TRADITIONALISM, PLURALISM, AND SAME-SEX MARRIAGE

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What makes the issue of same-sex marriage so hard? Many would deny the very premise of this question. Indeed, a prominent journalist once assured me that there exists not a single respectable argument against legal recognition of same-sex unions. Yet same-sex marriage has failed to win approval, often by large margins, in every state in which it has been put to a vote. Clearly, many voters do not agree with my journalist friend.

It is not surprising that same-sex marriage generates such extremes of opinion. Like abortion, same-sex marriage pits two strongly-felt world views against one another. Important elements of these disparate outlooks cannot be easily separated from matters of faith and religious belief, although they are not uniformly dependent on them. The implications of this ideological divide go well beyond defining marriage. It affects how people think about a range of contentious questions, including sexuality, morality, privacy, family form, parental authority, divorce, single parenthood, abortion, sex education, pornography, and reproductive technology.

How can these disparate world views be characterized? Various formulations are available both in scholarly and more popular literature. In a recent column in the New York Times, David Brooks drew a contrast between an expressive individualist and a socio-ecological view of social life. That distinction captures some of the difference. But perhaps a better way to characterize the divide is through the opposition between pluralism and traditional mores. To summarize: pluralism is a cluster of ideas associated with the embrace of diversity, choice, personal expression, autonomy, and individual freedom. Traditionalists, in contrast, focus on social ramifications of personal conduct and stress the importance of long-

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standing practices and restraints. Who advocates for these disparate positions? The demography reflects our political divisions more generally. Leading the pluralist camp are those, like my journalist friend, who are members of the “liberal intelligentsia”—coastal, intellectual, secular, relatively well-educated, and often living and socializing with other like-minded individuals in “blue states.” Typical traditionalists, in contrast, are conservative-leaning, often deeply religious persons who cluster together in the heartland in so-called “red states.” Each side has fellow travelers and hangers-on who do not subscribe wholeheartedly to every ideological element, but are roughly in sympathy with the overall view.

In important respects, the embrace of same-sex marriage straddles the cultural divide. This makes the issue a hard one for thoughtful people whose sympathies may lie predominantly with one camp or the other. On the one hand, same-sex marriage is a novel and revolutionary concept that requires the abandonment of eons of traditional practice and understandings about a bedrock institution of civilized societies. It entails the radical revision of a pivotal aspect of marriage, with far-reaching consequences that can only be dimly anticipated. On the other hand, same-sex marriage is marriage. As such, those seeking legalization would seem to endorse many of the values, traditions, understandings—and, one assumes, restraints, constraints, limitations, and obligations—that have widely been regarded as intrinsic to the institution of marriage as conventionally practiced. This paradox has not gone unnoticed by proponents of legalization. Indeed, some within the gay community have asked whether pursuing the right to marry does not give too much to the other side. For many homosexuals, it does not make sense to fight for the freedom to marry. Citing marriage’s patriarchal history and hostility to free and open expressions of sexuality, some gays argue against legalization and for expanding access to marital privileges outside the context of marriage. Claudia Card, for example, argues that gays should press for the State to “deregulate heterosexual marriage” rather than “to regulate homosexual marriage.”

3. See also KRISTIN LUKER, WHEN SEX GOES TO SCHOOL: WARRING VIEWS ON SEX—AND SEX EDUCATION—SINCE THE SIXTIES (2006) (exploring a similar cultural divide in the context of sex education in the schools).
4. See KATHLEEN E. HULL, SAME-SEX MARRIAGE: THE CULTURAL POLITICS OF LOVE AND LAW 78 (2006) (explaining that “[g]ays and lesbians have been debating the desirability and importance of same-sex marriage for years . . .”).
5. Id.
7. Id.
8. Id.
There is, accordingly, tension between some of the "liberationist" commitments held by gay (and heterosexual) proponents of same-sex marriage legalization, and the commitments that legalization entails. But this very tension also poses a challenge to traditionalists who are fighting same-sex marriage. After all, the chief rival to marriage is non-marriage in all its forms—from legally established domestic partnerships (which approximate the benisons of matrimony) to an extreme form of sexual and reproductive free agency that, in past eras, marched under the rubric of "free love" and today is labeled "polyamory."9 As the author Jonathan Rauch notes, an important force threatening marriage in American society today is the tendency of heterosexuals to flout or abandon it.10 Perhaps extending marriage to homosexuals will have the effect of shoring up that institution rather than undermining or destroying it.

Although what is good for gays may be good for marriage, that is not the only possible outcome. The alternative is that marriage (and, by extension, society) will suffer if gays are permitted to enter into the state of matrimony. The question of which prediction will prove most accurate animates the debate and informs the case law on the legality of same-sex marriage. As posed, the question takes for granted that marriage is a social good and that marriage benefits individuals—positions that, as noted, not all gays enthusiastically embrace. But the proponents of same-sex marriage are willing to grant this, at least for the sake of argument. Thus the filings by plaintiffs in the same-sex marriage cases often end up being very pro-marriage briefs.

This Article seeks to examine the overall approach to social institutions that underlies the debate on same-sex marriage as revealed in judicial decisions—specifically of the New Jersey courts (supreme and appellate division) in Lewis v. Harris11 and the New York Court of Appeals in Hernandez v. Robles12—that address whether state constitutions protect gays' right to marry. After defining the positions of pluralists and traditionalists, this Article explores the key points of disagreement that characterize the outlooks of advocates and opponents in these camps. It then discusses how the opinions in the cases reflect and respond to these

12. 855 N.E.2d 1, 5 (2006) (holding that "the New York Constitution does not compel recognition of marriages between members of the same sex. Whether such marriages should be recognized is a question to be addressed by the Legislature.").
perspectives. In the final section, this Article seeks to evaluate the opposing positions in light of data on demographic and social trends of the past 50 years. It concludes by noting that, although recent developments have vindicated the wisdom of many traditionalist commitments and assumptions, pluralist priorities have nonetheless become firmly entrenched in actual practice. In light of this, the fact that same-sex marriage has failed to become established via the judicial route may not impede reform in the long-term. Because people are increasingly ambivalent about traditionalist assumptions, same-sex marriage is likely to be adopted in the future through the democratic process.

TWO VIEWS OF FAMILY: THE TRADITIONALIST VS. PLURALIST DIVIDE

To most people, regardless of their position on gay marriage, "[t]he family is arguably the most important institution we have." Likewise, there is general agreement that we should not take what happens to the family lightly. Disagreement arises, however, as to what form of the family is best—for children, for adults, and for society as a whole. This disagreement finds expression in disparate views on the future of the family and the laws regulating it. In particular, the divide is acute on the question of whether gay marriage should be legalized.

This section attempts to characterize the two major competing visions of marriage in the context of more general ideas about sexuality, the individual, and the family’s relationship to society as a whole. This divide is complex, and there are potential alternative ways to characterize it. For simplicity, I shall refer to the respective positions as “traditionalist” and “pluralist.”

In general, traditionalists believe that the family form that has been most historically and socially respected and that has stood the test of time—the biological, heterosexual “nuclear” family—should occupy a privileged place today. This form should continue to be regarded, in law and custom, as the ideal model for our society. The pluralists, in contrast, insist that this view is too narrow and too hierarchical. The pluralist vision finds expression in the notion that individuals are free to choose how to construct their “family of

choice.” Within a broad range of combinations, they ought not to be restricted either by law or custom. A family, for example, can include more people than merely those to whom one is biologically related—and often does. The existence of many alternative types of families shows that there is no justification for privileging one family form over another or for defining one type as the “ideal” to which all should aspire. Many chosen families have the potential to function well.

Traditionalists and pluralists diverge on a few key points. First, traditionalists tend to focus on the form the family takes and find some forms more optimal than others. For example, two opposite-sex parents raising their own biological children is regarded as the best. Pluralists, on the other hand, are more concerned with family functioning—the potential for a family to work well—when determining whether or not a family should be regarded as acceptable or successful. Thus, a pluralist would look beyond the structure of an unconventional family to the substantive interactions and relationships between the members in determining whether the family is good for children, adults, and society. By extension, pluralists shy away from relying on generalizations, even if presently empirically valid, about how some families actually perform relative to others. What matters is the potential of a broad range of forms to function well. Instances of good families can be found in many types.

Similarly, the two camps differ in their views of the procreative function of families. Traditionalists believe that the nuclear family provides the best environment in which to raise children, while pluralists see a range of family variants—such as those headed by lesbian co-parents, or single mothers, or cohabiting couples—as potentially just as good for children.

Traditionalists and pluralists also tend to stress different aspects of relationships. For traditionalists, marriage’s central purposes are providing social stability, fostering commitment, and creating the best setting for socializing children to constructive and dominant

17. See id.
18. See id.
norms. A pluralist might acknowledge that marriage can be about those goods, but sees love, choice, individual fulfillment, and personal happiness as equally important. Implicitly, the two camps diverge on priorities when some of these values come into conflict. Pluralists tilt towards assigning significant weight to individual priorities, whereas traditionalists stress hewing to established duties and fulfilling well-defined responsibilities even at the cost of self-actualization. Finally, the two sides differ in their approach to the recent ferment in family life: traditionalists want to respond to actual behavioral and demographic changes by restoring, advocating, and strengthening the conventional institution of marriage, whereas pluralists want to accept the changes and introduce policies that will support alternative lifestyles and living arrangements.

