

# **The Conservative's Dilemma: Traditional Institutions, Social Change, and Same-Sex Marriage**

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## I. INTRODUCTION

What is the meaning of marriage? The political fault lines that have emerged in the last election on the question of same-sex marriage suggest that there is no consensus on this issue. This article looks at the meaning of marriage against the backdrop of the same-sex marriage debate. Its focus is on the opposition to same-sex marriage. Drawing on the work of some leading conservative thinkers, it investigates whether a coherent, secular case can be made against the legalization of same-sex marriage and whether that case reflects how opponents of same-sex marriage think about the issue. In examining these questions, the article seeks more broadly to achieve a deeper understanding of the place of marriage in social life and to explore the implications of the recent controversy surrounding its reform.

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One striking aspect of the debate over the legal status of gay relationships is the contrast between public opinion, which is sharply divided, and what is written about the issue, which is more one-sided. A prominent legal journalist stated to me recently, with grave certainty, that there exists not a single respectable argument against the legal recognition of gay marriage. The opponents' position is, in her word, a "nonstarter." That viewpoint is reflected in discussions of the issue that appear in the academic literature. One searches long and hard for a piece in law or social policy that rejects, or even makes a serious effort to formulate the case against, the official recognition of gay marriage and gay adoption.<sup>1</sup> Matters are not very different in journals of opinion that appeal to the educated public.<sup>2</sup> If the published materials reflect the views of the

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1. See Rutgers University, Same-Sex Marriage: A Selective Bibliography of the Legal Literature, <http://law-library.rutgers.edu/SSM.html> (2002) (listing numerous articles overwhelmingly favoring legalization). See Mark Spindelmn, *Equality, Privacy and Lesbian and Gay Rights After Lawrence v. Texas*, 65 OHIO ST. L.J. 1057 (2004), for recent, mostly pro-reform work by legal scholars on gay rights and same-sex marriage. Articles in the literature that take a different view include, for example, MARRIAGE AND SAME-SEX UNIONS: A DEBATE (Lynn D. Wardle et al. eds., 2003) (presenting arguments against legalizing same-sex marriage); Gerard V. Bradley, *Same-Sex Marriage: Our Final Answer?* 14 NOTRE DAME J. L. ETHICS & PUB. POL'Y 729 (2000) (contesting the "neutrality" and "equality" arguments in favor of same-sex marriage); John Finnis, *The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations*, 42 AM. J. OF JURIS. 97 (1997) (drawing on Thomian, Aristotelian, Platonic, and other traditional philosophies to argue that homosexuals do not have a fundamental right to marry and that limiting marriage to heterosexual unions has a basis in reason); Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773 (2002) (arguing that same-sex marriage will weaken norms that channel people into heterosexual unions, which will undermine the well-being of children); Andrew Koppelman, *The Decline and Fall of the Case Against Same-Sex Marriage*, ST. THOMAS L. REV. (forthcoming 2005) (draft on file with author) (reviewing conservative positions on same-sex marriage); Patrick Lee & Robert P. George, *What Sex Can Be: Self-Alienation, Illusion, or One-Flesh Union*, 42 AM. J. OF JURIS. 135, 135 (1997) (arguing that homosexual sex acts are "incapable of actualizing true marital union" and that the law ought not treat such acts like heterosexual marital sex acts); Lynn D. Wardle, "Multiply and Replenish": *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL'Y 771 (2001) (arguing that heterosexual marriage deserves special legal status because the "committed relationship of a man and woman to each other and to the family they create is unparalleled"); Lee Harris, *The Future of Tradition*, POL'Y REV., June–July 2005, at 3–31 (developing a conservative defense of tradition to argue against same-sex marriage). See also JONATHAN RAUCH, *GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA* (2004) (arguing that gay marriage would be good for American society because it would increase respect for the institution of marriage itself); Peter Berkowitz, *The Court, The Constitution, and the Culture of Freedom*, POL'Y REV., Aug.–Sept. 2005, at 19–24 (discussing the conservative perspective on gay marriage).

2. A typical example is THE NEW REPUBLIC, which has long championed same-sex marriage. See, e.g., Andrew Sullivan, *Here Comes the Groom: A (Conservative) Case for Gay Marriage*, THE NEW REPUBLIC, Aug. 28, 1989, at 20 (offering several conservative arguments for gay marriage such as that gay marriage would increase the number of happy, stable families).

educated elite—what Margaret Thatcher used to call “the chattering classes”—then this group staunchly favors extending marriage to same-sex couples, and the sooner the better. The commentary reveals general agreement that this reform is entirely in keeping with the institution’s character and purpose. Alternatively, because marriage is flawed anyway, there is no compelling reason to preserve it in its current form or to resist changes that some people desire or perceive better to serve their individual needs.<sup>3</sup> Few, if any, doubts are expressed that permitting gay marriage is an unalloyed good.

Yet, the election results show that most ordinary people beg to differ with my journalist friend and her cohort. Initiatives to block same-sex marriage passed in every state in which they were on the ballot this November, indicating that majorities disfavor legalization.<sup>4</sup> These developments suggest that our society is sharply divided in its understanding of marriage in particular and, perhaps, traditional social institutions in general. What is the significance of these votes and what attitudes do they reveal? Do many people find the idea of same-sex marriage to be fundamentally at odds with their concept of the institution? Is this stance just a matter of unexamined feelings, raw prejudice, or reactive hostility? Are the politics to be explained by animus alone? Some of the opposition undeniably stems from religious convictions that are unlikely to hold much water with those who fail to

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3. Critiques of marriage are commonplace in feminist legal scholarship. See, e.g., Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129 (2003). See also MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995). But cf. William C. Duncan, *The Social Good of Marriage and Legal Responses to Non-Marital Cohabitation*, 82 OR. L. REV. 1001 (2003).

4. See Lynn D. Wardle, *Marriage, Relationships, Same-Sex Unions, and the Right of Intimate Association*, in MARRIAGE AND SAME SEX UNIONS: A DEBATE 190 (Lynn D. Wardle et al. eds., 2003) (“[A]dvocates of legalizing same-sex marriage have lost, and lost convincingly, whenever the people have been allowed to vote on the issue . . . [Votes ranged] from 61 percent to 70 percent against legalizing same-sex marriage.”); Ramesh Ponnuru, *Option Four: A Compromise on Gay Marriage*, NAT’L REV., June 6, 2005, at 38, 39 (“[V]oters supported initiatives against same-sex marriage in every state where they were on the ballot.”). According to a recent report from the Pew Research Center for the People & the Press, public opinion runs strongly against recognizing gay marriage. See THE PEW RESEARCH CENTER, BEYOND RED VS. BLUE: REPUBLICANS DIVIDED ABOUT ROLE OF GOVERNMENT—DEMOCRATS BY SOCIAL AND PERSONAL VALUES 35 (2005), <http://people-press.org/reports/pdf/242.pdf> (“Americans continue to decisively reject gay marriage. Americans oppose gay marriage by nearly two-to-one (61%–32%), a margin that has remained stable since the middle of 2003.”).

share the relevant beliefs.<sup>5</sup> The more interesting question is how much of the opposition is informed by non-religious considerations. What are those non-faith-based grounds, and do they amount to a cogent case?

Although the majority's position receives relatively little explication in the academic literature on family law reform, it is not entirely without support from intellectuals. Educated conservative opinion leaders do not write much for an academic audience.<sup>6</sup> Rather, the opposition to gay marriage is voiced most vigorously in a handful of right-wing journals of opinion.<sup>7</sup> The approach to the subject is something of a grab bag, lacking sustained and systematic exposition.<sup>8</sup> Some pieces make strong appeals

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5. Several sources illustrate the role of religious convictions and religiously-based moral principles in policy debates. See CHRISTOPHER J. EBERLE, RELIGIOUS CONVICTION IN LIBERAL POLITICS (2002) (arguing that citizens may responsibly base their political stances on religious beliefs, even if the only reasons for those commitments are religious in nature); KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS (1995) (examining American history and culture to search for principles that will help Americans decide to what extent private convictions, including religion, should be employed to make and defend political choices); KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988) (arguing that American citizens should not be expected to rely exclusively on rational, secular grounds for their political decisions); WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION (1990) (arguing that viewing various moral theories in terms of a single "egalitarian plateau" can help to clarify disputes over the meaning of concepts such as rights, freedom, the common good, and justice).

6. See Daniel Klein & Andrew Western, *How Many Democrats per Republican at UC-Berkeley and Stanford?* ACADEMIC QUESTIONS (forthcoming 2005), cited in Karl Zinsmeister, *Diversity on Campus? There is None*, AM. ENTER., Jan.-Feb. 2005, at 43-45; Daniel Klein & Charlotta Stern, *How Politically Diverse Are the Social Sciences and Humanities?* ACADEMIC QUESTIONS, (forthcoming 2005) cited in Karl Zinsmeister, *id.*; see also John O. McGinnis & Matthew Schwartz, *Conservatives Need Not Apply*, WALL ST. J., Apr. 1, 2003, at A14 (using campaign contributions to document that 74% of law professors donate to Democrats, while 16% donate to Republicans); Adam Liptak, *Giving the Law a Religious Perspective*, N. Y. TIMES, Nov. 22, 2004, at A16 (noting that, according to forthcoming McGinnis study, 80% of law professors at the top 21 law schools made campaign contributions that primarily supported Democrats, while 15% primarily supported Republicans).

7. See Stanley Kurtz, *Going Dutch? Lessons of the Same-Sex Marriage Debate in the Netherlands*, THE WKLY. STANDARD, May 31, 2004, at 21 [hereinafter Kurtz, *Going Dutch?*]; Stanley Kurtz, *Beyond Gay Marriage: The Road to Polyamory*, THE WKLY. STANDARD, August 4, 2003, at 26. But see William N. Eskridge, Jr. et al., *Nordic Bliss? Scandinavian Registered Partnerships and the Same-Sex Marriage Debate*, 2004 ISSUES IN LEGAL SCHOLARSHIP art. 4, <http://www.bepress.com/ils/iss5/art4> (questioning Kurtz's data and arguments); Susan M. Shell, *The Liberal Case Against Gay Marriage*, THE PUB. INT., Summer 2004, at 3; Gerard V. Bradley, *Stand and Fight: Don't Take Gay Marriage Lying Down*, NAT'L REV., July 28, 2003, at 26; Midge Decter, *An Amazing Pass*, NAT'L REV., Nov. 8, 2004, at 30; Maggie Gallagher, *Massachusetts vs. Marriage: How to Save an Institution*, WKLY. STANDARD, Dec. 1, 2003, at 21; Robert P. George & David L. Tubbs, *The Future of Marriage: Injudicious Consequences of a Kerry Vote*, NAT'L REV. ONLINE, November 1, 2004, [http://www.nationalreview.com/comment/george\\_tubbs200411010830.asp](http://www.nationalreview.com/comment/george_tubbs200411010830.asp); Justin Raimondo, *A Gay Man Decries 'Gay Rights'*, AM. ENTER., Mar. 2000, at 44.

8. But see JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA (2004) (attempting to formulate and counter

to tradition, past practice, and customary understandings, with little analysis of why these elements should receive deference. Others take an approach more consonant with “value-free” social science, relying on studies that purport to predict dire changes in individual or collective behavior that, it is claimed, will erode marriage’s ability to perform its traditional functions. It is sometimes acknowledged that those predictions are necessarily just that—pronouncements that cannot help but speculate on the unknown, because the dreaded event and its aftermath have not yet occurred. Despite the occasional forays into social science methodology, much of the writing that opposes gay marriage adopts the tone of a beleaguered minority at pains to establish distance from the views of the abhorrent “liberal” elites. “Liberal” positions regarding family, sexuality, and the government’s role in these areas are routinely disdained as alien, threatening, partial, sophistic, and dangerous to the social order. Unfortunately, these critiques are often superficial and freighted with unstated or unsupported assumptions. The contemporary opposition to gay marriage is the quintessential incompletely theorized agreement.

The case law concerning rights of homosexuals and legal recognition of gay marriage likewise fails to set out a systematically principled position or to develop a sustained line of argument. In *Lawrence v. Texas*,<sup>9</sup> in which the Supreme Court struck down a Texas law criminalizing same-sex sodomy, Justice Scalia in dissent raises the specter of same-sex marriage without explaining why the government should refuse to permit it. Rather, he stresses the unpopularity of the Court’s position, accusing it of “tak[ing] sides in the culture war” and of failing to acknowledge that “[m]any Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children’s schools, or as boarders in their home.”<sup>10</sup> He observes that these citizens see holding homosexuals at a distance as necessary to “protect[] themselves and their families from a lifestyle that they believe to be immoral and destructive.”<sup>11</sup> Noting that the Court views excluding homosexuals “as ‘discrimination’ which it is the function of our judgments to deter,” Scalia accuses the Court of being “imbued . . . with the law profession’s

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the conservative position against gay marriage point by point). See discussion of Rauch *infra* text accompanying notes 99–108.

9. 539 U.S. 558 (2003).

10. *Id.* at 602.

11. *Id.*

anti-anti-homosexual culture,” and with being “seemingly unaware that the attitudes of that culture are not obviously ‘mainstream.’”<sup>12</sup> In conclusion, Scalia warns that the Court’s result and reasoning will inevitably lead to recognizing a right to same-sex marriage under the federal Constitution. But apart from noting the unpopularity of this move, Scalia says little about why this would be such a bad thing.

