Same-Sex Marriage as a Waste of Time: The Importance of Norms and the Impotence of Law

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ABSTRACT

Many expect legally-recognized same-sex marriage (SSM) to have significant effects on people’s behavior. This stance regarding SSM’s effects reflects a persistent, wide-spread belief that the law has a significant and reliable effect on social norms. However, I will argue that belief in the law’s capacity to effectively change social norms does not adequately take account of the nature of social norms, how they actually change, and the limits of government intervention. Through examining SSM and these factors more closely, I cast doubt on the claim that the law significantly, reliably, and effectively challenges mainstream, marital social norms. Instead, SSM is better seen as an indicator of gradual changes in conceptions of marriage. When explaining changes in marital social norms, we should not waste our time on SSM, rather we should look to non-state factors.

INDEX WORDS: Same-Sex Marriage, Gay Marriage, Social Norms, Legal Norms, LGBT, Law, Public Policy, Heteronormativity
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1 INTRODUCTION

Many on the political right view legal recognition of same-sex marriage (SSM)\(^1\) as a significant challenge to heteronormativity—the privileging and normalization of heterosexuality, sexual conservatism, procreation, traditional gender roles, and relationships that are monogamous, long-term, romantically-oriented, and (nuclear-)family-oriented.\(^2\) They worry that SSM “weaken[s] the social institution of marriage” by de-emphasizing traditional marital norms requiring heterosexuality, traditional gender roles, procreation, etc. (Girgis, George, & Anderson 2011, 260).\(^3\) Some on the political left also see SSM as challenging heteronormativity, albeit in a positive manner.\(^4\) For example, some on the moderate left support SSM as a way to “de-center” and “jeopardize” the status of heteronormativity (Meeks & Stein 2006, 154).\(^5\) More generally, 58-61% of Americans think that SSM will change society for better or worse, according to national polls conducted by Gallup (Jones 2009).\(^6\) Insofar as these groups causally connect SSM

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\(^1\) ‘SSM’ will refer specifically to legal recognition of same-sex marriage unless otherwise noted.

\(^2\) This definition of heteronormativity is stipulative and will be expounded in section two.

\(^3\) For examples of these concerns in the popular press, see Benne & McDermott 2004, Jackson Jr. 2010, Anderson 2013, and Morabito 2015.

\(^4\) For an overview of the ways in which those on the political right and left expect SSM to change social behavior, see Badgett 2009, Chapters 4, 5, and 6.

\(^5\) There are a number of examples of this reasoning in the popular press. Various media outlets have incorrectly linked legal recognition of gay marriage with fewer LGBTQ+ teen suicides—supposedly due to a weakening of heteronormative norms (Shapiro 2017). Robinson, Bailey, and McGorry (2017) tenuously make causal connections between SSM, weakened heteronormativity, lower suicide rates, and improvement in a variety of other health outcomes. Kevin Joffré (2015) argues that gay marriage is disruptive to heteronormative marital norms.

Those on the radical left also believe that SSM affects heteronormativity, although they view SSM as strengthening heteronormativity and creating a more conservative culture at large (See the first section of Conrad 2012). Because the radical left has a different take on SSM’s effects than does the political right or moderate left, they would require a different reply and so I do not address the radical leftists’ view in this paper. Nevertheless, they could still glean important insights from this thesis.

\(^6\) Polls were conducted on two separate occasions in 2003 and 2009. In 2003, 48% thought SSM would have a positive effect on society, 10% a positive effect, 40% no effect, and 2% expressed no opinion. In 2009, 48% again thought SSM would have a positive effect on society, 13% a positive effect, 36% no effect, and 2% again expressed no opinion (Jones 2009). Unfortunately, I was not able to find more recent or more specific polls on American’s perception of the perceived effects of SSM on society.
to the disruption of heteronormative marital norms, they drastically overstate the effects of the law on social norms. This stance on SSM’s effects reflects a persistent, wide-spread belief that the law has a significant and reliable effect on social norms—often found under the headings of the social engineering view or the economic analysis of law (Moore 1973, 719; Licht 2008; and Bicchieri & Mercier 2014, 64). Indeed, some even argue that state bans are necessary in order to eliminate harmful practices—like breast implants and female genital cutting—that are dependent on social norms (C. Chambers 2008, 194-197). However, as I will argue, belief in the law’s capacity to effectively change social norms does not adequately take account of the nature of social norms, how they actually change, and the limits of government intervention.

Section two will provide necessary explication of heteronormativity. It is not sufficient to quickly define the term here for two reasons. First, heteronormativity is a fairly new, esoteric term primarily used by feminists and queer theorists. Second, “heteronormativity” is not meant to be understood as its roots (“hetero” and “norm”) would be literally understood. Rather it has developed as a shorthand to describe the privileging and normalization of certain types of sexuality, gender, and relationships that are valued by mainstream, heterosexual, Western culture. Thus it is necessary to review the development of heteronormativity in order to explain its meaning and application. With this development in mind, I will settle on a stipulative definition that takes account of the most fundamental features of heteronormativity.

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7 This paper is primarily concerned with social norms. All references to “norms” should be read as reference to social norms, unless otherwise specified.
8 For an example of this view in international diplomacy, see Hillary Clinton’s 2011 speech to the U.N. where she claims that “progress comes from change in laws” and that “laws have a teaching effect” (full transcript available from Volsky & Ford 2011). She notes later on that important change can from below—e.g. from neighbors and communities deciding to treat each other more fairly—but these comments are still consistent with her strong belief in the ability of laws to effectively change people’s behavior.
9 “The only way for most individuals to escape a social norm that is a requirement for achieving social status (such as marriage) is in a context of (near-) universal noncompliance so that the norm ceases to function” (C. Chambers 2008, 194).
After establishing the concept of heteronormativity in section two, section three will show that SSM does not meet the conditions necessary for significantly challenging social norms. There is nothing exceptionally different between “traditional” marriage and SSM (Wedgwood 1999)—certainly nothing that is going to change the norms of those who do not value the practices or views of homosexuals in the first place. The ineluctable differences—homosexuality and non-traditional gender roles—are downplayed in attempts to assimilate into mainstream culture. Additionally, these differences are only small parts of a resilient schema of beliefs and values concerning marriage. Small changes guarantee no significant challenge to the schema.

In section four, I argue that the majoritarian, republican structure of the U.S. government severely limits the ability of the law to significantly and effectively challenge mainstream, dominant social norms such as heteronormative marital norms. Indeed, often the government must appeal to mainstream norms in order for law to be passed, adopted, and enforced. These mainstream norms are largely formed by non-state factors, like increases in material wealth and cultural revolutions. Examining these factors reveals that heteronormativity and marriage have gradually weakened as institutions over the last 200 years. Through this historical lens, SSM appears to be more of an evolution than a revolution in the institution of marriage (Coontz 2011). While the state may try to subvert these historical trends, radical legislation and court decisions inconsistent with mainstream social norms rarely pass. And even when they do, such policy encounters issues with implementation, enforcement, and long-term viability.

Through examining SSM more closely, we will cast doubt on the claim that the law significantly, reliably, and effectively challenges heteronormative marital norms. Due to the nature of norm change, limits of government intervention, and the type of factors that drive
marital norm change, SSM is better seen as an indicator of gradual changes in conceptions of marriage. SSM is not a primary site of norm change. Insofar as the right and left care about shoring up or tearing down heteronormativity, they have wasted their time on SSM. If one really cares about affecting heteronormativity, marital norms, or other mainstream norms, then one needs to consider non-state factors—such as culture, the economy, businesses, and religion—for these are the more significant drivers of norm change. These implications will be touched on briefly in the conclusion, but before going any further, we need to first clarify the concept of heteronormativity.

2 THE CONCEPT OF HETERONORMATIVITY

While heteronormativity is a common concept among queer theorists and feminists, its complicated meaning and absence from common discourse means that we need to carefully explicate the concept before we can utilize it in the body of the argument in section three and four. We will first address the meaning of heteronormativity as developed by various queer theorists and feminist theorists. From this examination we will distill a definition of heteronormativity that takes account of the fundamental features relevant to SSM. After we have our working definition, I will use a variety of examples to clarify the usage of heteronormativity in this paper.

As we will see below, heteronormativity is a bit of a misnomer. Heteronormativity is not primarily about heterosexuality per se; “heteronormativity” is not meant to be understood as its roots (“hetero” and “norm”) would be literally understood. Instead, heteronormativity has developed as a shorthand to describe the privileging and normalization of certain types of sexuality, gender, and relationships that are valued by mainstream, heterosexual, Western
In other words, heteronormativity is a system of societal norms concerning sexuality, gender, and relationships (Herz & Johansson 2015, 1017). But what does mainstream, heterosexual, Western culture value? And why does heteronormativity concern anything more than heterosexuality in the first place? I will address these questions by examining several seminal pieces that have influenced the development of the meaning of the term “heteronormativity.”