These positions on the family resonate with deeper philosophical and theoretical commitments—commitments that, in turn, have broad implications for many aspects of social life. A respect for tradition proceeds from particular ideas about human nature and the key forces that preserve communities. First, traditionalists believe that human beings are limited in virtue, because human nature often inclines towards selfish and socially destructive choices. Traditionalists embrace a “social ecology” view of customary institutions such as marriage which regards them as essential to a workable social and moral order. By establishing expectations and defining roles, these institutions promote virtue. They shape, guide, and constrain human action towards socially constructive goals.

Such institutions are also necessary because individuals are limited in knowledge and wisdom. They cannot rely wholly on their own reasoning powers or individual insights to lead them towards morally desirable behavior, especially in their relationships with others. Rather, people do better by looking to age-old, well-tested practices to guide their conduct towards socially beneficial goals. In effect, institutions establish “scripts” that define basic duties and provide transparent guidelines for behavior. These simple scripts “maximize the chance that persons of limited intellect and self-control will negotiate complex human interactions successfully.”

Pluralists de-emphasize the role of such restraints. Rather, they assign paramount importance to personal fulfillment. They insist upon the freedom to discover personal goals and pursue them. In emphasizing self-determination and choice as the key to maximizing social well-being, pluralists downplay the intellectual limitations and evil inclinations that tend to make moral innovation destructive of the social good. In that respect, pluralists appear to harbor a vision of human nature as fundamentally benign and socially constructive.

21. Wax, supra note 1, at 1090.
Likewise, tradition deserves no special deference, because it is as likely to thwart human happiness as to promote it. Breaking free of customary practices may be necessary for people to achieve their full potential and maximize well-being. Scrutiny should therefore be reserved for overly rigid norms and constraints, which can block or distort beneficial choices.

Pluralism is increasingly dominant among the well-educated. One source of its appeal is that it marshals key intellectual, democratic, and liberal values—values to which our culture has long been committed—to challenge settled practices in the area of sexuality and family. The pluralist view is also popular among intellectuals because it comports with a rationalist approach to social life. Rationalists are suspicious of tradition. They are skeptical of the notion, associated with conservative thinkers like Hayek and Burke, that customary norms that emerge organically over time are likely to be more beneficial than arrangements that are individually or bureaucratically devised through a process of reason. Rationalists see no basis for assuming that customs embody the collective wisdom of mankind. Indeed, some students of norms point out that longstanding traditions are as likely to be destructive and backward as constructive and conducive to collective well-being. They note that many established rules and customs—such as slavery, or the legal subordination of women—have now been discarded as irrational and harmful. Because there is no guarantee that traditions are benign or worth preserving, all entrenched practices must ultimately withstand the test of reason. In answer to these concerns, most traditionalists emphasize that they are not against all change. Rationalists respond that this concession begs the question of how social change is to come about if not by scrutinizing existing practices in light of other commitments that transcend settled customs.

In pursuit of such scrutiny, pluralists point to key values and priorities that are often at odds with customary ways. These include personal rights, equality, non-discrimination, sexual privacy, and personal autonomy. In the context of same-sex marriage, for example, reserving marriage for heterosexual, opposite-sex couples obviously "discriminates" against those who are excluded from this category and treats them unequally. Likewise, the ban on polygamy—or other unconventional marital combinations—also grants privileges to some while denying them to others. Dismantling this structure of exclusive privilege is unproblematic for those in the pluralist camp committed to individualistic values. Once again, pluralists harbor a strong assumption that pursuing these core ideals, even in derogation of settled forms, will improve social life.

For traditionalists, elevating a list of abstract principles above other concerns is misguided. It is not that the aforementioned ideals
have no place in structuring social rules. Rather, their unrelenting, exceptionless pursuit can lead to the demolition of institutions that, in practice, are sorely needed to help ordinary people engage in constructive action and make good decisions about their lives. Sweeping away those institutions or altering them radically—both in definition and in their day to day practice—may leave many people without the guidance they need. This can result in decisions with untoward consequences for adults, children, and society overall. Because people have limited powers of understanding and intellect, they cannot be expected to weigh all the costs and benefits that might accrue from discarding accepted forms and striking out in new directions. Indeed, many of the collective and long-term effects of radical changes are hard to anticipate. And once these effects are felt, they often cannot later be reversed.

Traditionalists are critical of the assumption that people are autonomous and discrete individuals whose self-realization consists in protecting freedom of action. Traditionalists fault this conception as ignoring the destructive potential of unguided choice. Without the restraints implicit in settled practices and customary guidelines, the autonomous exercise of rights runs the risk of issuing in socially destructive conduct. Rights must be balanced with the need to channel decision-making and to preserve the integrity of practices that protect us from others' self-regarding conduct.

How do pluralist and traditionalist views translate into thinking about family forms? What are the implications for gay marriage in particular? Traditionalists stress that marriage is a central organizing institution, and one that is crucial to defining identities and roles. Although not without flaws (as would be expected for any arrangement among imperfect—and non-perfectible—beings), marriage has long served society well by providing a stable setting in which individuals can conduct their social, sexual, and reproductive lives. Most importantly, marriage creates a sheltered environment in which children can be brought up and the values of society reliably transmitted to the next generation. Radical changes made to marriage—or abandonment of that institution altogether in significant numbers—leads to the loss of a defined "context" in which to make myriad decisions affecting others. Without marriage, personal life proceeds without a "stable repository of meaning beyond an elusive self." If it is ultimately up to the individual to decide what constitutes appropriate behavior in intimate relations, it is

23. Id.
hard to know what principles should be used to construct the rules of conduct. “Morality [is] to come from within, 'but the interior has no structure.”24 Because there are no prescribed guidelines dictating one's duties or defining proper behavior, it is hard to know how to make good decisions. In turn, it is difficult to find a reason for restraint or for turning away from one's momentary heart's desire, however narrowly self-regarding. Nothing seems worthy of “the foreclosure of possibility that intimate commitment necessarily entails.”25 In this way, a lack of prescription can lead to an ethic of amorality, which runs a significant risk of inflicting harm on others.

Pluralists, for their part, would deny that they lack overarching moral commitments. But the principles they appear to place at the centerpiece of social life, and those that presumably will ensure its perfection, are equal treatment and equal regard. Equal treatment dictates that individuals and their families should have the chance to realize their potential for happiness and success. That happiness may be achieved in many types of families;26 “gay and lesbian families, single parent families, blended families, nuclear families, [and] extended families” all have equal potential to impart “family values.”27 In addition, there is no a priori basis for believing that any one form of the family “constitutes the appropriate or normative arrangement for reproduction, nurturance, socialization and economic support.”28 For this reason, to select and accord a privileged place to any one form is seen as “simply discrimination.”29 Not only do pluralists argue that elevating the nuclear family above others is unwarranted discrimination, but they question whether the nuclear or biological family is as “natural” as the traditionalists claim.30 Different forms of family can be functional or dysfunctional, depending on the circumstances, and none has an intrinsically superior chance of doing their job well. Adequate social and financial

25. Regan, supra note 22, at 164.
27. Young, supra note 16, at 553.
29. Young, supra note 16, at 553; see also Rauch, supra note 10, at 112.
30. Jacqueline Stevens, Methods of Adoption: Eliminating Genetic Privilege, in ADOPTION MATTERS: PHILOSOPHICAL AND FEMINIST ESSAYS 68, 77 (Sally Haslanger & Charlotte Witt eds., 2005) (stating that “... the truth of the matter is that families have never existed without a political society providing the rules for what counts as a family, with patterns of endogamy and exogamy that vary across societies and within the same society over time.” (citation omitted)).
have no place in structuring social rules. Rather, their unrelenting, exceptionless pursuit can lead to the demolition of institutions that, in practice, are sorely needed to help ordinary people engage in constructive action and make good decisions about their lives. Sweeping away those institutions or altering them radically—both in definition and in their day to day practice—may leave many people without the guidance they need. This can result in decisions with untoward consequences for adults, children, and society overall. Because people have limited powers of understanding and intellect, they cannot be expected to weigh all the costs and benefits that might accrue from discarding accepted forms and striking out in new directions. Indeed, many of the collective and long-term effects of radical changes are hard to anticipate. And once these effects are felt, they often cannot later be reversed.

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23. Id.
support allows existing families to succeed even if they represent alternatives to accepted forms; social disapproval and discrimination are what undermine those disfavored arrangements and cause them to fail. Equal regard dictates that society take steps to enable all types of families to reach their full potential. To this end, it is important for society and the government to embrace, support, and affirm many different family forms.