The few decisions that, in the wake of *Lawrence*, grapple with the federal constitutional status of state recognition of homosexual family relationships such as same-sex marriage and adoption contain narrow, lawyerly discussions that stick closely to the legal script for analyzing claims under equal protection or fundamental rights jurisprudence and avoid broad theoretical issues. Nonetheless, the rationale for refusing to recognize same-sex unions or to establish other familial rights comparable to those accorded heterosexuals receives somewhat more explication than in Scalia’s dissent. For example, in *In re Kandu*, a federal bankruptcy court rejected a Canadian couple’s challenge to the federal Defense of Marriage Act’s ban on acknowledging same-sex marriage in federal law. The court justified the rule of marital exclusivity as based on the government’s interest in promoting the establishment of man-woman unions as the ideal setting for procreation and emphasized that same-sex couples are incapable of having shared biological children. In *Lofton v. Secretary of the Department of Children & Family Services*, an Eleventh Circuit decision upholding Florida’s ban on homosexual adoption, the court asserted that the state is entitled to assume that heterosexual couples are generally better equipped to raise children with a healthy gender identity.<sup>13</sup> Both opinions, however, avoid reliance on the goals of promoting traditional morality—goals that are specifically cited in the prologues of both statutes under consideration. Rather, the courts take a more functional view of the state’s interest in holding the line against same-sex unions or homosexual adoption. Both rely on the reasonableness of the assumption that shared biological parenting is superior to alternatives.<sup>14</sup> In contrast, Scalia’s opinion in *Lawrence* gives

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12. *Id.* at 602–03.

13. *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004) (ruling that the Federal Defense of Marriage Act did not deny a fundamental right, and did not violate equal protection); *Lofton v. Kearney*, 157 F. Supp. 2d 1372 (S.D. Fla. 2001) (trial court holding that a Florida law barring adoption by homosexuals does not violate substantive due process or equal protection under the appropriate standard of rational basis scrutiny), *aff’d*, *Lofton v. Sec’y of Fla. Dept. of Children and Families*, 358 F.3d 804 (11th Cir. 2004).

14. See, e.g., *Baehr v. Lewin*, 852 P.2d 44, 73 (Haw. 1993) (Heen, J., dissenting) (arguing that “marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race. Further, it is apparent that no same-sex couple offers the possibility of the birth of children by their union. Thus the refusal of the state to authorize same sex marriage results from such impossibility of

a nod to traditional morality, affirms the state's right to promote it, and stresses that the Court's reluctance to advance that goal is out of the "mainstream."<sup>15</sup>

In sum, current commentary and legal materials fail to provide anything like a unified, systematic exposition of the anti-gay marriage position. This paper represents a halting attempt to develop such an exposition by looking to thinkers identified with conservative approaches to politics and social life. Burke, Oakeshott, and Hayek are political philosophers centrally concerned with the problem of social innovation and change. Drawing primarily on the work of Edmund Burke and Michael Oakeshott,<sup>16</sup> and using original sources and commentaries,

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reproduction rather than from an invidious discrimination 'on account of sex.'"); *Morrison v. Sadler*, 821 N.E.2d 15, 30–31 (Ind. Ct. App. 2005) (rejecting equal protection challenge to state marriage law because "[e]ven accepting . . . many same-sex couples are successfully raising children in today's society, these couples are not at 'risk' of having random and unexpected children by virtue of their ordinary sexual activities. [Granting] civil marriage to same-sex couples would not further the State's interest in 'responsible procreation' by opposite-sex couples."); *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 976–77 (Mass. 2003) (Spina, J., dissenting) (noting that the right to enter into a same-sex marriage is not historically fundamental); *id.* at 979 (Sossman, J., dissenting) ("[T]he Legislature need only have some rational basis for concluding that, at present, those alternate family structures have not yet been conclusively shown to be the equivalent of the marital family structure that has established itself as a successful one over a period of centuries."); *id.* (Sossman, J., dissenting) ("Notwithstanding our belief that gender and sexual orientation of parents should not matter to the success of the child rearing venture, studies to date reveal that there are still some observable differences between children raised by opposite-sex couples and children raised by same-sex couples.").

15. *Lawrence v. Texas*, 539 U.S. 558 (2003). In his reliance on traditional morality, Scalia goes where other judges fear to tread. See Suzanne Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas* (Rutgers Law Sch. Newark) Faculty Papers, Working Paper No. 17, available at <http://law.bepress.com/rutgersnewarklwps/fp/art17>; see also Lino A. Graglia, *Lawrence v. Texas: Our Philosopher-Kings Adopt Libertarianism as our Official National Philosophy and Reject Traditional Morality as a Basis for Law*, 65 OHIO ST. L.J. 1139 (2004); Ronald Turner, *Traditionalism, Majoritarian Morality, and the Homosexual Sodomy Issue: The Journey from Bowers to Lawrence*, 53 U. KAN. L. REV., 42–47 (2004) (reviewing the question of whether traditional morality can be invoked to justify laws regulating homosexual conduct).

16. The third thinker associated with conservative social thought, Frederick Hayek, is less apposite here. See, e.g., FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* (1944). Hayek stresses the infirmities of human intellect in the economic realm. For Hayek, utopian economic and social schemes are likely to go awry because individual minds cannot possibly process all the information needed to run an economy efficiently. Rather, the free market, through its rules of distribution and trade, automatically generates, transmits, and harnesses voluminous and complex information. A complete understanding of the implications of that information is, by definition, beyond the reach

this paper seeks to explore whether these theorists' ideas provide any guidance on the vexed, contemporary question of whether marriage should be officially modified to accommodate homosexual unions. Do these thinkers' ideas shed light on the deep present divisions in the understanding of the meaning of marriage as a social institution? Do they tell us anything useful about how to approach the question of whether to modify marriage or preserve it in its present form? Do they suggest the methods we should use in analyzing the issue, or inform us as to whether, when, and how "mainstream" views or other considerations are to be factored into decisions regarding reform? This paper addresses these and like questions.

## II. CONSERVATIVES ON SOCIAL REFORM: BURKE AND OAKESHOTT

Edmund Burke's work is centrally concerned with the role of established institutions in social life. Russell Kirk, an important expositor of Burke, asserts that Burke attempted to articulate a theory of "collective human intellect."<sup>17</sup> Humankind accumulates its experience over generations. Traditional institutions and customary practices represent the embodiment of wisdom gleaned from this common experience. These traditions are presumptively good or, at the very least, useful. In Burke's view, "[p]rovidence, acting through the medium of human trial and error, has developed every hoary habit for some important purpose."<sup>18</sup> A corollary is that human reason and its creations are infirm and inadequate substitutes for the traditional forms that have evolved collectively over time. Burke insists that if we ignore tradition, or "tinker impudently with it . . . man is left awfully afloat in a sea of emotions and ambitions, with only the scanty stock of formal learning and the puny resources of individual reason to sustain him."<sup>19</sup> No one person or group living for a limited period in history can canvass all the possible challenges that an institution may be called upon to meet. Nor can mere mortals accurately predict all the consequences of any human plan. For this reason, charting the course of collective action and social policy using "formal learning" and "individual reason" is far more prone to error and unintended consequences than the faithful adherence to the accumulated

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of any person, planning committee, or sub-group. Although Hayek's focus is economic planning, his critique shares common themes with Burke and Oakeshott and applies more broadly to all types of social engineering schemes that seek to revamp long-standing social arrangements governing complex human relations.

17. RUSSELL KIRK, *THE CONSERVATIVE MIND: FROM BURKE TO ELLIOT* 33 (6th ed. 1978).

18. *Id.* at 34.

19. *Id.*

wisdom of mankind embodied in customs, cultural traditions, and settled practices.

Respect for the collective wisdom of custom and practice, and the recognition that rational constructions are inadequate substitutes, are themes that also run through the work of Michael Oakeshott. Like Burke, Oakeshott stresses the limitations of the rational faculties—limits that are both informational and analytic. He criticizes the modern, rationalist conviction that institutions are best designed from first principles. Rather, the rationalist project founders on the fundamentally fallacious assumption that “what is made is better than what merely grows.”<sup>20</sup> For Oakeshott, abstract principles cannot possibly substitute for the complexity, suppleness, and flexibility of traditions of behavior. For this reason, Oakeshott opposes the modernist tendency to bring “the political, legal, and institutional inheritance” before “the tribunal of intellect,” and to make reason the ultimate arbiter of policy and practice.<sup>21</sup> Relying too much on reason does violence to the nature of customary practice, which resists the demands of perfect coherence. As Oakeshott explains:

A tradition of behaviour is a tricky thing to get to know. Indeed, it may even appear to be essentially unintelligible . . . . [I]t has no changeless centre to which understanding can anchor itself; there is no sovereign purpose to be perceived or invariable direction to be detected; there is no model to be copied, idea to be realized, or rule to be followed.<sup>22</sup>

Oakeshott's remarks about the nature of social practice reveal that his concern is as much with moral psychology and the roots of virtuous action as with the inherent limits on human understanding. He draws a sharp distinction between “reflective morality”—or the morality “of the self-conscious pursuit of moral ideals”—and customary morality or the morality of a habit of behavior.<sup>23</sup> Oakeshott identifies the former with

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20. MICHAEL OAKESHOTT, *The New Bentham*, in RATIONALISM IN POLITICS AND OTHER ESSAYS 139 (Liberty Press new & expanded ed. 1991).

21. MICHAEL OAKESHOTT, *Rationalism in Politics*, in RATIONALISM IN POLITICS AND OTHER ESSAYS, *supra* note 20, at 8. See generally PAUL FRANCO, MICHAEL OAKESHOTT: AN INTRODUCTION 81–115 (2004) (outlining Oakeshott's critique of rationalism); TERRY NARDIN, *THE PHILOSOPHY OF MICHAEL OAKESHOTT* (2001) (investigating Oakeshott's philosophy of knowledge, especially knowledge of purposeful human conduct).

22. MICHAEL OAKESHOTT, *Political Education*, in RATIONALISM IN POLITICS AND OTHER ESSAYS, *supra* note 20, at 61.

23. MICHAEL OAKESHOTT, *The Tower of Babel*, in RATIONALISM IN POLITICS AND OTHER ESSAYS, *supra* note 20, at 472–77.

the demand that “everything must be justified at the bar of human reason.”<sup>24</sup> For Oakeshott, this demand is a formula for paralysis, both for individuals and for societies. Sound action can only proceed from giving the benefit of the doubt to existing precepts of morality, rather than from continuously mulling over the rightness and consistency of every decision in light of abstract principles. As with Burke, Oakeshott is respectful of tradition and skeptical of critiques grounded in ideology or a failure to achieve the “abstract and self-conscious coherence of a morality of ideals.”<sup>25</sup> Nonetheless, Oakeshott is not dogmatically opposed to reason in moral practice. Rather he defends “a mixed form of morality in which reflection plays a vital, if subordinate role.”<sup>26</sup> He acknowledges that reflection provides a basis for morality “to reform and to explain itself” and to “propagate itself beyond the range of the custom of a society.”<sup>27</sup> For Oakeshott, the ideological commitment to purging ideas from the deliberative mix is suspect as yet another absolutist move that enshrines dogma over practicality.<sup>28</sup> Oakeshott famously said of Hayek’s staunch opposition to centralized economic planning that “[a] plan to resist all planning may be better than its opposite, but it belongs to the same style of politics.”<sup>29</sup> He warns against giving abstractions, logic, or intellectual analysis primacy and stands against “moral criticism usurping the place of a habit of moral behaviour.”<sup>30</sup> His fear is that “[t]he pursuit of perfection will get in the way of a stable and flexible moral tradition, the naïve coherence of which will be prized less than the unity which springs from selfconscious analysis and synthesis.”<sup>31</sup> What is important is not to justify every practice, institution, and action to one’s own intellect, to iron out every inconsistency, and to square every rule with analytic demands, but to strive to “apprehend the existence of a subtle order in what appears to be chaotic.”

This discussion reveals that mistrust of sole reliance on reasoned analysis in designing social policies and institutions runs through the work of the thinkers most closely associated with conservative social

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24. FRANCO, *supra* note 21, at 96.

25. *Id.* at 88.

26. *Id.*

27. MICHAEL OAKESHOTT, *supra* note 20, at 477.

28. See, e.g., FRANCO, *supra* note 21, at 85–87 (describing Oakeshott’s disagreement with some conservatives’ unwavering commitment to ideology).

29. OAKESHOTT, *supra* note 20, at 26; FRANCO, *supra* note 21, at 85 (citing same). See also NARDIN, *supra* note 21, at 13; Gertrude Himmelfarb, *The Conservative Imagination: Michael Oakeshott*, 44 AM. SCHOLAR 405, 413–14 (1975) (arguing that Oakeshott disagreed sharply with conservatives who relied on principles or creeds like natural law instead of adopting a “disposition” to “com[e] to be at home in this commonplace world.”).