Some of the strongest roots of heteronormativity can be found in the work of Gayle Rubin and Adrienne Rich. Rubin’s “Thinking Sex” (1984), for example, explores how Western society orders various aspects of sexuality on a hierarchy (281-282). Society contrasts good sexual practice—that which is “normal, natural, healthy, holy”—with bad sexual practice—that which is “abnormal, unnatural, sick, sinful” (ibid, 282). Unsurprisingly, Rubin finds that heterosexuality, procreation, monogamy, family, and long-term, romantic relationships are the structures of sexuality that society deems good and normal (ibid). These are the aspects that society privileges and normalizes. Similarly, Adrienne Rich’s (1980) work explicates the effects of “compulsory” or “prescriptive” heterosexuality on the norms governing sexuality, gender roles, and family structure. Compulsory heterosexuality works through a “cluster of forces” to

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10 Several prominent queer theorists and feminists note this use of heteronormativity. For example, Stevi Jackson (2006) provides a similar interpretation: “the concept [of heteronormativity] has become widely used as shorthand for the numerous ways in which heterosexual privilege is woven into the fabric of social life, pervasively and insidiously ordering everyday existence” (108). In 2009, Jane Ward and Beth Schneider introduced a special issue of the prominent journal Gender & Society—designed to address how “heteronormativity underpins all social phenomena, including the construction of identities, the dynamics of relationships, the discourses and symbols of culture, and the practices of institutions” (438). Finally, in seeking to clarify the conceptual boundaries of heteronormativity, Marcus Herz and Thomas Johansson (2015) note the common usage of heteronormativity “as a critique not only of gender divisions and hierarchies but also of more specific ways of organizing family, sexuality, and lifestyle” (1011).

11 By using “structure of sexuality” instead of just sexuality, Rubin signals that she is concerned not only with the simple physical act of sex, but also with how sex is practiced and expressed in various different “structures.” So while family and monogamy do not seem to have anything to do with sex, they function as normal, privileged ways for sexuality to be expressed.
make it “inevitable” and “normal” for there to be distinct gender roles, wherein men are dominant; for everyone to be heterosexual and sexually conservative; and for everyone to be married, monogamous, reproducing, and raising a family (ibid, 640-641). Behavior that deviates from these acceptable, valued practices is frequently called “queer,” “sick,” or “unnatural” (ibid, 641). Although Rubin and A. Rich use different descriptions and terms, both describe a system of privilege and normalization based on “the power of heterosexuality as a norm” (S. Chambers 2007, 657).

In 1991, Michael Warner coins the term “heteronormativity” to describe this system of privilege and normalization. While he does not directly or systematically define heteronormativity, he does give it meaning through use: he describes modern society as heteronormative (1991, 16), aligns heteronormativity with heterosexism and heterosexual ideology (ibid, 6, 9), and contrasts heteronormativity with queer identity—i.e. an identity that rejects mainstream, societal norms governing gender, sexuality, and relationships (ibid, 8, 16).

More recent treatments of heteronormativity have more thoroughly clarified the concept and explored its societal implications. For example, John Elia (2003) notes that in the Western world, “a certain type of heterosexual relationship style is often promoted as the best, most respectable, and cherished” (ibid, 62). Furthermore, Elia conceptualizes heteronormativity as a matter of degree, such that even homosexual identity does not preclude one from being heteronormative. Indeed, some LGBTQ+ identities “are quite conservative about their sexual

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12 Sexual conservatism describes the value for sex that is private, “vanilla,” and traditional—in contrast to sex that is public, “kinky,” and liberal.
13 Heterosexism describes “discrimination or prejudice against homosexuals on the assumption that heterosexuality is the normal sexual orientation” (Stevenson & Lindberg 2013).
14 Heterosexual ideology is the system of beliefs and values that stem from the presumption that heterosexuality is the only natural and normal sexual orientation. This term was frequently used by A. Rich (1980) and other feminists before heteronormativity came into widespread usage.
relationships and ultimately mimic the prescriptively dominant heterosexual norms” (ibid, 77). On Elia’s reading, then, it seems that heteronormativity is more about a general adherence to mainstream, Western, heterosexual values rather than just being heterosexual or embodying a specific, valuable practice.

Stevi Jackson (2006) corroborates this argument that heteronormativity is not, and cannot be, only about heterosexuality per se, by focusing on the hierarchy of value just among heterosexuals:

Heterosexuality…is not a singular, monolithic entity – it exists in many variants. As Seidman points out[,] there are hierarchies of respectability and good citizenship among heterosexuals, and what tends to be valorized as ‘norm[al]’ is a very particular form founded on traditional gender arrangements and lifelong monogamy (ibid, 105; Jackson here references Seidman 2005, 59–60; and Seidman 2002). In assessing the development of heteronormativity, Marcus Herz and Thomas Johansson (2015) similarly find that “heteronormativity not only aims at changing conditions for homosexuals but also targets the whole societal and cultural institution of heterosexuality…including marriage, nuclear families, and heterosexual lifestyles” (1011). Thus, heteronormativity is not about a simple division between the heterosexuals and homosexuals. Rather, heteronormativity is about the specific ways that heterosexuality is practiced. These practices inevitably concern gender roles and relationship structure (Jackson 2006, 114-117). We can see this connection without even moving away from heterosexuality, as this identity necessarily depends on the ubiquity of the gender binary. Without the gender binary, it would not be clear what attraction to the

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15 See also Seidman (2002, 160) for an examination of heteronormative gay representation in the media.
16 The quote originally said ‘normative’ instead of ‘normal.’ However, Jackson’s usage diverges from the standard philosophical meaning of normativity that I use throughout this thesis. Whereas feminist scholars, like Jackson, most often use normative to mean “normal” or “accepted by mainstream culture,” philosophers use normative to refer to statements that make claims about what ought or ought not be.
“opposite” gender could mean. Moreover, heterosexual identity is proven through relationships, especially marriage. At a certain age, if one has not had tangible signs of romantic or sexual relations with the opposite sex, one’s sexuality is often questioned or de-legitimized. If one never engages in long-term, romantic relationships and pursues sex in the wrong setting (e.g. outside of marriage or with a sex worker), one is often negatively sanctioned. It is not enough to simply be attracted to the opposite gender, one must also express that attraction correctly through relationships. In sum, the practice of heterosexuality does not occur in a vacuum. Gender roles, sexual practice, and relationships are integral to the proper, normal practice of heterosexuality and therefore must be included in the concept of heteronormativity.

With a general overview of the literature on heteronormativity, we can see how heteronormativity does not only concern heterosexuality per se, but the expression of heterosexuality through appropriate gender roles, sexual activity, and relationship structure. We also now have various accounts of the types of sexuality, gender, and relationships that mainstream culture values. Compiling the most common, fundamental features together, we can stipulate that heteronormativity is the privileging and normalization of heterosexuality, sexual conservatism, procreation, traditional gender roles, and relationships that are monogamous, long-term, romantically-oriented, and (nuclear-)family-oriented. While feminists and queer theorists were the first to give name to this privileging and normalization, it should be uncontroversial that society generally privileges these things. One can easily see such evaluation in public discourse, education, the media, the law, religion, and various other social institutions (Kitzinger 2005, 478). Even with the gradually increasing visibility of homosexuals in the public

17 Appeals to the sex binary—male and female—will not make the issue any clearer. Without even addressing any controversial theories concerning gender or sex, one can see that intersex identities complicate the notion of “opposite” sexes or genders (see Fausto-Sterling 1993). More controversial, but equally significant, are the arguments that sex itself is a constructed, gendered category (Butler 1990).
sphere, strong normative views concerning acceptable expressions of gender, sexuality, and relationships persist.

With a working definition of heteronormativity, we can now clarify how it will be used throughout this paper. First, echoing Elia (2003) above, we can note that none of these aspects—heterosexuality, sexual conservatism, etc.—are independently necessary or sufficient for being heteronormative. These conditions work jointly: the more aspects that are present, the stronger the heteronormativity. Additionally, some of these aspects are a matter of degree—e.g. one can be more or less sexually conservative or traditionally gendered. Since heteronormativity has various different aspects, some of which are a matter of degree, heteronormativity is a scalar term. One is more or less heteronormative depending on how strongly one adheres to heterosexuality, monogamy, traditional gender roles, and other aspects of heteronormativity. As for whether someone/something is heteronormative at all, we can reasonably stipulate that if most aspects are present or supported, then someone/something is heteronormative. If most aspects are absent, then we will say someone/something is not heteronormative, or non-heteronormative.18 Importantly then, even a homosexual man could be very heteronormative (e.g. if he is sexually conservative, part of a two-parent household with kids, committed to life-long monogamy, traditionally masculine, etc.) and a heterosexual woman could be very non-heteronormative (e.g. if she practices BDSM, is polyamorous, has lots of short-term relationships, never marries, forgoes children, acts “butch,” has sex with other women,19 etc.).