The traditionalist-pluralist divide finds expression in disagreements regarding the connection between adult relationships and procreation. For traditionalists, children are front and center and raising the next generation is the cardinal purpose of marriage. Traditionalists also believe that married couples are most likely to provide for children's proper socialization. In defending that proposition, proponents stress the empirical findings of social science. These show that “children raised in two-parent homes where both a mother and a father are present grow up having better education, fewer physical and mental health problems, and are less likely than others to commit violent crimes as adults.” Children raised by their married biological parents are also “… significantly less likely to suffer from depression, anxiety, alcohol and drug abuse, and thoughts of suicide compared to children from divorced homes.” They also tend to have more successful marriages themselves. In sum: “[m]arriage is associated with advantages to children at all income and education levels.”

In explaining these findings, traditionalists note that marriage shores up the weakest parental link: the tie between children and their fathers. The law “traditionally presume[s] … that a child born to a married woman was fathered by her husband,” and law and custom assign married men responsibility for their children’s support and well-being. These conventions may account for why children are more likely to receive a man’s time, attention, and resources within a

31. Crews, supra note 19, at 99-100.
33. Id. at 20. But see Andrew J. Cherlin, Marriage, Divorce, Remarriage 77 (rev. and enlarged ed. 1992). “For example, [Sara] McLanahan and [Larry] Bumpass report that in one national survey of women age 15 to 44, 25 percent of [those] who had lived with only one natural parent at age 14 [had divorced], compared to about 14 percent among those who had lived with both parents, controlling for other factors.” Id.
marital relationship. They also help explain why “[e]ven cohabitating, biological fathers who live with their children are not as involved and affectionate with their children as are married, biological fathers who reside with their children.” Indeed, the best available evidence to date suggests that children do best across a range of indicators when they grow up in the home established by their married, biological parents. More specifically, the data show that the conjunction of living with one’s own biological parents and those parents being continuously married to each other is the most powerful predictor of children’s success. As discussed more fully below, recent research indicates that stepparent families are not as stable or conducive to effective childrearing as intact, conventional nuclear families. Also, children in stepparent families do as poorly as children in single parent families on some measures of outcome. This suggests that, although marriage confers stability, simply growing up in a marital household may not maximize benefits for children. Some marital settings may be better than others.

For pluralists, successful childrearing is important. However, it is just one of many equally compelling goals for families. Family relationships exist to provide support, security, companionship, self-fulfillment, and pleasure for all family members. Pluralists are suspicious of the essentialism expressed by the stress on biological connection. For them, a range of family types, representing different

36. Milton C. Regan Jr., Between Justice and Commitment, in JUST MARRIAGE 67, 69 (Mary Lyndon Shanley ed., 2004); see also WITHERSPOON INST., supra note 32, at 12 (“Specifically, the married family satisfies children’s need to know their biological origins, connects them to both a mother and a father, establishes a framework of love for nurturing the young, oversees their education and personal development, and anchors their identity as they learn to move about the larger world.”).

37. INST. FOR AM. VALUES, WHY MARRIAGE MATTERS: TWENTY-SIX CONCLUSIONS FROM THE SOCIAL SCIENCES 12 (2d ed. 2005) (citation omitted). Similarly, Kathleen Kiernan explains that:

[e]vidence is accruing which suggests that there are some differences between marital and cohabitating unions. For example, cohabitating unions are less stable and when these unions break up fathers of children born outside marriage may be less involved with their children on dimensions such as paying child support, visiting their children, and being involved in child rearing decisions than are fathers whose children were born within marriage.


38. See infra pp. 402-04.

39. See, e.g., AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS xv (2002) (claiming that “... in this diverse society, the achievement of fairness differs depending on the individuals, their choices, and their expectations”); Hull, supra note 4, at 215 (arguing that if the law recognized other important relationships besides marriage, “... people will have more flexibility to match their actual relationship and legal needs to state offerings”).
combinations of association, have the potential to function as well as conventional families under the right circumstances. Families based on kinship are not inherently superior to “chosen” associations based on affinity and commitment. There is no reason why a man cannot be as devoted to a child outside of marriage as within, and indeed no reason why a non-biological “parent” cannot function as well as a biological one. To the extent that social science data suggest otherwise, pluralists view existing patterns as “constructed” and thus contingent. Observed trends are amenable to modification through more generous or more propitious policies. In effect, there is nothing inherent to traditional forms that make them more likely to succeed.

Pluralists’ position on family form and childrearing would thus seem to entail a questioning of basing social policy and law on observed generalizations, even if those are empirically valid at the moment. In effect, pluralists resist prejudging relationships based on statistical patterns. One point pluralists often make is that there are plenty of unconventional families—such as single parent, or gay parent families—that do a good job raising children. Moreover, plenty of conventional families do poorly. Implicit in this observation is that the overall statistical likelihood of one family type doing better is not necessarily dispositive of what law or policy should permit. In the case of gays, proponents deny that the data indicates that children in gay parent families do worse. But, apart from that, the position more generally seems to be that there is no inherent reason why any particular non-traditional family cannot do a good job. Certainly a proper respect for rights and autonomy demands that families not be pre-judged based on generalizations from data. Each person or family should be given an equal opportunity to prove its bona fides and to function well.

The Cases: Pluralist or Traditionalist?

The split between traditionalist and pluralist views runs deep. These perspectives embody disparate visions of human nature, the role of biology, the nature of morality, the social arrangements conducive to desirable conduct, and even the very definition of morality itself. Are these broad philosophies evident in the two state same-sex marriage cases under consideration? Both cases—Lewis v. Harris in New Jersey and Hernandez v. Robles in New York—resolve challenges under their respective state constitutions to the law’s failure to allow same-sex couples to marry. Although using different formulations, both courts assess these challenges under a roughly similar standard: the legislature need merely supply some kind of plausible reason for creating an inequality of treatment for

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40. See infra p. 407.
homosexual and heterosexual couples. In declaring that the restriction of marriage to opposite-sex couples must advance a legitimate government purpose, the majority in *Hernandez* applied something like rational basis review.\(^{41}\) The *Hernandez* majority found that such a purpose existed: restricting marriage to opposite-sex couples promotes and protects the welfare of children.\(^{42}\) Marriage law serves the legitimate purpose of channeling heterosexuals toward behaviors that enhance domestic stability. For its part, the New Jersey Supreme Court in *Lewis v. Harris* stated the requirement that the restriction bear "a substantial relationship to a legitimate governmental purpose."\(^{43}\) In contrast with the New York Court of Appeals, the New Jersey Supreme Court majority found no justification for conferring unequal substantive rights and privileges on same-sex and opposite-sex couples. The court nonetheless found a restriction on the category of marriage itself acceptable on the same standard, albeit with little explanation as to why maintaining this structure served a rational state purpose.

Both decisions have in common the courts’ refusal to find a constitutional basis for invalidating legal definitions that restrict marriage to opposite-sex relationships. Neither court viewed the imperatives of equal treatment or the jurisprudence of fundamental rights as requiring the state to make marriage available to gay couples. Beyond that, however, the courts’ emphasis and reasoning differ dramatically. The *Hernandez* court did not find problematic the differential treatment entailed by the law’s exclusion of gay couples from the institution of marriage. In contrast, the New Jersey Supreme Court found objectionable the legal denial of “rights and benefits to committed same-sex couples that are statutorily given to their heterosexual counterparts.”\(^{44}\) Although the *Lewis* court majority relied on a fundamental rights analysis to hold that the legislature was not required to expand the designation of “marriage”, it nonetheless held that substantive distinctions must be eliminated from the state law of domestic relations.\(^{45}\) Regardless of what the legislature chose to call them, the relationships open to gay couples must be indistinguishable in all practical respects from those into which opposite-sex couples were permitted to enter.\(^{46}\)

\(^{41}\) 855 N.E.2d at 12.
\(^{42}\) Id. at 11-12.
\(^{43}\) 908 A.2d. at 212.
\(^{44}\) Id. at 200.
\(^{45}\) Id. at 217 (“Unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated under our State Constitution.”).
\(^{46}\) Id. at 224. The court concluded that:

[D]enying to committed same-sex couples the financial and social benefits and privileges given to their married heterosexual counterparts bears no
These decisions can be viewed as presenting the question of whether the state constitutions themselves embody a pluralist or traditionalist approach to sexual mores. At first blush, it would seem that the documents do not take sides. There are aspects of the language and reasoning in both cases that embrace neutrality. In stating that “of course the Legislature may ... extend marriage or some or all of its benefits to same-sex couples,” the Hernandez court appears to take the position that the constitution mandates no particular set of values or judgments on how the law should configure marital relations. Likewise, the New Jersey Supreme Court majority in Lewis made clear its view that a legislative decision to change the law to permit same-sex marriage would easily square with the state constitution. Indeed, in requiring the legislature to change the state’s law to conform to its “equality” mandate, the state supreme court recognized that one way (although not the only way) to fulfill that command would be to extend to gays the right to marry.