30. OAKESHOTT, *supra* note 20, at 477.

31. *Id.* at 478; FRANCO, *supra* note 21, at 88 (quoting same).

thought. For Burke and Oakeshott, conceptual relationships have little to do with how customs and traditions function in the real world. Because the powers of human reason are severely limited, all but the most intellectually gifted are incapable of engaging in sustained, rigorous analysis or of thinking through problems without falling into error. The dilemmas of human existence are particularly resistant to rational analysis because social practices and traditions are not derived from first principles, but evolve over time by trial and error. Human action in society and politics operates not primarily through reasoning, but through adherence to prescriptive roles, customs, and habits continuously adjusted to the messy demands of day-to-day living. The test of behavioral rules is thus whether they work well in the real world as guides for human interaction rather than whether they conform precisely to syllogistic demands. For this reason, institutions and customs routinely admit of exceptions or variations that fit uneasily within logical categories or fall short of treating seemingly like cases alike. That a body of rules is not always rigorously coherent, however, does not render it unsound as a foundation for the conduct of social life.

Although argument, analysis, and criticism of social practices are given a subordinate role, Burke and Oakeshott do not categorically reject them. Indeed, these thinkers' very identity as "social theorists" generates a paradox. If moral and social life were a matter of habit, custom, and traditional practice only, moral and political theory would reduce to ethnography. There would be little basis for normative criticism of existing traditions and little to say about social practices beyond cheerleading for the status quo. Moreover, both Burke and Oakeshott acknowledge that institutional change is an ineluctable part of social and economic life. Traditions evolve and customs transform themselves. Neither thinker is categorically opposed to change. Burke's commentators, for example, have repeatedly noted Burke's acknowledgment that reform is inevitable and that change, when properly guided, can be a source of renewal.<sup>32</sup> Oakeshott, likewise, recognizes that institutions are not static and that modifications are sometimes in order. The attitude prescribed, however,

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32. See, e.g., RUSSELL KIRK, *THE CONSERVATIVE MIND: FROM BURKE TO SANTAYANA* 40 (arguing that Burke believed that change was inevitable, and that, "properly guided, change is a process of renewal"); Don Herzog, *Puzzling Through Burke*, 19 *POL. THEORY* 336, 344 (1991) ("Tradition here [in Burke's thinking] isn't the enemy of change . . . . Political institutions require ongoing reform . . . [but change should] take the form of scrutinizing existing problems and canvassing available solutions, not trying to redesign things from scratch.").

is one of mild resistance or cautious acquiescence rather than enthusiastic embrace. “Looks good on paper” is never enough. Small, stepwise, piecemeal alterations are always preferable to radical transformations, however appealing such programs seem in theory.

The recognition that human customs, mores, and institutions evolve over time gives rise to a normative puzzle. The transformation of institutions does not happen blindly and automatically, wholly apart from human will. Change can occur through the evolution of informal social practice or through the enactment of legal reforms. Nonetheless, these two mechanisms are distinct in the challenge they pose to the Burkean paradigm. Although deliberation, conscious decision-making, and rational choice are components for altering both the social and legal landscape, shifts in customary practice are more likely to occur without extensive deliberation or conscious theorizing. Although sometimes debated among the people, changes on the ground occur spontaneously when enough people come to accept them. Such developments conform more closely to the evolutionary model in which new forms emerge from the gradual accretion of individual decisions designed to deal with the daily dilemmas of life. These developments are self-executing, because popular support automatically brings them about.

In contrast, legal reforms must be deliberately and consciously imposed. Under representative government, popular sentiment does not automatically translate into new law. Rather, reforms can be refused even in the teeth of popular sentiment or adopted by lawmakers without popular support. Thus, lawmakers must exercise independent judgment to decide which alternatives to impose from the top down. For this reason, conservative thinkers cannot easily avoid developing a heuristic to guide those with the power to advance or retard change. How should lawmakers go about deciding which reforms to pursue and which to resist?

According to Russell Kirk, Burke argues that change should only “*come as the consequence of a need generally felt*, not inspired by finespun abstractions.”<sup>33</sup> Moreover, that need deserves respect only when felt by people with a reverence for tradition—people who themselves lack enthusiasm for change. Politics are not to be entrusted to those who cannot distinguish between idealistic innovations and arrangements, however flawed, that have stood the test of time. Rather, for Burke:

Our part is to patch and polish the old order of things, trying to discern the difference between a profound, slow, natural alteration and some infatuation of the hour. . . . Human reason and speculation can assist in the adjustment of the old order to new things if they are employed in a spirit of reverence, awake to

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33. KIRK, *supra* note 32, at 40.

their own fallibility. . . . The perceptive reformer combines an ability to reform with a disposition to preserve . . . .<sup>34</sup>

Michael Freeman's commentary on Burke attempts further to explore the question of what should be reformed and under what circumstances. Once again, Freeman suggests that Burke is at pains to preserve the fundamental principles and purposes of basic social institutions, which must not be undermined by any deliberative plan. The periphery might be altered, but the core should remain intact. Further, all "progress" must be informed by the realization that perfectionism is a dangerous ground for reform of any kind, because modifications based on "fine-spun abstractions" or reasoning about the flaws of prior arrangements are themselves likely to be defective. One set of shortcomings will be replaced by another, with unintended consequences that cannot be fully anticipated until the reforms are in place. Freeman offers Burke's statement of guidance to politicians:

But it is not human frailty and imperfection and even a considerable degree of them, that becomes a ground for your alteration; for by no alteration will you get rid of those errors, however you may delight yourselves in varying to infinity the fashion of them. But the ground for a legislative alteration of a legal Establishment is this, and this only; that you find the inclinations of the majority of the people, concurring with your own sense of the intolerable nature of the abuse, are in favour of change.<sup>35</sup>

James Conniff interprets Burke's remarks on reform as revealing the conviction that a lawmaker should acquiesce in change only if both he and the public concur that some modification is necessary.<sup>36</sup> A simple public clamor is not enough—the politician on the spot must convince himself that reform is in some sense unavoidable. Minor changes should be resisted; it is only when the abuse is "intolerable" that change is warranted.<sup>37</sup> This suggests that Burke is holding out for something akin to the groundswell and perpetual agitation that builds when an institution creates so many hardships and difficulties, or threatens so many established values and priorities, that it becomes virtually unworkable. That standard sets the bar very high: the engineers of change should wait

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34. *Id.*

35. MICHAEL FREEMAN, EDMUND BURKE AND THE CRITIQUE OF POLITICAL RADICALISM 160 (1980) (quoting Edmund Burke, Speech on the Acts of Uniformity (February 6, 1772), in 7 THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE (2005)).

36. See JAMES CONNIFF, THE USEFUL COBBLER: EDMUND BURKE AND THE POLITICS OF PROGRESS 6–10, 68–70 (1994).

37. *Id.*

until settled practice is pushed to the breaking point. Anything short of that argues for a holding pattern or, at most, slight tinkering on the periphery of existing structures.

Michael Oakeshott likewise recognizes that traditions of behavior are “never quite fixed nor finished . . .”<sup>38</sup> “[They possess] no changeless centre to which understanding can anchor itself . . .”<sup>39</sup> It cannot be denied that change does occur in institutions over time, although the logic of change may be elusive and “some parts [of a practice] may change more slowly than others. . . .”<sup>40</sup> As with Burke, Oakeshott must grapple with the normative implications of the observation that social practices are not set in stone. From the positive recognition that existing forms do in fact transform themselves over time, Oakeshott must also decide which reforms should be pursued and how political decisionmakers should respond to pressure for change.

Like Burke, Oakeshott cautions against the enactment of reforms whenever any flaws or inconsistencies are identified in existing practices. Oakeshott comes out against what he terms the “politics of felt need,” which he characterizes as the relentless tendency to identify problems or dissatisfactions with existing arrangements, however limited in scope or effect, and then to pursue immediate action to correct the perceived flaws.<sup>41</sup> He is suspicious of the quest for perfect coherence and consistency in politics and law and disapproving of the insistence that institutions conform perfectly to a “self-consistent creed” or “universal norm[s]” that admit of no exceptions.<sup>42</sup> Rather, he points out that:

[Traditions] are not self-consistent; they often pull in different directions, they compete with one another and cannot all be satisfied at the same time, and therefore they cannot properly be thought of as a norm or a self-consistent set of norms or “principles” capable of delivering to us an unequivocal message about what we should do.<sup>43</sup>

As commentator Paul Franco notes, Oakeshott’s rejection of absolutism grows out of his concept of tradition as a diverse “multi-voiced creature.”<sup>44</sup> This characterization suggests that political deliberation must always be a messy, imprecise, ad hoc, pragmatic exercise, “a matter of striking a

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38. OAKESHOTT, *Reason and the Conduct of Political Life*, in RATIONALISM IN POLITICS AND OTHER ESSAYS, *supra* note 20, at 26.

39. OAKESHOTT, *Political Education*, in RATIONALISM IN POLITICS AND OTHER ESSAYS, *supra* note 20, at 61.

40. *Id.*

41. FRANCO, *supra* note 21, at 83–84.

42. *Id.* at 96.

43. Michael Oakeshott, *Rationalism in Politics: A Reply to Professor Raphael*, 13 POL. STUD. 90 (1965); FRANCO, *supra* note 21, at 96–97 (quoting same).

44. Oakeshott, *supra* note 43, at 90; FRANCO, *supra* note 21, at 97.

balance between competing goods.”<sup>45</sup> Oakeshott understood that “[p]ractical reasoning is always a matter of attending to the multiplicity of considerations that compose a tradition”<sup>46</sup> and finding some way to reconcile them all. Although arguments over principle are not wholly banished and play some role in the debate, the inquiry can never be reduced to “a matter of mathematical demonstration issuing in categorical injunctions.”<sup>47</sup> No set of abstract precepts can be allowed to sweep everything in its path, especially when the objects of demolition are long-standing practices that serve important social purposes and have stood the test of time.

### III. CONSERVATIVE IDEAS AND THE SAME-SEX MARRIAGE DEBATE

Do these pronouncements offer help on the issue that confronts us now, which is whether marriage should be reformed to allow same-sex unions? This question has two potential aspects. First, is current voter opposition to recognizing same-sex marriage motivated by similar notions, or does it stem from some other source? Second, do these ideas aid us in deciding, either as voters or lawmakers, to resist or embrace this particular proposal for reform?

The answer to the first question is complicated by the role of religion in the politics of same sex marriage, as well as by the place of religion in contemporary conservative politics generally. Burke’s and Oakeshott’s traditionalism is primarily secular and does not depend directly on religious belief of any kind. But some portion of political opposition to same-sex marriage is motivated by religious conviction.<sup>48</sup> Thus, whether Burke’s and Oakeshott’s ideas are shared by most contemporary voters may reflect in part the degree to which those voters’ hostility to same-sex marriage is grounded in religious belief. If faith-based convictions are a major factor, the theorists’ ideas may not matter much. On the other hand, Burke’s and Oakeshott’s ideas square easily with a religious outlook, and a religiously motivated opposition to same-sex marriage does not rule out additional, secular rationales for conservative views. Contemporary voters for whom religious convictions play a role might

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45. FRANCO, *supra* note 21, at 97.

46. *Id.* at 94.

47. *Id.* at 97.

48. See, e.g., Russell Shorto, *What’s Their Real Problem with Gay Marriage? (It’s the Gay Part)*, N.Y. TIMES MAG., June 19, 2005, at 34 (profiling anti-gay marriage activists in Maryland, who overwhelmingly cite religious reasons for their opposition).

also endorse Burke's and Oakeshott's more general caution towards institutional change.

On whether Burke and Oakeshott can help with the case against same-sex marriage, the central dilemma is whether the conservative veneration of tradition, coupled with a grudging willingness to allow tradition to evolve, can yield a determinate position on this specific problem considered in a contemporary setting. As Don Herzog points out, the formula that exalts preservation but admits change is an abstraction that is hard to apply in practice because it continuously flirts with a contradiction.<sup>49</sup> A person who credits a positive reason to modify settled practice is necessarily willing, in some sense, to jettison tradition.<sup>50</sup> The key challenge is to determine when that willingness is justified.

On this point, it might help to ask how Burke and Oakeshott would resolve the question of marital reform generally or would regard specific past changes in marital practice. Marriage has not been a static institution, with pronounced shifts in domestic law and custom occurring recently. How would Burke and Oakeshott have assessed, contemporaneously, the disappearance of the marriage bar in employment,<sup>51</sup> the enactment of no-fault divorce, the virtual abolition of alimony, and the evolution in the rules of child custody from paternal prerogative to "tender years" maternal preference to joint custody? It is far from clear that Burke and Oakeshott would have approved of any of these as they occurred. That all eventually came to pass poses the distinct question of how traditionalists should evaluate changes that are a *fait accompli*, after they have been accommodated over time by myriad transformations, subtle and dramatic, in behavior and social practices. Although these are not easy questions to answer, conservatives may regard them as of little relevance to the current project. Both Burke and Oakeshott view customary practice as particular and are loathe to see a sound position on one issue as necessarily prescribing the propriety of others. From this perspective, attempts to generalize from past marital reforms to the one under consideration is a futile exercise or, at best, of limited usefulness. Rather, there is no reason to believe that some unifying principle can answer all questions at once or that on-the-ground practicalities surrounding one innovation will shed light on the pros and cons of others. Reforms must be considered case by case. Thus, although the past may sometimes enlighten us on a present dilemma, it will not always help us. We will not necessarily learn much

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49. Herzog, *supra* note 32, at 343–45.