18 ‘Non-heteronormative’ does not mean, however, that the behavior is without normative implications. Indeed, non-heteronormative behavior can still be assessed normatively. For instance, one might say that certain non-heteronormative behavior like polygamy should or should not be performed on moral or religious grounds.
Second, heteronormativity is a *normative* view about which expressions are right and which are wrong, not an empirical view about how people actually express gender roles, sexuality, and relationships. More specifically, heteronormativity is not about a mere *statistical* norm. It is not about the number of people practicing certain expressions, but rather what expressions most people accept. It is about what people value. For example, single motherhood could be the statistical norm within society, but that does not mean single motherhood would necessarily be heteronormative. If society devalues the worth of a single mother relative to, say, a two-parent family, then single motherhood would be non-heteronormative—regardless of the number of single mothers. Put differently, unless single motherhood is privileged, it cannot be heteronormative no matter how prevalent. The negative view of single motherhood determines its heteronormativity, not the raw number of single mothers.

Finally, given the varied treatments of heteronormativity over the years, the above definition and clarifications are not meant to trace the definitive boundaries of the concept. Rather, they are meant to be useful stipulations for addressing the connection between heteronormativity, marital norms, the law, and SSM. Now we can turn to the body of argument, beginning with the connection between SSM and norms.

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20 Indeed, according to Stevi Jackson (2006), there cannot be a systematic account of heteronormativity because “gender, sexuality and heterosexuality are approached from a variety of perspectives focusing on different dimensions of the social. It is not a case of some having a clearer view than others, but rather that the social is many-faceted and what is seen from one angle may be obscured from another” (105-106).

21 For more on heteronormativity, see Berlant and Warner 1998, Duggan 2002, and Ryan Conrad’s edited collection, Against Equality (2012). Within all of these sources, one can find more specific aspects of heteronormativity not mentioned here, like the privileging the use of natural bodies in sex instead of manufactured objects (e.g. strap-on dildos, butt plugs, etc.) (Rubin 1984, 109). However, these more specific aspects are not as relevant to SSM and could easily be included in other aspects, like sexual conservatism. I will not be concerned to create a comprehensive definition of heteronormativity in this paper, and so I have omitted mentioning such specific aspects.
3 A THEORETICAL EVALUATION OF MARITAL NORMS, SOCIAL NORM CHANGE, AND SAME-SEX MARRIAGE

3.1 The Connection Between Same-Sex Marriage and Norms

As mentioned in the introduction, many view the law as having significant cultural and/or symbolic power over the behaviors of the populace. Those who believe in law’s effect on social norms expect the formal recognition of SSM to significantly change people’s behavior in and toward marriage. Obviously, SSM will “change” behavior by adding the behaviors of homosexual couples to the legal institution of marriage. But the more controversial belief is that more visible, formally-recognized homosexual marriages will change how people behave in heterosexual marriages. SSM is also purported to change people’s behavior toward marriage—i.e. how people value marriage. Whether explicitly or implicitly, such views assume that one’s behavior in and toward marriage is at least partially dependent on social expectations about how other people act and value. And since marriage is integral to heteronormativity (A. Rich 1980, 640-641; Elia 2003, 65; Daring et al. 2012, 12; Herz & Johansson 2015, 1011), any change of behavior in and toward marriage is likely to change heteronormativity. In other words, such views assume that important social norms connected to heteronormativity will change due to SSM. But do behaviors concerning marriage actually reflect social norms? Perhaps instead these behaviors in and toward marriage are simply self-interested and personal. People might pursue marriage in part for its function as a signal of trust between two parties, regardless of how society acts or values. Alternatively, value judgments concerning marriage may be understood primarily as expressions of personal normative views—moral norms that are not conditional on the behavior of the public or a specific social group. For the many Americans who see marriage as a religious institution, legal injunctions are indeed unlikely to affect their religious moral
injunctions, which prescribe specific behavior in and toward marriage. If behavior in and toward marriage does not depend on social expectations, then any concern about SSM’s effect on heteronormative marital norms would be unfounded. So our first task in this section must be to ascertain whether behavior in and toward marriage does in fact depend on the behavior of social groups—i.e. whether marital norms are social norms. We will first need to establish a working account of the relevant norms, then we can assess whether behavior in and toward marriage accords with this account.

While there are many accounts of norms and collective behavior, few clearly distinguish between habits, customs, conventions, moral norms, descriptive norms, and social norms. Furthermore, few accounts provide systematic steps for determining which norms are present in collective behavior, testing those norms, and distinguishing the various components that constitute them. Cristina Bicchieri’s account of norms in *The Grammar of Society* (2006) and *Norms in the Wild* (2016) laudably address both of these shortcomings. She defines each of the collective behaviors listed above, but collective behaviors in regard to marriage seem most likely to be social norms. A social norm is a

rule of behavior such that individuals prefer to conform to it on condition that they believe that (a) most people in their reference network conform to it (*empirical expectation*), and (b) that most people in their reference network believe they ought to conform to it (*normative expectation*) (Bicchieri 2016, 35).

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22 See Bicchieri & Muldoon (2011) for an overview of the literature.
23 Her account by no means captures every use of ‘norm,’ but we need not be concerned with all possible uses of these terms. Following Wittgenstein’s insight that no conceptual definition ever could capture all the family-resemblances of a word or concept, we should be most concerned that we are using a meaningful definition that is most conducive to our purpose (2010 [1953]).
24 See Bicchieri (2016, 2-3) for explanations of these other collective behaviors.
25 Bicchieri is here using the standard philosophical meaning of normative, but see footnote 2 for an important distinction between this usage and its usage in ‘heteronormative.’
The reference network is simply the group of people we care about or “reference” when making particular decisions (ibid, 14). This reference network could be as temporary and small as the group of people one stands in line with at the corner store (where the norms about standing in line might vary place by place or depending on the time of day), or it could be as consistent and large as all practicing Roman Catholics. Social norms tell us what is normal and predictable among our reference network in particular situations (empirical expectation) and also tell us what is approved and disapproved of socially (normative expectation) (ibid, 30). This approval and disapproval is often revealed in sanctioning, both positive and negative. We might shower gifts on a newly-wed couple or shame a couple that is having premarital sex. We do not only adhere to social norms in response to sanctions, though. We might follow social norms because we share the normative view of others, have our own personal normative views that are conducive to following the norm, or simply prefer to fit in. When visiting an Islamic country, a non-Muslim woman might wear a hijab because of her preference to respect and abide by local culture and its attendant social norms. Her reasons for adherence to the social norm differ from Muslims’ reasons, but her adherence is still conditional on social expectations. Other common examples of social norms concern corruption, trust, body modification, reciprocity, and fairness (Bicchieri 2016). In sum, a social norm exists when our actions are influenced by whether the people in our social network follow a behavior and approve/disapprove of that behavior.

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26 Examples of this aspect of reference networks can be found in experiments and in daily life. For example, in experiments reviewed by Bicchieri (2006), littering has been shown to be highly sensitive to social expectations: littering behavior can quickly change based on how much trash is present and/or whether the norm is made salient by other people’s behavior (Ch. 3). An example from daily life might concern an atheist going to a Christian friend’s house for supper. The atheist might go along with a pre-meal prayer—because she cares about that friend and that friend’s family—even if she has never been among this reference network before and never will again. In these examples, the reference network is, or can be, temporary and small. The norm can quickly change based on which reference network is present, i.e. what kind of people are around (or are thought to be around).
3.2 Marital Social Norms in America

Now with a working account of social norms, we can assess whether behavior in and toward marriage accords with this account. At first glance, it seems that the rules of behavior concerning marriage in the U.S. crucially depend on such social expectations. We can see this dependence most prominently in conservative appeals to how marriage is/has been practiced (empirical expectations) and appeals to how marriage should be practiced (normative expectations).²⁷ Those on the left make similar appeals (e.g. Brake 2012). Thus, how others practice and view marriage in the relevant reference networks crucially affects how one practices and values marriage. Because our adherence to marital norms depend on these empirical and normative expectations, they can be best described as social norms. Martial norms are not just moral norms, which are normative despite others’ beliefs and values;²⁸ nor are they habits or customs, which are merely beneficial for us, independent of how others act and value; nor are they descriptive norms or conventions, which depend only on empirical expectations.²⁹

We conform to certain marital norms because of how our reference network practices and views marriage. Americans care about marriage in America and care far less about “marriage” in, for example, the matriarchal Mosuo society in China.³⁰ While Americans do not all share the

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²⁷ Anderson (2013) establishes the empirical expectation by saying that, “virtually every human society” once understood marriage as “a union of a man and woman ordered to procreation and family life”— which is “the fundamental building block of all human civilization.” Furthermore, this institution and its accompanying norms are driven by more than mere self-interest: “marriage has public purposes that transcend its private purposes.” He establishes the normative expectations by asserting that “true marriage” requires a mother and a father and that it ought to be family-oriented.