In sum, both courts seem to agree that, if the New York or New Jersey legislature decided to recognize same-sex marriage, nothing in the state constitutional order would stand in the way. On the other hand, neither court was willing to require that recognition. Both courts’ refusal to mandate gay marriage, while acknowledging the legislature’s freedom to permit it, would appear consistent with constitutional “neutrality.” It could be claimed that neither court formally takes sides between the pluralist and traditionalist approaches to sexuality, marriage, and family. Such neutrality finds expression in the institutional allocation implicit in both decisions. Judges should leave to the legislature, the people’s duly elected representatives, the task of mediating between competing views of marriage advocated by the factions in the culture wars.

Further reflection reveals, however, that the neutrality in Lewis is superficial at best. Although Lewis pays lip service to legislative authority over the definition of marriage, the court’s equality command drains that authority of all but purely symbolic significance. In actual practice, if not in name, the Lewis court’s ruling necessarily embraces basic pluralist assumptions about the role and place of families in social life. Conversely, the court

substantial relationship to a legitimate public purpose. We now hold that under the equal protection guarantee ... of the New Jersey Constitution, committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples.

Id. at 220-21.

47. Hernandez, 855 N.E.2d at 7.

48. See 908 A.2d. at 221-22.

49. Id.
implicitly rejects traditionalist justifications for conferring on heterosexual relationships special rights and privileges.

A closer look at the court's analysis is revealing. In considering the plaintiffs' interests in equal treatment and non-discrimination toward their choice of family type, the New Jersey Supreme Court notes that "legislation, in distinguishing between two classes of people, [must] bear a substantial relationship to a legitimate governmental purpose." The court asserts that, despite an extensive body of New Jersey law that prevents "discriminat[ion] ... on the basis of sexual orientation," the state's laws "continue to restrict committed same-sex couples from enjoying the full benefits and privileges available through marriage." The court then considers how the State might justify those restrictions and whether they can be said to advance a "legitimate governmental purpose." Here the court comes up virtually empty-handed. It concludes that "[o]ther than sustaining the traditional definition of marriage ... the State has not articulated any legitimate public need for depriving same-sex couples of the host of benefits and privileges" given to married couples. Accordingly, it concludes that there is "no rational basis" to deny same-sex couples those rights and benefits. In contrast, the Hernandez majority accepts at least the potential validity of a traditionalist account of family life. Without actively advocating the traditionalist approach, the Hernandez majority acknowledges the basic reasonableness of traditionalism's core commitments. In particular, the Hernandez majority acknowledges that marriage can be a useful device for channeling behavior and protecting children's interest in domestic stability.

Although advocates of gay marriage in Lewis did not get precisely what they were seeking, the decision represents a giant leap forward for their position and for a pluralist vision of the family. Most pluralists deny it is incumbent on states to recognize matrimony at all. But having created that institution, the State

50. Id. at 212. As the court states, it must "weigh[] ... three factors" to make this determination: "the nature of the right at stake, the extent to which the challenged statutory scheme restricts that right, and the public need for the statutory restriction." Id. Furthermore, the court explains, "the more personal the right, the greater the public need must be to justify governmental interference with the exercise of that right." Id. (citation omitted).

51. Id. at 212-13. Examples cited by the court include New Jersey laws surrounding "parental visitation rights of a divorced homosexual father," the law of "domestic partnership," and the Law Against Discrimination. Id.

52. Id. at 215.

53. Id. at 217.

54. Id.

55. 855 N.E.2d at 8-7.

56. Id. at 217-18.
cannot plausibly justify restrictions on the types of relationships that can be accorded privileges and protections associated with marriage. To be sure, the New Jersey Supreme Court’s decision is, on the surface, a curious amalgam of traditional and pluralist elements. Importantly, the court did not mandate a right to marry. This aspect of the decision is based on the court’s refusal to recognize the right of same-sex marriage as a “fundamental right” rooted in history and tradition. In effect, the court imports traditional categories and understandings into the analysis of whether the right to marry satisfies the standard for a “fundamental right.” It is not surprising, then, that traditionalism wins the day on this narrow question of whether the State must label these rights and benefits “marriage.” But the practical reach of the “fundamental rights” analysis is virtually non-existent. The requirement of equal treatment has the curious effect of draining marriage of its substantive significance. It reserves marriage to heterosexual couples as little more than a label or rubric for their relationship. In this respect, traditionalism (with legislative discretion to operate on traditionalist assumptions) triumphs—literally—in name only. The footprint of traditionalism is so small as to virtually disappear.

The New Jersey Supreme Court’s approach to the core concerns of traditionalism, and its analysis of the possible basis for reserving special rights and privileges to opposite-sex couples, stands in stark contrast to the approach taken by the majority in the New Jersey Appellate Division decision under review. Unlike the supreme court, the appellate court left undisturbed the substantive distinctions between the rights conferred on same-sex and opposite-sex couples that were embodied in the state law of domestic relations. Like the New York Court of Appeals in Hernandez, the appellate division in Lewis gave serious consideration to the traditionalist argument that the best environment for children is the nuclear family. Judge Parrillo’s concurring opinion, in particular, is perhaps most explicit on the contrast between pluralist and traditionalist visions of this priority. In discussing the Massachusetts Goodridge v. Dep’t of Public Health case (in which the Massachusetts Supreme Court struck down the restriction of marriage in Massachusetts to opposite-sex couples), Judge Parrillo acknowledges that plaintiffs’ claims there—

57. Lewis, 875 A.2d 259.
58. See id. at 267.

[M]arriage is so clearly related to the public interest in affording a favorable environment for the growth of children that we are unable to say that there is not a rational basis upon which the state may limit the protection of its marriage laws to the legal union of one man and one woman.

Id. (quoting Singer v. Hara, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974)).
and in New Jersey—rely on equality and liberty jurisprudence "couched in the more recent terminology of privacy, autonomy, and identity." He expressly identifies the "close personal relationship model of marriage" as the one espoused and triumphant in the Goodridge case. He draws a contrast between that view and a concept that has "traditionally ... embraced so much more." According to Parrillo, this richer conception encompasses an awareness of:

[T]he fact of sexual difference; the enormous tide of heterosexual desire in human life, the massive significance of male female bonding in human life; the procreativity of heterosexual bonding, the unique social ecology of heterosexual parenting which bonds children to their biological parents, and the rich genealogical nature of heterosexual family ties.

Describing marriage as a "privileged state," Parrillo's discussion implies that the privilege is grounded in the momentous public consequences of opposite-sex relationships' procreative potential—a potential that same-sex relationships notably lack. In general, Parrillo's description of conventional marriage expresses an "ecological," social-regulatory notion of the institution that comports well with the traditionalist position. His opinion embodies a deeper neutrality than that advanced by the New Jersey Supreme Court majority. According to his view, the legislature could choose to adopt traditionalist norms and reject pluralist understandings. For him, it is not the place of the court to second-guess the legislature by making a choice between these visions. Unlike the supreme court majority, he is willing to accept that the traditionalist approach has some plausibility. That outlook cannot be said to be wholly unjustified. Nor, by implication, is it inconsistent with prior law.

Parrillo's expression of the traditionalist view of marriage is echoed by the opinions—majority and concurring—in Hernandez v. Robles. With the concern to identify a rational basis for restricting marriage to opposite-sex couples, the New York Court of Appeals, as already noted, focused on the legislative purpose of promoting the welfare of children. But in explicating how the restriction advances that purpose, the court took a deferential stance. It stated that the

60. Lewis, 875 A.2d at 295.
61. Id.
62. Id. at 276
63. Id. (quoting Monte Neil Stewart, Judicial Redefinition of Marriage, 21 CAN. J. FAM. L. 11, 81 (2004) (citation omitted)).
64. Id.
65. See id.
66. See discussion, infra. p. 394.
67. 855 N.E.2d at 11-12.
legislature is permitted to decide that “it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships.” In recognizing that fostering stability of procreative relationships is a valid and vital objective in the area of domestic relations, the opinion alluded more than once to a critical difference between same-sex and opposite-sex couples: only for heterosexuals can their “preferred ... of sexual activity ... lead to the birth of children.” The Hernandez court’s acknowledgment of the potential significance of the ineluctable biological and procreative differences between same-sex and opposite-sex unions contrasts with the limited deference that court gives to the social science evidence plaintiffs adduced to shore up their case. That evidence consisted of the limited studies to date on homosexual childrearing, which have so far failed to show that heterosexual families are better for children than same-sex families. Despite the paucity of pro-traditionalist data on this point, the Hernandez court refused to characterize customary restrictions as “irrational, ignorant or bigoted.” Relying on the long provenance and near-universal acceptance of conventional marriage, it noted that “[i]n the absence of conclusive scientific evidence, the Legislature could rationally proceed on the common-sense premise that children will do best with a mother and father in the home.”