50. Herzog, *supra* note 32, at 345.

51. See Tom Sheridan & Pat Stretton, *Mandarins, Ministers, and the Bar on Married Women*, 46 J. OF INDUS. REL. 84, 84–101 (2004), on the debate surrounding the marriage bar in Australia.

about how to approach same-sex marriage from reviewing the story of past institutional change.

Although the particularism of the conservative approach to social change would appear to offer little hope of developing an all-purpose heuristic for assessing specific reforms, it is nonetheless possible to make some valid observations by contrasting these theorists' broader ideas with contemporary advocacy of same-sex marriage. The views of Burke and Oakeshott are sharply at odds with the proponents' approach to modifying existing institutions and reforming traditional marriage. For one, these thinkers' ideas arguably cannot be squared with using the courts as a forum for advancing the cause. Indeed, a pure countermajoritarian move in the name of abstract principles—of the type our courts make under the banner of judicial review of legislative enactments—would appear antithetical to their understanding of how institutional change should occur. Kirk's suggestion that Burke seems to countenance reform when the need for change is felt by people with a reverence for tradition seems to suggest that something close to majority sentiment is a vital prerequisite for legal change. Majority support, or more, is a necessary, although not always a sufficient, condition.<sup>52</sup> This, in turn, implies that highly unpopular reforms pushed through under the principle of absolute rights for individuals and subgroups are suspect unless most people already recognize those rights as valid. Burke and Oakeshott would thus appear to be deeply suspicious of a robust set of countermajoritarian powers or prerogatives to effect change.

The conservative perspective also sits uneasily with same-sex marriage proponents' form of advocacy. Reformers would not score points with Burke and Oakeshott by relying on the argument that specific ideas or abstract values must be given paramount effect in the design of social institutions generally and marriage in particular. For Burke and Oakeshott, unwavering commitment to ideas should never be allowed to carry the day. The reluctance to push an abstraction to its logical conclusion grows from and fuels a skepticism about demands for complete consistency in the workings of real-world institutions. Any emphasis on chosen principles as paramount, and any unwillingness to tolerate exceptions to those principles in practice, exemplifies the rationalist project that Burke

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52. For Burke, legal decisionmakers need not bow to popular sentiment, but must make their own independent judgment about whether to make changes in law that are necessary to alter the workings of existing institutions. *See supra* pp. 1070–71.

and Oakeshott abhor. Other concerns must enter the picture and be given great weight in the final calculus.

Three ideas repeatedly invoked by same-sex marriage proponents are equality, nondiscrimination, and rights—specifically the rights to sexual privacy and autonomy of action. These ideas are applied categorically and admit of few exceptions. Perhaps the most important objection to marriage as currently defined is that gay and straight persons and couples are treated unequally. Confining marriage to a man and a woman “discriminates” against men who wish to marry men, and women who wish to marry women. This approach draws strength from the observation that the categories recognized by marriage as currently constituted—such as gender and sexual preference—are either immutable or deeply ingrained and, thus, effectively beyond the individuals’ control. Using these categories to establish entitlements under law violates fundamental principles of fairness and non-arbitrariness. It is wrong to dole out entitlements based on accidents of birth, as these distinctions are not likely to reflect any legitimate social purpose. This line of argument effectively constricts the apparatus developed under constitutional equal protection jurisprudence as a limit on government action. This move in turn draws on an elaborate body of liberal political theory that starts from a presumption in favor of equal treatment and demands a reasoned justification for departures. If an arrangement disfavors one group or throws obstacles in its path, it is presumptively invalid absent a demonstrable public purpose.

The arguments for same-sex marriage that are grounded in the primacy of equality are intertwined with a call for respecting “fundamental” individual rights to sexual privacy and autonomy. Although some rights are regarded as absolute and inviolable, legal doctrine allows the presumption of invalidity to be rebutted in some cases. But the reasons must be weighty and principled. Those who plead the case for same sex marriage demand a compelling justification for the claimed violation of equal treatment and the compromise of the full exercise of sexual autonomy that results. The reasons offered by opponents for differential treatment in the realm of familial rights and relations are deemed too insubstantial, speculative, and abstract to support such incursions.

Same-sex marriage proponents’ approach to modifying existing institutions is clearly at odds with the conservative stance towards reform. In their enthusiastic advocacy in the name of equality, rights, and sexual privacy, reformers embrace a radical perfectionism that harbors no wariness or hesitation in pursuing change. Change is unproblematic for those who are committed to individualist values that elevate the achievement of equality, the maintenance of sexual privacy and autonomy, and the banishment of discrimination to pride of place in government or collective

action. Oakeshott's "politics of felt need" is in full force here.<sup>53</sup> Analytic tools are relentlessly put to work ferreting out all obstacles to perfect equality and autonomy. The project is to identify every social practice that disfavors some category of individuals—and is thus "discriminatory"—or that stands in the way of exercising individual prerogatives—and thus violates "rights." Whenever any institution fails fully to exemplify these ideals, it is presumptively invalid and therefore must be altered or abolished. Traditions that fall short of absolute vindication of core ideals are harmful and unworthy of respect by definition. This method necessarily gives little consideration to the potential long-term costs of pursuing the stated objectives as aggressively as possible, as it overwhelms those concerns with a potent counterweight. Because the venerated ideals are salutary by definition, there is no reason to be wary of changes that more perfectly achieve them.

There are additional arguments and advocacy methods same-sex marriage proponents employ that Burke and Oakeshott would find problematic. As already noted, both thinkers reject the notion, which they regard as the hallmark of rationalism, that social practices, customs, and institutions should be held to a standard of logical or ideological coherence. Likewise, in deciding whether changes in traditional practices are to be introduced, analytic rigor, logical consistency, and syllogistic exactitude should never be paramount. The contrast between conservative pragmatism and the quest for logical rigor shows up in three elements of the same-sex marriage debate: the question of the centrality of reproduction in marriage; the significance of society's acceptance of interracial marriage; and the use of the "slippery slope" argument to predict an inexorable progression from gay marriage to other unconventional, and presumably undesirable, marital relationships.

An essentialist argument repeatedly advanced by opponents of same-sex marriage is that marriage's chief rationale is the production and nurturing of children. Although recognizing that homosexual couples can raise children together, opponents of same-sex marriage stress that homosexual couples are by definition incapable of joint procreation and that only heterosexual couples can produce shared biological children. The power of biological ties means that heterosexual families are most likely to achieve stability and successfully perform the childrearing function.

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53. See FRANCO, *supra* note 21, at 83–84; see also discussion *supra* p. 1072.

If same-sex couples are allowed to marry, the institution will include many more couples who fall short of the procreative ideal.<sup>54</sup>

Proponents of gay marriage respond by focusing on the logical inconsistencies in this position. After all, some heterosexual couples are sterile and some—such as the elderly—are allowed to marry even though they cannot reproduce. The willingness to make exceptions for heterosexual couples incapable of bearing children together shows that joint procreation is not the “defining” essence of marriage.

Opponents of gay marriage respond that the belief “that procreation is a primary purpose of marriage” does not entail an insistence “that only people who can and will have children be allowed to marry.”<sup>55</sup> The critical distinction is that “for heterosexuals, barrenness is the exception. For homosexuals, it is the rule.”<sup>56</sup> This response rejects the syllogistic form of the proponents’ argument, which relies on the inexorable progression from premise—non-reproducing heterosexuals are allowed to marry—to conclusion—therefore non-reproducing homosexuals should be, too. Traditionalists counter this close reasoning with the observation that they seek to maintain a society in which heterosexual marriage is the *dominant* and *preferred* choice. The benefit of the doubt should go to long-standing and well-established methods for channeling people into this most desirable form of behavior. The paramount method for this channeling—and one with a venerable cultural and historical pedigree—is the institution of heterosexual marriage. The belief is that the privileged place accorded to heterosexual marriage in law and custom encourages people to enter into this relationship and enhances the support provided to those blessed with the ideal capacities.

The functions of encouragement, privilege, and support do not turn on purely logical relationships. They are experiential and pragmatic, not conceptual. Marriage’s social role does not rest on any ironclad,

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54. According to Maggie Gallagher, a leading critic of same sex marriage, children need and deserve fathers as well as mothers. The public legal union of a man and woman is designed first and foremost to protect the children that their sexual union (and that type of sexual union alone) regularly produces. A large body of social science evidence now confirms what the preferences for marriage embedded in law (more strongly in the past than now) suggested: children do better when raised by their own two married mothers and fathers.

Gallagher, *supra* note 1, at 782. See also RAUCH, *supra* note 1, at 114–22; Kay S. Hymowitz, *Gay Marriage vs. American Marriage*, CITY J., Summer 2004, at 16, 16–24 (arguing that the problems faced by the many children of divorced parents—including children in step-parent or “blended” families—demonstrate the value of heterosexual marriage as an institution for rearing children); WILLIAM J. BENNETT, *THE BROKEN HEARTH* (2001) (arguing that gay marriage will undermine the traditional nuclear family unit).

55. BENNETT, *supra* note 54, at 133–34; RAUCH, *supra* note 1, at 115 (citing same).

56. RAUCH, *supra* note 1, at 114.

exceptionless demand that all couples actually achieve the optimum arrangement.<sup>57</sup> Nor does the channeling function require the elimination of all relationships that fall short of the ideal. After all, adhering to an airtight rule would itself entail costs and intrusions. Such adherence would fail to accommodate the untidy, unpredictable nature of male-female relationships and the imperfect state of knowledge that prevents infallible prediction about biological functioning. Finally, allowing homosexuals as opposed to sterile heterosexuals to marry may have very different real-world effects on the integrity of the institution—effects that cannot be known until reforms are actually in place. The key is not consistency for its own sake, but what actually works in practice to help shape human choice and nurture the most desirable human relationships. In this endeavor, reasoning only goes so far. For a conservative theorist, disparaging the centrality of marriage's goal of promoting joint biological reproduction based on permitted exceptions exemplifies the fallacious insistence on logical rigor rather than on how institutions really work.

Another move in the debate favored by same-sex marriage proponents is to compare the present legal exclusion of same-sex marriage to the past bar on interracial marriage. In *Loving v. Virginia*, the Supreme Court invalidated the ban on interracial marriage as based on an irrational animus against blacks and an unjustified revulsion against "racial mixing."<sup>58</sup> As a form of pure prejudice that discriminates on the basis of the arbitrary characteristic of race and that trenches on fundamental rights, the ban is at odds with the constitutional guarantee of equal protection.<sup>59</sup>

For same-sex marriage proponents, the analysis yields a strong parallel. The exclusion of gays is likewise grounded in unreasoned and unreasonable attitudes and revulsions. The rule lacks any rational justification and fails to advance any legitimate social purpose. As a product of pure animus or prejudice, it cannot stand. Although race is the quintessential immutable characteristic whereas the status of sexual preference is more ambiguous, this argument does not depend crucially on the immutability element. Nonetheless, understanding homosexuality as having some intrinsic, biological basis strengthens the analogy. If sexual preference

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57. For a discussion of the traditionalist stance towards tolerating some deviance from optimum rules, see *infra* pp. 1094–96.

58. 388 U.S. 1 (1967).

59. *Id.* at 11–12.

is in part biologically conditioned and, by extension, difficult or impossible for individuals to control, the failure to accord equal treatment to those endowed with same-sex desires will appear even more unjust.<sup>60</sup> A related argument, grounded in the recognition of sex as a fixed attribute, is that the ban on gay marriage is a form of sex discrimination. Restricting the choice of a partner on the basis of sex is no different from restricting the choice of a partner on the basis of race. Both distinctions turn on immutable characteristics and trench on rights to be free from invidious and arbitrary discrimination.

Although sex, race, or even sexual preference would appear analytically to share attributes that would dictate similar treatment, conservatives would not necessarily view these parallels as compelling. Interracial and same-sex marriage seem conceptually similar for purposes of legal analysis grounded in equality, rights, and the priority of anti-discrimination, but these arrangements might operate very differently in the real world. The roles that sex and race play in social life diverge in many respects. There is simply no reason to believe that changing the rules of marriage regarding sexuality will have the same practical impact as changing the rules regarding race. Once again, what matters are not conceptual affinities, but how same-sex and opposite sex relationships function, both individually and in collective social life. The issues for traditionalists are down-to-earth and pragmatic: whether recognition of same-sex marriage will end up weakening or transforming the conventions surrounding the institution in ways that have real consequences for real lives. Homosexual practices regarding sexuality and familial relations may differ on average from heterosexual practices. The speculation is that homosexuals may be more likely to have multiple sexual partners, to tolerate sexual infidelity, to be childless, or to view procreation as less central to the institution than heterosexuals.<sup>61</sup> If homosexual couples' behavior diverges significantly from the conventional roles established for husband and wife, this behavior could influence how everyone thinks about marriage, with significant consequences for expectations and conduct. That the nature of this transformation might be difficult to predict or anticipate ahead of

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60. The argument from a biological basis for homosexuality to the injustice of banning gay marriage is far from airtight. First, that tastes and preferences are biologically conditioned does not mean they are fixed or "immutable," in the sense of being wholly resistant to willful modification. Second, even if desires are unruly, conduct based on desires—including engaging in homosexual relationships—is a matter of choice and is therefore amenable to meaningful control. See for example DEAN HAMER & PETER COPELAND, *THE SCIENCE OF DESIRE: THE SEARCH FOR THE GAY GENE AND THE BIOLOGY OF BEHAVIOR* (1994), and ROBERT ALAN BROOKEY, *REINVENTING THE MALE HOMOSEXUAL: THE RHETORIC AND POWER OF THE GAY GENE* (2002), for evidence and arguments about the biological basis of homosexuality.