²⁸ Even though marital norms seem like they could qualify as moral norms due to strong religious foundations, they almost always function socially and are dependent on the views and practices of others. For example, Christians in different areas of the U.S. have different positions on whether divorce or child-bearing outside of wedlock is acceptable. Furthermore, over time, such norms have liberalized along with broader culture.

²⁹ See Bicchieri (2016) for a comprehensive account of the distinction between habits, customs, conventions, moral norms, descriptive norms, and social norms (Ch. 1).

³⁰ Indeed, the Mosuo people do not even practice marriage in our sense of the term. The Mosuo practice zuo hun, or “walking marriage,” wherein women take lovers as they please, with no strong norms of infidelity. Being a
same reference network or abide by the same exact social norms, their reference networks overlap significantly,\(^{31}\) such that most end up with heteronormative preferences regarding marriage. Traveling throughout the country, we expect others to be heteronormative and we feel that others expect us to be heteronormative. Oftentimes, people will sanction us for broaching norms, which is a clear signal that there are normative expectations at work. We might hear disparaging comments about single-mothers, swingers, or short-term marriages. We might even see community members ostracized for such non-heteronormative behaviors and situations. We often conform to these rules of behavior or feel their pull even when we do not personally believe in the value of the social norm. We conform not necessarily because we agree with the behaviors or views of our reference network (although we might), but because sometimes we simply fear being sanctioned, prefer to fit in with our community, or lack knowledge. Sometimes this fear of sanction and/or lack of information can lead to “pluralistic ignorance, a cognitive state in which each member of a group believes her personal normative beliefs and preference are different from those of similarly situated others, even if public behavior is identical” (Bicchieri 2016, 42). Pluralistic ignorance often perpetuates maladaptive norms. So social norms themselves are not necessarily beneficial for us individually or even for society as a whole— even if individuals view conformity itself as beneficial (ibid, 2-3, 29).

But even with evidence of empirical and normative expectations, we still have not established that people’s behavior in and toward marriage \textit{depends} on these social expectations. Without establishing this connection, we cannot assess whether these behaviors reflect social

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\(^31\) As Wedgwood (1999) argues, marriage’s “social meaning consists of certain \textit{generally shared expectations}” (229-230).
norms. Unfortunately, pursuing this line of argument would require surveying for conditional preferences, empirical expectations, and normative expectations (ibid, 50-51, 89). Such empirical research is costly and beyond my expertise. Luckily, though, it is unnecessary. By simply assuming that people follow marital social norms, we can evaluate whether SSM would have the potential to change marital social norms given what we know about social norm change. Hence, the question we will address in the remainder of this paper is this: If people follow heteronormative marital norms, would SSM significantly affect heteronormativity?

### 3.3 Social Norm Change

Bicchieri’s account of social norms not only helps us clarify the types of norms that we are dealing with in marriage, it can also help us to assess how norms change in response to different interventions. Many actions and events can affect social norms, but since SSM is a government intervention, that is the type we will be concerned with here. And since SSM purportedly challenges heteronormativity, causing it to weaken or be abandoned, we will be primarily concerned with norm abandonment, not norm creation.

From lab and field work, Bicchieri (2016) has distilled four requirements for any kind of norm change: “people must face a collective action problem, they must have shared reasons to change, their social expectations must collectively change, and their actions have to be coordinated” (111). For abandonment of social norms, there needs to be a change in both empirical and normative expectations in the relevant reference network. The order of change is important:

For a social norm to emerge, normative expectations must be created first, and empirical expectations will follow. To abandon a social norm instead, empirical expectations will
have to change first, and change in normative expectations will follow (Bicchieri 2016, 111). 

So in evaluating the potential effects of SSM on the abandonment of marital norms, we will need to pay attention to how formal legal recognition changes empirical expectations—i.e. how people behave within their own marriages, how many people get married, and how people are generally treated in regard to their marital status. We will also need to keep in mind the relevant reference network, as this constrains the impact of any change in behavior.

Given this understanding of social norms and social norm change, we might translate the view that SSM changes people’s behavior in and toward marriage to better assess what it claims. We can now more precisely say that if SSM changes people’s behaviors in and toward marriage, it does so by changing the empirical and normative expectations concerning marriage in most Americans’ reference networks. Now clear on the nature of social norms and how they change, we can assess whether SSM actually constitutes a significant threat to heteronormative marital norms.

### 3.4 Same-Sex Marriage’s Effect on Heteronormative Marital Norms

In this subsection, I explore two main reasons why SSM will not significantly affect heteronormative marital norms. First, I argue that SSM has a limited scope of influence on heteronormativity since it only necessarily affects two aspects—gender roles and orientation. Furthermore, these aspects are embedded in a resilient schema of beliefs and values; neither of these non-heteronormative aspects of SSM is central to heteronormative marriage, and so they are unlikely to upset or challenge heteronormativity. Indeed, as we will see, the importance of

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32 Bicchieri acknowledges that this is a simplification, as norm abandonment and emergence often occur in conjunction.
gender roles and orientation are actually *downplayed* while the other aspects of heteronormativity are *embraced* and *strengthened*. Second, even assuming their disruptive potential, these non-heteronormative aspects of SSM will probably not be seen or valued in most reference networks. Without large-scale change in empirical expectations, normative change and social norm abandonment are unlikely. These two reasons are independent, but not mutually exclusive. I discuss them in turn below.

### 3.4.1 Limited scope of influence

First of all, SSM only necessarily affects two aspects of heteronormative marital norms—gender roles and sexual orientation. SSM is not really SSM without homosexual orientation and non-traditional gender roles.\(^{33}\) However, SSM does not necessarily affect the other heteronormative marital norms—those privileging sexual conservatism, procreation, and relationships that are monogamous, long-term, romantically-oriented, and (nuclear-)family-oriented.\(^{34}\) Challenging these other norms is not a necessary component of SSM.

Now while SSM does not *necessarily* challenge all of heteronormativity, is SSM not more *statistically likely* to include non-heteronormative norms? Indeed, there is some evidence that homosexual couples perform more non-heteronormative behaviors than heterosexual

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\(^{33}\) A possible exception would be heterosexual friends that decide to marry for the legal benefits. However, such a relationship would likely be assumed to be homosexual unless otherwise clarified, so the public message would remain the same. Furthermore, I do not imagine such relationships being statistically significant. And if they are, this type of SSM could actually *support* my case by further separating SSM from a challenge to heteronormativity, for in such relationships, homosexual orientation would not be a requirement. At the same time, it would weaken the romantic love aspect of marriage. Much more could be said here, but for the purposes of this paper, I constrain my focus to SSM with homosexual partners.

\(^{34}\) While homosexuals do not procreate in the traditional sense, they do commonly have children through surrogacy or in vitro fertilization. Heterosexual couples also take advantage of these means. I am unsure of the amount of stigma attached to either of these practices, but at the very least, they do not *necessarily* challenge or preclude procreation in the way that homosexuality and non-heteronormative gender roles challenge heterosexuality and traditional gender roles.
couples, like higher rates of non-monogamy and a lower desire for parenthood (Hoff et al. 2010; Riskind & Patterson 2010). While I do not have space here to fully engage with such possibilities, a few cursory points might quell such concerns and redirect focus to the non-heteronormative aspects of SSM that are certain. First, we cannot assume that historically visible and publicly out homosexuals are representative of all homosexuals. It is possible—perhaps even likely—that as society becomes more and more accepting, many more conservative homosexuals will come out, which could offset the liberal behaviors of historically visible homosexuals. Indeed, Hoff’s study cited above only surveyed those in the very liberal San Francisco Bay Area. Second, some historic behaviors of homosexuals can be partially explained by legal restrictions. For example, legal barriers have historically prevented same-sex couples from adopting children. Third, not all non-heteronormative behaviors are publicly displayed. While homosexual couples may practice open relationships and other non-heteronormative behaviors at higher rates, the public could be unaware of these practices and how widespread they actually are. In short, there is not clear evidence that the behaviors of homosexuals actually are significantly different from heterosexuals. Nor is there clear evidence that current behaviors would remain representative.35 Thus, for the present study I will primarily focus on the ineluctable aspects of SSM: homosexual orientation and non-heteronormative gender roles.