The court’s opinion went further than just accepting that stabilizing potentially procreative—that is, heterosexual—relationships was an important goal. The court left open the possibility that abandoning opposite-sex exclusivity and putting homosexual relationships on a par with marriage (in status or in substance) might somehow undermine heterosexual marriage. One of the significant weaknesses of the opinion is the failure to explain how this might occur. Judge Graffeo, in concurrence, tried harder on this point, although not with complete success. She states that “the current definition of marriage is rationally related to the State’s legitimate interest in channeling opposite-sex relationships into

69. Id. at 11.
70. As the Hernandez majority explains, [p]laintiffs, and amici supporting them, argue that the proposition asserted is simply untrue: that a home with two parents of different sexes has no advantage, from the point of view of raising children, over a home with two parents of the same sex. Perhaps they are right, but the Legislature could rationally think otherwise.

Id. at 7.
71. Id. at 8.
72. Id.
73. Id.
marriage because of the natural propensity of sexual contact between opposite-sex couples to result in pregnancy and childbirth."74 Beyond that, her opinion says nothing about how the channeling function actually works and how excluding homosexuals strengthens that function. Rather, the connection is more or less assumed.

In *Lewis v. Harris*, the New Jersey Supreme Court does not so much take on this position as disregard it.75 On review of the appellate decision, the court sidestepped the question of whether differences in procreative potential and success—whether biological or social—justify different legal treatment of same-sex and opposite-sex couples. In refusing even to consider such arguments, the court followed the lead of the New Jersey Attorney General’s office, which repudiated any reliance at the supreme court stage on a state interest in fostering the well-being of children or in promoting the formation of families most conducive to children’s welfare. As the appellate division majority acknowledged, “[t]he State concedes that state law and policy do not support the argument that limiting marriage to heterosexual couples is necessary for... providing the optimal environment for raising children.”76 In taking this position, the court appeared to endorse the view that any derogation of homosexuals’ qualifications to serve as parents was indeed in tension with prior state law and judicial decisions concerning parental rights, custody, and adoption. The court noted that state law had been converging towards equality of treatment in these areas regardless of sexual orientation.77 The court pointed to its acknowledgment in past decisions “that a woman can be the ‘psychological parent’ of children born to her former same-sex partner during their committed relationship, entitling the woman to visitation with the children.”78 This and like decisions, the court suggested, deprived the State of a key traditionalist rationale for preserving marriage: that standard nuclear families should receive special sanction and protection as the best setting for rearing children. Based on these past precedents, the New Jersey Supreme Court concluded that “[o]ther than sustaining the traditional definition of marriage, which is not implicated in this discussion, the State has not articulated any legitimate public need for depriving same-sex couples of the host of benefits and privileges [earlier] catalogued... “79

74. *Id.* at 21.
75. 908 A.2d at 205-06.
76. *Id.*
77. *Id.* at 212-13.
78. *Id.* at 213 (quoting *V.C. v. M.J.B.*, 748 A.2d 539 (2000)); see also *AM. LAW INST.*, *supra* note 39, at 5, 12 (describing different categories of parents such as “de facto parents” and “parents by estoppel”).
In placing the arguments based on procreative interests off limits the court appeared to embrace defining pluralist tenets. Family function—not family form—matters most to child well-being. Widely divergent types of families have the potential to function well. Indeed, the court seemed to view these precedents as tilting strongly against recognizing any state law distinctions related to parent-child relations on the basis of sexual orientation. That is, the court appeared to see those cases as conclusively establishing the lack of any valid basis for preferring heterosexual, or opposite-sex couple, homes as a setting for child rearing. On this view, the State must officially recognize same-sex and opposite-sex families as equally capable of providing a healthy and nurturing environment for children.

The court's assessment that this conclusion followed closely from prior precedents is understandable. The individualist and pluralist orientation of past decisions on parent-child relations creates a doctrinal force field that militates against the distinctions necessary to preserve a privileged status for opposite-sex relationships. Yet, here are good reasons to treat these two areas of domestic law differently. Indeed, New Jersey's approach to the law of parent-child relations is not inconsistent with a more traditional paradigm for the law as applied to relations between adults. Rules that allow a broad range of people to adopt, or that recognize and protect the parental rights of gays, can be justified as an accommodation to child well-being and the exigencies entailed by less than ideal circumstances. The law of parent-child relations often develops in the wake of relationship failures. Either the child's original family has dissolved through divorce or a breakup, or the parents never married at all (in some instances because they are in same-sex relationships). In those cases, the government is there to pick up the pieces. The State's priority must be to do what is best for the child under circumstances that, by definition, fall short of the ideal. It makes sense to adopt the position that flexible, pragmatic principles of "damage control" should govern. Having some parent is better than having no parent. Cutting a child off from someone who has effectively cared for him—regardless of whether that person fits neatly into a pre-defined category—may not represent the best accommodation to a messy reality and can often prove harmful to the child. A child-oriented approach means that children will often be placed in a setting that the State might not wish to foster in the first instance but that nonetheless represents the best available option.

The decision to adopt flexible rules that protect children on a case-by-case basis does not necessarily entail a commitment to enshrining adults' prerogatives to form the relationships they favor, nor does it dictate the enforcement of strict equality between same-
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sex and opposite-sex couples. The New Jersey Supreme Court erred in failing to see that a body of law developed to protect children in “second best” cases provides little guidance on how the State should shape the law to encourage “first best” relationships for childrearing. Salvaging bad situations—which is the business of child-parent relations law—does not mandate that the State reject the traditionalist ideal. That ideal dictates that the State should not encourage the initial creation of families that are, on average, less than optimal. Yet the appearance of such families in greater numbers is the expected consequence of giving equal legal rights to same-sex couple partnerships.

In failing to make the distinction between ordering parent-child relations and relationships between adults, the court rejected the view that sanctioning a more liberal law of couple relations might harm children in the long run. Its position was also aided by an individualist focus on the harms allegedly suffered by specific children now living in unconventional households. The court alluded to the “social benefits and privileges available to children in heterosexual households” that are “denied” to children of same-sex couples.80 The court noted that the law’s restrictions lead children in same-sex families to suffer “the economic and financial inequities that are borne by same-sex domestic partners,”81 despite “having] the same universal needs and wants, whether they are raised in a same-sex or opposite-sex family . . . .”82 The court concluded that, if the objective is to give all children maximum security, then “[t]o the extent that families are strengthened by encouraging monogamous relationships, whether heterosexual or homosexual, we cannot discern any public need that would justify the legal disabilities that now afflict same-sex domestic partnerships.”83

In concluding that conferring the full panoply of rights on gay unions would be best for children growing up in those homes and that withholding those rights would harm them, the court shares a dominant pluralist concern with the fate of children currently being

80. *Id.* at 218.
81. *Id.* at 216. The court noted that:
   [the Act [extant Domestic Partnership Act] provides no comparable presumption of dual parentage to the non-biological parent of a child born to a domestic partner . . . As a result, domestic partners must rely on costly and time-consuming second-parent adoption procedures. The Act also is silent on critical issues relating to custody, visitation, and partner and child support in the event a domestic partnership terminates.

*Id.* (citation omitted). In addition, they go on, “. . . the Act does not place any support obligation on the non-biological partner-parent who does not adopt a child born during a committed relationship.” *Id.*
82. *Id.* at 216-17.
83. *Id.* at 218.
raised in unconventional families. More broadly, the court implicitly distances itself from the traditionalist position that children’s interests are best vindicated by maintaining institutional standards regardless of whether some people fall short of them. For the traditionalist, it is more important—and ultimately better for society—to maintain the clear message sent by holding up “best practice” than to assist the people who deviate from it. The hope is that strong institutions will influence more people to choose the forms that redound over time to everyone’s benefit. In failing to give credence to this position and in focusing on the children already living in same-sex families, the court is more in line with the pluralist position than with traditionalism.

The court’s rhetoric is also in keeping with a key, related pluralist stance that an evolution towards more diverse family forms is an inevitable feature of the social landscape. In reviewing the expanding rights of homosexuals, noting that “[t]imes and attitudes have changed,” and construing past decisions as expressing “a developing understanding that discrimination against gays and lesbians is no longer acceptable,” the court acknowledges how social practices have shifted and implies that such changes will continue. The court also explains how time has altered even traditional marriage: “[t]he institution of marriage reflects society’s changing social mores and values. In the last two centuries, that institution has undergone a great transformation....” The emphasis on change and its inevitability echoes pluralist arguments that resistance to these innovations is not only counterproductive but futile. Emblematic of this position is the work of the sociologist Stephanie Coontz, who argues that “[w]e may personally like or dislike all of these changes [in family form and practice]. But there is a certain inevitability about most of them.” Despite its expressed recognition that social institutions will inevitably undergo modifications, the Lewis court nonetheless stops short of viewing this dynamism as mandating a legal recognition of homosexual marriage. Rather, according to the court, “the issue is not about the

84. See, e.g., JUDITH STACEY, IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POST MODERN AGE 135 (1996) (describing the way that these children “... risk losing a beloved parent or co-parent at the whim of a judge”); EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY AND GAY PEOPLE’S RIGHT TO MARRY 96 (2004) (describing how these children “are deprived of protection in the case of death, disability, divorce, or other life-changing events.”).
85. See Lewis, 908 A.2d at 214-15.
86. See id. at 209 (citation omitted).
87. Id. at 223.
88. STEPHANIE COO:ITZ, MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY OR HOW LOVE CONQUERED MARRIAGE 280 (2005); see also STACEY, supra note 69, at 37 (stating that “we do not have the option of returning ... even if we truly wanted to.”).
transformation of the traditional definition of marriage, but about the unequal dispensation of benefits and privileges to one of two similarly situated classes of people." It is substantive equality, not the right to marry as such, that represents the appropriate accommodation to changes—legal, social, and institutional—that have already occurred.