61. See discussion of these claims, *infra*, at pp. 1088–89 and notes 81–83.

time does not mean it will not occur. Any such effects cannot be derived by inference from a fixed set of premises or principles, but rather depend on the realities of social psychology and social life.

Although the foregoing points depict advocates of same-sex marriage as champions of conceptually abstract arguments of the type that Burke and Oakeshott would regard with suspicion, logic-chopping is not the exclusive purview of one side in the debate. Traditionalists warn that sanctioning same-sex marriage will inevitably lead to the legalization of other suspect forms of conduct, including polygamy, group marriage, incest, and bestiality.<sup>62</sup> If marriage must accommodate all preferences on an equal basis, no variation, however repugnant, will be regarded as off limits absent a palpable, manifest harm. Homosexual marriage lies on a “slippery slope” that leads to other marital forms, it is argued, because there is no analytically sound basis for distinguishing those relationships under the principles that ground the recognition of same-sex relationships.<sup>63</sup>

Conservative thinkers should question this conclusion as giving too much weight to abstract analysis. Just as permitting interracial unions does not require that same sex marriage be legalized, a decision to permit gay marriage does not entail a commitment to accept other forms, if only because social practice often does not, and need not, yield to the demands of consistency. Relationships that are potential candidates for marital status will inevitably vary in their social and behavioral implications and moral overtones, so each must be evaluated on its own merits. First, the real-world costs of denying recognition to other forms of marriage may differ from the costs of denying homosexuals the ability to marry. A ban on marrying one's cat, for example, will have a limited effect aside from frustrating a few strange persons' desires. On the other hand, a ban on marrying a same-sex partner will have important consequences for large numbers of people and for social life generally. Second, the impact of granting the right to marry in other combinations may also diverge significantly from the consequences of same-sex recognition, and that impact will also depend on how many people take

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62. See, e.g., Justice Scalia's dissent in *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting) (warning that the logic of the *Lawrence* decision threatened all marital restrictions “based on moral choices”). But see RAUCH, *supra* note 1, at 123–37 (analyzing and rejecting what Rauch calls the “anything goes” argument).

63. On the “slippery slope” argument, see John Corvino, *Homosexuality and the PIB Argument*, 115 ETHICS 501, 501–34 (2005).

advantage of the new marital form. Incestuous relationships are believed to have disruptive effects on families and to pose a strong threat of exploitation. Polygamy, if widely adopted, may alter the delicate ecology of sexual allocation, unsettle family dynamics, and weaken the position of women.<sup>64</sup> Third, there may be little actual demand for other forms of marriage. As Jonathan Rauch points out, there is no movement to speak of for the legalization of incest and no plausible prospect that it will be accepted anytime soon.<sup>65</sup> Finally, there is no reason to believe that the slippery slope will have much purchase in the political arena as a general matter. Ordinary voters will not necessarily give much weight to conceptual consistency and adherence to principle. Realizing that seemingly like cases are really not alike, voters may remain unmoved by the notion that sanctioning one extension of the category of marriage necessarily requires giving in to all conceivable reforms. All these factors potentially undermine the force of the slippery slope argument. On the other hand, the argument is not necessarily invalid. Permitting one new form of marriage may in practice ease the way for another or may strike many people as a reason to permit other novel forms. The point is that this cannot be determined a priori. Rather, it is a matter of how the changes play out. It's not possible to know what will happen until it actually occurs.

The discourse surrounding same-sex marriage also reveals patterns in the political uses of justification and evidence that conservatives would find problematic. Burke and Oakeshott repeatedly object to rationalist demands that existing institutions justify themselves at the bar of reason.<sup>66</sup> Those demands are evident in a modern progressivism that views all settled arrangements with skepticism unless proof is forthcoming of their superiority to proposed alternatives. Although conservatives often speak the language of traditional values in defending long-standing rules to one another, that parlance does not carry the day with reformers who grant no presumption in favor of established mores. Pointing to those who sacrifice in the name of the status quo, reformers maintain that proposed changes will vindicate fairness, equality, freedom, and other desirable values. These claims place the onus on traditionalists to demonstrate that reform is undesirable and that current practices serve compelling social objectives. Mere speculation about potential future harms and vague allusions to collective wisdom about "human nature" fail to satisfy. Those who suffer under existing arrangements call upon conservatives to present empirical evidence to support the predictions of

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64. See RAUCH, *supra* note 1, at 126–27 (discussing drawbacks of polygamy).

65. *Id.* at 131–32.

66. See, e.g., FRANCO, *supra* note 21, at 83; KIRK, *supra* note 17, at 33–34.

harmful effects. Data and statistical analyses become the weapons of choice and social science the battleground on which the participants in the culture wars engage across party lines.

This is a war that conservatives are destined to lose. Rationalists call for objective, empirical justification for traditions that fall short of perfectly exemplifying core ideals. This demand places conservative positions at a severe disadvantage because it sets an exacting standard that is virtually impossible to meet. Albert O. Hirschman has suggested that conservative arguments are of three types: that change will not work (the Futility Thesis), that it will backfire (the Perversity Thesis), or that it will threaten the valuable functioning of sound institutions (the Jeopardy Thesis).<sup>67</sup> Accordingly, conservative voices are frequently heard to assert that proposed reforms will fail to advance claimed beneficial objectives, will generate effects opposite to those intended, or will produce harmful results. These arguments are necessarily predictive. The consequences of unprecedented shifts in law, custom, or practice have, by definition, not yet been realized. To satisfy social science standards, conservatives must come forward with data that systematically compares the effects of established arrangements with innovations they resist. In most cases, this circle cannot be squared. The data either do not yet exist or are radically inconclusive.<sup>68</sup>

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67. ALBERT O. HIRSCHMAN, *THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY* (Harvard Univ. Press 1991).

68. Examples of paucity and questionable quality of data regarding the effects of same sex marriage can be found in Stanley Kurtz's analysis of same-sex marriage in the Netherlands and in Scandinavia. See Kurtz, *Going Dutch?*, *supra* note 7, at 26–29. Kurtz claims to show a correlation between the advent of same-sex marriage and higher out-of-wedlock birthrates in the Netherlands, but argues from correlation to causation without effectively controlling for other influences. See Stanley Kurtz, *The End of Marriage in Scandinavia: The 'Conservative Case' for Same-Sex Marriage Collapses*, *THE WKLY. STANDARD*, Feb. 2, 2004, at 26, for a similar study involving Scandinavia.

In the case of gay adoption, sociologist Judith Stacey has stated that “[t]he debate among scientists is all about how good the studies [regarding the effects of growing up with gay parents] we have really are.” Benedict Carey, *Experts Dispute Bush On Gay-Adoption Issue*, *N.Y. TIMES*, Jan. 29, 2005, at A16. A recent survey of 44 adolescents raised by lesbian parents by psychologists at the universities of Virginia and Arizona, reported in the Carey article, revealed no significant differences between the children and children not raised by lesbian parents. In contrast, a meta-study that collates work on children raised by homosexuals noted that the data on the effects of being raised by gay parents is “scant and underanalyzed,” with some appearing to suggest that the children of gay parents “will be more likely to attain a similar orientation . . . .” One of the authors of the study commented, however, that “you can’t base an argument for justice on information that’s empirically falsifiable in the long run.” Susan Dominus, *Growing Up With Mom and Mom*, *N.Y. TIMES MAG.*, Oct. 24, 2004, at 68, 74. For an overview of the

The requirement to produce rational or “scientific” justification in the political arena also ensures that remote and collective effects get little weight. Effects that are cumulative over time are especially hard to demonstrate.<sup>69</sup> Information on the ramifications of social change is likely to concern short term shifts and to focus piecemeal on outcomes that are easy to isolate and measure objectively. This necessarily slights normative changes in mores and practice, which tend to play out over the long term and to interact with a complex host of factors.<sup>70</sup> Those factors are internal and external, psychological and material. As these complexities are not easily measured, canvassed, or described using conventional tools of social science, the dynamics of social norms are poorly understood and elusive. Indeed, the study of social norms is just getting started, and it is unclear how far it will advance in the future.<sup>71</sup> The difficulties of developing theories and accumulating data about normative shifts and behavioral trends, in combination with the relatively long timeline for many important social developments, translates into a chronic shortfall in the ability to demonstrate how reforms conservatives resist produce detrimental outcomes.

Moreover, gathering the requisite comparative data carries its own intolerable costs. Information can only be obtained by engaging in the

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controversy surrounding the effects of gay parenting, compare Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 833 (1997) (claiming to find evidence of adverse effects) with Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253 (1998) (claiming that Wardle systematically misconstrues the evidence on which he relies). For discussion of a related issue, see *infra* note 44 (reviewing the controversy surrounding evidence of gay male promiscuity).

69. See Yannis M. Ionnides & Linda Datcher Loury, *Job Information Networks, Neighborhood Effects, and Inequality*, 42 J. ECON. LIT. 1056 (2004) (documenting unpredictable and often counterintuitive effects on employment prospects of small differences in group networking patterns and conventions), for a recent example of an attempt to describe complex dynamics of normative interactions in the employment realm.

70. For a discussion of the conservative perspective on social norms, see *infra* pp. 1089–97.

71. See, e.g., Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000) (exploring the interaction of norms and law); Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law* (Yale Law School, Public Law Research Paper No. 31, Yale Law & Economics Research Paper No. 281, 2002), available at <http://ssrn.com/abstract=361400>; Richard H. McAdams, *Conventions and Norms: Philosophical Aspects*, 4 INT’L ENCYCLOPEDIA OF THE SOCIAL AND BEHAV. SCI. 2735 (Neil J. Smelser & Paul B. Baltes eds., 2001) (discussing dynamics of social norms and conventions); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997) (using social norms to develop explanations of behavior and to predict the effects of legal rules). See generally MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (2002), for a more general introduction to the dynamics of norms.

very social experiments conservatives seek to forestall. Because many longstanding norms or practices are difficult to reinstate once breached, the very structure of the method for generating proof threatens to undermine traditionalist priorities. Yet rationalists are unmoved by these concerns. Vague premonitions of erosion or unraveling are deemed an inadequate basis for resisting changes that satisfy immediate needs and urgent desires. The imperative to respond to these priorities puts traditionalists everywhere on the defensive and effectively reverses their cherished presumption that existing institutions, and not their transformation, deserve the benefit of the doubt.

The controversy surrounding single-sex marriage is but one example of how this dynamic plays out to the detriment of a traditionalist agenda. Another example can be found in the effort to change the single-sex status of the Virginia Military Institute. The challenge to VMI's policy of excluding women succeeded in part because the school's defenders were unable to demonstrate that the so-called "adversative" method of education used at the school—in which students were routinely exposed to harsh conditions, demands, penalties, and hazing by more senior students—was superior to alternatives.<sup>72</sup> Nor was the school able to muster persuasive proof that the preservation of the method depended on the school's all-male character.<sup>73</sup> Although those issues were aired in the court briefs, with the parties referring to social science studies about various aspects of single-sex education, the submissions contained a paucity of data on the key questions at issue: whether the adversative method actually produced beneficial outcomes and whether the presence of women would be subversive of the method's integrity and effectiveness.<sup>74</sup> The defenders of the status quo were ultimately forced

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72. See *United States v. Virginia*, 518 U.S. 515, 540–41 (1996).

73. *Id.* at 545–46.

74. An exchange in oral argument between Theodore Olson, the United States Solicitor General, and Justice Breyer, is particularly revealing on these points. Transcript of Oral Argument at 51–53, *United States v. Virginia*, 518 U.S. 515 (1996) (Nos. 94-1941 & 04-2107), 1996 WL 16020:

MR. OLSON: The evidence is overwhelming that that system would not exist in the company of [women].

QUESTION: Well, maybe it wouldn't. . . . [B]ut my question is, what is it that's so important about this really hard to grasp adversative thing that . . . enables you to say to a young woman I'm very sorry, even though you want to go there and you want this result, you can't?

MR. OLSON: The answer—the experts testified, and people who are professional educators, who have spent their life in education, saying that the system could not exist. It would fundamentally have to be changed.

to rely on a small number of “experts” who invoked their long experience, rather than any hard supporting data, to opine that the adversative method had proven its worth in turning unruly and directionless boys into disciplined and effective men.<sup>75</sup> Likewise, in support of the prediction that women would denature the adversative method, experts pointed to women’s relative physical weakness, their psychology, and their tendency to excite men’s erotic interest and protective impulses. These factors, it was argued, made women inherently unsuited to, and destined to alter, the adversative environment. A skeptical Court found none of these arguments persuasive, and VMI was ordered to admit women or go out of business.<sup>76</sup>

Another debate that has been raging for decades with no definitive resolution concerns the connection between federal welfare programs and rising out-of-wedlock birth rates among the poor. Although common sense would suggest that providing money to single-parent families is a potent incentive to form such families, conservatives have struggled without much success to find data to support that conclusion.<sup>77</sup> Family disintegration is almost surely the product of a multi-pronged assault on conventional strictures and understandings from many quarters, with factors like the availability of birth control, changes in divorce laws, feminism, the sexual revolution, and the courts’ recognition of children’s and parental rights outside of marriage playing some role.<sup>78</sup>

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QUESTION: I take that as a given. What I’m asking is, what’s so important about that particular rat line, et cetera?