Changing just two aspects of legal marriage through SSM is unlikely to significantly change heteronormative marital norms because the beliefs and values concerning marriage are not independent. Rather, they are embedded in an interdependent schema of beliefs and values that reinforce one another, increasing resistance to fundamental change. Importantly, even when specific beliefs and values are changed within a schema, the central beliefs and values in that

35 For more on the difficulty of establishing representative samples of the LGBT population, see Shankle et al. 2003; Gates 2011; Institute of Medicine 2011; and Coffman et al. 2016.
schema may not change at all. This process can result in an update of the schema, instead of abandonment (Bicchieri 2016, 140). Societies can adapt repressive schemata; they need not abandon them. In such a case, the overall system of norms remains intact. There is no significant change. For example, in the Nsenene village of Tanzania, more progressive notions of women’s ability to engage in market production and be a family provider were simply added to the existing, repressive schema for gender roles and marital roles (ibid; see also Boudet et al. 2012). That is, women were still expected to do the domestic duties like cleaning, cooking, and taking care of the children, even as the specific social norm restricting their ability to work was weakened (Bicchieri 2016, 140). The schema was updated, but remained fundamentally repressive and restrictive for women. In the same way, then, we might simply expect homosexual identity or non-heteronormative gender roles, such as men performing all the domestic duties, to be added to an updated notion of heteronormative marriage and its supporting social norms, beliefs, and values. Simply updating two aspects of the heteronormative marital schema would not fundamentally change that schema, it would still restrict those identities and expressions that mainstream culture rejects. Without addressing the schema as a whole or its central beliefs and values, SSM is unlikely to change much concerning mainstream marital norms.36

Indeed, as Cristina Bicchieri and Peter McNally (2018) argue in a forthcoming paper, “ignoring the cognitive underpinnings of a social norm doom[s] interventions to failure” (1).

Furthermore, homosexual identity and non-heteronormative gender roles are not even meant to challenge mainstream marital norms or heteronormativity. Instead, advocates of SSM aim to uphold and bolster the existing schema for marriage. SSM simply amends the requirement

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36 Perhaps, SSM can be a small step toward significantly challenging heteronormative marital norms, but this step by itself guarantees neither further development nor a significant challenge. And regardless, the historical trends in acceptance of SSM recounted in section four will further undermine the potential causal efficacy of this small step.
for heterosexuality and gendered division of labor based on traditional gender roles. Moreover, the importance of these aspects is downplayed—it is not gender or orientation that is important in marriage, it is love, commitment, emotional fulfillment, long-term partnerships, romance, sexual exclusivity, sexual conservatism, self-actualization, and family. Politicians, pundits, activists, and casual supporters alike argue that SSM embodies these important aspects of marriage just as well as heterosexual marriage. In doing so, they attempt to assimilate SSM into mainstream culture: it is “virtually normal” (Sullivan 1995; see also Warner 1999) and a “civilized commitment” (Eskridge 1996). Supporters of SSM thus utilize “homonormativity: a politics that does not contest dominant heteronormative assumptions and institutions—such as marriage, and its call for monogamy and reproduction—but upholds and sustains them” (Duggan 2002, 179). Activists utilize images of the family, focus on how gay couples contribute to society, and contest the stereotype that homosexuals are promiscuous (Huntington 2015, 25). These narratives largely reinforce, rather than challenge, the marital schema, marital norms, and heteronormativity (Elia 2003, 78). In other words, supporters of SSM largely work against the disruption of heteronormative marital norms.

3.4.2 The importance of reference networks

Whether or not the above points hold, considering the relevant reference network presents an additional barrier to challenging heteronormativity. According to the account of social norm change presented above in subsection 3.3, it seems plausible that SSM could cause

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37 Emotional fulfillment and self-actualization are specific, contemporary aspects of marriage that mainstream Western culture has gradually come to expect, accept, and privilege (Cherlin 2004; Coontz 2006; and Horowitz 2015). This point will be explored in greater depth in section four.

38 Following from our definition of heteronormativity at the beginning of this paper, we might also understand homonormativity as the privileging of LGBTQ+ identities and issues that are heteronormative.
significant change in marital norms: SSM would associate non-heteronormative gender roles and same-sex attraction with the culturally symbolic label of marriage, thereby changing the empirical expectations for what marriage is. As we saw, changes in empirical expectations can then lead to changes in normative expectations and eventual social norm abandonment. However, this empirical change would not be sufficient to change the social norm, for it is not just empirical expectations per se but those within the relevant reference network that affect adherence to the social norm. So if same-sex couples and their supporters are not within one’s reference network, we should not expect this empirical change to have any strong effect on one’s adherence to heteronormativity. Even assuming same-sex couples are a part of most people’s reference networks, social norms are not likely to change, for widespread non-compliance with a norm is necessary to encourage non-compliance in others (Bicchieri & Mercier 2014). Since openly homosexual couples are such a small minority among US couples, we should not expect many people’s empirical expectations about adherence to marital norms to change (especially if most homosexuals are in fact assimilated). Without a large-scale change in empirical

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39 According to a 2011 U.S. Census Bureau, “nationally, about 1 percent of all couple households were same-sex couples” (Lofquist 2011, 1). One can also look to statistics on homosexual identification in order to see the potential for an increase of this rate. While statistics vary and homosexual identification is rising, homosexual identification does not range above 5%. For example, according to a 2011 report by the Williams Institute, 3.5% of American adults identified as homosexual or bisexual (Gates 2011). According to a 2013 survey conducted by the Center for Disease Control, only 2.3% of Americans self-identified as homosexual or bisexual (B. Ward et al. 2014, 1). Gallup reported LGBT identification at 4.1% in 2016, but did not separate lesbian, gay, and bisexual identification from transgender identification (Gates 2017).

40 Now perhaps the media or informational cascades could enhance the impact of a change even among a small minority group. For example, if married homosexuals were overrepresented in television shows, then at least most people would be exposed to a different empirical situation. However, no change in empirical expectations would necessarily result—and regardless, this situation seems highly unlikely given the current amount and type of media representation of homosexuals. Informational cascades seem slightly more promising, as they rely on the gradual diffusion of a norm through a social network and do not require a large group of defectors (Bicchieri 2006, 176, 196). However, informational cascades are best applied to situations of pluralistic ignorance (Bicchieri & Fukui 1999, 104). SSM does not seem to be a case of pluralistic ignorance, as many aspects of heteronormative marriage are explicitly endorsed by the public. Finally, at most we could only expect the informational cascade to work among liberals, as there is limited transmission of politically-charged norms across the right-left political divide.
expectations, it is highly unlikely that we would see a change in normative expectations (Bicchieri 2016, 120).\footnote{Simply proclaiming a behavior right or wrong carries much less weight when societal behavior does not change accordingly.} Hence, we should not expect heteronormative marital norms to be significantly changed by SSM.\footnote{Perhaps people view SSM as crucially affecting future generations. While this line of objection proves stronger than the claim that SSM will significantly change social norms now, section four will counter this objection by arguing that the law is best seen as an indicator of underlying changes in material conditions and culture. Thus, this objection may be incorrectly identifying the significant causal factors which influence future generations.}

In sum, homosexuals do not make up a significant portion of the relevant reference networks for mainstream, heteronormative marital norms; SSM challenges only two aspects of marital norms without directly addressing the central beliefs and values in the heteronormative schema; and these two aspects are downplayed in order to assimilate SSM into mainstream, heteronormative marriage. While it is possible for SSM to affect social norms, there are many factors working against this potential influence. Section four will further challenge the potential for SSM to affect heteronormativity by considering the historical relation between the law, social norms, and marriage.