In sum, in refusing to recognize that fostering the stability of relationships is a valid and vital objective in the area of domestic relations, the Lewis v. Harris opinion resoundingly rejects a traditionalist view of potentially procreative partnerships. Unlike the New York court in Hernandez, the Lewis court refuses to accept that conferring rights on homosexual relationships could ever undermine the stability of heterosexual marriage. The New Jersey Supreme Court's preoccupation is almost entirely with substantive equality for gays and for gay couples—a view that assigns priority to individual rights, autonomy, and equality of treatment. Children have a place in the opinion only as innocent dependents already ensconced in unconventional families. The court's paramount objective is to avoid harming those existing children and to save them from the detriments of unequal treatment. Broader ecological or systematic factors—such as the effects on future children of putting innovative relationships on a par with others—are beyond the scope of concern. In this respect, the court's opinion gives little weight to traditionalist conceptions of the heuristic, normative dynamics of familial forms.

PLURALIST VS. TRADITIONALIST FAMILIES: WHAT IS THE EVIDENCE?

One criticism leveled against the embrace of tradition—and of traditional family forms—is that it is unscientific. Progressive social movements are allied with modern science in demanding evidence that settled arrangements—especially as these force some individuals to sacrifice benefits or privileges enjoyed by others—are superior to proposed reforms. The lower court opinions in Lewis v. Harris actively question the claim that excluding same-sex couples from the privileges enjoyed by opposite-sex couples will redound to the benefit of children. The Hernandez dissent also notes the lack of obvious connection between barring homosexuals from marriage and encouraging heterosexuals to marry or to confine procreation to that

89. Lewis, 908 A.2d at 217.
90. Id.
91. See 855 N.E.2d at 12.
92. 908 A.2d at 217.
93. See, e.g., Wax, supra note 1, at 1082.
94. See 875 A. 2d 259, 264.
setting. In asking those who resist same-sex marriage to spell out the exact causal chain that links rights for gay couples to the weakening or destruction of marriage, some of the opinions in Lewis and Hernandez refuse to take for granted a traditionalist assumption that conventions and individual conduct are effectively intertwined. Chief Justice Kaye’s dissent in Hernandez, for instance, although conceding that “encouraging opposite-sex couples to marry before they have children is certainly a legitimate interest of the State,” concludes that “the exclusion of gay men and lesbians from marriage in no way furthers this interest.” In observing that “there are enough marriage licenses to go around for everyone,” Chief Justice Kaye implicitly faults the lack of demonstrable connection between homosexuals’ inability to marry and heterosexuals’ behavior.

Conservative traditionalists, in contrast, resist demands that existing institutions justify themselves by adducing empirical evidence of claimed benefits. The notion that fundamental revisions in modes of living, by altering social expectations, norms, and roles, will affect behavior in the long run is regarded as obviously true or at least plausible enough to counsel caution. In answer to the objection that barring homosexuals from marriage seems to have little to do with whether heterosexuals enter that state, traditionalists would point to how conduct is mediated by social meanings and understandings. The fear is that, if the institution of marriage is reshaped to give priority to diversity, choice, and individual prerogatives—and if marital roles are redefined to fit different homosexual and heterosexual lifestyles—then behavior surrounding all marital relations may change in response. Those changes may not be beneficial. For example, if homosexuals are less likely to have children, procreation might become less central to marriage. This might foster a model of marriage that views children as optional or even unimportant. Or, in keeping with past commitments and rhetoric, homosexual couples might place less emphasis on sexual fidelity or be more tolerant of sexual infidelity within their relationships. The existence of a significant number of “open

95. See 855 N.E.2d at 23 (Kaye, C.J., dissenting).
96. Id. at 30.
97. Id. As Chief Justice Kaye explains, [o]f course, there are many ways in which the government could rationally promote procreation—for example, by giving tax breaks to couples who have children, subsidizing child care for those couples, or mandating generous family leave for parents. Any of these benefits—and many more—might convince people who would not otherwise have children to do so. But no one rationally decides to have children because gays and lesbians are excluded from marriage.
98. See Wax, supra note 1, at 1088.
marriage” homosexual couples might affect how heterosexuals view their own commitments, with potentially unsettling or disruptive consequences. These projections are based on assumptions of how normative dynamics function within social life rather than on actual empirical observation or scientific data. It is not surprising that, in keeping with its pluralist outlook, the New Jersey Supreme Court in Lewis v. Harris gives little credence to these types of arguments.99

By definition, traditionalist projections on the consequences of equality for same-sex relationships cannot be backed by data, since the proposed changes have not yet occurred—at least not on the large scale that proponents advocate. For traditionalists, this creates a dilemma. Those who resist change will rarely be able to answer the call for hard evidence of the detrimental effects that elicit their apprehensions. Given current rationalist demands, traditionalist efforts to slow social innovation threatens to be a losing battle.

But all is not lost yet. First, despite elite opinion strongly in favor of same-sex marriage, voters have staunchly resisted attempts to legalize these relationships. There is also a growing body of demographic data that, although far from definitive on the question of the functioning of same-sex families, provides cause for concern. Although the evidence to date may not suffice to win the day against legalization, it flags issues and sets priorities for more research. It remains to be seen whether future social science studies will validate or dispel popular reservations about the creation of new types of families on a wide scale.

In investigating the effects of family structure on outcomes for children, social scientists have accumulated impressive evidence that “[f]rom the standpoint of... economic well-being and sound psychological development... the intact two-parent family is generally preferable to the available alternatives.”100 Much demographic investigation has focused on the effects of single parent families, which have greatly increased in number through extramarital childbearing and divorce. It is now well-accepted that, even controlling for factors like income and parental education, children growing up with two parents do significantly better on a range of social indicators than children living with one parent.101 In seeking to

99. See 908 A.2d at 209.
refine these observations and discover the secret of the two-parent family’s success, demographers have recently studied and compared different types of two-parent families. The data from a wide range of studies shows that not all such families are alike. Rather, the best outcomes for children are seen where (1) the parents are married and (2) both parents are biologically related to the child. A research brief by Child Trends sums up the scholarly consensus:

[R]esearch clearly demonstrates that family structure matters for children, and the family structure that helps them most is a family headed by two biological parents in a low conflict marriage. Children in single parent families, children born to unmarried mothers, and children in step-families or cohabiting relationships face higher risks of poor outcomes.102

In seeking to further understand these patterns, sociologists have compared conventional gold standard two-parent families to a variety of family combinations in which two opposite-sex adults are present. These include families in which the parents are unmarried, the mother is living with a boyfriend unrelated to one or more children, or the parents are married but the family is “blended”: that is, one biological parent lives with a stepparent who may have been married previously or have children by another relationship.

Most relevant to the same-sex marriage debate is the data on different types of blended families. In particular, evidence has emerged that stepparent families are significantly less beneficial for children than intact nuclear families.103 In some studies, blended families do not produce measurably better child outcomes on a range of indicators than single parent or cohabiting families.104 As summarized by two respected demographers, the evidence shows that these results hold even after controlling for factors such as “parental education, number of siblings, race, and region.”105

According to these investigators,

late adolescents and young adults who had grown up with both biological parents performed better on school achievement tests, had fewer children as teenagers, finished high school more often, attended college more often, and were more likely to be

104. See id. at 28.
105. Id.
employed in early adulthood than those who had grown up with a single parent or a stepparent.\textsuperscript{106}

Furthermore, although “[c]hildren living with a stepparent . . . were almost as well off economically as children living with two biological parents,”\textsuperscript{107} they nonetheless were “at least as likely as children who had lived with a single parent to drop out of high school or to have a baby before they turned twenty.”\textsuperscript{108} The authors concluded that “[f]or adolescents, the economic advantages of having a stepparent seemed to be offset by psychological disadvantages.”\textsuperscript{109} In sum, parental matrimony measurably benefits children, but welfare is most enhanced when both parents are biologically related to the child.