MR. OLSON: Because—

QUESTION: You could have the same—are you getting my point?

MR. OLSON: Yes. The answer is that it works, Justice Breyer, in a single sex environment for young men. Now, given the opportunity to design something exactly identical to that, the people who spent their life in education designing a system for young women, and the Government experts really don’t disagree with that, say we know what would work, we would know what would attract sufficient numbers of people—

QUESTION: And even a woman who says, I understand that, but for me, she says, for me, I think it would work better at VMI, and it may be true as to her, irrespective of the majority, mightn’t it?

75. *Virginia*, 518 U.S. at 540–44.

76. *Id.* at 557–58.

77. See, e.g., Charles Murray, *Family Formation*, in *THE NEW WORLD OF WELFARE* (Rebecca M. Blank & Ron Haskins eds., 2001); Robert Moffit, *Incentive Effects of the U.S. Welfare System: A Review*, 30 J. ECON. LIT. 1–61 (1992). See generally Ira Ellman, *Why Making Family Law is Hard*, 35 ARIZ. ST. L.J. 699 (discussing causes of changes in marriage and divorce rates).

78. See JUNE CARBONE, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW* 123–29 (2000) (discussing factors leading to changes in family structure); see also George A. Akerlof et al., *An Analysis of Out-of-Wedlock Childbearing in the United States*, 111 Q. J. OF ECON. 277–317 (1996) (proposing an economic model of the effects of the technological “shock” of the birth control pill on sexual, marital, and childbearing behavior).

Even if welfare programs contribute, the noise-to-signal ratio may be too high to allow separate factors to be teased out. Social science has simply proved inadequate to the complexities of this issue, and has failed to provide a definitive answer.

A related controversy—on the effects of single-parent families on children's well-being—has generated clearer data, but only after decades of social experimentation. The story of the controversy surrounding out-of-wedlock childbearing, however, illustrates the point that knowledge often comes too late. There is a necessary lag between the instigation of a social change and the generation of persuasive evidence on its ultimate effects. Even if traditionalist priorities are eventually vindicated, it is hard to put that knowledge to good use because the shifts at issue have taken on a life of their own and are resistant to “rational” correction in the light of scientific insights. Although social science evidence continues to mount that single motherhood and divorce have detrimental effects on children's well-being independent of education, income, and other factors amenable to correction through public policy,<sup>79</sup> there is little indication that many people are significantly influenced by the emerging wisdom or that existing trends will be arrested or reversed.<sup>80</sup> In any event, the story of single-parenthood illustrates how arduous is the task of assessing the effects of social innovation even after long experience. Social science methodology is necessarily crude, and generating the requisite data is arduous and expensive. Demonstrating group differences or temporal

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79. See CARBONE, *supra* note 78, at 111–22 (summarizing evidence of the negative effects on children of growing up in single-parent or stepparent families). See also SARA McLANAHAN & GARY SANDEFUR, *GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS* 38 (1994); Sara McLanahan, *Diverging Destinies: How Children are Faring Under the Second Demographic Transition*, 41 *DEMOGRAPHY* 607–27 (2004) (discussing how patterns of fertility, employment, and marriage, which differ dramatically by social class, have contributed to social inequality by fostering a divergence in the well-being of children at the bottom and top of the socioeconomic scale).

80. The much touted decline in teen and single-parent births masks a stabilization at much higher rates of single parenthood and much lower marriage rates than prevailed fifty years ago. Specifically, the ratio of children born to single parents versus two parents is dramatically higher and continues to climb. See Charles Murray, *Does Welfare Bring More Babies?*, 115 *THE PUB. INT.* 17 (1994) (discussing correlation between welfare and childbirth rates); see also Charles Murray, *The Coming White Underclass*, *WALL ST. J.*, Oct. 29, 1993, at A14 (discussing significance of out-of-wedlock birthrate), for a discussion of different ways of interpreting data on marriage and single-parenthood.

changes requires large samples and complex statistical analyses, which leave plenty of leeway for arguments over methodology. Studies differ widely in the magnitude and nature of demonstrated effects, with some showing only modest impact. Because studies necessarily focus on a few easily measured outcomes, they tend to slight subtle variations in experience and functioning and fail to capture the full spectrum of family structure effects. Dissection and simplification are the unavoidable methodologies of choice—whether from ideology, from the limitations of the chosen instruments, or from some mixture of the two.

Related issues regarding sexual behavior and psychology have emerged in the debate surrounding same-sex marriage, with their resolution plagued by similar difficulties. Traditionalists worry that same-sex marriage is destined to destabilize the institution across the board by undermining the conventions of sexual fidelity and exclusivity that are essential to its cohesion. The claim is that homosexuals are more likely to have multiple sexual partners and to tolerate an “open relationship” with their partners.<sup>81</sup> Although this speculation comports with commonsense observations concerning male homosexual practices and existing evidence of males’ preference for sexual variety,<sup>82</sup> hard data comparing heterosexual and homosexual patterns are nonetheless hard to come by. Existing studies are rare, use small samples, or do not clearly address the differences between homosexual and heterosexual conduct.<sup>83</sup>

In any event, unpacking the traditionalist argument based on disparities in sexual proclivity and practice yields a number of premises that resist empirical verification. The argument assumes that the “contagion” from

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81. Compare RAUCH, *supra* note 1, at 141–45 (rejecting the “myth of gay-male promiscuity”), with Lynn D. Wardle, *Image, Analysis, and the Nature of Relationships*, in MARRIAGE AND SAME-SEX UNIONS: A DEBATE, *supra* note 4, at 115–16 (citing studies in support of the contention that “the reality of multiple partners, promiscuity, and lack of sexual fidelity in homosexual relationships is beyond serious dispute today”). Eugene Volokh, on his weblog, Volokh Conspiracy, has posted the results of his survey and analysis of existing studies on gay male promiscuity. See Posting of Eugene Volokh, Volokh Conspiracy, <http://volokh.com/> (May 16, 2003, 09:40 PST); see also Posting of Eugene Volokh, Volokh Conspiracy, <http://volokh.com/> (May 22, 2003, 13:54 PST). According to Volokh, the most reliable data show that, while gay men have more varied sexual experiences than straight men, the differences are not as dramatic as opponents of gay marriage suggest. According to his summary, gay and bisexual men on average have 26.6 sexual partners after the age of 18, while straight men have 16.9. The median number of lifetime partners is 10 for gay men and 6 for straight men.

82. See DAVID M. BUSS, *THE EVOLUTION OF DESIRE: STRATEGIES OF HUMAN MATING* (rev. ed. 2003) (discussing male sexual habits and greater desire for sexual variety).

83. In his survey of studies of gay male sexual behaviors, *supra* note 81, Eugene Volokh notes that most studies in this area are “junk science” and none are entirely reliable. Even the most methodologically sound study, EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 315 (1994), is not free from significant flaws.

homosexual practice to heterosexual norms cannot easily be contained. This, in turn, rests on accepting that only a single expectation or norm regarding sexual fidelity in marriage is likely to prevail. Finally, the traditionalist position draws strength from the possibility that heterosexual relationships may be more vulnerable than homosexual unions to disruption through infidelity. Whether this is so depends on men, women, or both, feeling more threatened by an opposite sex—as opposed to a same sex—partner's adulterous behavior. Those who resist these propositions absent factual support are unlikely to be persuaded. To the extent that conservative thinkers such as Burke and Oakeshott are skeptical of the unrelenting demand for hard evidence to support all grounds for preserving existing institutions, they are more likely to credit these speculations.

Yet another way in which supporters of same-sex marriage arguably diverge from thinkers like Burke and Oakeshott is in their attitudes towards cultural norms, including those embodied in customary practices and established institutions. The conservative stance towards same-sex marriage grows directly from a conception that assigns traditional institutions a crucial role in the regulation of moral life. On the conservative view, moral codes exist to curb conduct that is harmful to others and to the group. Because individual and group priorities do not always align, morality pits individual self-interest against the collective. Under this conception, critical self-determination in the realm of moral choice, which rational individualists tend to favor, is a formula for disaster. Individuals cannot be trusted to chart their own course in areas governed by traditional morality, for two reasons. First, the mistrust of moral improvisation proceeds from the recognition of limitations in human understanding. Individuals are simply not equipped to divine what is best for society as a whole, to canvass all concerns, or to predict the consequence of deviating from well-established rules. Second, conservatives acknowledge the infirmities of human will. Even if individuals could systematically take account of all considerations that inform moral precepts, they are unlikely to follow the wisest course. Since morality often requires self-sacrifice, assigning individuals the task of figuring out how best to navigate their own social life unguided by strong normative structures poses too high a risk of self-serving choices. Adherence to established codes—including those governing human sexuality, family life, and procreation—is necessary to insure that appropriate sacrifices are made to safeguard the well-being of others

and preserve the social order. In sum, because self-prescribed judgments in matters of morality are likely to go wrong, deference to traditional moral codes is in order despite apparent harshness or irrationality in individual cases.

Traditional institutions, and the role prescribed for individuals within them, are a practical response to the dual infirmities in human intellect and will that make moral codes necessary. Because most people are incapable of reasoning through every dilemma of social life on their own, they depend on off-the-shelf scripts that define basic duties and provide transparent guidelines for behavior in commonplace social situations. Simple, unyielding rules maximize the chance that persons of limited intellect and self-control will negotiate complex human interactions successfully. As such, these scripts should be as clear and unequivocal as possible. Formal institutions such as marriage, by embodying a simple and transparent set of expectations, help facilitate moral conduct by ordinary people. Marriage, and the conventional nuclear family that results, define the duties of good husband, wife, parent, child, or sibling. By marrying, a person implicitly accepts these aspirational roles and pledges to live up to them. The very rigidity of these duties resists self-regarding manipulation. Individuals who faithfully fulfill them minimize the risk of behaving destructively. The enabling function of such well-defined institutional roles goes along with a moral psychology that sees practical guidance as more important than the critical faculties. Adherence to duty is not primarily a matter of reason and does not rest chiefly on analysis. Rather, compliance is best learned by example and through the development of habits in thought and action. Experience and observation are the most effective teachers. The family itself is the principal locus of moral education.

This conception of moral psychology regards the health, stability, and integrity of basic institutions as essential to a civilized existence. Changes in those institutions are met with wariness because they engender moral confusion. If good conduct consists of fulfilling established duties, modifying those duties in unpredictable ways may undermine their authority, generate errors in judgment, and lead to harmful choices. By posing the challenge of unprecedented situations, radical innovation in family arrangements potentially compromises the clarity of social prescription by disrupting stereotyped expectations and upsetting well-established forms of interaction. On this view, the introduction of same-sex marriage threatens to diminish marriage's effectiveness as a moral heuristic.

The conservative resistance to novelty cannot be derived from first principles. Rather it rests on the experiential perception that most human beings are incapable of figuring out how to behave and must rely on

strong, well-established, external paradigms. On this approach, clarity, transparency, stability, and simplicity are of utmost importance. The maintenance of authority is also critical: if an institution is too changeable or too amenable to modification to satisfy the perceived needs and desires of the moment, its status as an aspirational ideal risks being undermined. Because disruptions threaten moral efficacy, analytic and reasoned critiques that engender the demand for change are viewed as potentially subversive.

Accepting a heuristic role for marriage in fostering moral improvement would seem to argue in favor of extending marriage to same-sex couples. If participating in the institution engenders heterosexual couples' beneficial conduct—by making them, for example, more responsible, other-directed, dutiful, hard-working, prudent, and conscientious—why would it not do the same for homosexuals as well? The previous exposition suggests that matters are not so simple. The disruptive effects of moral innovation, and the confusion such novelty generates, must be balanced against the behavioral benefits that extending marriage might confer. Moreover, the predicted benefits might not be forthcoming. Marriage may not exert as salutary an influence on homosexuals as heterosexuals because the institution might prove less effective in “settling” the former than the latter. The concern is that gays are more likely to dilute marriage than marriage to strengthen gay commitments, for at least two reasons. First, gay couples will never share biological children, and many will have no children at all. Allowing same-sex marriage may hasten the shift of marriage towards a non-procreative norm, which conservatives fear will be less stable. Second, marriage will require gays to abjure the free-wheeling sexuality to which some members of their community have long been committed. The worry is that, instead of uncritically accepting the strictures of heterosexual marital fidelity, too many gay couples may choose to accommodate the sexual variety they enjoyed prior to legalization.