4 A HISTORICAL EVALUATION OF THE RELATION BETWEEN THE LAW, SOCIAL NORMS, AND MARRIAGE

The account of social norms above argues against the ability of state-recognized SSM to significantly change heteronormative marital norms. However, this account might seem counterintuitive to most: at first glance, the state seems like a primary site for cultural change. We have significant examples of the state repealing socially harmful laws (e.g. sodomy, segregation, and public decency), conferring rights to marginalized groups (e.g. the 19th
Amendment and Civil Rights Act of 1964), and even providing positive support for marginalized
groups (e.g. affirmative action). These actions were in part successful because of the nature of
state enforcement and legislation, for “it can inflict sanctions without risk of disavowal and can
disavow sanctions by others” (De Jasay 1985, 19). That is, the state could uniformly apply
protections and benefits, even in places that had strong opposition to these interventions.
Following the specific interventions mentioned above, views of the relevant marginalized groups
became more favorable and mainstream norms negatively affecting them were eliminated or
changed into less harmful ones. Could not the same process occur with SSM? Perhaps the above
argument is correct that SSM alone does not change social norms, but is it not a significant part
of the process of changing social norms? Is the above argument simply missing the broader
picture? At this point we have to be careful not to confuse correlation for causation. We also
need to consider the direction of causality and possible common causes. In the cases just cited,
norms and cultural views might have just as well been shifting before or alongside changing
legal views and policies. These interventions were only legal protections and benefits—they did
not guarantee change in beliefs, values, or norms. Thus, we will need to examine further the
relationship between culture, norms, and the government in order to determine the nature of the
causal connection between SSM and heteronormativity. Taking a broad, historical view of this
relationship is instructive and will ultimately dispel the claim that SSM causes a significant
change in heteronormative marital norms.

4.1 Investigating a Common Cause for Change in Social Norms and the Law

If SSM can be best explained as an outgrowth of long-term historical trends, it will be
that much more unlikely that SSM by itself is challenging heteronormative marital norms. In
fact, several scholars have given largely consistent accounts of such long-term historical trends. Historians such as Andrew Cherlin (2004; 2010), John D’Emilio (1983; 2006), Estelle B. Freedman (D’Emilio & Freedman 1998), and Stephanie Coontz (2005), as well as economists such as Jeremy Greenwood and Nezih Guner (2008) and Steven Horwitz (2015), note economic conditions and cultural shifts as the driving force of change in marital norms and family structure. With the Industrial Revolution and move to wage labor in the U.S. came significant changes in family structure due to increases in material wealth: the family unit became less of an economic necessity; women gained economic, cultural, and political autonomy; and non-heteronormative sexual identities emerged and formed their own communities (D’Emilio 1983; Cherlin 2004, 851; Coontz 2006; Greenwood & Guner 2008; Horwitz 2015). Throughout the 20th century, traditional norms surrounding marriage gradually weakened as divorce rates increased, sexual mores loosened, women gradually increased their workforce participation, and children figured less centrally in long-term romantic relationships (Cherlin 2004, 851; D’Emilio 2006, 11; Greenwood & Guner 2008).

Thus, for the last 200 years or so, marriage has not retained a consistent function, form, value, or set of norms (Coontz 2006, Introduction; Horwitz 2015, Ch. 1). As the function and form of marriage have changed, so has adherence to all aspects of heteronormative marital norms—notably, what marriage is and should be, the importance of children, gender roles, sexual conservatism, and heterosexuality. By examining how and why these aspects of heteronormativity have changed historically we will provide a strong account of a common cause for both change in social norms and the law. With this account, SSM will appear to be a logical step in the evolution of marriage, rather than a disruptive departure.
4.1.1 What is marriage and what should it be?

For most of human history, marriage has primarily served economic and political needs. Marriage was necessary for its members’ success in agriculture and business, but perhaps even more important was marriage’s essential role in fulfilling the needs of the community, as it converted strangers into relatives and increased cooperation among distant groups (Coontz 2006, 6-7; Brake 2012, 10; Horwitz 2015, 73). Without the material wealth and freedoms of modern, industrialized society, communities faced severe costs if its members avoided marriage or sought to disrupt its functions. Communities had certain empirical and social expectations about how marriage should function—i.e. social norms. For example, they “monitor[ed] couples for adultery or for either one abandoning their responsibilities in the household and/or farm” (Horwitz 2015, 73). Marriage had one function and one form. A strict set of norms guaranteed the continuation of both. Since then, the function of marriage has become much more individualized, marital forms have proliferated, and marital norms have weakened or, in some cases, utterly transformed (Cherlin 2004, 848; Horwitz 2015, 166, 168). Increases in material wealth are central to these changes, for without expansion of the economy, labor-saving technology would not develop quickly, women would not have leverage for political gains, and child-laborers and family would remain economically necessary for survival, as explained below. As increases in material wealth enabled more choice and bargaining power, “free choice became the societal norm for mate selection, love became the main reason for marriage, and a successful marriage came to be defined as one that met the needs of its members” (Coontz 2006, 306-307). What was once a matter of economic and political necessity is now often a matter of
preference—notably, procreation and raising children, traditional gender roles, and sexual conservatism.\textsuperscript{43} It is to these three aspects that we now turn.

4.1.2 \textit{Children and procreation}

Children and procreation have always factored importantly in marriage. Children were originally necessary for agricultural labor and household production. Most, if not all, households would burden themselves economically and politically if they forwent children.\textsuperscript{44} Additionally, in poor communities where the survival of all depended on the conformity of its members, childless marriages and single people would encounter severe, negative social sanctions (Horwitz 2015, 74). Child labor remained useful at the beginning of the Industrial Revolution, but as the economy expanded and wages rose, children became costlier to families.

The higher the material wealth of a society, the more that parents will need to invest in their children in order to make them competitive in the market. The more the parents invest, the less resources they are left with. So in wealthy societies, economic constraints typically dictate the \textit{maximum} as opposed to \textit{minimum} amount of children. Such societies, then, face the opposite constraints of agricultural societies. Furthermore, because of the increasing focus on the happiness of the individuals in the marriage as opposed to their community contribution, some marriages even became childless, especially as women increasingly committed themselves to careers (Horwitz 2015, 125). Children still feature centrally in the family, but the birth rate has gradually declined across the last 200 years (D’Emilio & Freedman 1998, vi). Additionally,

\textsuperscript{43} I acknowledge that these are not matters of pure, free choice devoid of institutional and cultural pressures. The main point here is to acknowledge the breakdown of a singular form and function of marriage.

\textsuperscript{44} The burden for poorer households was mostly economic, as there was a significant loss in potential agricultural and household labor. The burden for richer households was mostly political, as marrying off children was one of the chief means for expanding and retaining a family’s political power.
“marriage is no longer the nearly universal setting for childbearing,” as more and more births occur outside of marriage (Cherlin 2004, 849). Thus, the procreative and family-centered aspects of heteronormativity have been on the decline for some time.

4.1.3 Gender roles

Since procreation and childcare have historically been integral to women’s role in the family, the above trends in childbearing also contribute to the weakening of restrictive gender roles. Without lots of children, demand for women’s household production decreases, and they experience less interruptions to market production. They do not need to birth, feed, clothe, clean, and shop for numerous children. Instead, they can invest in their own human capital with education and job training, pursue a career, or focus on creative work and self-actualization—activities historically reserved for men.  

While certain periods over the last 200 years actually increased the gendered division of labor (e.g. the doctrine of the “separate spheres” in the 1800’s [Horwitz 2015, 90] and the nuclear family of the 1950’s [Cherlin 2004, 851]), in general, marital gender roles have become less distinguishable and less important. Technological advances, like the washing machine, dishwasher, sewing machine, and microwave, have significantly lowered the time required for household production (Shelton & John 1996, 302-303; Greenwood & Guner 2008). Additionally, increases in wages made these technologies available to an increasing number of people (Horwitz 2015, 116). Together, increases in wages and technological advances increased women’s ability to pursue a career and other self-actualizing activities.

45 While industrialized societies do require more investment in individual children, most of the increased investment is typically in education and extracurricular activities. Since this type of investment is largely monetary, it does not constrain women to the household as much and the burden can be more easily shared among parents.
Along with economic advances have come a host of political advances that have removed restrictions on women’s access to economic, political, and social institutions (e.g. the 19th amendment, elimination of coverture, and equal opportunity in employment). Similarly, social movements and cultural revolutions have eliminated harmful social norms and empowered women to self-actualize in ways that had not been allowed or possible. These advances have significantly diminished the importance of gender roles, such that “married couples may no longer have a clear set of rules about which partner should do what in their marriage…[although] they do have a clear set of rules about what each partner should not do” (Coontz 2006, 309). This “clear set of rules” protects the self-actualizing aspects of marriage by barring the imposition of regressive gender roles and one-sided decision-making (ibid, 311).

Important effects of these political and economic advances for women can be seen in time-use surveys. Various analyses of time use surveys show that women’s household labor has significantly declined and women’s market production has increased, while men’s household labor has increased and men’s market production has decreased (Gershuny & Robinson 1988; Bianchi et al. 2000; Archer et al. 2013; Bianchi et al. 2012; Parker & Wang 2013; but see Shelton & John 1996 for methodological considerations). With the weakening of restrictive gender roles and marital division of labor, heteronormativity has likewise diminished. That homosexual couples do not have as clearly defined marital roles seems quite consistent with
trends for the contemporary family, which increasingly feature non-heteronormative gender roles, like female breadwinners, and more equal division of household chores.