Two recent papers in the journal Demography buttress these conclusions. In one, the sociologist Sandra Hofferth undertakes an analysis of the patterns of school achievement and behavioral problems for children growing up in a range of two-parent families.\textsuperscript{110} Although her analysis is complex—due in part to the number of family types she examines\textsuperscript{111}—a few simple conclusions emerge. First, her data shows that children growing up in blended families—those in which one adult caretaker is biologically unrelated to at least some of the children—have lower school achievement and more behavior problems than children growing up in conventional nuclear families.\textsuperscript{112} These differences decline but remain significant after controlling for resource factors like family income, number of siblings, parental education, and parents’ working hours.\textsuperscript{113} Although joint (co-biological) children living with married parents generally do best on most measures, her data indicates that the co-biological tie to both parents carries more weight than the parents’ marital status.\textsuperscript{114} On tests of academic achievement, for example, she notes that “there was no significant difference between the scores of children living with their unmarried biological parents and children living with two married biological parents.”\textsuperscript{115} In contrast, children living with at least one non-biological parent (in her sample, usually a step-father)

\begin{itemize}
\item \textsuperscript{106} Id.
\item \textsuperscript{107} Id.
\item \textsuperscript{108} Id.
\item \textsuperscript{109} Id.
\item \textsuperscript{111} These categories include: married biological parents, unmarried biological parents, biological father and stepmother, biological mother and stepfather, and biological mother with co-habiting male partner. \textit{Id.} at 53-75.
\item \textsuperscript{112} \textit{Id.} at 73.
\item \textsuperscript{113} Id.
\item \textsuperscript{114} Id.
\item \textsuperscript{115} Id. at 63.
\end{itemize}
consistently scored lower. The difficulties experienced by children living with step-fathers, she observes, suggest "that the biological relationship of the father matters more than the marital relationship of the parents." Indeed, Hofferth found that children living with their biological father in a blended family (although not with a single biological father) did virtually as well as those living with both biological parents. Her conclusion is that, although having two parents is important, "the achievement story in two-parent families" stems largely from the pronounced benefits of living with a biological father.

Another *Demography* piece by Donna Ginther and Robert Pollak also investigates the effect of family structure on educational outcomes for children. Like Hofferth, these authors acknowledge the well-documented disparity in well-being as between "children who grow up in what the Census Bureau calls 'traditional nuclear families' (i.e., families in which all children are the joint biological product of both parents) and children who grow up in other family structures (i.e., single parent families, blended families)." In seeking to refine this observation, the authors present data suggesting that the critical distinction is not "between children who are reared by both biological parents and children who are not." Rather, the author's study suggests that family type is important regardless of whether the child's two biological parents are present in the family. That is, the evidence indicates that children who grow up in blended (or stepparent) families—regardless of whether they, themselves, are the joint biological children of the parents in that family—do worse than children reared in traditional "non-blended" nuclear families. Specifically, "outcomes for both types of children in blended families—stepchildren and their half-siblings who are the joint children of both parents... are substantially worse than outcomes for children reared in traditional nuclear families." Based on this evidence, families that contain some children who are unrelated to one parent (which, in their sample—as in Hofferth's—is

117. *Id*.
118. *Id*.
119. *Id*.
121. *Id.* at 672.
122. *Id.* at 671.
123. *Id.* at 672.
124. *Id*.
125. *Id*.
usually the father) appear to function less well for all children—even for those who are the joint products of both parents.

What is the explanation for these observations? Why is the average blended family less conducive to good outcomes for children? Why is that effect observed even for joint children of a blended couple? Additionally, why do demographers find that children who live apart from a biological father or with an unrelated male do relatively poorly? The answers are currently a matter of speculation. Researchers have tried to explain the data by positing selection effects, ecological effects, and resource effects. On the resource theory, "family structure may . . . be a proxy for . . . the allocation of time and other resources that affect outcomes for children."126 Divorced and remarried parents (and especially fathers) must sometimes contribute to the care of children or ex-spouses from other relationships. For this reason, blended families may have less money at their disposal, and adults (especially males) in those families may have less time to devote to children. There is some evidence that resources play a role in the effects seen for blended families, since controlling for such factors does indeed reduce observed detrimental effects. That blended families tend to be short on resources cannot be a complete explanation for the data, however, since significant shortfalls still remain even when resources are equalized.127

Alternative explanations are selection and ecology. In trying to distinguish these, the question to be answered is "whether men who are stepfathers or cohabiting partners differ in observed and unobserved ways from men who raise biological children in a marital union"?128 It is possible that "those differences rather than something about the step family or cohabiting family itself," are responsible for the observed "differences in child achievement and behavior."129 The idea here is that fathers (and mothers) who end up in blended families are not representative of the population as a whole. Rather, they are a "select" group that is perhaps less likely to possess traits that make them successful family members. The attributes that lead individuals to divorce or start second families may also detract from those persons' ability to maintain orderly, harmonious, and well-functioning families and to rear children effectively. That is, the disadvantages suffered by children in blended families may reflect the fact that the parents in those families, on average, tend to be less well-adjusted. Not only may these parents be less able to negotiate family relationships, but they may pass the traits responsible for

126. Ginther & Pollak, supra note 120, at 691.
127. See Hofferth, supra note 110, at 55-68.
128. Id. at 54.
129. Id.
these difficulties on to their children directly through genetic inheritance as well as environmental conditioning.\textsuperscript{130}

An explanation that looks to ecological factors, in contrast, is based on the hypothesis that blended families may function less well as environments for raising children. There are good reasons, grounded in social dynamics, to believe that stepparent families present a less harmonious and orderly child rearing environment than traditional nuclear families. Lines of authority and loyalty in blended families are often ambiguous, divided, and vexed. Mothers may feel torn between their biological children and the demands of their new partners, whose interest in the children may not match hers. Alternatively, children may feel little need to respect or obey a step-father or their mother's male partner, especially if they maintain a relationship with a biological father who exists outside the relationship and independently exerts authority over them.

The evidence to date does not clearly distinguish between selection and ecological explanations for observed patterns. The observation that blended families produce worse outcomes for children than conventional nuclear families may point to an ecological explanation. Blended families may tend to generate a negative dynamic that affects all children. Alternatively, a selection effect may be at work. That is, parents in stepparent families may be less competent or effective parents. Although it is difficult empirically to distinguish selection from ecology, there are methods to help sort out these effects.\textsuperscript{131} As Pollak and Ginther concede, however, there is insufficient data to construct a full explanation for observed differentials in child welfare by family type.\textsuperscript{132}

What implications do these demographic observations have for legalization of same-sex marriage or for legal measures that confer rights and benefits on same-sex couples generally? Any speculation rests on the assumption that same-sex parent families will grow in

\textsuperscript{130} See, \textit{e.g.}, \textsc{Judith Harris}, \textsc{The Nurture Assumption} 1 (1998) (noting the heritability of personality traits and other attributes bearing on adaptive behaviors).

\textsuperscript{131} One way would be to compare blended step-father families in which the step-father has neither been married before nor previously fathered a child to families in which the father has been previously married and divorced, or has cohabited and fathered a child out of wedlock. If first-marriage step-fathers are not significantly different from first-marriage fathers generally, an observation that all children of first-marriage fathers (whether in blended families or not) do equally well, and better than children in "second relationship" step-father blended families, argues in favor of a selection hypothesis. On the other hand, if children in conventional nuclear families do better than children in all types of step-father families (regardless of whether the father has been married before), this argues for an ecological effect. The possible confounder here is that men who marry a divorced woman with children—even as a first marriage—may be a different breed from men who do not.

\textsuperscript{132} See Ginther & Pollak, \textit{supra} note 120, at 691-92.
numbers as same-sex partnerships acquire new legal rights. If this prediction is borne out, the question is then how this will affect the well-being of children within those families. Although the briefs in *Lewis v. Harris* cited to data suggesting that children are not harmed by growing up in that setting, the sample sizes for existing studies are too small—and the time-frames too short—to reach definitive conclusions. Clearly, more and larger studies are needed.

Proponents of same-sex marriage predict that more data will only vindicate their position. After all, sociologists assure us that marriage is good for children and adults alike, so legalization will only expand the circle of those permitted to benefit from this effect. The problem with this position is that it is too simplistic. The emerging data on the effects of family form demonstrate that marriage is not all that matters for children. Indeed, the two studies discussed above seem to indicate that marriage alone is not what protects children. Rather, the most advantageous setting combines parental matrimony with a biological relationship to both parents. It is the three-way biological bond, cemented by marriage, that represents the “best practice” for child rearing.

For same-sex families, that three-way bond can never be realized. To the extent that the evidence shows the traditional nuclear family to be the “gold standard” for family form, same-sex families must necessarily fall short. But the differences extend beyond biology. Because the two parents in a same-sex family can never both be the “real parents,” same-sex families’ social relations will often prove as tangled and complicated as those facing heterosexual blended or post-divorce families—with the lines of authority and loyalty as murky and confusing, or more so.