The conservative understanding of the key role played by established institutions in regulating moral conduct goes along with a broader conception of the centrality of norms, mores, customary practices, and cultural traditions in social life. The dynamics of these elements fit well with the pragmatic, organic picture favored by conservatives, who regard them as central to organized existence and critical to the regulation of behavior. These forms fit less well with a rationalist-materialist, “scientific”

outlook, which regards them with unease or even suspicion to the point of sometimes denying their reality.

Those who think culture matters are partial to a view of human motivation, choice, personality, and moral life that makes “enlightened” intellectuals uneasy. The rich picture of human motivation embraced by conservative traditionalists like Oakeshott and Burke necessarily resists systematic description. These thinkers challenge a materialist view that sees persons as “rational actors” who are motivated by self-interest and who operate through reasoned calculation. Rather, they observe that people are often moved by values, emotions, ideologies, moral expectations, and group identity, and sometimes take decisions that appear self-defeating, unpredictable, and at odds with rational deliberation.

As already suggested, the slighting of traditional normative practices is partly fueled by frustration with their methodological intransigence.<sup>84</sup> The functioning of norms and the influence of cultural factors in social life are poorly understood and elusive, and resist precise dissection, analysis, quantification, and unifying theories. Although social science has not ignored norms entirely and has made some attempt to describe their dynamics using concepts such as “contagion” or “tipping,” the state of the work is primitive.<sup>85</sup> In general, social science has proved inadequate to a full understanding of how cultural factors fit into social life or how traditional institutions motivate and shape behavior. Indeed, cultural phenomena are so complex that they often elude comprehension using currently available instruments and methods of social science.

The methodological infirmities of social science and its inability to achieve a comprehensive understanding of the roots of human action vindicate the central Burkean theme: that rational, human capacities are inadequate to the task of accounting for the vagaries of social life. Limitations on understanding and descriptive power necessarily translate into restricted ability to manipulate complex behaviors and to design effective policy interventions. These shortcomings are an affront to the rationalist worldview. Not surprisingly, proponents of a scientific outlook resist these conclusions and are loathe to recognize that their instruments may fail to capture the messy realities of social life. The response is to slight the elements that elude understanding by discounting them in favor of a more objective and materialist description. These biases in

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84. See discussion *supra* pp. 1082–85.

85. See, e.g., THOMAS SCHELLING, *MICROMOTIVES AND MACROBEHAVIOR* (1978) (showing ways in which small changes in behavior can precipitate dramatic shifts in aggregate patterns and practices); GLADWELL, *supra* note 71 (building on Schelling’s work to argue that ideas and social practices often spread quickly and pervasively, like outbreaks of infectious disease).

the social scientific outlook, coupled with the demand for empirical, systematic, “scientific” justification for traditionalist claims, necessarily disfavor conservative priorities.

The methodological limitations of the social scientific worldview fuel the especially partial and impoverished outlook on sexuality that currently dominates legal analysis. The enlightened case for gay marriage is grounded largely in a narrow discourse of rights, needs, and individual desires. In personal and collective life, sex functions primarily as a realm of individual expression and self-actualization. Sexuality and procreation belong to a private arena upon which society should not trench, and institutions are valued principally for advancing individual interests.<sup>86</sup> Because sexuality, sexual choice, and sexual practices have come to be regarded as rights that function to trump other social priorities, absolutism tends to dominate the discourse. Not only should sex remain as free as possible from legal or even informal public regulation, but any rules must not discriminate in the allocation of benefits and burdens. All individuals have an equal claim to regard in this area. Fairness requires claims of sexual autonomy to be enforced with rigorous attention to neutrality and even-handedness.

To the extent that principles of morality govern conduct that harms others, this freedom-of-sexuality view is at pains to drain sexuality of moral implications. The reluctance to balance sexual prerogatives against the social effects of sexual conduct—which are often powerful—is reflected in the tendency to slight or ignore harms that may result from the free pursuit of personal inclinations. These effects are either ignored outright or minimized by casting doubt on asserted connections through the familiar demands, described above, for objective, empirical evidence of harm.

The individualistic discourse of rights that surrounds sexuality is in tension with an outlook that takes normative dynamics seriously. As noted, conservatives are attuned to the crucial role of conventions—including the customary forms surrounding established institutions—in promoting moral conduct and maintaining the proper functioning of social life. Anything that subverts traditional expectations is the proper subject of public and private concern. That social norms often serve to restrain

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86. As Maggie Gallagher puts it: “Here is one view: Marriage is an essentially private, intimate, emotional relationship created by two people for their own personal reasons to enhance their own personal well-being. Marriage is created by the couple, for the couple.” Gallagher, *supra* note 1, at 775.

self-regarding, irresponsible behavior renders them fragile and vulnerable even to remote and obscure effects. Because cultural practices are maintained through group consent, conformity is crucial to their vitality, and deviant conduct poses a potential threat to their very integrity.

For those who reject this view of normative regulation, the notion that individuals should be expected to sacrifice their perceived interests and hearts' desires to help shore up traditional institutions seems at best a case of muddled thinking and at worst a formula for tyranny. It seems bizarre that the health of conventional couples' marriages somehow depends on gay persons being prevented from jointly adopting children, declaring bankruptcy, buying homes as tenants in the entirety, inheriting without probate, or making medical decisions for their partners—all under the socially sanctioned banner of matrimony. The asserted connections are especially suspect given the absence of a well-developed theory of how social norms work and how seemingly independent choices exert remote effects on unrelated individuals. By definition, these dynamics are hard to demonstrate to skeptics' satisfaction. In the absence of manifest interconnection, the traditionalist folk wisdom that non-conforming conduct constitutes a threat to beneficial institutions and social practices fails to persuade.

Giving pride of place to the role of social norms in regulating conduct is also at odds with the adherence to analytic consistency—the hallmark of a legalistic emphasis on equality and individual rights. Social norms are a form of practice rather than a theoretical construct. Their role is to guide the pragmatic accommodation to messy experience in which multiple priorities must be balanced and human judgment applied to unique or unprecedented situations. Norms are highly functional and resist absolutist abstractions. They do not always conform to the strictures of syllogistic nicety, exceptionless adherence to principle, internal consistency, “fairness,” or the imperative that like cases be treated alike. They are untidy, imprecise, and ad hoc.

The contrast between a rationalist, intellectualized, perfectionist view of behavior and a more traditional outlook that assigns a key role to social norms is revealed in ways of dealing with deviancy. Although conservatives typically embrace clear, unequivocal standards of conduct, their perspective on enforcement is more nuanced. An extreme and unyielding stance towards non-conformity suffers from an absolutism at odds with conservative pragmatism. The force and integrity of rules are not viewed as requiring that those rules never be broken. Rather, in many cases their usefulness requires only that they be followed by most

people most of the time.<sup>87</sup> Therefore, traditional societies often stop short of seeking the complete elimination of nonconforming behavior, with custom dictating an informal spectrum of responses from tolerance to outright sanction against those who fall short of normative expectations. A graduated response, conditioned by specific circumstances, allows society to accommodate some degree of deviance, which serves as a safety valve, acknowledges human frailty, makes room for eccentricity and imperfection, and recognizes that too much uniformity itself compromises important values. But this stance is not at odds with clear standards. On the contrary, traditional societies know that deviant behavior cannot be permitted to infect and undermine core social norms and values. It is crucial to the integrity of norms that non-conformity be vigilantly marginalized, cabined, and penalized in ways mild or severe.<sup>88</sup> Maintaining clarity and behavioral standards means that in no case can deviance be equated with best practice. Nonconforming lifestyles must not be accorded the approval and privileges reserved for more favored forms.

This approach entails creating a declension or pecking order among social practices that judges some better than others and valorizes some to the detriment of others. Such a hierarchy fits uneasily with a moral absolutism that can accommodate only polar responses. Unless a practice is demonstrably harmful, discrimination of any kind is unjustified. If harmful, it must be banished entirely. Any conduct not bad enough to eradicate completely warrants a categorical permission that admits of no exceptions, extends uniformly to everyone, and must apply on the terms enjoyed by all permitted alternatives.<sup>89</sup> This all-or-nothing approach is

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87. See, e.g., discussion *supra* pp. 1078 (arguing that the centrality of cobiological parenting as a rationale for restricting marriage to opposite-sex couples does not require that infertile heterosexual couples be excluded). See also Gallagher, *supra* note 1, at 789 (arguing that the “restrictions and supports at the heart of marriage law are not absolute,” and that the “public purposes of marriage law” do not necessarily require the imposition of punitive sanction for all nonconforming behavior).

88. Patrick Devlin, for example, recognizes that the complete elimination of practices that violate social rules may sometimes be unnecessary or even inadvisable. “We may feel about [certain conduct] that, if confined, it is tolerable, but that if it spread it might be gravely injurious; it is in this way that most societies look upon fornication, seeing it as a natural weakness which must be kept within bounds but which cannot be rooted out.” PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 17 (2d ed. 1968).

89. An important contemporary conservative commentator, Theodore Dalrymple, recently took note of a similar argument in a different context. See Theodore Dalrymple, *Ibsen and His Discontents*, CITY J., Summer 2005, at 79, 87 (“This is an argument typical of people who wish to abolish boundaries: if those boundaries are not—because

fundamentally at odds with the conservative recognition that habits that are relatively inconsequential if kept on the periphery of social life can seriously threaten the social order if celebrated or allowed to become too commonplace. This traditionalist understanding is wary of one-size-fits all and sees value in preserving distinctions between tolerance and privilege, studied disregard and affirmation, and ostracism and legal penalty. Although these gradations are notoriously hard to justify in theory, what counts far more for conservatives is how they actually work in practice. What is important is their effectiveness in channeling conduct and preserving institutions that, however imperfectly, help maintain a viable social order.

Jonathan Rauch's characterization of the practices surrounding adultery provides an illustrative example. Adultery takes place against a backdrop of a strong expectation of marital sexual fidelity that continues to hold sway in our society. Rauch's discussion of adultery makes reference to "hidden law," which he describes as "the norms, conventions, implicit bargains, and folk wisdom that organize social expectations, regulate everyday behavior, and manage interpersonal conflicts."<sup>90</sup> He claims that hidden law largely governs the social response to violations of the rule of marital fidelity.<sup>91</sup> Secrecy, hypocrisy, double standards, and lack of candor are essential elements in the delicate social ecology that maintains monogamous sex as the norm for heterosexual marriage. Discreet adultery is often ignored, but open and flagrant conduct is more severely sanctioned.<sup>92</sup> Transgressions receive a graduated response, with society at large looking the other way until families and spouses signal the appropriate reaction based on their own perceived interests. Rauch claims that these practices work to preserve the core expectation of marital exclusivity while at the same time recognizing the facts of human frailty, the realities of longstanding marital relationships, and the complexities of desire.<sup>93</sup> They also function, most importantly, to protect and empower the most vulnerable players, including spouses and children.<sup>94</sup>

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they cannot be—adhered to with perfect consistency, then they should be obliterated, as they can only give rise to hypocrisy.”).

90. Jonathan Rauch, *Conventional Wisdom: Rediscovering the Social Norms that Stand Between Law and Libertinism*, 31 REASON 37, 37 (2000).

91. *Id.*

92. Jonathan Rauch, *Live and Let Lie*, THE NEW REPUBLIC, Sept. 22, 1997, at 25–26.

93. *Id.* at 26.

94. *Id.* See also Jonah Goldberg, *Hidden Law and Open Adultery*, NAT'L REV. ONLINE, July 16, 2001, <http://www.nationalreview.com/goldberg/goldbergprint071601.html> (arguing that there is no inconsistency in society studiously disregarding discreet adulterers while also sanctioning those who misbehave notoriously or who are unlucky enough to get caught).

These conventions cannot be derived from or explained by a few basic precepts. The practices do not conform to absolutist and categorical rules such as “lying is always wrong,” “conduct should be equally condemned regardless of whether or not one gets caught,” “if some transgressors are punished, all must be,” or “everyone must receive the same penalties.” Rather, the hidden law continuously balances personal freedom and pursuit of happiness against social well-being and institutional integrity, all in light of individual circumstances, with no one consideration gaining absolute primacy and no single principle triumphing over all. Although imperfect, these complex guidelines work to balance multiple priorities while minimizing social harm. They simultaneously maintain the integrity of core expectations that serve vital social purposes.

#### IV. SHOULD CONSERVATIVES RESIST SAME-SEX MARRIAGE?

Where does the forgoing leave us in our quest to understand the political resistance to marital reform and to assess the cogency of this position? We can speculate that those who voted against the recognition of same-sex marriage reject the inexorable logic of equality, rights, equal access, non-discrimination, and the demand for absolutely principled consistency. These opponents have signaled their refusal to lump into one undifferentiated mass the spectrum of sexual, familial, and procreative forms or to regard all options as equivalent in social effects and significance. Likewise, their outlook appears hostile to the leveling of degrees of social approval and disapproval and is skeptical of according all lifestyles exactly the same treatment in law and social life. On the other hand, it is unlikely that voters who reject gay marriage are completely immune to rationalist methods and principles. The institutional imperatives of modern democratic societies and the need to find common ground among diverse constituencies push participants to develop reasoned justifications and to look for evidence to support their position whenever possible. As Hegel noted in *Philosophy of Right*, the “unwilling[ness] to acknowledge in attitudes anything which has not been justified by thought” is “the characteristic property of the modern age.”<sup>95</sup> Ordinary voters, steeped in that modern age, cannot altogether avoid thinking critically about their opposition to marital reform.