4.1.4 Sexual conservatism

Just like changes in childbearing and gender roles, changes in sexuality are enabled by economic change (D’Emilio & Freedman 1998, xiv; see also Cherlin 2004, 851). Expansion of the economy—and its attendant increases in opportunities and wealth—enabled men and women to be more selective in their partners, both sexual and marital. As their economic and social dependence on marriage and the family weakened, they were free to have sex outside of marriage and make sexual compatibility a higher priority in marriage.

Increases in material wealth also increased choices through various advances in medicine, technology, sex education, public discourse, cultural movements, and commercialization (Horwitz 2015, 110; D’Emilio & Freedman 1998). One of the most important advances was the birth control pill, introduced in 1960, which “enabled women, really for the first time, to be in total control of their fertility[…]…as the Pill separated sex from pregnancy, it also [further] separated sex from marriage” (Horwitz 2015, 123). Men and especially women had

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46 According to Sarah Jane Glynn (2016) at the Center for American Progress, “in 2015—the year for which the most recent data are available—42 percent of mothers were sole or primary breadwinners, bringing in at least half of family earnings. Nearly another one-quarter of mothers—22.4 percent—were co-breadwinners, bringing home from 25 percent to 49 percent of earnings for their families. This represents an increase over previous years and is the continuation of a long-running trend, as women’s earnings and economic contributions to their families continue to grow in importance.”

47 Since the 1960’s, the “roles of moms and dads [have] converge[d] as they balance work and family,” according to a 2013 Pew Research Center analysis (Parker & Wang 2013, Ch. 1). Although, “data from the General Social Survey (GSS) reveals that…convergence in gender roles among married couples seems to have slowed over the past 20 years” (Austin Institute 2014). Furthermore, “time in work and leisure is somewhat unbalanced among single-income families, especially when the mother is the breadwinner” (Parker & Wang 2013, Ch. 4). There is certainly room for improvement, but the important point here is that the trend has been in the direction of less division of labor. Thus, the non-heteronormative division of labor in homosexual couplings is not a significant outlier compared to the existing division of labor in heterosexual couplings. See also Coontz 2006, 299.
the autonomy to have sex when they wanted, without needing to worry about pregnancy. The pill then facilitated the sexual revolution of the 1960’s, which pushed for change in social norms and the removal of legal restrictions on sexual autonomy.

All these changes go to show that “the dominant meaning of sexuality changed over the course of U.S. history from a primary association with reproduction within families to a primary association with emotional intimacy and individual physical pleasure” (D’Emilio & Freedman 1998, v). Sexuality, then, followed a progression similar to marriage—from economic and political necessity to psychological fulfillment and individual choice. As men and especially women have gained more economic and political power, the sexual conservatism and exclusivity of heteronormativity have continually decreased.

4.1.5 Same-Sex marriage as evolution, not revolution

The shift in the meaning of and reasons for marriage highlighted above also facilitated gays and lesbians viewing their attraction as essential parts of their identity (Horwitz 2015, 128). Indeed, many of the above changes lead logically to acceptance, or at least toleration, of SSM:

With the collapse of...[the assumption that marriage is tied to procreation] in the twentieth century, the legalization of the close analogy of interracial marriage, and the more general multiplication of new family forms, the gay and lesbian demand to be included in the world of marriage and family is hardly as revolutionary as it first seemed (Horwitz 2015, 126).

The demand for gay and lesbian marriage was an inevitable result of the previous revolution in heterosexual marriage. It was heterosexuals who had already created many

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48 Further evidence of the importance of these historical events for homosexual identity is John D’Emilio’s (1983) highly influential article, “Capitalism and Gay Identity.” D’Emilio here argues that gay identity itself is an outcropping of increases of material wealth (see also Horwitz 2015, 126). His argument follows the same line as above: as material wealth increases, the family becomes less of an economic necessity, newfound independence then allows men to eschew marriage, form their own communities, and fully express and identify with their homosexual desires (D’Emilio 1983, 104). Like marriage, then, gay identity results from increases in material wealth.
alternative structures for organizing sexual relationships or raising children and broken down the primacy of two-parent families based on a strict division of labor between men and women (Coontz 2006, 274; See also Coontz 2011).

Of course, some communities still follow social norms dictating that SSM should not be recognized and that homosexuals should not be in family relations at all. However, what the above changes show is that there exists a strong and consistent basis for extending marital norms and legal marriage to include homosexuals (e.g. Wellington 1995; Wedgwood 1999). If marriage is now primarily about free choice, individuality, the expression of love, companionship, and fulfilling the needs of the individuals involved, there seems to be little reason for barring homosexuals from such a union. Clearly, homosexuals are capable of fulfilling the main functions of contemporary marriage. The homosexual form of marriage does not disrupt marriage’s functions or radically depart from its other forms.

While it’s tempting to point to SSM as a primary causal factor changing the norms, function, and form of marriage, these changes also align with longstanding historical trends moving from a single, necessary form of marriage to liberalization, free choice, and a plurality of forms. Love and companionship have increasingly become the primary reasons for marriage. Extending legal marriage to gays and lesbians represents a logical step in the gradual evolution of the institution of marriage rather than a disruptive departure. Without a correlation between SSM and a sharp increase in the rate of change in marital structure, norms, or public opinion, it is difficult to argue that SSM is a driver of change in marital norms or a significant challenge to heteronormativity. While these conclusions do not preclude SSM from having some causal force in changing norms, the restrictions on the law explored in the next subsection will further limit its potential effects.
4.2 Reverse Causation and Constraints on the Law’s Effectiveness

4.2.1 Law as a lagging indicator of social norms

The history of marriage recounted above suggests that changes in heteronormative marital norms can be best described as the effects of changes in the economy and culture rather than changes in the law. While there have been important changes in the law, these changes stem from the more fundamental changes in material wealth and culture. And just because we might see the trends now does not mean we can intelligently intervene in the future: as Horwitz cautions, “unpredictable change produced by market economies will often lead to changes in the culture that are equally difficult to predict and nearly impossible to control” (2015, 52). Indeed, the history of the law, heteronormativity, and marriage seem to suggest that mainstream values and norms form and constrain the law, not the other way around. This suggestion matches the historical trends recounted above and could explain why SSM is assimilationist and homonormative—as opposed to radical or progressive. Indeed, it explains why most policy inclusive of LGBTQ+ identities tends to be assimilationist and homonormative. If mainstream culture is heteronormative, it should not be surprising that viable policy proposals, regulations, and court decisions will be hetero- or homonormative. The law in the U.S. is largely the product of majoritarian, representative democracy. Since it takes time for politicians to be elected, judges to be replaced, and policy to be implemented, much of the law is likely to be a lagging indicator of mainstream values, beliefs, and norms. One indication of this relation in regard to SSM is the difference in time between public support for legal recognition of same-sex marriage and actual legal recognition of same-sex marriage. Indeed, as early as 2010, a majority of Americans approved of SSM (Baunach 2012, 368). However, it was not until 2015 that the Supreme Court

49 Homonormativity is the privileging of LGBTQ+ identities and issues that are heteronormative. See page 21 of this thesis.
ruled in *Obergefell v. Hodges* that state-level bans on same-sex marriage are unconstitutional.

The historian John D’Emilio (2006) notes a similar pattern for desegregation and abortion:

> [The] Supreme Court…has not generally led in struggles for social justice. Rather, it has tended to intervene as a new social consensus develops. Decisions like *Brown v. Board of Education* and *Roe v. Wade* do not prove that social movements should turn to the courts to deliver justice. Instead they show that litigation produces the desired results only after a lot of groundwork outside the courts has been laid (10).\(^5^0\)

While the courts do not exactly proactively “intervene” in social justice issues, there are a number of factors that constrain which cases come to be selected for review and how they are decided. First of all, prosecutors must feel that the case is strong. Secondly, the court needs compelling reason to hear the case: the case needs to be important culturally, speak to judicial interest, or involve conflict among conflicting government bodies. Since only 2% of petitioned cases are heard by the Supreme Court each year, contentious cases such as those mentioned above must meet a very high bar in order to have widespread impact. Finally, judges must find the case convincing. Since judges are either elected themselves or appointed by elected officials, they are unlikely to hold radical views on the nature of law.\(^5^1\) They are much more likely to simply reflect the dominant view and values of their party, that is, a mainstream approach. Thus, what is convincing to the judge will likely be convincing or at least understandable to many Americans, especially moderates. As for the legislative branch, the periodic nature of elections, the lack of accountability for sitting politicians, and the large number of non-voters among the

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\(^{50}\) Both *Brown v. Board* and *Roe v. Wade* had substantial majority support from the U.S. populace at the time of the Supreme Court’s decisions (Carrol 2004; Krane 2007). For a more extensive account of the court’s relation to public opinion generally see Rosenberg 2008. For an account that focuses on the court’s relation to SSM, see Klarman 2012.