To be sure, same-sex couples who choose to create families through adoption of unrelated children will confront problems that may not be dissimilar to those facing all adoptive families. Adopted children are generally at higher risk of learning disabilities, mental health problems, and other adverse outcomes. Selection effects are thought to make a significant contribution to the problems adopted children face. Because troubled people are more likely to relinquish their children, the biological parents of adoptive children may function less well than average. Adopted children may inherit some of those difficulties, which would in turn adversely affect their educational and social success. But these effects will cause all adopted children to have more problems than biological children regardless of the familial setting in which they are raised. Whether

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133. 908 A.2d at 230 (Long & Zazzali, JJ., concurring).
children adopted into same-sex families will be even more troubled than the general population of adoptees is an open question that can only be settled through empirical study. There is currently no evidence on this one way or the other.

Some gay couples choose not to go the conventional adoption route. Gay couples who decide to bring new children into the world must confront the ineluctable natural reality: gay sex does not produce babies. Their children can be biologically related to, at most, only one member of the pair. The couple must find a biological father or mother, who will ordinarily be imported from outside the family unit. That person may be a sperm donor, surrogate mother, former boyfriend, or just a friend, and may have a same-sex or opposite-sex partner of his or her own. The existence of this external “third parent” hovering in the wings potentially introduces complications not unlike those that afflict opposite-sex blended families. What is that person’s status? What will be that person’s role? How much authority does he (or she) have over the child? The biological parent may seek a degree of involvement that is at odds with the expectations of the same-sex “parental” couple. That person may only be willing—or permitted—to play an intermediate role in the child’s life. That role may come to clash with the expectations of that child or other family members. These complications may give rise to contentious negotiations, introduce uncertainty and ambiguity, and erode the involved adults’ authority or ability to shape and direct the child’s upbringing.

A recent New York Times Magazine article on same-sex families illustrates some of these difficulties.135 That article documents the complicated and shifting alliances that develop in same-sex families when biological parents are permitted or denied access, biological fathers or mothers are cast as supplicants or “friends,” and same-sex partnerships form, dissolve, and re-form.136 This “crazy circuit board” of family relations generates equivocal lines of authority and volatile and uncertain loyalties that may be profoundly unsettling for children.137

The emerging data on heterosexual blended families, although not directly applicable, does not bode well for this brave new world of complex, extended family relations. To date, the research on child well-being and family form bears out that children thrive on structure, order, routine, stability, continuity, certainty, and clarity. The evidence shows that conventional beats unconventional every time. This means that the complexities and ambiguities of non-

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136. Id.
137. Id.
traditional families come at a price. By virtue of their biology alone, same-sex families are more likely to present the risks inherent in innovative, hybrid family forms. These structures leave children in doubt about who has authority over them, whom they can rely on, and who will be there for them.

Although the evidence on opposite-sex families is troubling, the implications should not be overstated. Data on opposite-sex blended families cannot settle the question of how the State should approach the legal status of same-sex partnerships because observations about heterosexual childrearing do not extrapolate easily into the same-sex context. There are potentially relevant differences that might mitigate (or exacerbate) observed effects. In the end, the question of whether same-sex families are good or bad for children must be resolved through direct empirical observation. The literature on blended families does, however, raise red flags and counsel caution. It also points to questions to be explored and parameters on which researchers should focus in evaluating same-sex families with children.

The key observation that emerges from the blended family literature—and the literature on child development generally—is that biological ties are important to child well-being. Children do best if their entire childhood is spent with both their biological parents. Because, as noted, children raised by a same-sex couple cannot be the biologically related to both partners, all same-sex families with children are, in that sense, “blended.” Does this mean such families are doomed to do a worse job than the “gold standard” families? Consider a family consisting of two gay male partners plus one or more children who are biologically related to one member of the couple. The blended family evidence suggests that living with a biological father is protective. The fact that one partner is the biological father of a child within the family might enhance the child’s well being. On the other hand, as noted above, the data also shows that living with an unrelated male puts children at risk, which may detract from the child’s well-being. These effects may balance each other or one may overwhelm the other. There is no way to predict this ahead of time.

Any attempt to tease out these effects is complicated by the numerous permutations that are possible in such families. For example, a gay male couple family might consist of a child that is the offspring of one man, plus a child that is the offspring of the other. Or there may be adopted children mixed in. The possibilities are endless, which poses a formidable challenge for research design. Or consider a family consisting of two lesbian women and children who are biologically related to only one of them. The demographic analogy to this in the opposite-sex context is not immediately apparent.
Should these children be compared to those raised in heterosexual step-father families? Although children in step-father families do not fare as well as children raised by their two biological parents, their disadvantages may accrue for reasons that are specific to heterosexuals. Children raised with step-fathers are deprived of their biological father, but also live with an unrelated male. Although children of lesbian couples also lack the advantage of living with a biological father, an unrelated woman in the home may be more benign for children than an unrelated man. If that proves to be the case—and only data will tell—children in lesbian couple homes may not do as badly as children raised in typical heterosexual blended families.

Outcomes for children in all these gay-couple situations also depend on the reason that opposite-sex blended families do worse than conventional nuclear families. The choice between ecology and selection has different implications for same-sex parental units. The dominance of selection effects predicts better outcomes for same-sex families. By definition, opposite-sex blended families are either the product of non-marriage or are formed in the aftermath of divorce. This means that many fathers in these families either have refused to commit to marriage or have failed at a previous marriage. This suggests that such fathers may be less capable than average of maintaining harmonious relationships or adapting to family living. There is no reason to believe, however, that the population of gay men who choose to form families will exemplify these flaws. Indeed, they may display the opposite traits. These men must deliberately choose fatherhood and take special steps to realize that goal. Many are not now married because marriage has not been available to them. Many would get married if it were, and many of those will be in first time relationships. In sum, it is possible that the future population of gay non-biological fathers will be better suited to fatherhood and domesticity than heterosexual step-fathers. If that is the case, then “structurally blended” gay male families may end up being more functional—and producing more favorable outcomes for children—than opposite-sex blended families.

If, however, the chief defect of opposite-sex blended families is an ecological one, the story may not be quite as sanguine. How this factor plays out depends on the logic of the ecological difference, which is not completely understood. The “stressful” environment in heterosexual blended families may be due to the asymmetry of the parents’ biological ties, or it may stem from the events, such as a divorce, that preceded those families’ formation. If the risk is somehow tied to the fact of prior family break-up, and fewer same-

138. See Ginther & Pollak, supra note 120, at 691-93.
sex parents have been through a divorce, then same-sex families might have better outcomes. If, on the other hand, the asymmetry of biological connection is key, same-sex families could end up exemplifying the difficulties observed with opposite-sex blended families. Similarly, if the existence, presence, or involvement of an external biological parent sows disruption, then same-sex families could be just as vulnerable as blended families involving opposite-sex couples. Without further investigation, these issues cannot be sorted out.

These observations point to directions for future research. First, the blended family literature suggests that gay and lesbian couple families should be analyzed separately, since the dynamics of those relationships could differ significantly. It is also important to distinguish between those children who are biologically related to one parent and those who are unrelated to both. Any research design should attend to the role, if any, of biological parents who stand outside the same-sex partnership. Finally, studies should be mindful of selection effects by carefully controlling for background characteristics and the life experience of family members. Investigators must ask whether same-sex parents have produced, adopted, or raised children with previous partners. If so, are they still responsible—either financially or personally—for those children? Have they had significant past relationships and have these relationships been stable? These distinctions are important for making appropriate comparisons across the same-sex and opposite-sex divide. Above all, researchers must be mindful that not all opposite-sex—same-sex—families are alike. There is significant heterogeneity within each group that potentially bears on family success and child welfare. In each case it is important to formulate the hypothesis to be tested and to specify the counterfactual to which the families under scrutiny are to be compared.

CONCLUSION

This Article assesses recent state court decisions on the right of homosexuals to marry against the backdrop of two distinct views on family. For pluralists, recognition and equal rights for homosexual couples, including the right to marry under state law, vindicates core legal and constitutional values. For traditionalists, extending the right to marry—or other equivalent prerogatives and incidents—to same-sex relationships runs contrary to a proper understanding of the role of marriage in social and moral life. In particular, it fails to honor the centrality to marriage of childrearing and the socialization of future generations. Traditionalists believe that function is best performed within conventional, opposite-sex nuclear families.
Traditional forms and practices are often difficult to justify on social scientific grounds. There is some modest support, however, for traditionalist wariness towards same-sex marriage. That wariness is grounded in the very concerns with same-sex families as an environment for rearing children that the New Jersey Supreme Court set aside in *Lewis v. Harris*. What we know about the relationship between family form and child well-being suggests that children raised in same-sex families—which, by definition, are “blended”—might not do as well in the long run as children raised by their joint biological, married parents. These speculations await the results of empirical investigation.

Even if these predictions prove true, however, facts are not values. Data on social outcomes never tell us what to do about them. Same-sex relationships represent a brave new world of novel families, dynamics, combinations, and ecology. Caution concerning such arrangements and their effects—and attention to the well-being of children within them—is the wise course of a decent society. But enhanced risks for children, especially if modest, may not warrant abandoning reforms motivated by a firm commitment to rights and equality. Although we may choose to balance costs and benefits, it is important to strike that balance with full information.