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95. FRANCO, *supra* note 21, at 86–87, (quoting G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 22 (Allen Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991)).

Although reasoned justification, grounded in empiricism, is certainly part of the political equation, the outcomes on same-sex marriage ballot initiatives strongly suggest that reasoned justification is not the whole of it. Many intellectuals take for granted the importance of a search for a “self-consistent creed” or for evidence that would stand the test of scientific standards, but those imperatives may not have the same hold over ordinary people. Although there is surely overlap in the arguments that influence intellectuals and voters, that overlap is not perfect because members of these groups do not share the same stance towards faith, tradition, custom, and social mores. For many ordinary citizens, not everything is open to question and not all institutions demand the same form of support or justification. Thus, Paul Franco, in commenting critically on Oakeshott’s views, overstates the case when he asserts that “the valorization of habit, custom, and the unselfconsciousness of tradition is profoundly anachronistic. This may be the way politics were conducted in aristocratic societies, but it is irrelevant to modern democratic societies.”<sup>96</sup> The politics of same-sex marriage directly challenges this view. Habit, custom, tradition, and settled understandings are far from irrelevant in most lives, and those who would work a radical change in marriage must confront their hold even in the present age.

These observations do not settle the question of how conservatives should or would vote on same-sex marriage. As noted, although Burke and Oakeshott are wary of change, neither believes that reform is always to be opposed.<sup>97</sup> Not all change is change for the worse. Nonetheless, general precepts such as giving the status quo the benefit of the doubt and eschewing rationalism do not get us very far in resolving particular questions. We may have to concede that the conservative understanding of social life will not always determine whether a specific reform should be adopted. Burke’s and Oakeshott’s sometimes obscure pronouncements may not tell us what we should do when confronted with a burning issue of the day.<sup>98</sup> In the end, neither thinker leaves us with a clear roadmap for reform, nor do their writings generate a checklist of specific criteria for classifying changes as good or bad.

As political actors, we are still left with the challenge of how to decide which aspects of specific institutions should be changed or preserved and how fast the pace of change should be. Jonathan Rauch has taken up that challenge by attempting in a recent book to extrapolate conservatives ideas and apply a traditionalist framework to argue in

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96. FRANCO, *supra* note 21, at 96.

97. *See supra* p. 1072.

98. *See* Herzog, *supra* note 32, at 340 (“[I]n any actual moral or political dispute, the [Burkean traditionalist] has no extra resources, no trump card up his sleeve that can be triumphantly brandished at the moment when his opponents are stymied.”).

favor of same-sex marriage. Rauch's analysis makes common cause with those who honor traditionalist forms. Unlike many proponents of same-sex marriage, Rauch does not start with skepticism about the institution. Rather, he accepts the centrality and social importance of marriage as traditionally constituted and views the preservation of heterosexual marriage and the nuclear family as vital priorities.<sup>99</sup> From this starting point, Rauch argues that offering—rather than denying—same-sex couples the option of getting married is more likely to preserve marriage, to increase its importance, and to strengthen its role as the most important form of sexual commitment in our society.<sup>100</sup> He notes in this vein that making marriage available to homosexuals supports the withdrawal of privileges and recognition now accorded in some circumstances to domestic partnerships, or “marriage lite,” because maintaining those privileges for same-sex couples despite the availability of marriage will operate as discrimination against heterosexuals, who do not have—because they never needed—the option of domestic partnerships.<sup>101</sup> But if homosexuals can marry, they do not need domestic partnerships either. In that case, however, marriage can once again be made the sole route—for everyone—to the privileges previously associated with that institution. That move, he argues, is likely to strengthen marriage rather than weaken it.<sup>102</sup> One aspect of Rauch's prediction has recently been borne out: employers in Massachusetts—the one state to recognize same-sex marriage—have pushed to repeal the requirement that they provide benefits to same-sex domestic partners.<sup>103</sup>

Rauch nonetheless admits that a scenario at odds with his positive predictions—one more consistent with homosexuals weakening some of marriage's central understandings rather than with marriage making homosexuals' behavior more conventional—cannot be categorically ruled out. The traditionalists' concerns with stability, sexual fidelity—in service of stability and for its own sake—and the marital unit as a protected space for childrearing, are not entirely put to rest. Rauch

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99. See RAUCH, *supra* note 1, at 7.

100. See *id.* at 86–103. But see *supra* p. 1080 (reviewing reasons for conservative concerns that extending marriage to gays will destabilize, rather than shore up, marriage).

101. RAUCH, *supra* note 1, at 6.

102. *Id.* at 86–103.

103. Kimberly Blanton, *Unmarried Gay Couples Lose Health Benefits*, BOSTON GLOBE, Dec. 8, 2004, at A1.

implicitly acknowledges that arguments about how this reform will affect the future of marriage are necessarily speculative and are thus unlikely to bridge the entire divide between advocates and opponents of same-sex relationships.

Is there some way to improve on Rauch's conservative case for marriage by placing less stress on prediction and more on present developments? In their discussions of proposed changes in social practice, Oakeshott and Burke seem to place great weight on how much change has already transpired.<sup>104</sup> Legislators, lawmakers, or ordinary citizens, in deciding whether to vote for a shift in law or policy, should ideally be able to point to some seismic transition that has already taken place. Minor or marginal modifications will not do. Rather, there must be an overwhelming urgency, which is best established by identifying how evolution on many fronts has made the remnants of past practice awkward, unworkable, or even self-defeating. Enough change must have occurred to make the proposed reform compelling or even unavoidable.

It can be argued that same-sex marriage does not clearly meet this standard. The picture is decidedly mixed. Attitudes towards homosexuality have liberalized and practices surrounding marriage have evolved significantly. On the other hand, those changes are partial, embattled, and resisted by large numbers of people. That referenda seeking to bar same-sex marriage have passed by wide margins all over the country suggests that gay marriage does not represent the capstone of a revolution that is irresistible or virtually complete. This is not a case of a few grey-haired relics holding out for the past. Many people see no urgency whatsoever in making this change and are functioning just fine without it.

It is thus far from clear whether the conservative prerequisite for change—clear, widespread, and urgent need—is even satisfied for gay marriage or will be any time soon. But even if the groundswell were sufficient, that would not resolve the matter. Majority sentiment is, for Burke and Oakeshott, only one factor in the mix. As Burke puts it, a politician must determine whether “the inclinations of the majority . . . concur[] with [his] own sense of the intolerable nature of the abuse.”<sup>105</sup> And beyond the uncertainty generated by looking to existing moral attitudes and practices regarding homosexuality, a broader methodological issue is at stake. There is something circular about relying on the very existence of current beliefs and practices as a guide to whether they

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104. For Oakeshott's comments on women's suffrage, see OAKESHOTT, *supra* note 20, at 57 (“[T]he only cogent reason to be advanced for the technical ‘enfranchisement’ of women was that in all or most other important respects they had already been enfranchised.”).

105. *See supra* note 35.

deserve our encouragement and approval or whether we should vote to advance or extend them. How should we then determine if a present turn is decadent or errant? As conservatives would arguably want to reserve the possibility of forestalling or reversing current developments, they should hold on to the idea that it is sometimes appropriate to resist what is popular. What marriage has become may not be what we want it to be or what it needs to be. Touting same-sex marriage as an accommodation to reality leaves us unsatisfied because it crowds out normative judgment and the possibility that most people may behave badly or abandon sound practices. Our suspicion is that changes in morals cannot, in themselves, justify moral change.

Clearly we need to look to something more than popular sentiment for a way out of the thicket. Although evolution in moral practice or belief is not entirely irrelevant, developments of a different type may offer a more secure and unproblematic foundation for embracing reform. One way to break the logjam is to move away from bootstrapping off prevailing mores and focus more on objective factors. We should look for social changes that alter not so much the meaning of institutions and traditions as their practical utility and real-world function. Material, measurable, comprehensive, and non-ideological secular shifts are what we are seeking. The more far-reaching and palpable the transformations proposed reforms are designed to accommodate, the stronger the foundation for change.

Another of Rauch's arguments offers promise in this department. Rauch maintains that the centrality of procreation, with marriage seen primarily as a crucible for nurturing the next generation, should yield to a model of marriage as facilitating and encouraging mutual adult caretaking. Acceptance of that model, he argues, points strongly in favor of the adoption of same-sex marriage. Homosexuals require and desire mutual caretaking as much as heterosexuals, and reinforcing the commitments that foster such caretaking is good for society as a whole. These benefits do not depend on the sexuality of participants.

This argument acquires special force when considered in light of recent objective, material, and demographic changes. The last 150 years have been witness to unprecedented modifications in the terms of existence worldwide, but especially in the developed and developing world. Perhaps most profound are dramatic improvements in health and life expectancy, which have led to a sharp growth in population and accelerated urbanization. As a result, the world is now overcrowded,

with space and resources in demand. The rise of a technological, “knowledge” economy (which depends on high quality human capital), combined with longer lifespans and lower infant mortality (which enhance the payoff to investments in human capital), encourages the shift from large families to more intensive cultivation and education of fewer children. These developments also make children more expensive to bear, raise, and educate. Because producing large numbers of children no longer makes economic sense, the birth rate has fallen worldwide. As a consequence, a smaller percentage of the human—and especially the female—lifespan is devoted to bearing, raising, and nurturing the next generation. Childrearing is no longer a project to fill a woman’s entire life or to preoccupy couples for all but a fraction of their lives together. The lengthening of the lifespan, however, has meant that a larger fraction of many lives is spent in old age. Because age produces a decline in health and physical vigor, elderly persons often require care and assistance from others. The family and marriage are the institutions that have best provided such care.

These developments have radically transformed family life, with corresponding drastic changes in the interaction of the sexes and the lives of women.<sup>106</sup> That transformation has not been uniform, with some individuals holding out by adhering to patterns more in keeping with the demands of the past. But those holdouts ride the crest of a secular, demographic trend of increasing longevity and falling birthrates—a trend that has engulfed western and non-western societies alike and has made early marriage and large families increasingly uncommon. The dynamic of smaller families and longer lifespans has greatly increased the number of elderly persons, including many who require a prolonged period of support and care.

The emerging pattern is one of greater diversity of styles of life, with fewer relationships or marital units devoting themselves to procreation primarily, and many of those only for a short and concentrated period. At least in the first world, the numbers reflect that procreation and childrearing have become a niche lifestyle rather than the gold standard for responsible adult existence.<sup>107</sup> At the same time, the plethora of

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106. See for example PETER G. PETERSON, *GRAY DAWN: HOW THE COMING AGE WAVE WILL TRANSFORM AMERICA AND THE WORLD* (1999); PHILLIP LONGMAN, *THE EMPTY CRADLE: HOW FALLING BIRTHRATES THREATEN WORLD PROSPERITY AND WHAT TO DO ABOUT IT* (2004); BEN J. WATTENBERG, *THE BIRTH DEARTH* (1987); BEN J. WATTENBERG, *FEWER: HOW THE NEW DEMOGRAPHY OF DEPOPULATION WILL SHAPE OUR FUTURE* (2004); Stanley Kurtz, *Demographics and the Culture War*, *POL’Y REV.*, Feb.–Mar. 2005, at 33, for a summary and review of the demographic developments and effects on family life.

107. See, e.g., David Brooks, Op-Ed., *The New Red-Diaper Babies*, *N.Y. TIMES*, Dec. 7, 2004 (discussing the “new natalism” that divides red, high marriage-and-birth

elderly persons creates the challenge of how society will care for those at the end of life.

The facts of demography and the march of history have unavoidably rendered procreation less central to adult existence and more peripheral to many lives. At the same time, mutual adult caretaking has become an important function of families and human partnership. That these developments have occurred cannot be denied. Nonetheless, there is still room to differ over their precise significance and import for institutional change. It can be argued that procreation, although much diminished in volume and duration, remains vital to human and cultural continuity. Thus the need to accommodate demographic reality must be balanced against the potential to jeopardize the well-being of children and families—or to worsen the beleaguered position they now occupy from recent upheavals. But those fears must be tempered by considerations that loom large as a matter of fact. If it is not to lose its dominant position, marriage must—and inevitably will—accommodate the increasing number of individuals who eschew childbearing altogether or have long moved far beyond it—a group that includes many homosexuals. It will adopt itself to the present reality of a nation that is rapidly aging. Whether the form of marriage that results will be a weaker one, and one that less well serves the still vital role of providing for future generations, may not be a question that can presently be answered. As Jonathan Rauch aptly notes, our current ploy of preserving marriage in its traditional forms while also creating a menu of alternatives, such as domestic partnerships, to solve the problem of unmet need, is one that could backfire and arguably already has.<sup>108</sup> “Marriage-lite” threatens to weaken marriage itself by making it irrelevant to many lives. Thus in choosing among alternative responses to present conditions, conservatives are thrown back on their old dilemma of having to risk destroying an institution in order to save it. Unfortunately, their emphasis on experience as the best guide to action is the very source of uncertainty and risk that surrounds the choice. A definitive answer, for now, remains elusive.

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rate states from blue, low birthrate states).

108. See RAUCH, *supra* note 1, at 86–103.