\(^{51}\) There are approximately 30,000 state judges, compared to only 1,700 federal judges (IAALS 2017, 3). All federal judges are presidentially nominated and confirmed by the Senate. Nineteen of the fifty states in the U.S. (38%) have appointive systems for appellate and general jurisdiction courts; twenty-two (44%) have elective systems; and the remaining nine (18%) have mixed appointive-elective systems (“Judicial Selection in the States” 2013, 2).
young who tend to be more liberal all contribute to the law being a conservative institution that lags behind more liberal public opinion. It seems that both judicially and legislatively, the law is generally a lagging indicator of public opinion.

4.2.2 Backlash

Finally, even if SSM turns out in practice to be more disruptive and radical than would be expected given the above historical trends, the law will not remain effective. Law that supports unpopular social norms faces problems of implementation, enforcement, and long-term viability. Indeed, Bicchieri (2016) finds that “perhaps the most important determinant of successful enforcement is a sense that the legal arrangements are not so distant from existing social norms as to lose credibility” (145; see also Bicchieri & Mercier 2014, 65). Bicchieri and Mercier (2014) reference several works to back up this claim: Platteau (2000) provides a book-length treatment of the importance of considering various indigenous norms in African economic development, such as land tenure rights, norms of income-sharing, and moral norms; Aldashev et al. (2010a, b) provide empirical examples concerning the difficulty of crafting effective state legislation for heterogeneous populations. Such research reflects the growing awareness of the importance of indigenous actors and informal institutions within economics—e.g. in new situations of legal pluralism—i.e. “the coexistence of several law systems”—Aldashev et al. (2010a) report that “except in cases where the statutory law is grounded in customary rules, legal pluralism tends to produce neutral or negative effects” (2, 3). While Aldashev et al. go on to offer possible conditions under which law can affect social norms, several conditions must obtain, and even then, a law only “might create a situation in which its objectives are partly met” (ibid, 27, my emphasis).

52 For example, see Tilley & Evans 2014.
53 This insight applies best to policy that is highly publicized, controversial, and/or conflicts with the beliefs and values of many people—e.g. SSM. The extent to which this insight applies to esoteric policy, say, small changes in regulation of endangered species, is questionable and requires a separate research project.
54 In reviewing situations of legal pluralism—i.e. “the coexistence of several law systems”—Aldashev et al. (2010a) report that “except in cases where the statutory law is grounded in customary rules, legal pluralism tends to produce neutral or negative effects” (2, 3). While Aldashev et al. go on to offer possible conditions under which law can affect social norms, several conditions must obtain, and even then, a law only “might create a situation in which its objectives are partly met” (ibid, 27, my emphasis).
institutional economics,\textsuperscript{55} developmental economics,\textsuperscript{56} and comparative institutional analysis\textsuperscript{57} (Boettke, Coyne, & Leeson 2008).

In regards to SSM, the history of state-based amendments regarding SSM reveals the backlash that occurs when the law diverges sharply from common norms and values. In the 1970’s and 80’s, homosexuals rose to prominence in the public eye and started publicly contesting the constitutionality of marriage restrictions. However, at this time, the public still generally disapproved of homosexual activity, let alone marriage. As a result, “judges decisively rejected the legal arguments for gay marriage,” states began enacting new statutes to explicitly restrict marriage to opposite-sex couples, and gay-rights activists faced severe social repercussions (Klarman 2012, 18-19). It was not until the 90’s that Hawai‘i became the first state to consider the denial of same-sex marriage licenses as unconstitutional in \textit{Baehr v. Miike}. In reaction to this consideration, the federal Defense of Marriage Act (DOMA) was passed in 1996 and Hawai‘ian voters passed legislation and a constitutional amendment to restrict marriage to opposite-sex couples, forcing the dismissal of \textit{Baehr v. Miike} in 1999. Similar backlash occurred in Massachusetts in 2004, California in 2008, Maine in 2009, and various states, counties, and cities throughout this time.\textsuperscript{58} Summing up some of these trends in 2006, D’Emilio noted that “the battle to win same-sex marriage through the courts has done something that no other campaign or issue in our movement has done: it has created a vast body of new \textit{antigay} law” (10, my emphasis). So straying too far from marital norms can cause backlash which, for at least a time, \textit{entrenches} dominant norms instead of changing them.

\textsuperscript{55} See, for example, the work of Elinor Ostrom (e.g. \textit{Governing the Commons} [1990]).
\textsuperscript{56} See, for example, Hayami (1997, 280-282).
\textsuperscript{57} See, for example, Aoki (2001).
\textsuperscript{58} See Klarman (2012) for a book-length examination of such backlash in response to SSM.
Dan Kahan (2000) has commented on this pattern of backlash and entrenchment in regard to legal norms generally:

If a new legal norm imposes harsh penalties against an accepted social norm, police will be less likely to enforce the legal norm, prosecutors will be less likely to charge, and juries to convict, with the effect of ultimately reinforcing the social norm that was intended to be changed (146, my emphasis).

Because of these hurdles, Kahan recommends “gentle nudges” over “hard shoves” in the law. Of course, law is meant to be uniformly applied, so we face issues even with gentle nudges. In order for the norm to be effective in all places, the law will need to accommodate the lowest common denominator. In the case of SSM, then, laws will need to be somewhat accommodating of the norms of conservative communities if lawmakers want them to be applied consistently, effectively, and as intended. With such a small potential for change in social norms, it seems unlikely that the law is sufficient to quickly and significantly expand protections of LGBTQ+ identities or change the social norms that harm them. With the evidence of the problems of implementation, enforcement, and resilience in the social sciences and SSM-relevant legal policy, we can reasonably conclude that mainstream norms modulate the effectiveness of legislation. By and large, social norms constrain legislation, not the reverse.

The appeal to effective legislation, like women’s rights and civil rights, at the beginning of section four usefully led us to re-evaluate the historical relationship between the law and heteronormative marital norms. By considering possible common causes and the direction of causation, we significantly weakened the claim that SSM causes significant change in heteronormative marital norms. Furthermore, given the evidence, we should not only be skeptical of the law’s ability to change marital norms and challenge heteronormativity, we should seriously consider the evidence showing that the opposite is true: long-term change in marital and cultural norms has resulted in the formal recognition of SSM. And if mainstream
norms do not actually support SSM, we should expect to encounter problems of implementation, enforcement, and long-term viability.

5 CONCLUSIONS

Considering how social norms change theoretically and historically casts doubt on the claim that the law is—or could be—a reliable, significant, and effective driver of change in heteronormative marital norms. Same-sex marriage does not actually change much in mainstream marital norms. The only challenge seems to come from its non-heteronormative gender roles and homosexuality, but the importance of these aspects is downplayed (not to mention the fact that they have been increasingly accepted in contemporary society). Even assuming an empirical change in what marriage looks like, the effect will be minimal because homosexuals are not a part of the reference network for most people, especially for the conservative right, the contingent most concerned with the erosion and abandonment of traditional marital norms. Examining the history of the law’s relation to SSM further undermines the law’s potential to significantly change social norms, as the law has not significantly or successfully contested mainstream culture for long periods of time. Finally, even if in practice SSM comes to diverge sharply from mainstream marital norms, the law has self-corrective measures that will respond to such deviance. Thus, because of the theoretical and historical limitations on the law’s effect on social norms, anyone focusing their attention on SSM as a means for saving or eliminating heteronormativity has been wasting their time. The significant trends and changes in adherence to heteronormativity, marital norms, and other social norms exist prior to their legal manifestation. So those concerned with changing social norms should look to non-state factors, such as increases in material wealth, as highlighted
above, media representations (Gross 2012 [2001]), or significant cultural events like Pride parades (Bruce 2016). Since the conditions for social norm change and the limits on governmental intervention are grounded in wide-ranging empirical and theoretical evidence, these insights can apply more generally (Bicchieri 2016). Thus, this thesis has important implications for how we should engage with future changes in the law. At the very least, we should consider viewing the law as an indication of cultural shifts and thereby reorient our focus to non-state factors. For effective and significant social change, we cannot rely primarily on the law.
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