("[W]e have internalized law's meanings and its representations of us, so much so that our own purposes and understandings can no longer be extricated from them. We are not merely the inert recipients of law's external pressures. Rather, we have imbibed law's images and meanings so that they seem our own.")

<sup>175</sup> See, e.g., POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE*, *supra* note 18, at 126–35.

If we both make and are made by law, then same-sex marriage presents a significant opportunity to make our law into a new form that can then shape our understanding of what makes a family. If we can manage to untether marriage from its gender hierarchy, its heteronormativity, and its exclusivity, then our collective conceptions of family may adapt to marriage as it is functionally lived, rather than as it is formally prescribed. The notion that marriage is about how it functions may send the message that function is more important than legal form across a variety of family relationships. In other words, we may support pluralism across the spectrum of family law by constituting marriage in a more pluralistic way.

#### CONCLUSION

This Article has attempted to reconcile, at a theoretical level, support of same-sex marriage with marriage skepticism's effort to broaden the scope of state and social recognition of family form. This work is critical for understanding how two seemingly disparate strands of thought relate to one another in the contemporary debate on the left over same-sex marriage and, more specifically, how they may be read as compatible and connected.

I have focused in this Article merely on conceptualizing the relationship between broad movements that comprise and influence the current same-sex marriage debate. I do not attempt in this Article to weigh in on whether the pursuit of same-sex marriage was an appropriate goal to pursue at the outset. I position my argument in the present tense, in the context of an existing same-sex marriage movement.

Now that we are in the midst of a same-sex marriage movement, what contribution does skeptical marriage equality make to the debate about same-sex marriage? Without a clear sense of how the two movements relate to one another, we would risk repeating the marginalization and hierarchy resulting from marriage as it has traditionally operated. Moreover, skeptical marriage equality can inform advocacy choices about how to frame the interests at stake. For example, skeptical marriage equality would favor more descriptive approaches to marriage's importance, rather than normative ones. Skeptical marriage equality can also keep in focus efforts toward maintaining legal recognition of non-marital family forms, even alongside successes in the marriage equality movement.

It is important to note that the goal of pluralism that animates this argument is based on expanding the scope of legal support for a diverse range of family forms, not constricting it. I argue for a broader array of options for those who engage in the family work of commitment and caregiving. I thus view marriage skepticism as a way to support a range of family connections beyond the nuclear, heterosexual, marital family. Skeptical marriage equality is a way to achieve legal and social recognition for a wider spectrum of

families—same-sex couples, LGBT parents, single-parent households, children raised by their grandparents, elderly siblings, to name a few.

Rather than treating the debate on the left concerning same-sex marriage as a zero-sum game, skeptical marriage equality provides a means of viewing past and current arguments on this issue as critical in achieving the broader aims of supporting individuals in their committed and caring relationships. Ultimately, skeptical marriage equality, though born of critique, is a positive project in constructing pluralism.